

## Relief from Forfeiture-

### Introduction

Before a landlord may exercise a right of re-entry or forfeiture of lease the provisions of s.146(1) of the Law of Property Act 1925 must be complied with. This section applies to most breaches of covenant save for:-

- non-payment of rent (s.146(11)) and
- the cases specified in s.146(8) and (9) for example, a mining lease or insolvency in special cases.

Under s.146(1) the landlord must serve upon the tenant a notice:-

- a. specifying the breach complained of;
- b. if capable of remedy requiring the tenant to remedy it; and
- c. in any case, requiring the tenant to make compensation in money for the breach.

Upon the service of a s.146 notice an application for relief against forfeiture may be made.

### Who may claim Relief?

- A person(s) in whom the lease is vested immediately prior to the forfeiture (s.146(2)) may apply. Former tenants cannot apply.
- In the case of joint tenants both must apply for relief. Relief cannot be granted to one as to do so would result in the continuing liability of the other lessee.
- Relief also extends to Agreements for Lease where the tenant is entitled to the grant of a lease i.e. the tenant is entitled to call for specific performance as there are no outstanding contractual obligations to be performed by the tenant.
- By virtue of s.146(4) sub-tenants may also apply. Historically relief was not available to a sub-tenant of part. This is no longer the case. The Court now has absolute discretion to grant relief upon such conditions as it thinks fit in the circumstances save that the term granted may not be greater than that granted by the sub-lease. Neither is it dependent upon relief being available to the head-lessee. For example, it includes cases where the head lease is forfeited for bankruptcy or non-payment of rent which are otherwise expressly excluded from the general operation of s.146.
- A mortgagee by way of legal charge is also entitled to claim relief under s.146(4) in the same way as if it were an under-lessee. This section also allows equitable tenants and equitable assignees to apply allowing them to avoid all the costs and legal complexities of seeking a vesting order. However, equitable mortgagees cannot get relief in their own name, so they have to take proceedings to force the tenant to do so. Mortgagees may also apply even if the lease has been disclaimed on the bankruptcy of the tenant/mortgagor

### When can an Application be made?

- An application for relief can be made as soon as a s.146 notice has been served and one need not wait for forfeiture proceedings to be issued and served.
- Relief may only be sought under s.146 while the landlord is 'proceeding to enforce his right of re-entry'. Therefore, once possession has been secured by the landlord pursuant to the execution of a Court Order the right to relief is lost. This is because the landlord is now entitled to rely, not on his right of re-entry, but on the Order of the Court as justifying his right of possession. In such circumstances, a tenant's only remedy is to attempt to set aside the judgment or otherwise impugn the judgment for possession.
- In the case where a landlord seeks to forfeit by physical re-entry without court action a Court's jurisdiction is not lost as the landlord can only justify his

possession by relying on his right of re-entry under the terms of the lease. So long as that remains the position the landlord is deemed to be 'proceeding to enforce'. Therefore, there is no time limit within which relief must be sought. However, in practice the Courts have adopted as a guideline a 6 month time limit.

### **The Courts' Discretion to grant Relief**

- A wide discretion is given to the Courts to grant relief
- In all cases the Court will consider all the circumstances and conduct of the parties; the nature and gravity of the breach and its relation to the value of the property in deciding whether to grant relief, and if so, upon what terms.
- There is no rule that relief can only be granted in exceptional circumstances.
- Woodfall lists a number of cases concerning special factors that are taken into account which include:-
- Whether the breach was wilful or deliberate – case law suggests that only in exceptional cases should relief be granted for wilful breaches:-

***'A Court should not in exercising its discretion encourage a belief that parties to a lease can ignore their obligations and buy their way out of any consequential forfeiture'***

- Whether the breach was caused by circumstances beyond a tenant's control
- If in breach of a qualified covenant (e.g. where a sub-letting occurs without consent) whether that consent could reasonably have been refused had it been asked for
- Whether the breach occasioned lasting damage to the landlord
- Whether the damage sustained by the landlord is proportionate to the advantage he would obtain if no relief is granted
- Personal hardship caused to tenant if no relief granted for example, the loss of a valuable asset
- Whether the tenant has a remedy against a third party
- Whether third parties have acquired rights in the property in good faith and without knowledge of forfeiture – save where landlord has acted unreasonably or precipitately. In the case of *Fuller v Judy Properties Ltd [1991] 64 P & CR 176*, CA the landlord had re-entered by the time the application for relief was heard. It was held that relief would be granted subject to the new lease granted. This meant that the former tenants became the immediate reversioner of the new tenants in possession and were entitled to collect the rent subject to payment of rent on their reinstated lease.

Relief is usually granted where a tenant remedies the breach and is able and willing to perform his obligations in the future.

The Court takes a strict view of breaches involving immoral use. This is because such use may result in a stigma being attached to the property which will not abate if the tenant is permitted to continue in possession. The mere fact that premises are used for immoral purposes does not, however, preclude the grant of relief. If no stigma arises then relief may be granted but only in rare cases.

If immoral use only affects part of the premises then relief may be granted in respect of the unaffected part - *GMS Syndicate Ltd v Gary Elliott Ltd 1982 CH 1* – part of the demised premises which had been lawfully sublet was used by the subtenants for immoral purposes. An Order for possession was made against the tenant in respect of that part only. In such circumstances the Court has the discretion to impose terms apportioning the rent and making other adjustments to the terms of the lease.

Relief may be granted if the breach is serious – *Central Estates (Belgravia) Ltd v Woolgar (No2) (1972) 3 All ER 610* – *Ropemaker Properties Ltd v Noonhaven Ltd (1989) 2 EGLR 50* and also if incapable of remedy – *Scala House and District Property Co Ltd v Forbes (1974) QB 575*

If a tenant has remedied the breach, he will be required to pay compensation where the landlord has suffered loss. Where such compensation is awarded it is measured by the same rule as damages are payable in an action for breach of covenant.

Where a tenant has persistently breached lease terms in the past and, for example, the lease has been forfeited previously, the Court may be reluctant to grant relief on the basis that the relationship between landlord and tenant has substantially broken down (Whitbread case (unreported)).

Whilst the cost of preparing and serving a s.146 notice cannot be recovered under the notice itself this does not prevent the Court from exercising its discretion in awarding such expenses in granting relief against forfeiture.

### Terms of Relief

- The basic principle is that a landlord is entitled to be put in the position he would have been had it not been in for the forfeiture. Usually a tenant is placed under an obligation to make good the breach upon which the forfeiture was based. Other breaches may be taken into account if the forfeiture is not based on non payment of rent
- If the tenant does not comply with the conditions imposed no relief is granted. A tenant cannot however, be compelled to comply. If time limits are imposed the Court does have the discretion to extend the same where it is just and equitable to do so. Court may even vary the terms of relief even if embodied in a consent order where the circumstances and subsequent events justify such a variation. It is however, accepted that if the Court has jurisdiction to interfere with the terms of a genuine consent order it is to be exercised only in very exceptional circumstances – *Fivecourts Ltd v J R Leisure Development Co Ltd [2000] QBD 18 Aug 2000* – *Ropac Ltd v Innpreneur Pub Co and another [2000] L & TR 93*.
- The tenant may not always be required to remedy the breach for example, in a case where a s.146 notice was served upon a tenant for failure to carry out repairs to a building which had long since outlived its useful life, relief was granted without requiring the tenant to put the building into repair – *Associated British Ports v C H Bailey 1990 2AC 703*
- Making payment of the costs of forfeiture action and/or application for relief is usually a term of relief. Costs are normally awarded on a standard basis unless the lease expressly provides for payment of indemnity costs - *Church Commissioners v Ibrahim 1997 1 EGLR 13*.
- The tenant may also be required to compensate the landlord for any losses sustained by reason of the tenant having failed to comply with its covenants during the period of forfeiture for example, an obligation to comply with purchasing obligations - see *Soteri v Psylides [1991] 1 EGLR 138*. Albeit that the landlord cannot enforce such covenants during that period if the tenant is granted relief the landlord ought to be treated as being in the same position as if the lease had never been forfeited.
- The Court will be reluctant to stay an application for relief pending determination of a counterclaim – the hope of recovering sufficient sums to pay the arrears is insufficient - *Innpreneur v Langton [1999] All ER (D) 1150*.

## Relief to Sub-Tenants

- As a general principle, the jurisdiction to grant relief to a sub-tenant under s.146(4) of the Law of Property Act 1925 should be exercised sparingly as its effect is to thrust upon a landlord a person whom he has never accepted as tenant, and creates privity of contract between them
- The recent case of *Duarte and Another v Mount Cook Limited* [2002] L & T R 21 provides general guidance about how the Court will exercise its discretion when considering an application for relief from forfeiture by unauthorised sub-tenants. In that case unlawful subtenants were granted relief from forfeiture despite finding that the landlord was unaware of the subletting. Such relief is exceptional and on the facts the Court was influenced by the following:-
  - The landlord was keen to have the sub-tenants as new tenants and had used the forfeiture as a negotiating tactic. There was no question of unlawful sub-tenants being foisted upon him against his will.
  - The lease contained a qualified covenant against sub-letting. It was held that had the tenant applied for consent the landlord would have been unreasonable to refuse.
  - There was no evidence of the sub-tenants being in breach of the terms of their tenancy.
  - The sub-tenants had carried out refurbishment works to the premises and on balance they would have suffered greater hardship than the landlord if relief was not granted.
  - The conduct of the landlord's agents in seeking to re-negotiate an inflated rent after agreement had been reached on the terms of the lease was held to be unconscionable.

Other factors that may be taken into account are as follows:-

- Whether the property sub-let is capable of convenient occupation under a lease divorced from the remainder of the property comprised in a head lease.
- Whether the sub-tenant would be entitled to security of tenure on the expiry of the sub-lease.
- Whether the sub-tenant (although not himself in breach) is in breach of restrictive covenants contained in the head-lease.
- Whether the breach is wilful.
- Whether the sub-tenant is prepared to make good any breaches of covenant contained in the head lease.

The relief granted takes the form of a vesting order. A sub-tenant may make an application for relief by Counterclaim and Defence.

In cases of non-payment of rent relief is usually granted on payment of arrears. Sub-tenants may be ordered to pay only part of the arrears if the sub-let is for part only of the premises.

The Court may also increase the rent payable – *Ewart v Fryer 1901 1 Ch 399*. The Court cannot however, require a sub-tenant to pay a higher rent merely because the market rental value of property has increased - *Cholmeley's School Highgate v Sewell 1894 2 QB 906*.

## Effect of Relief

- A distinction is made between relief granted to tenants and sub-tenants/mortgagees.
- In the case of tenants, the granting of relief reinstates the lease retrospectively and as such, it is as though the forfeiture had never happened. Upon reinstatement any derivative interests, for example, sub-leases, are also reinstated

- In the case of sub-tenants the lease is not reinstated. A new lease is created and no inferior sub-tenancies are resurrected. It is interesting to note that if a sub-lease is granted before the Landlord and Tenant (Covenants) Act 1995 came into force on 1 January 1996 and the sub-tenant successfully applies for relief against forfeiture after that date a new lease will be granted which will not be subject to privity of contract. Therefore, the sub-tenant will be free from any continuing obligation on assignment. In such cases, the landlord may wish to request the Court to vary the alienation covenant under the provisions of ss 34 and 35 of the Landlord and Tenant Act 1954.
- In the case of mortgagees, the new lease remains subject to the tenant's equity of redemption
- Often relief granted is conditional upon the tenant complying with a number of requirements. In such cases, pending compliance the tenant remains in occupation of the premises under a Tenancy at Will which determines if the conditions are not met.

### **Breach of Covenant for non-payment of Rent**

- The right to grant relief against forfeiture for non-payment of rent is expressly excluded from the provisions of s.146 save in the case of sub-lessees where s.146(4) gives a general right to apply for relief whether ground is for non payment of rent or otherwise.
- Instead it is based upon the Courts equitable powers to grant relief. This jurisdiction has now been placed on a statutory footing. In the High Court the Court has power to grant relief under s.38 of the Supreme Court Act 1981. In the County Court, s.138 and s.139 of the County Court Act.
- In the case of forfeiture for non-payment of rent, if a tenant discharges all outstanding sums claimed together with costs then relief is automatically granted. The landlord is under no obligation to accept payment from a third party.
- Where the forfeiture is effected by service of proceedings, the application for relief must be made within 6 months of the execution of the warrant of possession. This time limit is strict. Where forfeiture has been effected by peaceable re-entry the 6-month period is used as a guide line.
- Relief may be refused if the tenant has delayed in making the application and the landlord has since renovated or granted a new lease. If the landlord however, has granted a new lease in total disregard of an application for relief then relief may be granted despite the new letting. If there is any risk of a tenant making an application then it may be prudent to advise a client to initially re-let premises on a temporary agreement.
- Although there is case law to suggest that when deciding whether or not to grant relief the Court should ignore other breaches of covenant – *Gill v Lewis* [1956] 2 QB 1 personal experience (and subsequent cases) has shown that relief is more often than not ordered on terms that a tenant make good other breaches.
- Under s.138 of the County Court Act if the tenant pays into Court 5 days before the hearing all the outstanding arrears together with costs the action shall cease and the tenant shall hold the land according to the lease without the need for a new lease. This does not apply if the landlord is relying on other breaches besides non-payment of rent
- If payment is not made prior to trial and the Court is satisfied that the landlord is entitled to enforce the right of re-entry or forfeiture the Court must order that possession be given to the landlord at the expiration of such period, being not less than 4 weeks from the date of order, as the Court thinks fits, unless within that period the lessee pays into Court all arrears and costs. Court may extend this period at any time prior to possession (s.138(4)). If the period has expired and a warrant of execution issued then when the extension is granted the Court must also suspend the warrant for the extended period (s.138(9)).
- If the tenant defaults in making payment then subject to s.138(8) and s.138(9A) he is barred from relief.
- Once the landlord secures possession of the premises, the tenant has 6 months within which to make an application for relief against forfeiture.

- Under s.38 of the Supreme Court Act in any action in the High Court for the forfeiture of a lease for non payment of rent the Court has the power to grant relief against forfeiture in a summary manner.
- Under s.210 of the Common Law Procedure Act a landlord has the right where there is more than 6 months rent outstanding to obtain judgment for possession without the making of a formal demand. If the tenant fails to apply for relief within 6 months after execution of the order then he is 'barred and foreclosed from all relief or remedy in law or equity'.

### **How is an Application made?**

- The right to apply for relief is available in the High Court or a County Court.
- An application is usually made by the tenant either by:-
  - counterclaim in the lessor's action (good practice); or
  - by summons in an action brought by the lessor; or
  - by bringing his own action for relief.
- If an application is made in an action it is not essential for the relief to have been claimed in the pleadings.

### **Consent Orders**

If a tenant defaults in complying with the terms of a Consent Order he is at liberty to seek a further order for relief. In such circumstances, the Court jurisdiction's to grant further relief is to be exercised in exceptional circumstances. Where the tenant is seeking an extension of time the Court will be slow to interfere with the terms of that agreement.

### **Law Commission Recommendations**

The Law Commission has recommended the adoption of a modern, comprehensive law of forfeiture. To date those recommendations have yet to be implemented.

*Note: These notes summarise complex legislation & case law are not intended as a definitive statement of the law. Any specific enquiries regarding Relief from forfeiture should be addressed to Julia Elson, Carmela Inguanta, or your usual contact at SGH.*

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