Neutral Citation Number: [2021] EWHC 127 (Ch)

Case No: E80LS641

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
APPEALS
On appeal from the County Court in Leeds
Decision of HHJ Klein dated 13 March 2019

Combined Court Centre
Oxford Row
Leeds LS1 3BG

Date: 27 January 2021

Before :

MR JUSTICE SNOWDEN
Vice Chancellor of the County Palatine of Lancaster

- -

Between :

GURPAL SINGH CHANA	**Appellant/ Claimant**
- and –	
CC PROPERTIES (YORKSHIRE) LIMITED	**Respondent/ Defendant**

- -

The Appellant appeared in person
Lawrence McDonald (instructed by **Miah Solicitors**) for the **Respondent**

Hearing date: 12 March 2020

- -

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m. on 27 January 2021.

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

1. This is an appeal against an order of HHJ Klein made on 13 March 2019 at the conclusion of a two day trial in the County Court on 12 – 13 March 2019. HHJ Klein declared that the Respondent landlord ("CC Properties") had lawfully forfeited a lease in respect of which the Appellant ("Mr. Chana") was tenant.

2. The demised property was Units 6 & 7, The Clock Buildings, Roundhay Road, Leeds LS8 2SH. The lease was dated 1 September 2005, was for a term of 15 years at an annual rent of £10,000, and was for the use of the premises as a restaurant and bar. The lease was made between the Trustees of Empire Retirement Scheme (as original landlord) and Mr. Chana. The reversion of the lease was vested in CC Properties on 2 February 2017.

3. CC Properties forfeited the lease on 28 April 2017 for non-payment of rent. Mr. Chana commenced these proceedings in the County Court in Leeds on or around 19 July 2018 challenging the forfeiture of the lease. After that claim was dismissed by HHJ Klein, Mr. Chana applied for permission to appeal on 10 April 2019 on a variety of grounds. Permission to appeal was refused by Barling J on paper on 4 July 2019, but granted by me on a single ground following an oral hearing on 25 November 2019. The sole permitted ground of appeal was,

> "Whether the suspension of the tenant's liability to pay rent was still operative as at 1 February 2017 and/or 1 April 2017."

The lease

4. The written terms of the lease provided that the rent was initially £10,000 per annum payable quarterly in advance on the first day of the month commencing on 1 October 2005, so that according to the lease, the advance rental payments were due on 1 October, 1 January, 1 April and 1 July each year.

5. Clause 10 of the lease is central to this dispute. It provided,

> "10. If the property is or the common parts are damaged by any of the risks to be insured [by the landlord] under clause 12 [which included storm, flood and water] and as a result of that damage the property, or any part of it, cannot be used for the use allowed:
>
> 10.1 the rent or a fair proportion of it, is to be suspended for three years or until the property or the common parts are fully restored, if sooner
>
> 10.2 if at any time it is unlikely that the property or the common parts will be fully restored within three years from the date of the damage, the landlord (so long as he has not wilfully delayed the restoration) or the tenant may end this lease by giving one month's notice to the other during the three year period, in which case

> (a) the insurance money belongs to the landlord and
>
> (b) the landlord's obligation to make good damage under clause 12 ceases
>
> …
>
> 10.5 any dispute under any part of this clause is to be decided by arbitration under clause 17.5."

6. In addition to the landlord's obligations as to insurance and making good and repairing after an insured event under clause 12, the landlord was also obliged under clause 13 to maintain the state and condition of the structure of the building, including the roof.

7. Under clause 14 of the lease, the landlord was entitled to forfeit the lease whenever payment of any rent was 14 days overdue, even if it was not formally demanded.

Background

8. There is a long history of disputes between Mr. Chana and his landlord over the state of the premises. Mr. Chana began trading from the premises as permitted by the lease in about July 2006 under the name "Bar Noir". Trading continued until about 2008, when a leaking roof and other features of disrepair caused a cessation of trading and a withholding of rent. Mr. Chana sought and obtained relief against forfeiture in respect of non-payment of rent and pursued an arbitration claim for losses between 2009 and 2011.

9. Mr. Chana also pursued a County Court action against the original landlord in 2013 for damages for loss of profits for breach of the terms of the lease. That action was tried by HHJ Cockcroft at the end of June 2013 and he gave judgment on 1 July 2013 for Mr. Chana in the sum of £61,500 plus interest and costs. HHJ Cockcroft also refused to reinstate a counterclaim by the original landlord under clause 10.2 of the lease for payment of arrears of rent that had been abandoned at an earlier hearing. The landlord apparently sought to argue that its agreement to abandon the counterclaim had been procured by a misrepresentation, that the premises had since been put into good repair and were watertight, and/or that the rent suspension under clause 10.1 of the lease could only operate for a maximum of three years.

10. The unapproved transcript of HHJ Cockcroft's judgment recorded that he was reluctant to allow the counterclaim to be reinstated without full knowledge of the circumstances in which the counterclaim had been abandoned. But in any event HHJ Cockcroft said that there was no good reason to allow reinstatement of the counterclaim, stating,

> "The Defendants [the landlord] are not entitled to the relief contemplated in clause 10.2 [sic] whilst they remain in derogation [inaudible]. The premises continue to be in internal disrepair. So the counterclaim stands dismissed."

HHJ Cockcroft's remark that the premises "continue to be in internal disrepair" reflects an earlier finding by him to the effect that the premises had remained unfit for use and occupation since the end of the arbitration in 2011.

11. Thereafter, according to Mr. Chana's pleading in the current action, even after the judgment of HHJ Cockcroft in 2013, the roof continued to leak and internal repairs were not possible. Rent was, he alleged, neither demanded nor payable as a result of the continued disrepair of the premises. Mr. Chana alleged that this situation continued after CC Properties acquired the reversion of the lease on 2 February 2017.

12. CC Properties did not, however, accept that the roof was not watertight, or that there was any internal disrepair, or that rent was not due.

13. Matters came to a head in late April 2017, and on 25 April 2017 Mr. Chana applied to the RICS to appoint an arbitrator to determine in accordance with clause 10 of the lease whether the obligation to pay rent under the lease was suspended due to water damage.

14. The solicitors for CC Properties rejected the claim for arbitration, repeating their contention that rent was due and unpaid, and on 28 April 2017 they purported to forfeit the lease for non-payment of the rent due under the lease on 1 April 2017.

The arbitration

15. Following Mr. Chana's request for arbitration, a sole arbitrator, Mr. Robert Davis, was appointed by the RICS on 16 May 2017. The arbitrator gave a first award on 11 August 2017, rejecting a challenge to his jurisdiction by CC Properties. A substantive hearing was held in the arbitration on 31 July 2018, following which the arbitrator issued a fully reasoned second award on 21 September 2018 (the "Second Award") rejecting Mr. Chana's claim that the obligation to pay rent was suspended.

16. In the course of his Second Award, the arbitrator held (at paras 30.16-30.19) that Mr. Chana had been given free scope to repair the roof by the original landlord in 2016, and had done so on or about 12 December 2016, following which he had submitted an invoice to the original landlord for the works. That invoice had been settled by the original landlord on 16 January 2017.

17. The arbitrator then noted (at para 30.20) Mr. Chana's contention that clause 10 of the lease provided relief from the obligation to pay rent if, as a result of internal water damage, the premises or any part of it could not be used as a restaurant and bar. The arbitrator held (at para 30.25) that the burden of showing that the premises could not be used as a result of consequential damage following water ingress was on Mr. Chana. After considering the evidence before him, the arbitrator then stated, at para 30.35,

> "I determine that following [Mr. Chana's] own repairs to the roof [he] has not evidenced that firstly leaks existed thereafter and secondly that there was internal damage to the building."

18. The arbitrator concluded his award in the following way, at paras 30.59-30.64,

> "30.59 Historically there were significant leaks and damage, which rightly led to the suspension of rent. Fundamentally however, [Mr. Chana] was given an unfettered instruction to carry out roof repairs to resolve the issue.

> 30.60 That was in my view a bold step to take by the previous owners, but one which effectively passed full control of the matter to [Mr. Chana]. Therefore, to suggest that rent should be suspended due to continued issues is effectively recording that the works instructed by [Mr. Chana] and carried out by Chana Maintenance under [Mr. Chana's] direction were themselves defective. This would provide [Mr. Chana] with an opportunity to benefit from [his] own breach.
>
> 30.61 To the extent that [Mr. Chana's] continued claim relates to the damage aspect caused by previous water ingress, then despite extensive submissions in this matter, no credible evidence is provided of such internal damage following works undertaken by Chana Maintenance.
>
> 30.62 What I consider to be clear is that following completion of the works by Chana Maintenance, a fair proportion if not 100% of the rent became payable. Due to a paucity of evidence as to a date when such works were undertaken I cannot determine a date when this occurred.
>
> 30.63 I therefore determine that there is no justifiable reason under the lease why a continued suspension of 100% of the rent was permissible. In so doing I dispense with the issue as claimed. In any event I consider that [Mr. Chana] has not provided any evidence of loss.
>
> 30.64 My decision on this issue is that I determine that [Mr. Chana's] claim fails."

Events following the Second Award

19. Mr. Chana was dissatisfied by that Second Award and sought to challenge it by a variety of means.

20. First, he sought to appeal under section 57 of the Arbitration Act 1996 (the "Arbitration Act"). The arbitrator rejected that appeal on 9 October 2018.

21. Then, on 6 November 2018, Mr. Chana commenced proceedings in the County Court in Leeds against the arbitrator and CC Properties. The claim was ostensibly brought under sections 67-69 of the Arbitration Act and sought both to challenge the arbitrator's jurisdiction to make the Second Award and claimed that it was irregular and disclosed an error of law (the "Arbitration Appeal").

22. Among other things, Mr. Chana contended that the arbitrator was in some way bound by and could not depart from the decision of HHJ Cockcroft reflected in the paragraph of his judgment in 2013 to which I have referred above. As I understand it, the suggestion appeared to be that following repairs to the roof, it was for the landlord to prove that the internal damage to which HHJ Cockcroft had referred had been remedied, rather than for Mr. Chana to show a continued inability to use the premises.

23. The Arbitration Appeal had not been commenced in accordance with CPR 62 and Practice Direction 62. It was subsequently transferred to the High Court in the Business and Property Courts in Leeds under Case number E30LS780. I shall return to consider the progress of those proceedings below.

24. In the meantime, in July 2018, Mr. Chana had brought a second set of proceedings in the County Court in Leeds against the original landlord (Claim F00LS564). The aim of the proceedings was unclear, but they appeared to seek to reinforce HHJ Cockcroft's judgment by asking the court to determine, as against the original landlord (only), that the suspension of the obligation to pay the rent referred to by HHJ Cockcroft had remained in force due to a failure by the original landlord to repair the internal damage to the premises prior to it selling the reversion of the lease to CC Properties. CC Properties was not a party to those proceedings.

The trial of the forfeiture claim before HHJ Klein

25. As indicated above, the trial of the instant claim took place before HHJ Klein in March 2019. Mr. Chana raised a number of challenges to the forfeiture of the lease, of which only three are relevant for present purposes.

26. The first relevant challenge was that the obligation to pay rent was still suspended at the relevant quarterly payment date in 2017 by reference which CC Properties had purported to forfeit the lease. That issue is the subject of this appeal.

27. Mr. Chana's originally pleaded case had been that the premises remained in internal disrepair so that the landlord could not claim rent; that the three years rent suspension period under clause 10.2 "was increased" due to the original landlord wilfully delaying restoration; and (importantly) that the matter of whether rent was outstanding was pending before the arbitrator and hence nothing could be claimed by CC Properties until the arbitrator had given his award.

28. By the time of the trial, the Second Award had been made. The pleadings were not updated to deal with that event, but Mr. Chana's witness statement and skeleton argument both made mention of the fact that the Second Award was subject to an appeal. They did not, however, develop the point further.

29. The second relevant challenge was an assertion that the quarterly dates for payment of rent set out in the written lease had been amended as a result of Mr. Chana having been given a rent-free period until 30 April 2016, having commenced payment of rent on 1 May 2006, and having made payments quarterly thereafter. Mr Chana contended that the quarter days for payment under the lease had thus been amended to 1 February and 1 May each year rather than 1 January and 1 April. Mr. Chana contended that because of the unremedied disrepair the original landlord had not been entitled to rent, so that the first payment that could have been due to CC Properties after the transfer of the reversion to it would have fallen due on 1 May 2017 and not 1 April 2017. Hence, he argued, the forfeiture on 28 April 2017 was invalid.

30. The third relevant challenge was a contention that CC Properties had waived the right to forfeit the lease due to communications with Mr. Chana in mid-April 2017.

31. HHJ Klein rightly rejected Mr. Chana's second and third arguments, and I refused permission to appeal against those aspects of his decision. But the fact that such arguments over the quarter days for payment under the lease and subsequent waiver of the right to forfeit the lease were raised at trial is relevant to the way in which HHJ Klein approached the first point on the suspension of rent.

The argument on suspension of rents

32. At the outset of the trial, HHJ Klein sought to identify the way in which Mr. Chana put his case by reference to his pleadings. In the course of that process, HHJ Klein appeared to refer to a section of Mr. Chana's Amended Particulars of Claim headed "Part B – Billing date not belonging to the defendants" which set out Mr. Chana's argument on the relevant quarter day having been varied to 1 February. The Judge referred to Mr. Chana's contention that it was not open to CC Properties to forfeit the lease by reference to any payments allegedly due on 1 February 2017 because CC Properties only acquired the reversion on 2 February 2017 and only told Mr. Chana about that on 22 February 2017. The Judge then identified the waiver argument. The following exchange took place,

> "HHJ Klein: …. What you say is: there was a rent payment due on 1 February 2017, yes?
>
> Mr. Chana: Yes.
>
> HHJ Klein: But in fact the defendant cannot rely on that rent payment because it never bought the property until 2 February 2017 and, in any event, it did not tell you it was buying the property until it had bought the property on 22 February 2017, okay?...
>
> The other point you make is that even though rent was due on 1 February 2017, and even if the defendant could rely on that, was entitled to that payment of rent, although it only became the owner on 2 February 2017, nevertheless the defendant was not entitled to forfeit the lease because it had waived the right to forfeit the lease, because of emails between 19 April and 27 April that you identify in your particulars of claim, and because of what happened at two meetings, okay? Now that is as I understand your case at the moment. Have I understood it correctly so far?
>
> Mr. Chana: Absolutely correctly, …."

HHJ Klein then proceeded to explore various other aspects of the pleaded case and the evidence with Mr. Chana and Mr. McDonald before hearing from the witnesses.

33. The transcript of large parts of the proceedings is, unfortunately, incomplete due to technical problems. However, the transcript does include an exchange that took place in closing between HHJ Klein and Mr. McDonald which is significant, because it shows that there was initially a divergence between the understanding of the parties and the

Judge over whether Mr. Chana was pursuing the argument on suspension of the obligation to pay rents.

34. Mr. McDonald had dealt with the suggestion that there had been a variation of the lease in relation to the quarter days, and his dialogue with HHJ Klein continued,

> "Mr. McDonald: Your Honour, Mr. Chana says, again as I understand, that the rent is in fact suspended and was suspended at all times up to the exercise of the right to forfeit.
>
> HHJ Klein: Yes [several inaudible words] he accepts there is a rent payable due on 1 February, and that is the basis on which I need to decide the case, because that is what he confirmed to you twice this morning [several inaudible words].
>
> Mr. McDonald: Your Honour I am grateful, in that case I do not think I need to deal with the arbitration award at all.
>
> HHJ Klein: Well, it is not technically right, Mr. McDonald, to say the arbitration is binding on me at the moment …[*overpeaking*] issue estoppel, because there is, as I understand it, an outstanding appeal. As I understand the position, so far as issue estoppel, and so on are concerned, it is that the issue estoppel can only arise effectively once any right of appeal has lapsed, and that has not happened….
>
> In any event, even if Mr. Chana disputed that a rent payment was due, the arbitrator has expressed a view, as it happens, that some rent was due from when the repair had been carried out. He says that at one point in his award that effectively you say that the repair had been carried out by January, and therefore there was some rent due on 1 February. Whilst that is not binding on me, if one couples that with the evidence that is before me, as I understand it, what you say is that on any basis, even if there was an argument about suspension, rent was due on 1 February, at the latest on 1 February, consistent with Mr. Chana's case.
>
> Mr. McDonald: Then, your Honour, I apologise, I think that is my mistake, I had not understood that it was accepted the rent was due on 1 February. But I am content to rest my case on that basis –
>
> HHJ Klein: That is my understanding on the pleaded case that Mr. Chana put…"

HHJ Klein's Judgment

35. In his judgment, at paragraph 12, HHJ Klein recorded his understanding, presumably based on the exchanges to which I have referred above, that Mr. Chana accepted that rent was due to the original landlord on 1 February 2017.

36. At paragraph 34 of his judgment, HHJ Klein then set out the relevant extracts from the arbitrator's Second Award. He continued, at paragraphs 35-37,

> "35. I understand that there is an outstanding appeal from the arbitrator's award, and, so it seems to me, there is no issue estoppel arising and that the arbitrator's award does not bind me. However, what the arbitrator appears to say is consistent with the claimant's own case, namely, as I have set it out and on the basis of which I have to determine this case, that a rent payment was due on 1 February 2017.
>
> 36. Even if it had been the claimant's case that clause 10 of the lease continued to be engaged on 1 February 2017, that is, that rent was suspended on and from 1 February 2017, so that no rent was due then on or before 28 April 2017, the claimant would have to establish, on the proper construction of clause 10 that:
>
> i) an insurable risk had occurred in the previous three years; and
>
> ii) that the occurrence meant that the whole of the property could not be used as a restaurant or bar on 1 February 2017, on the claimant's case, or 1 April 2017 on the defendant's case.
>
> 37. I have not been taken to any or any sufficient evidence on which I could conclude on balance that the claimants has established those two matters, so I proceed on the basis that at least one rent payment was due before 28 April 2017."

The arguments on appeal

37. On appeal before me, Mr. Chana submitted that HHJ Klein erred in two respects. He first contended that neither the arbitration itself nor HHJ Klein could reach a conclusion contrary to what Mr. Chana contended was the continuing suspensive effect of the order and judgment of HHJ Cockcroft from 2013 to which I have referred above. In that respect, Mr. Chana also argued that the "continuing effect" of HHJ Cockcroft's order had been "confirmed" by an order that he had obtained on 18 June 2019 (i.e. after HHJ Klein's judgment) from District Judge Troy in the second set of County Court proceedings (Claim F00LS564) in default of any evidence from, or appearance by, the original landlord.

38. Secondly, Mr. Chana contended that HHJ Klein went wrong in his approach to the Second Award which was subject to the Arbitration Appeal. Among other submissions in his skeleton argument for the appeal, Mr. Chana contended that HHJ Klein did not have any jurisdiction to render any judgment on the issue of suspension of rents, because clause 10.5 of the lease required any dispute over that issue under clause 10 to be decided by arbitration.

39. Mr. McDonald responded that HHJ Cockcroft's judgment and order against the original landlord in 2013 had nothing to do with the right of CC Properties to forfeit the lease

in 2017. He pointed out that the decision of HHJ Cockcroft was actually a decision as to whether the original landlord was entitled to reinstate a counterclaim to rent, and that it went no further than concluding that given the state of repair of the premises at the time of the trial in 2013, rent was not then due. Mr. McDonald added that nothing that DJ Troy decided in May 2019 (some months after HHJ Klein's judgment), in proceedings to which CC Properties was not a party, could be relevant on this appeal.

40. On the issue of the relevance of the arbitration proceedings and the Arbitration Appeal, Mr. McDonald submitted that even giving Mr. Chana some latitude as a litigant in person, he should not be entitled to resile from the position that he took at trial. Mr. McDonald submitted that it is perfectly possible for a litigant to decide not to pursue a pleaded point at trial, and that given what little emphasis Mr. Chana put on the arbitration point, HHJ Klein did not go wrong in approaching matters on the basis that Mr. Chana was conceding that any previous suspension of the obligation to pay rent was no longer effective and that an instalment of rent was in fact due on 1 February 2017.

41. Mr. McDonald accordingly contended that the decision of HHJ Klein was therefore neither (a) wrong, nor (b) "unjust because of a serious procedural or other irregularity" within the meaning of CPR 52.21(3) so as to justify allowing the appeal.

Analysis

42. I should start by recording that I have considerable admiration for the way in which HHJ Klein sought to disentangle the submissions being made to him by Mr. Chana and thus to identify the points that were being made and which he had to decide. Mr. Chana's documentation and submissions raised a large number of arguments and complaints of varying degrees of clarity and coherence, and the Judge sought carefully to get to the issues.

43. I also entirely reject Mr. Chana's suggestion that there was anything in HHJ Cockcroft's decision from 2013 that would have prevented HHJ Klein from concluding that rent was due on 1 February 2017. Mr. McDonald was entirely correct to identify that HHJ Cockcroft was dealing with a different issue between different parties and (fundamentally) addressing the state of repair of the premises on the evidence before him in 2013. HHJ Cockcroft's judgment on the facts could have no relevance to the question of whether rent had become due by February 2017 or April 2017 as a result of events in the interim. Still less could anything decided by DJ Troy in proceedings that did not involve CC Properties and at an unopposed hearing that took place after the trial before HHJ Klein be relevant either to HHJ Klein's decision or to this appeal.

44. Where, however, Mr. Chana is on stronger ground is in relation to the effect of HHJ Klein's decision on the arbitration and the Arbitration Appeal.

45. The basic principle, encapsulated in section 1 of the Arbitration Act, is that where parties have agreed to submit a dispute to arbitration, the court should not intervene except on the grounds set out in the Arbitration Act. As the Court of Appeal indicated in Cetelem v Roust [2005] 1 WLR 3555 at 3571,

> "a central and important purpose of the 1996 Act was to emphasise the importance of party autonomy and to restrict the

> role of the courts in the arbitral process. In particular the Act was intended to ensure that the powers of the court should be limited to assisting the arbitral process and should not usurp or interfere with it".

46. In this case, Mr. Chana had invoked the arbitration provisions in clauses 10 and 17 of the lease to have the issue of whether the obligation to pay rent had been suspended as a result of the disrepair of the premises determined by the arbitrator. That being so, I do not think that was for HHJ Klein hearing the forfeiture claim in the County Court to determine the issue as to the suspensive effect of clause 10 of the lease for himself. He plainly could not have done so if the issue under clause 10 had been pending before the arbitrator, and although HHJ Klein took the view in his judgment that he was not bound by the Second Award, the true analysis is that in accordance with the principle of party autonomy, the parties' agreement to arbitrate had removed the issue that was the subject of the arbitration from the list of issues that they could ask the court to decide. Any intervention by the court in that arbitral process should only have been made in accordance with the Arbitration Act.

47. It also seems to me that to preserve the coherence of the statutory scheme under the Arbitration Act, the principle of limited court intervention must apply as much to a pending appeal under the Act against an arbitration award as it applies to the process leading to the award itself. However, by granting a declaration in the County Court that the lease had been lawfully forfeited, HHJ Klein effectively rendered the Arbitration Appeal nugatory, because after the forfeiture had been confirmed, there would be no purpose in pursuing the question of whether the obligation to pay rent had been suspended.

48. There would, of course, have been no difficulty with HHJ Klein making such a declaration in the County Court if Mr. Chana had in fact agreed to forgo and discontinue his Arbitration Appeal. But, on the facts, I do not think that is what Mr. Chana intended to do, or should objectively be taken to have done.

49. What, of course, did not remotely assist HHJ Klein in these respects was that among a myriad of other points raised by Mr. Chana at trial, there was hardly any reliance placed on the consequences of the Arbitration Appeal in the documentation for trial. In particular, Mr. Chana's skeleton argument barely mentioned the arbitration or the Arbitration Appeal, but focussed instead on pursuing his misconceived point about the supposedly continuing effect of HHJ Cockcroft's order from 2013.

50. Moreover, when the Judge asked Mr. Chana at the start of the hearing whether he accepted that rent was payable on 1 February 2017, Mr. Chana appeared to accept that it was. Mr. Chana told me on appeal that he thought that the Judge's question related to the issue of variation of the quarter dates for payment under the lease, rather than going to the question of whether there was a more general suspension of the obligation to pay rent as a result of the operation of clause 10 of the lease. He said that he did not intend to concede the point which he had raised in the Arbitration Appeal.

51. Given that Mr. Chana was taking every other conceivable point in his challenge to the forfeiture, I accept that it is unlikely that Mr. Chana intended so readily to concede that the suspension of rent for which he had contended in the arbitration and in relation to

which he had launched the Arbitration Appeal was not still operative as at 1 February 2017 or indeed 1 April 2017.

52. Moreover, Mr. Chana's explanation of his exchange with HHJ Klein is consistent with the fact that at the time the Judge was directing his questions to Section B in Mr. Chana's pleadings (which focussed on the alteration to the quarter days and the date of the assignment of the reversion to CC Properties) rather than Section D (entitled "Active suspension of rents") which included reference to the arbitration.

53. It is also of some significance that when the matter came up in the exchanges between the Judge and Mr. McDonald in closing argument, Mr. McDonald initially indicated that he had not understood that Mr. Chana was conceding the point on the suspension of the obligation to pay rent due to clause 10, albeit that he then did not pursue the point when HHJ Klein expressed the opposite view.

54. There is force in Mr. McDonald's submission that, in effect, Mr. Chana was the architect of his own downfall at trial in taking a plethora of other bad and hopeless points that HHJ Klein was forced to deal with at some length, in not focussing on the arbitration point at all, and in not objecting to HHJ Klein proceeding on a misapprehension as to Mr. Chana's position as regards the suspension of rent.

55. Nonetheless, for the reasons that I have given, I do not think that Mr. Chana either intended, or objectively should be taken to have given up his argument that the question of the suspension of rent under the lease fell to be dealt with in the Arbitration Appeal. Instead, I consider that, as a consequence of an unfortunate combination of factors, there was a genuine misunderstanding that led to Mr. Chana's Arbitration Appeal being effectively rendered nugatory by HHJ Klein's declaration that the lease had been validly forfeited. That decision did not give appropriate weight to the principles of party autonomy and non-intervention by the court in arbitral proceedings which are enshrined in the Arbitration Act.

56. The position reached could, I think, either be regarded as an error of law in the approach of the Judge or as an unjust result reached as a result of a serious procedural or other irregularity.

57. In my judgment, what HHJ Klein should have done would have been to determine all other matters relevant to the challenge to the forfeiture which were appropriately before him, but then to adjourn giving a final decision until after resolution of the issue concerning the suspension of rents which was the subject of the Arbitration Appeal.

58. Having reached this conclusion, in the ordinary course, I would have allowed the appeal, set aside the declaration and orders that HHJ Klein made at the end of the trial and remitted the matter to him to make a final judgment in light of the outcome of the Arbitration Appeal (or any further award in the arbitration dealing with the suspension of rent point).

59. Events have, however, moved on in the meantime, and I therefore propose to take a different course.

The Arbitration Appeal

60. After the trial before HHJ Klein in March 2019, the arbitrator applied on 31 May 2019 to strike out all the material parts of the Particulars of Claim in the Arbitration Appeal. CC Properties did not make any such application (doubtless because it was satisfied by HHJ Klein's declaration that the lease had been validly forfeited).

61. The arbitrator's application was heard by District Judge Pema on 21 January 2020, who granted the application and ordered that the material paragraphs of Mr. Chana's pleading be struck out. I am unclear what, if anything, of substance remained in the proceedings following the decision of DJ Pema.

62. Mr. Chana then applied on 11 February 2020 for permission to appeal the decision of DJ Pema. That application for permission to appeal has since been placed before me for determination on paper, but no complete appeal bundle has been filed. In particular I do not have any transcript or note of the judgment given by DJ Pema.

63. Having considered Mr. Chana's grounds of appeal and Skeleton Argument, even without sight of a transcript of DJ Pema's judgment, my decision on paper (which I shall record in a separate order) is that for the following reasons, Mr. Chana's appeal against DJ Pema's decision stands no realistic prospect of success.

64. Mr. Chana's Arbitration Appeal was made under sections 67-69 of the Arbitration Act.

65. Section 67 relates to a challenge to an arbitrator's substantive jurisdiction, and Mr. Chana's Skeleton Argument for permission to appeal accepts that this was inappropriate.

66. The remainder of Mr. Chana's Skeleton Argument suggests that DJ Pema should have allowed the case to proceed as a challenge under sections 68 (serious irregularity) or 69 (question of law) of the Arbitration Act. Those sections provide in material part as follows,

> "68. (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. …
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
>
> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

….

69. (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except—

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

…

(3) Leave to appeal shall be given only if the court is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong, or

> (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
>
> (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."

67. From his appeal documents, the primary basis for Mr. Chana's appeal against the decision of DJ Pema appears to be a rehash of the contention that the arbitrator was bound by the order of HHJ Cockcroft from 2013 to find that the obligation to pay rent under the lease was still suspended in 2017. It is said that DJ Pema ignored this, and the decision of DJ Troy in 2019 which was said to have confirmed it. For reasons that I have already given, I consider that this argument is wholly misconceived.

68. Alternatively, Mr. Chana asserts that the arbitrator effectively varied or changed the terms of the lease. I take this to be a contention that the decision of the arbitrator was based upon a misinterpretation of the lease. Such a mistake could constitute an error of law for the purpose of the Arbitration Act: see London Underground v Citylink Telecom [2007] EWHC 1749 (TCC).

69. However, as it appears to me, the arbitrator simply concluded that if Mr. Chana wished to assert that rent was not due as a result of the operation of clause 10, the burden was on him to show that he was, at the relevant time, unable to use some or all of the premises due to some continuing state of internal disrepair resulting from the earlier disrepair of the structure (the roof). The arbitrator also concluded that Mr. Chana had failed to produce the evidence to discharge that burden.

70. That seems to me to be a correct reading and application of clause 10 of the lease, and I cannot see how the arbitrator's approach in that respect can be said to disclose an error of law, still less one that is "obviously wrong" so as to justify intervention by the court under section 69(3)(c)(i) of the Arbitration Act. That provision is intended to encapsulate the decisions in cases such as Pioneer Shipping v BTP Tioxode ("The Nema") [1982] AC 724 and Antaios Cia Naviera v Salen Rederierna ("The Antaios") [1985] QC 191 and to set a relatively high hurdle to intervention by the court in the arbitral process: see HMV UK Limited v. Propinvest Friar LP [2011] EWCA Civ 1708.

Disposal

71. In the circumstances, it seems to me that the appropriate course to take is to hand down this judgment, but to adjourn my final decision on the order to make on the appeal from HHJ Klein until after I have heard a renewed application by Mr. Chana for permission to appeal against DJ Pema's decision. Mr. Chana has indicated his desire to have such a hearing after sight of this judgment in draft. The two matters should be listed to be heard together on notice to the other interested parties and on a date to be fixed.

72. I should add that in order to prepare for such oral renewal of his application for permission to appeal against DJ Pema's decision, Mr. Chana must file a full appeal bundle, which will require him to obtain and include an approved transcript of the judgment of DJ Pema (or a note of the judgment agreed with opposing counsel if a

transcript cannot be obtained) as soon as possible, and in any event in good time for the hearing.