Claim No D31BS863

IN THE COUNTY COURT AT BRISTOL

B E T W E E N :

(1) SHB REALISATIONS LIMITED

(2) GB EUROPE MANAGEMENT SERVICE LIMITED

Claimants

-and-

(1) CRIBBS MALL NOMINEE (1) LIMITED

(2) CRIBBS MALL NOMINEE (2) LIMITED

Defendants

JUDGMENT

Handed down on Monday 1st April 2019

Representation:

Claimant	Ms Anderson QC and Mr Pritchett
	instructed by DLA Piper
Defendants	Ms Shea QC and Ms Fairley
	instructed by Hogan Lovells

JUDGMENT

INTRODUCTION

1. The Mall at Cribbs Causeway, Bristol is, as its name suggests, a shopping mall. It is large and formed of two storeys. It is shaped like a dumbbell with John Lewis occupying one end and Marks and Spencer the other end. They are the two primary anchor stores. Within the Mall are a number of units of differing sizes occupied mainly by retailers but also some restaurants and cafes.

2. Unit LR19 at the Mall is on the lower level and centrally placed; it is the fourth largest unit and fit to house what one might describe as a sub-anchor store. In 1998 it was let to the retailer known as British Home Stores, "BHS", for a term of 125 years ending on 24th March 2123 at a peppercorn rent but the premium paid was £7,050,000 plus Value Added Tax. There are significant periodical payments to be made such as service charge and I refer to all the non rental outgoings as 'holding costs'. For 2018 the holding costs amounted to about £767,000.

3. The lease contains a 'keep open' covenant on the part of BHS; in short, BHS covenanted to open its shop to the public seven days a week during stipulated opening hours.

4. BHS traded well for a time but found itself in financial difficulties. It borrowed a large amount of money (more than the original premium paid) from GB Europe Management Service Limited, "GB", which is secured for repayment by a legal charge over the lease.

5. Unfortunately BHS was unable to turn itself around and it entered administration on 25th April 2016 and thereafter liquidation on 2nd December

2016; its name has changed to SHB Realisations Limited, “SHB”. Plainly SHB is insolvent.

6. In the meantime:

(a) BHS instructed Colliers to market the lease for sale in June 2016;

(b) the retail store at LR19 closed permanently on 28th August 2016 and since then BHS, now SHB, has been in admitted breach of the ‘keep open’ covenant.

7. Unsurprisingly given the premium paid for the lease and the interests of GB, there have been ongoing attempts to sell the leasehold interest which have not succeeded to date. I think all concerned accept that there is no prospect of there being any equity in the lease after repayment of the GB loan for the benefit of creditors of SHB and so it must be accepted that GB are the driving force in this litigation. There is no evidence that SHB would secure a benefit for itself (i.e. its other creditors) even if its debt to GB is reduced.

8. The Defendants, as immediate landlords, served a notice of forfeiture under section 146 of the Law of Property Act 1925 and by this claim issued on 28th July 2017 SHB and GB seek relief from forfeiture. As Defendants the Landlords resist relief and have counterclaimed for possession thus forfeiting the lease and for mesne profits.

9. It is common ground that SHB cannot cure its breach of the keep open covenant and cannot perform it thus, but for the forfeiture, its only option was to find an assignee who would perform the covenants in the lease. By these proceedings clarified by the closing submissions, SHB and GB seek more time to find an assignee and thus ask for relief from forfeiture to give SHB 6 months in which to complete an assignment commencing from the date of this judgment.

10. GB has not sought an order for vesting of the lease in itself under section 146(4) of the Law of Property Act 1925 because it cannot itself perform the keep open covenant.

11. There is no remedy other than relief from forfeiture which can assist the Claimants (in reality GB). There is no remedy other than possession which can

realistically benefit the Landlords and compensate them for the continuing breach of covenant.

12. The Landlords' position is that SHB has had some 32 months now to find an assignee and that enough is enough. It wants to recover possession and manage the Mall in its best interests to ensure that the currently boarded up LR19 is let (possibly with additional space) to a vibrant retailer (such as Primark) to keep the Mall attractive to consumers and to attract footfall all of which benefits other tenants.

13. There are a number of discrete primary issues raised by the parties which have required determination which I identify and describe as follows:

(1) **Interest in the lease** – how much real (as opposed to passing or speculative) interest has been expressed by retailers in taking an assignment of the lease to date?

(2) **Planning Blight** – did the Landlords' planning application for an extension impact on the market for the lease until that application was determined and refused such that now there is a better chance of selling the lease?

(3) **Litigation Blight** – currently the lease is forfeit so does this litigation impact on the market for the lease such that if an order for relief is made there would be a better chance of selling the lease?

(4) **Market?** – given the above, what is the current market for the lease?

(5) **Value of lease** – given the above, what is the value of the lease?

(6) **Value of reversion** – if the lease remains forfeit what appreciation or depreciation has there been in the value of the Landlords' reversion?

14. Relief from forfeiture is discretionary and thus the fundamental decision that the court must make is whether it should grant relief and if so, on what terms.

15. The case came before myself for trial for 5 days commencing 21st January 2019; day 1 being reserved for reading. I was assisted at trial by Ms Anderson QC leading Mr Pritchett for the Claimants and Ms Shea QC leading Ms Fairley

for the Landlords. The trial bundles contain some 3,900 pages over 16 lever arch files. References to numbers in square brackets in this judgement cross refer to the bundle and page number therein so [X/20] is page 20 in bundle X.

16. I heard oral evidence of fact as follows:

(a) For the Claimants:

(i) Mr Lloyd Entwistle, Director of Colliers instructed on behalf of SHB and GB to market the lease;

(ii) Mr Angus Collett, Chief Financial Officer of GB.

(b) For the Defendants:

Mr Robert Mogford, Director in Investment Management (UK Retail & Leisure) employed by M&G Real Estate who is the agent jointly appointed (together with Intu Properties plc) by the Landlords to manage their interest in the Mall.

I heard oral expert evidence as follows:

(a) For the Claimants:

Mr Graham Chase of Chase and Partners on marketing and valuation issues; Mr Chase is independent.

(b) For the Defendants:

(i) Mr Martin Acton of Cushman & Wakefield on marketing issues;

(ii) Mr David Lusher of Cushman & Wakefield on valuation issues;

both of whom are retained by the Landlords in any event as their agents with respect to The Mall.

17. Various contentious applications were made requiring adjudication and there was considerable friction and interruptions between leading counsel all of which ate into the available time causing the trial to go part heard on 25th January 2019 to await counsels' closing submissions and thereafter judgment in due course. I have received those closing submissions and the final submission is the Defendants' reply sent to me on 22nd February 2019. The closing submissions (especially the Landlords') are excessively long and I record that:

(a) The Claimants' submissions amounted to 55 pages and replies to 10 pages

(b) The Landlords' submissions amounted to 80 pages and replies to 61 pages.

18. I have read all the submissions but I shall address only those points which I consider to require addressing to do justice to this case.

THE ORDERS SOUGHT DURING AND AFTER TRIAL

19. Neither the particulars of claim nor the Claimants' skeleton argument identified **the precise terms** on which relief was sought. Those terms should have been identified early on. Court ordered disclosure, evidence and expert evidence was not necessary for that purpose. The claim as drawn seeks a general relief [A11]; normally terms are needed and offered with respect to curing the breach and/ or ceasing breach.

20. The Landlords opposed relief although on 22nd January 2019 I was told that they would agree to relief on terms requiring (inter alia) a swift assignment to Sports Direct (see the supplemental submissions and draft order prepared by Ms Shea QC and Ms Fairley) following disclosure of Sports Direct's apparent interest in the lease. Those terms were rejected by the Claimants.

21. For the avoidance of doubt I do not interpret the above event as any general concession by the Landlords that relief should be granted and I understand that the Landlords continue to counterclaim for possession and mesne profits.

22. The Claimants seek the orders set out at page 3 of their counsels' closing submissions which are relief for a period of 6 months starting with the date of judgment in order to find an assignee and complete an assignment. Nothing else is mentioned and I would have thought there would be a number of other obligations that the Claimants would have to formally perform such as payment of holding costs and landlords' costs.

23. The Landlords' position has not changed. It seeks possession and mesne profits [A30]. The Landlords' evidence on mesne profits was not challenged and

Ms Shea QC and Ms Fairley have calculated that £1,253,201.10 + VAT is due as of 22nd February 2019 continuing at £2,706.70 + VAT per day until possession is given up.

THE EXPERT EVIDENCE

24. The strategies of both parties were to identify certain features or events and then up play or down play as they saw fit to further their cases. For example, it is common ground that the Landlords applied for planning permission for a substantial extension to the Mall. The Claimants contended that the same killed the market for the lease whilst the Landlords contended it had no effect. As discussed later in this judgment the evidence simply showed that it was neither of nil nor lethal effect.

25. It is right to observe that the Landlords' experts are in fact the Landlords' own retained letting and valuation agents for the purposes of its business whereas Mr Chase, the Claimants' expert, is entirely independent. Messrs Acton and Lusher have a degree of conflict however much they both try to wear two hats but if that conflict had been identified in the instructions and dealt with differently in the reports perhaps less time would have been spent trying to colour them.

26. The experts on both sides seem to have got caught up in the outdated gladiatorial combat on behalf of their clients forgetting that their primary duties lie to the court. For example, Mr Acton's lack of evidence about the impact of the planning application was surprising and Mr Chase's lack of disclosure and comment about the Day's offer rather worrying.

27. However, I am confident that all the experts sought to be truthful open and honest when they gave their evidence and I was cheered to see pauses for thought and considered responses to questions.

THE WITNESS EVIDENCE

28. I am confident that all witnesses of fact sought to assist me and did not seek to colour their evidence.

THE MALL

29. John Thomas Bayliss owns the freehold of the Mall. By a lease dated 2nd October 1995 he let it to John Bayliss Limited for a term of 500 years and a day from 2nd October 1995. By an underlease made on the same day John Bayliss Limited let the Mall to The Prudential Assurance Company Limited, "Prudential", for a term of 500 years starting on 2nd October 1995. The Defendants are now the tenants of this underlease.

30. The Defendants are nominee companies. The First Defendant's immediate parent company is Prudential; the Second Defendant's parent company is Belside Limited, "Belside" which is a group company of Intu Shopping Centres Limited, "Intu". The Defendants hold their interest in the Mall on behalf of Prudential and Belside by way of a joint venture arrangement.

31. Cribbs Causeway JV Limited, "JV", is owned by Prudential and Intu and is appointed to act as the property asset manager of the Mall. JV has an executive committee which makes most of the decisions required to run and manage the Mall. This is delegated to a management team consisting of appointees, - made by Prudential from M&G Real Estate Limited, "M&G" and appointees made by Belside from Intu. The appointees are part of the Asset Management Team.

32. The role of the Asset Management Team is to maintain and enhance the value of the Mall and to keep customers happy and attracted to the Mall; this requires active management of the tenant mix; they have two leasing agents namely Cushman and Wakefield Limited and Time Retail Partners Limited.

33. The Mall opened in 1998. It sits on an 80 acre site and comprises some 1,000,000 square feet. There is easy access to and from the M4 and M5 motorways with free parking for customers and no doubt there are bus

connections serving the Mall as well. It contains about 125 stores although there is an inevitable degree of churn as retailers come and go and units are re-configured or re-fitted as necessary. In its “Cribbs 2 Proposed New Anchor Store” promotional material [C1/203] which related to the proposed extension the promoters describe the Mall as an “established Top 10” Shopping Centre in the UK with 4.7 million catchment resident population and some 12.6 million customers per year. The Mall benefits from “ABC1” type catchment and it has seen increases in footfall although the total retail sales have declined during the period 2016 to 2018 [X256].

34. The Mall is near the former Filton airfield which is due for redevelopment which should see a growth in local population and thus potential customers.

35. The Landlords wanted to extend the Mall considerably (and offer more than just retail) and put in a planning application. That extension would, inter alia, house a new anchor store and in early 2016 the Landlords had Primark, Fenwick, House of Fraser, Debenhams and Next in mind as potential anchors in the extension; see [D3/749]. The Landlords were also considering the prospects of reconfiguring LR19 with other units to create one larger unit to attract, in particular, Primark following an approach made by BHS in 2013 to surrender the lease for a price.

36. For the avoidance of doubt, in my judgment, there can be no criticism at all of the Landlords by their agents keeping all of the holdings in the Mall under review in order to maintain and develop the Mall’s attraction to consumers and retailers; that is their commercial business.

37. Adjoining the Mall is the Cribbs Causeway Retail Park which is some 215,000 square feet in area and houses retailers like Argos, Sports Direct and PC World.

38. The planning application was refused in October 2018 and no fresh applications have been made.

39. Much comment has been made about the state of the retail industry and there have been a number of high profile casualties such as House of Fraser.

However, it appears to be common ground that the Mall is weathering the storm aided no doubt by the growth of Bristol.

LR 19

40. Under the terms of its lease BHS occupied the unit known as LR19. Currently it is boarded up.

41. A current photograph of LR19 can be seen in [D5/1215] and [D/1219] shows Boots above. LR19 comprises about 25,421 square feet and is on the lower level only; it is the fourth largest unit after those occupied by the main anchor stores John Lewis and Marks and Spencer (and another sub-anchor store occupied by Next).

42. LR19 may not have the best possible frontage but I can see for myself that it is fairly prominent. It cannot be made larger (i.e. combined with another unit) save with the agreement of the Landlords and arrangements being made by the Landlords with the tenant(s) of the neighbouring unit(s) that would be absorbed to make a greater space; the primary candidates being the unit above LR19 occupied by Boots and the units either side of LR19 - currently occupied by Soho Coffee and Pret-A-Manger. In a similar vein LR19 cannot be made more visible without the Landlords' agreement to move decorative fountains and suchlike.

43. It is in the interests of the Landlords and all its tenants/ licensees for an active retailer to be occupying LR19 otherwise LR19 is of no attraction and the number of shopping opportunities within the Mall is duly reduced; in fact its current contribution is negative as it still has running costs.

44. The Landlords argue that LR19 has some unattractive features given its shape and the obscuring of its frontage; that may be right. I can see that the pie wedge shape is not ideal. Evidence was given about the attractiveness of LR 19 but the evidence fell far short of persuading me that retailers would be put off.

45. Of course it must be noted that SHB can only assign the lease which means it can only assign LR19 'as is'. If the Landlords were marketing LR19 they would be in a position to:

(a) Offer a new tenancy on negotiated terms

(b) Enhance the attractiveness of the premises by carrying out works to the common parts of the Mall that impact upon LR19

(c) Enlarge the premises available (subject to the Landlords agreeing terms with the neighbours of LR19 such as Boots, Pret-A-Manger and Soho Coffee).

THE BHS LEASE

46. By a sub-lease dated 12th August 1998 Prudential sublet LR19 to BHS plc for a term of 125 years starting on 25th March 1998 at an annual rent of one peppercorn [D2/277].

47. The relevant terms of the lease given the issues in this case are as follows.

(a) Keep open

Clause 3.18.1 [D2/297] requires the tenant to:

"keep the Demised Premises open for business during the Shop Opening Hours and throughout the Term to maintain active trade within substantially the whole of the Demised Premises at which retail trade is carried out throughout the Shop Opening Hours except …."

(b) Partial assignment/ subletting

Clause 3.13.1 [D2/294] forbids absolutely partial assignment or any subletting (other than mortgage by sub-demise of the whole).

(c) Assignment

Clause 3.14.3 of the lease [D2/294] (now) permits assignment (with the landlord's consent not to be unreasonably withheld) of the lease after compliance with schedule 4 [D2/335] which gives the landlord pre-emption rights on a proposed assignment. The price to be paid by the landlord should it choose to pre-empt is:

"the sum specified in the Offer being the arms length price offered in the open market by or to an unconnected intended assignee for the Tenant's interest in the demised premises"

(d) User

Clause 3.14 generally prohibits the tenant from sharing possession but clause 3.14.6.2 [D2/295] permits in-store concessions limited to 10% of the internal sales area.

(e) Break Clause

(i) There is ***no*** tenant's break clause;

(ii) Clause 7 [D2/312] contains a landlord's break clause at the expiration of the 25th, 50th, 75th and 100th years of the term. If the Landlord exercised the break clause it must pay compensation equivalent to the Open Market Value of the lease. ***March 2023***, which is some 4 years hence, will see the 25th year of the term.

48. Thus so far as the Claimants and any potential assignee is concerned the lease is pretty restrictive. Absent an assignment or the Landlords exercising clause 7, any tenant is (now) locked into a lease with about 104 years to go. There is no rent to pay other than a peppercorn but there is the obligation to perform and observe the other covenants and pay the financially onerous holding costs. I do

not need expert evidence to observe that the following facts may deter potential assignees:

(a) Any potential assignee investigating the merit of taking an assignment will incur significant pre-purchase costs in the knowledge that the Landlords are at liberty to exercise their right of pre-emption and thus render the whole exercise an expensive waste of time;

(b) The Landlords may exercise the break clause in 2023 – 4 years hence; compensation is payable under the lease but the assignee is at risk of having to close / find a new unit in the comparatively near future;

(c) Sub-letting is forbidden;

(d) In-store concessions are limited;

(e) There is no tenant's break clause so any assignee is signing up to performing the tenant's covenants for another 104 years.

49. As emphasised by Ms Shea QC, SHB can only sell (assign) the lease of LR19; any potential assignee who wants more square footage or varied terms has to negotiate with the landlord.

50. The lease is rather more advantageous to the Landlords. They have 4 occasions on which they can end the lease early. In the event that the tenant wishes to assign and finds (in my words) a ready willing and able assignee, the Landlords can end the lease by pre-emption. The tenant has only the lease to sell. If it recovers possession the Landlords have the opportunity to re-size and re-configure (perhaps by negotiations with other tenants) to offer a new and much more attractive lease of new and much more attractive premises than the lease of the premises that the tenant could sell.

51. The above leaves SHB in a rather poor bargaining position. It can only sell its lease of LR19 therefore it needs to find an assignee who is content to step into SHB's shoes. The obvious selling points are that LR19 is a sizeable unit in a successful Mall adjacent to a vibrant city and the rent was effectively paid up front by the premium but there are significant disadvantages as identified above.

CURRENT TYPICAL LEASES AT THE MALL

52. It is common ground that most of the units at the Mall are now let on turnover leases set at 80% of market rent plus a share of turnover that exceeds an agreed threshold [X251].

53. I think it is common ground between all parties and their experts that turnover leases are common now and the SHB lease is unusual not least as tenants do not want to be locked into long terms.

54. I think it is also common ground now that leases are bargained for with much shorter terms up to 15 years or so with more flexibility built in. Therefore the lease in question is unusual by today's retail norms.

BHS/ -GB

55. The shenanigans concerning British Home Stores and its ownership have been reported in the media and do not affect the matters with which this judgment is concerned.

56. On 4th February 2016 BHS borrowed some £9,418,437 from GB secured by first legal charge over the lease. I have not been given the precise amount owing but all parties agree that the debt is rather higher now and will exceed the net proceeds (if any) realised on any sale.

57. On encountering financial difficulties BHS entered into a Company Voluntary Arrangement on 23rd March 2016 swiftly followed by Administration on 25th April 2016. LR19 was closed on 28th August 2016 and, as set out in the introduction, the keep open covenant cannot be performed without an assignment of the lease. Ms Shea QC describes the breach as deliberate and wilful. Given that no third parties are involved the breach must be said to be deliberate (a deliberate decision was made to close) but 'wilful' has connotations of obstinacy and I cannot agree that the breach is wilful.

58. GB paid the outgoings until forfeiture and I understand it is common ground that they are in a position to and will pay all outgoings payable if relief from forfeiture is granted.

MARKET INTEREST IN THE LEASE TO DATE

59. On 23rd June 2016 Colliers International were instructed to market the lease and Mr Entwistle of that firm was in charge [D4/1005]; he has 14 years' experience in retail. Mr Collett of GB believed that had the

"best retail expertise in the relevant market (South West)" [B38/13.3].

60. On 14th September 2014 Mr Entwistle was joined as agent by Mr Stephen McMullen of another agency, McMullen Wilson at the behest of GB following a decision described by Mr Collett [B1/299 para 3]:

"to provide some fresh impetus to the marketing campaign and, in particular, to double check that no potential interested party had been missed in the marketing activities to date and in order to access alternative contacts and relationships with potential interested parties".

No evidence has been filed from Mr McMullen. This is especially odd as he has the lead in the recent discussions with Sports Direct according to Mr Entwistle [B1/263 para 17]. Sports Direct is not a new interested party; in fact there is no evidence that Mr McMullen has identified anyone new.

61. In his evidence Mr Entwistle has set out his strenuous efforts to find a purchaser and there is a useful state of play document dated 1st May 2018 at [D8/2229] showing the targeted retailers and responses at that time. It is plain that since May 2018 a number of potentials have fallen by the wayside (e.g. Victoria's Secret and Zara) and little progress has been made with others e.g. Sports Direct (at least until recently so far as this retailer is concerned). By the date of his witness statement (29th June 2018 [B4/11]) M4 Entwistle told me that the:

"two most advanced discussions we have had are with Primark and Sports Direct"

and that feedback to him was concern that the Landlords will simply pre-empt.

62. Mr Entwistle updated his evidence in his second statement [B1/257]; this shows that his strenuous efforts have continued but, in reality, to little avail save at first blush with respect to Days (Edinburgh Woollen Mill) which I consider further below.

63. I agree with Ms Shea QC that care must be taken in separating evidence of interest in the premises – LR19 – as opposed to interest in the lease. In my judgment great caution must be taken with respect to any evidence of general interest unless the person expressing the interest has at least seen the lease or been aware of its primary terms to have a reasonable idea of what interest it is they are buying and the obligations they would be taking on.

64. *Some* interest in acquiring the lease has been shown by the Landlords and some third parties. As I said during the trial there might be an unknown lurking retailer waiting to pounce and there might be a known retailer prepared to have a 'punt' if the bargain is good enough. It is a classic bargaining tactic to feign disinterest.

65. Ms Anderson QC argues that there is such interest in the lease as to make it marketable; the Landlords disagree. Accordingly the evidential burden is on the Claimants to establish on the balance of probability that there is such interest.

66. I consider first evidence of the Landlords' interest in re-acquiring LR19.

67. At the end of 2013 the Landlords were giving some thought to what it might pay BHS on a pre-emption and Mr Mogford had a figure of £10m in mind; see [D2/427]. In mid June 2015 Mr Acton had £8m in mind [D2/531].

68. In May 2016 the Landlords were considering their options which included the possibility of buying out the lease to temporarily house Primark [D4/925] pending completion of its proposed extension in which Primark would be the anchor store. Having learned that GB wanted over £9.6m their strategy was to wait for assignment applications [D4/1006]. By October 2016 the Landlords were reluctant to pre-empt at around the £9,000,000 mark because of their uncertainty of pulling off the Primark project [D5/1258] although permutations were still being considered to see if Primark could be found space until a total of 71,000 square feet could be found [D5/1278].

69. The plan for the extension containing Primark died last year.

70. Further progress has not been made with Primark. They seem to be interested in principle and the Landlords would still like to see Primark in the Mall. Only the Landlords are in a position to assemble a package which would tempt Primark in and Primark do not seem to be in any rush (they have a large store in Bristol City Centre in Broadmead).

71. Thus the Landlords do not appear to have any pressing interest in swiftly acquiring LR19 to house Primark (and, of course, there is the break clause in 2023 in any event).

72. I turn to consider the interest of other retailers. I immediately observe that:

(a) No witness evidence was put before me from any potential purchaser.

(b) There is little evidence that any potential retailer has done more than express informally a passing interest. In particular there is no evidence that:

(i) Any potential assignee has taken steps to ***thoroughly*** investigate the lease and the premises (i.e. carry out at least a preliminary 'due diligence');

(ii) Any potential assignee has made a ***formal*** subject to contract offer;

(iii) There have been any ***real negotiations at all*** let alone negotiations identifying the sticking point(s) to any deal other than with Days (and those negotiations did not really go beyond testing the water).

73. I turn to address the evidence which the Claimants have put before the court to see whether any of it goes beyond passing interest. As Ms Shea QC has rightly observed, it is generally all hearsay but admissible nonetheless. The weight to be attached to it is another matter.

LAMBRETTA

74. Apparently Lambretta was interested in taking a subletting of LR19 on flexible terms [D7/1929]. Given subletting is not an option and I have no idea what flexible terms are this is not evidence of interest in the lease.

PRIMARK

75. I have already referred to Primark in some detail from the Landlords' perspective.

76. Primark are interested in a retail outlet at the Mall that has some 50,000 to 60,000 square feet [D6/1643]. I have already referred to the Landlords' aspirations in respect of Primark. Mr Entwistle sought to persuade me that Primark was still in the market. However, there has been a recent chain of e-mail correspondence between Mr Acton and Ms Sara Tack who is Primark's property executive stating that Primark is not interested in the lease and wants a larger store; see the e-mail dated 7th January 2019 [X234].

77. The Landlords have given considerable thought into how Primark's requirements could be met utilising neighbouring units and/ or a roof box etc. The obvious difficulty for SHB is that such options are not in SHB's gift. Only the Landlords can bring about these options (and then only after successful negotiation with the incumbent tenants). The Claimants are suspicious that the Landlords are trying to put Primark off but there is no evidence that the Landlords are trying to sabotage any deal Primark might make with the Claimants (there is no evidence that Primark really want to talk to or make any deal at all with the Claimants). What Mr Entwistle's evidence shows is that the Claimants have simply not made headway with Primark and, inevitably, the Claimants can only offer LR19 and not the square footage Primark is known to require as a minimum.

78. Finally under cross examination Mr Collett accepted that Primark were not actively in the market for the lease. This is the reality.

SPORTS DIRECT (FLANNELS)

79. In June 2016 Sports Direct made some tentative preliminary enquiries of Mr Entwistle [[D4/1009] and towards the end of June [D4/1016] the Landlords were

taking a wait and see approach whilst informing potential assignees that they had redevelopment plans in 2023

"and if nothing else it might help to dumb down the price"

80. In September 2016 GB understood from Mr Entwistle that an offer was expected from Sports Direct [B/212] but no offer was made [B/197]; they may have been dissuaded by Mr Entwistle's indication that £5,000,000 was

"way off" [B/198].

81. In September 2017 there seems to have been some activity with Sports Direct considering acquisition of the debt as well [D6/1696], [B1/269] but then in November Sports Direct go quiet [B1/272].

82. Conversations restarted in November 2018 [B1/333 with respect to a possible purchase of the lease and the debt [B1/309]; the premises were being considered for Sports Direct's new store called Flannels.

83. Sports Direct continued to show some interest into 2019; see Mr Collett's third statement dated 20th January 2019 and the attachments thereto [B1/342] and information is provided to Sports Direct's solicitors but there it seems to end.

84. On 22nd January 2019 Ms Lulham of M&G reported a conversation she had with Mr Foyle of Savills acting for Flannels asking about availability at The Mall but appearing unenthusiastic about the lease [X382]. Of course Mr Foyle may have wanted to feign disinterest as a tactic but, so far as I am aware, the story seems to end there without any offer from Sports Direct no matter how informal.

85. In his evidence Mr Acton made some positive noises about Flannels entering the Mall but observed that they may well be put off by the lease. In contrast it seems that Mr Chase has not carried out any investigation into the prospects of securing a sale to Sports Direct.

86. Lastly the Landlords sought to argue that the size of LR19 was not compatible with Sports Direct's requirements for a unit with up to 20,000 square feet (i.e. that LR19 was too large) but there is no evidence that Sports Direct were put off at all by the size.

87. I am left with finding that Sports Direct do have some interest in LR19.

DAYS (EDINBURGH WOOLLEN MILL)

88. Edinburgh Woollen Mill sought to expand its business by way of a new department store to be called Days. Mr Simpson of Days met with Mr Entwistle on 7th September 2018. Mr Entwistle has not enlightened us in his witness statement of the contents of the discussions; he e-mailed some statistics to Mr Simpson and asked him to confirm his offer. Mr Simpson sent an e-mail in reply as follows [B1/281]:

"Yes I have explained all the difficulties with this unit

And think it will be very hard to make work

I would offer subject to contract 2 million sterling as we discussed"

The above is the only 'offer' made. It seems to me to be nothing more than Mr Simpson taking a bit of a punt. For example, I have no evidence that Mr Simpson gave any real attention to the significant terms of the lease e.g. as to the landlords' break clause which one would have thought would be relevant to a company seeking to establish a new department store.

89. On 15th October 2018 Mr Simpson sent an e-mail:

"We can't increase"

which I take to be a refusal to consider paying anything above £2,000,000.

90. On 14th November 2018 Mr Simpson sent a round robin e-mail saying that the launch of the Days department stores was to be delayed [X380].

91. On 15th January 2019 Mr Acton made further enquiries of Mr Simpson to see how informed Mr Simpson's offer was [X343]; I do not think there was any reply. Somewhat oddly Mr Chase did not consider it appropriate to investigate this offer even though it seems to be highly material to the market for the lease [X346].

92. Finally, the identity of the maker of the offer was kept hidden by the Claimants and their agents from the Landlords. However, it was not kept hidden from their

expert Mr Chase (albeit it post-dates his report). Notwithstanding that the Days' offer was an obvious piece of material information necessitating further research on his part, Mr Chase ignored it and left his opposite number (Mr Acton) in the dark. In oral evidence Mr Chase eventually accepted that he had not complied with his expert's overarching duty to the court and I have to observe in this judgment that it was not for Mr Chase to protect the commercial sensitivities of his client at the cost of his duties as an expert witness.

93. I am left finding that whatever interest Days had in LR19 has now evaporated.

THE PHANTOM PURCHASER

94. It appears that GB's thoughts turned to a plan that if they could persuade the Landlords that they had an offer for the lease, the Landlords would exercise their right of pre-emption. On 6th June 2017 Mr Collett of GB sent out an email recording as an output from a meeting:

"re-review lease to determine if we can play with stalking horses who are not committed to take the lease if Landlord does not take up pre-emption rights. If possible, assess consequences of a failed attempt and consider orchestrating/ teaming up with such a stalking horse/ horses".

95. In June 2017 Mr Entwistle was being told [B195]:

"I still maintain that it will probably ultimately be a landlord deal but they have to be dragged to it 'kicking & screaming. So we do need some sort of operator willing to run the process at least"

and there was some discussion with Poundstretcher's property agent of a non-genuine offer being made [B196].

96. On 7th November 2017 SHB gave notice to the Landlords of its wish to effect an assignment and offered to surrender the lease for £8,650,000 [B186].

Unsurprisingly the Landlords asked for some particulars [B187] which were not answered

"for commercial reasons" [B189].

97. Insofar as it can be said that there is a line between hard commerce and fraud the above tactics must come close to straying into the latter and SHB's/ GB's conduct is exceedingly questionable.

98. The above evidence must reflect the Claimants' understanding of the state of the market for the lease (otherwise why adopt such questionable tactics?).

LANDLORDS' ASPIRATIONS FOR LR19

99. In my judgment the Landlords cannot be criticised for vibrantly and efficiently running their business by constantly considering potential options and permutations. Inevitably they will have an eye to the solvency and stability of their tenants and the prospects of a unit unexpectedly becoming available. When BHS was sold for £1 it could be said that the writing was on the wall. Thus the future plans (e.g. X40, X243) are just that.

100. Insofar as Mr Chase considers that the Landlords' dealings with the Mall and their negotiations with Primark have adversely impacted on the market for the lease, that might be right to a modest extent but I cannot see how the point advances the Claimants' case given the Landlords are carrying out lawful commercial activities. For example, the fact that the Landlords might pre-empt is not going to go away; it is a contractual right. I certainly have not divined any improper *interference* by the Landlords with the Claimants' attempts to assign their lease.

PLANNING BLIGHT

101. In December 2014 the Mall's owners submitted a planning application for a large extension to accommodate various uses such as retail, leisure, restaurants, hotel and so on as summarised at [X252]. It was to include 33 or so retail units with an anchor store. The application was referred by the local planning authority (which was minded to grant permission) to the Secretary of State on 3rd December 2016 and it was called in on 1st March 2017. On 1st October 2018 the application was refused and the time limit for appeal has passed. The challenge period expired 6 weeks thereafter.

102. It is the Claimants' case that this planning application has rather stifled interest in the lease because potentially interested retailers would want to see first what became of the planning application; see Mr Chase's opinion at paragraphs 5.f ff [C17]. At paragraph 9.10 [C/27]) he says:

"*The difficulties in securing an assignee have been caused by the uncertainty of the planning application to extend the centre with a new southern shopping mall and the potential activities to improve this area as being promoted by the Defendants".*

103. Notwithstanding this assertion, no one has suggested that the regular churn at the Mall has been affected or that the Landlords have had trouble filling other units; when Mr Chase visited he considered that there was only one vacancy (paragraph 4.16 [C14]).

104. It would seem that the only retailers who would be seriously interested in the extension (in preference to the original mall) would be anchor stores such as Next, Fenwick or Primark who could acquire the square footage and location available in the extension but not in the original mall.

105. Close scrutiny of the documents and cross examination of Mr Chase established that, in fact, there was only one retailer who might be interested in LR19 (as reconfigured and enlarged) namely Primark who was also interested in the planning outcome [X40].

106. Mr Chase told me that the proposed leases for units in the extension would be standard occupational 10 to 15 year leases with 5 year break clauses which are rather different to the subject lease. Ms Shea QC makes the point that those in the market for such a lease would not be in the market for the subject lease but that assumes such leases are available in the first place.

107. In any event it was Mr Chase's evidence that:

"The market for the assignment of the BHS sublease by the tenant is very good once the outcome of the planning application … is determined"

[C/35 para 11.20].

108. In my judgment the impact of the planning application on the market for the lease has been greatly exaggerated. But for Primark, there is no evidence that the extension was competing with LR19 for the attention of retailers. In fact, on closer analysis, Primark's interest in LR19 was higher whilst the extension was planned because it could have a temporary home there (bearing in mind that completion of construction of the extension, had planning been granted, would have taken a fair amount of time).

LITIGATION BLIGHT

109. Litigation is often a blight on the marketability and value of property the subject of the litigation; a classic example is a neighbour dispute and the effect thereof on the demand and value for the neighbouring properties. However, this is not a case for sweeping generalisations and so I turn to examine the evidence.

110. The Claimants had no evidence at all that the existence of this litigation was blighting a sale of the lease until Mr Chase asserted the same for the first time in his *oral* evidence at trial. It is exceedingly surprising that if litigation blight was a material factor that it did not appear in any of Mr Chase's reports or responses. His instructions may have been on the basis of no forfeiture but we are not concerned with 'forfeiture blight'. There was no evidence from Mr Entwistle that litigation blight was a problem. If litigation blight was going to be a problem it is surprising that the Claimants chose to commence it.

111. In fact there is no evidence that the litigation is a blight. Sports Direct do not want to be a party to the litigation but that has nothing to do with assignment. The recent communications from Sports Direct have occurred notwithstanding the litigation.

In any event:

(1) If I grant relief the litigation will not go away because the relief will be time limited and conditional in any event; likewise forfeiture will remain a risk.

(2) Whilst some individuals may steer clear of any transaction that has a whiff of litigation about it, I would be surprised if retailers (who have access to specialist advice) would be dissuaded from considering taking an assignment of a lease that they were otherwise interested in. They would know (with advice) that the Landlords would be highly likely to agree to relief because it would be highly likely that the court would grant relief if there was an assignee ready willing and able to proceed.

MARKET?

112. I do not need expert evidence to remind me that the market turns on supply and demand and that many conventional 'high street' retailers are struggling to survive. I consider that I can take judicial notice that it is a 'tenants' market' (as confirmed by Mr Entwistle [B4 para 10]). The obvious problem faced by the Claimants is why would a retailer desirous of occupying a unit at the Mall pay to acquire their lease when there are chances of securing a better more flexible deal by negotiation with the Landlords? It is obvious that no retailer is going to purchase the lease unless it perceives that is the best bargain available.

113. It is obvious from the evidence that one of the Claimants' aspirations is a deal with Primark under which Primark (or the Landlords) take the lease of LR19 off the Claimants' hands for a significant sum but the Claimants cannot offer what Primark wants – 50,000 to 60,000 square feet and the Landlords are not now expressing any interest in purchasing a surrender. If there is a forfeiture and the Claimants later see Primark in occupation of LR19 (and other units) they may feel upset but in my judgment it's a matter of harsh commercial reality.

114. I have addressed the factual evidence above and I now turn to the expert evidence.

115. Mr Chase was instructed on behalf of the Claimants to address:

"The ability of the respective parties to let the Premises …." [C/185]

What have Mr Chase's investigations into the market revealed? Quite properly he has looked at the marketing efforts to date. The difficulty here is that Mr Chase has not conducted his own investigations but seems to rely entirely on Mr Entwistle's evidence who is the source for almost the entirety of section 10 of Mr Chase's report (starting at [C/27]). Mr Chase told me that it would be inappropriate of him to market the lease but no one was asking him to do that. The danger of wholesale reliance was shown when in oral evidence Mr Chase

identified the retailer Zara as a candidate even though on Mr Entwistle's enquiries Zara was not interested in the Mall. The reason for Mr Chase's assertion is that he relied on out of date information from Mr Entwistle.

116. Generally, an expert is required to carry out the research necessary to provide an informed opinion (as a statement of the obvious but also found within RICS guidance and case law). By Mr Chase not carrying out research I am **not** better informed about the interest of Primark, Sports Direct and Days (all of whom are relied on by the Claimants as potential purchasers).

117. In my judgment greater reliance must be placed on the evidence of marketing outcome to date rather than Mr Chase's opinion evidence (or, indeed, Mr Acton's). That evidence can be summarised simply as:

(i) Days were prepared to test the water and take a chance (rendered safe by utilising 'subject to contract') but there is no evidence that they remain interested;

(ii) Sports Direct has an interest but has not made any sort of offer.

118. There is no evidence, factual or expert, on which any finding can be made that there is a real prospect of finding someone else. The reality is at the conclusion of the trial that only Sports Direct is a potential assignee.

VALUE OF THE LEASE

119. We have the purchase price which was approximately £7,000,000 but such have been the changes to the retail world and growth in internet sales since 1998 (when the internet was barely a competitor to the 'high street') there can be no doubt that the value of the lease has depreciated considerably given the new retail world and its terms. However, can it be said that the state of the market is such that this lease is now worth nothing?

120. I am, of course, concerned with the value of the lease, not the premises themselves. It cannot be controversial that a tenant interested in taking on LR19 will want to do so on the best possible terms and if they can take a unit like LR19 on rather better terms than the lease with which they must comply they are likely to walk away.

121. It is common ground (further to Mr Chase's concession) that if there is no market for the lease it has no value. It is obviously difficult to value a lease where there is one possible purchaser in the market who is not competing against anyone else and who has not made any offer at all to date.

122. This means that the valuation evidence submitted to the court comprises the expert opinions of Mr Chase and Mr Lusher which are based on their own methodologies and approaches but not comparables. If there is a market Mr Chase says the lease is worth about £2.8m and Mr Lusher says £1.91m.with adjustments to the figures depending on methodologies adopted. Inevitably there is reliance on rental value per square foot etc etc.

123. I decline to delve too heavily into these reports to try to divine whose opinion is likely to be more accurate because the question for the court is whether the lease has a significant value or not; if it has a value the court need not trouble itself with the precise figure.

PROSPECTS OF ASSIGNING THE LEASE

124. Ms Shea QC makes a sound point that if SHB has been unable to find an assignee over the last 2 ½ years, what prospect does it now have of finding an assignee? Ms Shea QC is dismissive of the interest shown thus far (and the

evidence showing such interest). Ms Shea QC argues that the prospects of SHB finding an assignee are “vanishingly small”.

125. In contrast Ms Anderson QC argues that regard has to be had to the Day’s offer; it may have gone away but there was an offer and now Sports Direct are showing an interest. She argues that there are others e.g. for the purpose of achieving a Primark package.

126. In the hearing I said that there might be a lurking silent retailer waiting to pounce but I wonder what such a retailer is waiting for now. A retailer (like Days) might yet ‘have a punt’. However, this is all rather speculative.

127. I do not agree with Ms Shea QC that there is no market at all. The recent developments with Sports Direct show that the Claimants’ cause is not hopeless and someone might yet pay value for this lease.

128. It is clear to me that it is an extremely weak market and there is no evidence before me to suggest that the market is likely to get any stronger.

VALUE OF REVERSION IF FORFEITURE

129. Much time has been spent attempting to calculate the increase in value in the Landlords’ reversion should relief be refused and the lease remain forfeit. The Claimants contend that:

(1) There is an increase in value – the ‘windfall’ and

(2) The court should take it into account in the exercise of its discretion.

I address the relevance of windfall later in this judgment and this section is limited to values.

130. It is common ground that the base value of the Landlords' reversionary interest is £348,800,000 and I observe that Mr Chase has agreed with Mr Lusher's figure not the methodology.

131. Mr Lusher uses bespoke software for the purposes of his valuations called Argus Valuation-Capitalisation which is used by practitioners who value shopping centres. Inevitably there are variables and no doubt one of the purposes of the software is to answer 'what if' questions. The fundamental purpose of Argus seems to be to keep the Landlords on top of the book value of the Mall and to analyse the effect of changes (actual, proposed or conceptual as the case may be) but the fundamental understanding that I gleaned from Argus and Mr Lusher's report (which relies on the same) is heavy reliance on costings and no value being ascribed to intangibles such as hope, increased revenue for all businesses (thus causing increase in rent paid) and such like. In turn an informed purchaser would, I am sure, interrogate Argus or its equivalent but would also come to a more holistic view as anyone does who purchases a business or a property.

132. As a non expert I would perceive the apparent windfall to the Landlords flowing from the forfeiture as being referable to (and possibly calculable from) the notional net rent generated by LR19 from now until 2123 (which they would not have received but for the forfeiture) less a considerable discount to reflect market uncertainties and early receipt and less an element of capital costs attributable to LR19. Inevitably there are all sorts of theoretical permutations.

133. The exercises carried out by the experts are far more sophisticated and again look at the differing options rather than limiting themselves simply to forfeiture

of LR19. I can readily understand that the different options would produce different results. I also readily understand that short term financial pain to the Landlords can result in long term gain.

144. The rival valuations are as follows (assuming a market)

	Description	Mr Lusher	Mr Chase
1	Re-let LR19 as is	£6,900,000	£7,270,000
2	Combine LR19 + Pret + Soho units into one unit	(£3,400,000)	£3,090,000
3	Combine LR19 + Pret + Soho + Boots into one unit	(£11,900,000)	(£5,790,000)
4	Combine LR19 + Pret + Soho + Boots + build roof box on top of Boots into one unit *and let to Primark*	(£10,400,000)	£65,000,000

145. So, there is common ground between Mr Lusher and Mr Chase that option 3 (relocating Boots, Pret-A-Manger & Soho Coffee and using their units plus LR19 to let to a single occupier) reduces the value of the reversion so there is no windfall (albeit they differ on the figures). There is common ground that option 1, re-letting LR19 (assuming a market) enhances the reversion by £6,900,000 (Lusher) or £7,270,000 (Chase); the difference in figures is not worrisome. The relevant differences really relate to options 2 and 4.

146. How important is this? In my judgment the focus should be on option 1 in any event. This is not a case where the Landlords have done anything wrong in

order to profit at the Claimants' expense. It is the *Claimants'* actions which give rise to any windfall and I think that should be limited to such windfall arising from the Landlords recovering possession of LR19 over a 100 years sooner than expected.

147. I am somewhat troubled by the figures advanced on each side with respect to option 4 (should that be relevant). It begs the question of why the Landlords are even thinking about such an option if it will reduce the value of the reversion whereas I struggle to see how the same option causes an appreciation in value of as much as £65,000,000. I pointed out to Mr Lusher that on his figures the Landlords are better off not forfeiting and having a retailer in LR19 and he agreed. It puts an awful lot of faith in:

(a) Primark taking up occupation at the Mall

(b) enormous value being added by Primark.

I am sure that Primark would be an asset and I am prepared to accept that consumers are attracted to Primark and that will benefit footfall all being well but it seems to me that for court proceedings it is far too speculative to start assessing future rents on the basis that turnovers will rise etc. I also agree with Ms Shea QC that Mr Chase's figure seems predicated on the basis that option 4 has been executed rather than hoped for.

TIMESCALES

148. In his report Mr Chase advised that (but for the planning uncertainty) the timescales for an assignment are between 3 to 6 months commencing with the date of marketing [C/33 para 11.8 and 11:.20 to 11.22]. Of course marketing has been an ongoing exercise since the latter part of 2016.

149. I do not criticise Mr Chase for a moment in telling me that an additional 3 months would be helpful; that is a statement of the obvious. Nor do I criticise Mr Chase for running time from expiry of the challenge period rather than the date of the planning decision but no good reasoning has been identified for the oral change to start time from the outcome of these proceedings (i.e. judgment) other than trying to get more time for the Claimants.

150. I have stated elsewhere that of the 4 options considered by the marketing experts only option 1 is within the gift of SHB (assuming relief).

151. Given that only Sports Direct is evidencing an interest from January it seems to me that a final realistic period for securing an assignment ***if*** relief is granted and an assignment is going to happen is 6 months expiring 28th June 2019 (last working day in June 2019) which is about 3 months from the date of handing down of this judgment.

DAMAGES FOR BREACH OF COVENANT

152. The Claimants argue that the Defendants will have a claim in damages for breach of covenant and are thus compensateable for the same. This needs to be broken down into 2 parts:

(1) I agree they have a claim

(2) The only remedy available is monetary

but it seems to me that the damages are all but unquantifiable. The burden is on the Defendants to prove loss and the ease or difficulty of quantifying loss is bound to be a relevant factor in determining whether or not to grant relief.

FINDINGS SOUGHT BY THE CLAIMANTS

153. In closing submissions Ms Anderson QC makes a list of findings sought by the Claimants. My findings are as follows adopting her order and numbering:

(1) Market – there is some slight interest in the lease and thus demand for the lease. It is slight but exists.

(2) Value of lease - £1.91m to £2.8m

(3) Just & Equitable – this is not a finding of fact and is addressed later

(4) Period – 6 months expiring 28th June 2019

(5) Primark – the Landlords have various strategies with respect to management of the Mall and aspire to persuading Primark to take up occupancy if a way can be found that is commercially viable to both parties and provides Primark with the floor space it requires

(6) Primark - Primark have an interest in taking a suitable permanent unit but are not rushing

(7) Footfall – *if* Primark takes up space in the Mall, it will benefit The Mall (as would any retailer in LR19 compared to a boarded up shop) and may generate an increase in footfall but it is far too speculative to find that there will be a ripple effect on turnovers etc.

(8) Appreciation in value – *if* Primark takes up occupation the value of the reversion is likely to be enhanced but nothing like the £65,000,000 suggested by Mr Chase.

(9) See (8)

THE LAW

154. At common law, provided the terms of a lease allow for forfeiture on a tenant's breach of covenant, the landlord can forfeit the lease and the tenant loses it no matter how long the term left to run is or how much was paid to acquire it in the first place. Thus forfeiture was a penalty and in due course the remedial

jurisdiction of equity against penalties was extended to the Courts of Common Law; see Barrow v Isaacs [1891] 1 QB 417.

155. It is now settled law that the remedy of forfeiture exists in order to secure performance of the tenant's covenants, not to penalise the tenant for breach of covenant and provision for relief from forfeiture is found in section 146(2) of the Law of Property Act 1925 as follows:

"(2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit."

156. The most common forfeiture cases appear to concern those where there is a past but remediable breach of covenant: in Magnic v Ul-Hassan [2015] EWCA Civ 224 it was observed by Patten LJ that in most cases relief would be granted on the breach being remedied and on terms as to costs (see paragraph 50).

157. The remedy is discretionary and that discretion is very wide. In Hyman v Rose [1912] A.C. 623, 631 per Earl Loreburn L.C. held[1]:

"When the Act is so express as to provide a wide discretion, meaning no doubt to prevent a man from forfeiting what in fair dealing belongs to someone else, by taking advantage of a breach from which he is not commensurately and

[1] Approved in Associated British Ports v C.H. Bailey [1990] 2 A.C. 703

irreparably damaged, it is not advisable to lay down any rigid rules for guiding that discretion."

158. A court can award damages against a tenant who is in breach of a 'keep open' covenant; see Costain Property Developments Ltd v Finlay & Co Ltd (1989) 57 P & CR 345 where damages were assessed by reference to the diminution in value of the landlord's reversion.

159. In this case the Landlords have elected not to pursue a damages claim against SHB but that does not stop:

(i) the remedy existing and/ or

(ii) me reminding myself that such remedy exists and the Landlords can be compensated for breach of covenant whether they choose to make a claim for damages or not;

(iii) further reminding myself that SHB is insolvent and GB is not liable for breach of covenant.

160. In Freifield v West Kensington Court Ltd [2015] EWCA Civ 806 the tenants deliberately breached the covenant against sub-letting and argument arose on whether there could be relief given a deliberate breach and upon the relevance of the windfall to the landlord if the lease remained forfeit. The first argument does not arise in the present case but the second does. At paragraph 47 Arden LJ said:

"The windfall point is about proportionality. The appellants' egregious conduct is not relevant to the question of the windfall, which was a self-standing consideration to be considered on its own merits and then *weighed against the appellants' egregious conduct. Once it has been appreciated that the value of the leasehold interest is an advantage which the respondent will obtain from forfeiture, it has to be thrown into the balance with all the other circumstances".*

161. There is a helpful summary of the (non-exhaustive) factors to be taken into account in the exercise of the discretion in Woodfall on Landlord and Tenant paragraph 17.166 as follows:

Specific factors include:

(a) whether the breach was wilful or deliberately committed, for established and sound principle requires that wilful breaches should not, or at least should only in exceptional cases, be relieved against, if only for the reason that the lessor should not be compelled to remain in a relation of neighbourhood with a person in deliberate breach of his obligations;

(b) whether the breach was inadvertent, due to a mistake by the tenant's solicitors;

(c) whether the breach was caused by circumstances beyond the tenant's control (e.g. the threat of compulsory acquisition or requisition);

(d) where the breach consists of doing something (e.g. assigning or the making of alterations) without the landlord's consent and without having asked for that consent, whether that consent could reasonably have been refused if it had been asked for;

(e) whether the tenant has made or will make good the breach of covenant and is able and willing to fulfil his obligations in the future;

(f) whether the breach has occasioned lasting damage to the landlord;

(g) whether the damage sustained by the landlord is proportionate to the advantage he will obtain if no relief is granted;

(h) relevant conduct and interests of persons who are not party to the lease (e.g. a contracting purchaser or a beneficiary under a trust of the lease);

(i) the personal suitability of the tenant, where it is clear from the lease that the personal qualifications of the tenant are important;

(j) personal hardship which will be occasioned to the tenant if relief is refused;

(k) whether the tenant has a remedy against a third party (e.g. his solicitor);

(l) whether the tenant's defence has been put forward in good faith;

(m) whether third parties have acquired rights in the property without notice of the forfeiture, although this factor will not carry much weight where the landlord has acted unreasonably or precipitately;

(n) whether the breaches relate to non-payment of periodic sums such as maintenance/service charges akin to rent, in which case the principles applicable to forfeiture for non-payment of rent should apply so long as the landlord recovers the sums due.

RELEVANCE OF WINDFALL

162. For the purposes of this part of my judgment I am assuming that there is a material windfall to the Landlords by the lease remaining forfeit.

163. In my judgment, in relief from forfeiture cases, the focus tends to be on the loss to the tenant of the value of the lease (and consequential loss e.g. of its business) should relief not be granted. In carrying out a balance sheet exercise I can readily see that a court may want to compare loss to tenant and windfall to landlord.

164. I agree with Ms Shea QC that if the lease has no value at all, the relevance of the windfall falls away. In other words, if by forfeiting the lease the landlord is not in fact penalising the tenant by taking away something of value to the tenant, why should the court by troubled by windfall? The cases to which I have been referred all concern leases which had a value.

165. However, I can see that the windfall argument has relevance if the lease has some value and one is weighing the net effect of forfeiture/ relief on the landlord.

CONCLUSIONS

166. The points which weigh heavily in my discretion are as follows:

(1) SHB was and is in deliberate but not wilful breach of covenant not caused by third parties;

(2) SHB had an asset which was once of considerable value and it should not be deprived of the opportunity to reduce its debts;

(3) GB are a secured creditor and it should not be deprived of its security;

(4) There is a market still for the lease and a real rather than fanciful prospect of finding an assignee;

(5) The lease has a value of over £1,000,000;

(6) The breach of covenant is incurable and will continue until an assignee is found and who opens their store for business;

(7) Therefore the Landlords suffer ongoing damage and their other tenants some damage by being in a Mall where the fourth largest store has been and continues to be boarded up;

(8) If the Landlords remain unable to recover possession they will be unable to devise and implement strategies for the mall incorporating LR19 for their benefit and the benefit of all retailers in the Mall;

(9) The Claimants' hands are not clean given their use of the phantom purchaser;

(10) The court can impose conditions particularly with respect to time limits.

167. I have considered the 'windfall' point but in the circumstances of this case I do not give it great weight.

168. I have come to the conclusions that:

(1) There should be conditional relief from forfeiture

(2) The primary condition is completing an assignment of the lease by 5pm 28th June 2019 (to any assignee, not limited to Sports Direct)

(3) The remaining conditions will be the usual conditions as to payment of holding costs etc from date of forfeiture and costs.

169. The ordinary rules relating to costs do not apply in relief from forfeiture cases. Although the Claimants have obtained relief they have sought an indulgence from the court. They did not set out the terms on which relief was sought until closing submissions and their hands were not clean. There may be further argument and material to consider with respect to costs but at this stage I would expect payment of the Landlords' costs to be one of the conditions for relief.

170. I ask Counsel to agree and draw up an appropriate minute of order.

HHJ Ralton

1st April 2019

ADDENDUM

(a) Counsel for the parties have not been able to agree the minute of the order following circulation of the draft judgment.

(b) I have taken it upon myself to determine the minute of order but as I do so without a hearing all parties may apply to have it reconsidered at a hearing under CPR 3.3(5).

(c) Given the nature of this case and section 146 LPA 1925 it is difficult to see what argument the Claimants possess to avoid paying the Defendants' costs of the claim and counterclaim but I might not be privy to some critical

and relevant information and argument therefore see my approach which is to hold the ring until there is a hearing on costs.

(d) Although the First Claimant was the tenant it is in reality the Second Claimant which has prevented the Defendants from recovering possession to date thus I cannot see that the Second Claimant can resist liability to pay mesne profits (assuming no assignment is achieved).

(e) I am unclear what the real arguments are about service charge. The liability to pay is that imposed by the lease. It may be that £x is paid on account but that there must be a refund if appropriate circumstances arise. Therefore I have made it clear that the sums payable are those payable under the terms of the lease.

HHJ Ralton

1st April 2019