Landmark CHAMBERS

An Update on Forfeiture

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What we will cover

- Recent cases on relief from forfeiture
  - *Gibbs v Lakeside Developments* [2018] EWCA Civ 2874
  - *SHB Realisations Ltd v Cribbs Mall Nominee (1) Ltd* [2019] L. & T.R. 25
  - *Timbo v Lambeth* [2019] EWHC 1396 (Ch)
- *Toms v Ruberry* [2019] EWCA Civ 128
- *Golding v Martin* [2019] EWCA Civ 446
- *Vauxhall Motors Ltd v Manchester Ship Canal Co Ltd* [2019] UKSC 46

Recent cases on relief from forfeiture

***Gibbs v Lakeside Developments* [2018] EWCA Civ 2874**

Facts

- Ms Gibbs held a long lease of a flat
- She moved abroad and provided her parents' address for all correspondence
- Demands were sent to the parents' address, but from 2007 service charges and rent stopped being paid
- The landlord issued a claim for money judgment, which was served at the flat
- Possession proceedings were then issued (again served at the flat) and in April 2010 the landlord took possession
- In July 2011 Ms Gibbs realised that the property was being marketed for sale
- In October 2011 she filed an application to set aside the possession order and for relief from forfeiture
- In December 2011 a new lease was granted to a third party
- Ms Gibbs amended her claim to seek damages for unjust enrichment but abandoned the application to set aside the possession order

Recent cases on relief from forfeiture

***Gibbs v Lakeside Developments* [2018] EWCA Civ 2874**

Court of Appeal

- The defendant could not succeed in her claim for damages for unjust enrichment as the possession order had not been set aside
- If the possession order had been set aside, this would not have assisted the defendant. She had issued her application for relief from forfeiture over one and a half years after the claimant landlord had taken possession of the flat, so relief from forfeiture would not have been granted
- Lewison LJ: “the elasticity of "reasonable promptitude" had snapped” [58]

Recent cases on relief from forfeiture

SHB Realisations Ltd v Cribbs Mall Nominee (1) Ltd **[2019] L. & T.R. 25**

Facts

- The landlord let a commercial unit to tenant for a 125 year term
- The tenant fell into financial difficulties and closed down the unit (in breach of a covenant that prohibited the unit being left unoccupied)
- The landlord served a s.146 notice
- The tenant sought relief from forfeiture for a period of 6 months to complete an assignment of the lease

His Honour Judge Raulton

- The tenant remained in deliberate but not wilful breach of the covenant
- The tenant should not be deprived of an opportunity to reduce its debts
- The secured creditor should not be deprived of its security
- Relief from forfeiture was granted on the condition of completing the assignment of the lease within 6 months and with the usual conditions of payment of charges and costs

Recent cases on relief from forfeiture

***Timbo v Lambeth* [2019] EWHC 1396 (Ch)**

Facts

- Ms Timbo held the long lease of a flat in Lambeth
- She moved to Sierra Leone in 2010 and service charges were unpaid
- Lambeth obtained a series of money judgments for unpaid sums
- A s.146 notice was served and possession proceedings were issued
- A possession order was granted and thereafter a warrant was executed on 27 October 2017
- On 31 January 2018 Ms Timbo filed an application for relief from forfeiture, which was returned because the incorrect fee had been paid
- Ms Timbo then decided to pursue an application to set aside the possession order and then filed a notice of discontinuance (seemingly because she thought she would reach an amicable resolution with Lambeth)
- On 26 July 2018 Ms Timbo brought her claim for relief from forfeiture

Recent cases on relief from forfeiture

***Timbo v Lambeth* [2019] EWHC 1396 (Ch)**

Master Shuman

- When exercising the equitable power to grant relief from forfeiture, the court should have regard to the six-month time limit that applies in the county court (in cases under s.138, County Court Act 1984).
- The claimant's "hope" that matters might be resolved was not a good reason for the delay in applying for relief.
- There had been a "dilatory approach to seeking relief… without any adequate excuse or explanation for that delay."
- The claimant's poor payment history was also relevant
- As was the claimant's inability to provide evidence that she would be able to pay off all the arrears and costs that were due at the date of the hearing

Toms v Ruberry [2019] EWCA Civ 128

Facts

- The lease of a public house imposed repairing covenants on the tenant
- The lease conferred a right of re-entry on the landlord if the tenant breached any obligations under the lease, and where such breach was capable of remedy, failed to remedy the breach within 14 days following receipt of a default notice
- The landlord discovered that the tenant was in breach of repairing covenants
- The landlord served a default notice at the same time as a notice under s.146, LPA 1925 and subsequently sought possession

Toms v Ruberry [2019] EWCA Civ 128

High Court - Dingemans J

- The claim was dismissed on the basis that s.146 notice was invalid because it had been served before the landlord's contractual right to forfeit had arisen

Court of Appeal

- The landlord argued that s.146 merely required that the underlying breach of covenant that gave rise to the right of re-entry needed to have occurred before a s.146 notice could be served
- Appeal dismissed
- The s.146 notice could only be given once the contractual right of re-entry had arisen i.e. after (a) there had been a breach of covenant, (b) a default notice had been served, and (c) the tenant had failed to remedy the breach within 14 days of the notice

Golding v Martin [2019] EWCA Civ 446

Facts

- Ms Martin was the lessee of flat in Sidcup. She moved abroad to Majorca and left the flat unoccupied
- Proceedings were brought in the FTT for determination of service charges
- Money judgment was entered for unpaid service charges
- Then, in June 2016 Mr Golding issued a possession claim for forfeiture of a lease
- Ms Martin did not respond to proceedings to a possession order was granted “forthwith”
- Mr Golding took possession of the flat and granted a lease of the flat to his daughter, who subsequently sold the flat to a third party purchaser
- In December 2016 Ms Martin discovered what had happened and in January 2017 applied to set aside the possession order

Golding v Martin [2019] EWCA Civ 446

Deputy District Judge Mohabir

- Applying the three-stage test in CPR 39.3(5), he concluded that: (a) Ms Martin had acted promptly in seeking to set the order aside once she learned of its existence; and (b) she had a good reason for not attending the hearing; but (c) she did not have a good prospect of success at trial
- She had no defence to the claim for possession and although she could have applied for relief against forfeiture, that was not a defence to the claim for possession

His Honour Judge Luba

- Allowing the appeal, he held that if the tenant has a reasonable prospect of obtaining relief against forfeiture at a hearing following the setting aside of the possession order, that counts as “success at the trial”

Golding v Martin [2019] EWCA Civ 446

Court of Appeal

- New points raised on appeal:
  - The possession order was defective and ought to be set aside
  - This was not a case in which CPR 39.3(5) ought to have been applied
- The possession order was defective for two reasons:
  - It did not specify any period before possession of the flat was to be given up
  - It did not provide for any possibility of payment of the arrears and costs before the expiry of that period
- The court had no power to make the order it did and it failed to comply with s.138, County Courts Act 1984
- The application to set aside the order came within the ambit of CPR 3.1(2)(m) and 3.1(7) (as per *Forcelux v Binnie* [2010] HLR 20) although the factors in CPR 39.3(5) were relevant

Vauxhall Motors Ltd v Manchester Ship Canal Co Ltd [2019] UKSC 46

Facts

- In 1962 MSC granted to Vauxhall a licence in perpetuity entitling it to discharge water through a drainage system into the defendant's canal for an annual sum of £50
- The licence was actually worth between £300,000-£440,000 per annum
- The licence provided that the Vauxhall would have sole use of the drainage system and was solely responsible for maintenance and repairs
- The Vauxhall failed to make an annual payment and then ignored a reminder
- MSC's right to terminate the licence was exercised. MSC proposed a new (much more expensive) licence
- Vauxhall sought relief from forfeiture, which was granted by Judge Behrens sitting in the Chancery Division of the High Court

Vauxhall Motors Ltd v Manchester Ship Canal Co Ltd [2019] UKSC 46

Court of Appeal

- Upheld the decision of Judge Behrens
- The licence had granted possessory rights because the claimant has a sufficient degree of physical custody and control of the drainage infrastructure, having regard to the nature of the property and the manner in which property of that character was commonly enjoyed
- Relief from forfeiture was only available where a licence, considered as a whole, granted proprietary or possessory rights

Vauxhall Motors Ltd v Manchester Ship Canal Co Ltd [2019] UKSC 46

Supreme Court

- MSC argued that relief from forfeiture can only be granted if the right is proprietary
- Upheld the decision of the Court of Appeal
- When considering the extent of equity's jurisdiction to grant relief from forfeiture, there was no logic or reason of principle for drawing a distinction between rights over land and rights over chattels or other personality
- The licence gave Vauxhall a possessory right (with virtually exclusive possession)
- The jurisdiction to grant relief from forfeiture was exercisable in relation to both proprietary rights and possessory rights

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