

Landmark Property Nuts and Bolts Seminar

Relief from Forfeiture

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1. The law applicable to relief from forfeiture depends on four factors, which need to be established at the outset when considering relief:
 - a. The method by which the forfeiture was effected - court proceedings or peaceable re-entry;
 - b. If effected by court proceedings, whether these are in the County Court or High Court;
 - c. Whether the relevant breach of covenant was a rent or non-rent covenant;
 - d. The point in time at which the application for relief is being made.

Basic Principles

2. **What is the guiding principle behind relief from forfeiture?** It must not be forgotten that the right to forfeit is regarded in equity as merely a security for the performance of the covenants and so, provided that the lessor and other person interested can be put in the same position as before the breach and forfeiture occurred, relief should be granted.
3. **What is the effect of the Court granting relief from forfeiture?** The general effect of granting relief from forfeiture is to cause the lease to revive and continue as if it had never been determined. The exception to this is when relief is granted under section 146(4).

4. **Can one joint tenant apply for relief without the other?** No, a joint tenant cannot apply for relief against the will of another joint tenant: *TM Fairclough & Sons v Berliner* [1931] 1 Ch 60.

5. **Can a lessor and lessee agree amongst themselves for relief to be granted, without a Court order?** The better position is that they cannot, as has been held in the County Court decision *Zestcrest Ltd v County Hall Green Ventures Ltd* [2011] 50 EG 60. However, there is High Court authority to the contrary: *William Skelton & Son Ltd v Harrison & Pinder Ltd* [1975] QB 361.

Relief in Non-Payment of Rent cases

6. **What is considered rent for these purposes?** Anything reserved as rent in the lease, including perhaps service charges and interest.

Relief in the High Court – see accompanying table

7. In the High Court, a tenant has an automatic right to relief, pursuant to section 210 of the Common Law Procedure Act 1852, so long as the following conditions are satisfied:
 - (1) At least 6 months' rent are in arrear;
 - (2) The tenant or his assignee pays the lessor (or into court) all the rent and arrears;
 - (3) And costs;
 - (4) At any time before trial.

8. The High Court also has a discretionary power to grant relief, where forfeiture has been effected by the issue and service of proceedings: section 210 of the 1852 Act.

9. Both of these powers (automatic and discretionary relief) are preserved by section 38 of the Senior Courts Act 1981.

10. If the forfeiture has been effected by proceedings (rather than peaceable re-entry) the applicable time limit is 6 months from the execution of the possession order. If the forfeiture has been effected by peaceable re-entry, there is no absolute time limit but the limit of 6 months (from re-entry) will be applied by analogy: *Billson v Residential Apartments* [1992] 1 AC 494.

Relief in the County Court – see accompanying table

11. If the lessor effects the forfeiture in the County Court, section 138 of the County Courts Act 1984 applies. The court can grant relief in one of three ways.

12. First, automatic relief could be granted pursuant to section 138(2):

If the lessee pays into court or to the lessor **not less than 5 clear days** before the **return day all the rent in arrear** and the **costs of the action**, the action shall cease, and the lessee shall hold the land according to the lease without any new lease.

13. For these purposes:

- (1) The return day = the hearing date;
- (2) All the rent in arrear = all the rent that was in arrear at the time when the lease was forfeited and would have fallen into arrears by the date of the hearing if the lease had not been forfeited: *Maryland Estates Ltd v Bar-Joseph* [1999] 1 WLR 83; see also *Thomas v Ken Thomas Ltd* [2007] EWCA Civ 1504 in which it was held that that “all the rent in arrear” did not include rent which had fallen due before the lease was forfeited but in respect of which the landlord had lost the right to forfeit due to waiver;
- (3) Rent includes interest on the same;
- (4) Costs = costs on the indemnity basis (see below)

14. Section 138(2) does not apply if the lessor is proceeding on the basis of a non-rent ground as well as a rent ground – see section 138(6).

15. Second, relief could be granted pursuant to section 138(3):

(3) If—

- (a) *the action does not cease under subsection (2); and*
- (b) *the court at the trial is satisfied that the lessor is entitled to enforce the right of re-entry or forfeiture,*

the court shall order possession of the land to be given to the lessor at the expiration of such period, not being less than 4 weeks from the date of the order, as the court thinks fit, unless within that period the lessee pays into court or to the lessor all the rent in arrear and the costs of the action.

16. The Court may extend the period referred to above before possession of the land is recovered – see section 138(4).

17. If the lessee pays all the rent in arrear and costs, within the period in the order, he will hold the land according to the lease without any new lease – section 138(5).

18. An order made under section 138 must be in the correct form: Civil Procedure Rules, Form N27.

19. Third, relief could be granted pursuant to section 138(9A), if within six months from the date on which possession was recovered:

(9A) Where the lessor recovers possession of the land at any time after the making of the order under subsection (3)(whether as a result of the enforcement of the order or otherwise) the lessee may, at any time within six months from the date on which the lessor recovers possession, apply to the court for relief; and on any such application the court may, if it thinks fit, grant to the lessee such relief, subject to such terms and conditions, as it thinks fit.

20. Finally, if the lessor physically re-entered rather than issued proceedings, the County Court has a discretionary power to grant relief from forfeiture within 6 months of the re-entry – section 139(2):

(2) Where a lessor has enforced against a lessee, by re-entry without action, a right of re-entry or forfeiture as respects any land for non-payment of rent, the lessee may [...]at any time within six months from the date on which the lessor re-entered apply to the county court for relief, and on any such application the court may, if it thinks fit, grant to the lessee such relief as the High Court could have granted.

Relief in other cases – non-rent covenants

Practical preliminaries

21. **When is the earliest an application can be made for relief from forfeiture?** The application can be made “where the lessor is proceeding, by action or otherwise, to enforce the forfeiture”. A tenant may therefore apply for relief as soon as he receives a section 146 notice.

22. **Until what point in time can a tenant make an application for relief from forfeiture?** If the lessor effected the forfeiture by proceedings, an application for relief can be made until possession is recovered by the lessor, i.e. when the possession order has actually been enforced. If the lessor effected the forfeiture by peaceable re-entry, an application can technically be made at any time thereafter. However, in practice, a 6-month time limit from re-entry will be applied.

23. **In procedural terms, how does a tenant make an application for relief from forfeiture?** If the landlord issued proceedings to effect the forfeiture, the tenant can claim relief as a counterclaim. If not, the tenant will need to bring a free-standing claim for relief from forfeiture. Both would be governed by CPR part 55 (Possession Claims).

24. **What happens if a third party has obtained rights in the meantime, for example where the lessor has granted a lease of the property to a third party?** The existence of the third-party interest will be a relevant factor in the exercise of discretion to

grant relief, but is certainly not a bar to relief. If relief is granted, the forfeit lease will be ordered to take effect in reversion to any lease to a third party. The former tenant then becomes the immediate reversioner to the new third-party tenant.

Discretion under section 146

25. The power of the court to grant relief in respect of non-rent breaches is contained in section 146(2) of the Law of Property Act 1925:

(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.

26. The Court's discretion is a wide one, requiring an assessment of all the circumstances and the conduct of the parties, with regard to the guiding principle that the right to forfeit is merely security for the performance of the covenants in the lease.

27. A number of factors may be material to the exercise of the court's discretion:

- (1) The nature and gravity of the tenant's breach together with the tenant's willingness and/or ability to put the breach right;
- (2) Whether the breaches were committed wilfully or were mere oversights;
- (3) Whether the circumstances of breach were beyond the tenant's control;
- (4) Where the breach related to doing something that required prior consent, whether that consent could have been reasonably withheld;

- (5) Whether the damage from the breach to the landlord is proportionate to the advantage he would obtain if no relief is granted;
- (6) The personal hardship of the tenant;
- (7) Other breaches of covenant beyond those that the landlord is forfeiting for:
Essex Furniture plc v National Provident Institution [2001] L&TR 32;
- (8) Any delay by the tenant in seeking relief, the reasons for such delay and an prejudice to the landlord caused by such delay;
- (9) Whether third parties have obtained rights over the premises in the meantime;
- (10) The value of the property to be forfeited and any possible windfall to the landlord.

Terms of relief

- 28. The object of relief is to put the landlord back in the position he would have been if not for the breach and forfeiture. The court has a broad discretion in respect of the terms of relief.
- 29. One of the more drastic, but not uncommon, terms of relief is one requiring the sale of the lease: see *Khar v Delbounty Ltd* (1998) 75 P&CR 232.

Underlessees and Mortgagees

- 30. Underlessees and mortgagees can seek relief from forfeiture under section 146(2):
Smith v Metropolitan City Properties Ltd [1986] 1 EGLR 52.
- 31. In addition, section 146(4) provides:

(4) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, or for non-payment of rent, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less

term, the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case may think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

32. The key points to note are:

- (1) Section 146(4) by its express terms extends to non-payment of rent;
- (2) This power is used sparingly because the effect of section 146(4) is to foist upon the landlord a direct contractual relationship with someone whom he may not have chosen to contract with;
- (3) A vesting order pursuant to section 146(4) creates a new lease on the same terms as the old lease (save to the extent the court orders otherwise);
- (4) The vesting order is prospective in nature;
- (5) The court has a wide discretion in relation to the terms of the vested lease;
- (6) The term of the new lease cannot be longer than the term of the original underlease;
- (7) The underlessee must pay the costs of obtaining relief;
- (8) A mortgagee of leasehold by sub-demise or by way of legal mortgage is entitled to apply under section 146(4). Where the mortgagee obtains relief, a new term is vested in him but is held as a substituted security and the mortgagor has a right to redeem that security although the original lease has been forfeited: Chelsea Estates Investment Trust Co v Marche [1955] Ch 328.

Costs

33. If the court grants relief from forfeiture, the lessor is entitled to recover its costs, pursuant to section 146(3) of the Law of Property Act 1925:

(3) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under the provisions of this Act.

34. The usual order is for the tenant to pay the lessor's costs on the indemnity basis. This has been reaffirmed by the Court of Appeal in Patel v K&J Restaurants Ltd [2011] L&TR 6.

35. The principle behind this is expressed in Fairview Investments Ltd v Sharma, 1999 unreported by Chadwick LJ:

"It is the lessee's conduct in breach of covenant which gives rise to the lessor's need to protect his interests. It follows that, if the lessee is to be relieved from forfeiture, it should be on terms that reflect that. The lessor should not be left in the position where he is out of pocket as a result of proper steps which he has taken to protect his legitimate interests"

36. An exception to this is where the landlord has brought the forfeiture proceedings in circumstances which do not justify doing so: Bland v Ingram's Estates Ltd (No 2) [2001] EWCA Civ 1088.

37. A court will give significant weight to a covenant in the lease providing for the tenant to indemnify the landlord against costs it may incur on or in connection with a forfeiture: Church Commissioners v Ibrahim [1997] 1 EGLR 13.

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