

Relief from Forfeiture

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Relief or no relief?

Pineport Limited v Grange Glen Limited [2016] EWHC 1318

Breach was non-payment of £2,155 service charge reserved as rent

Tenant suffered from severe depression

Delay was caused by lack of money and advice

Initial premium: £90,000

Premises had been used for MOT fraud

Value of lease: £275,000

Delay in bringing claim for relief: 14 months after peaceable re-entry

Relief or no relief?

Freifeld v West Kensington Court Limited [2015] EWCA Civ 806

Breach of
alienation
provisions

Conscious and
deliberate
decision not to
seek landlord
consent

Proposed
term of
relief: sell
the lease
within 6
months

No steps
take to
remedy the
breach

Other
breaches,
e.g. failed to
adequately
insure

Sub-let to a
“controversially –run”
Chinese restaurant
→ nuisance

Rack rent
achievable in
respect of
sub-letting was
in region of
£133,000

Concealed
the breach
from the
landlord

“Cynical
disregard for
their
obligations
under the
lease”

Starting point: 4 relevant factors

1. Method of forfeiture: proceedings or peaceable re-entry
2. County Court or High Court
3. Rent or Non-Rent covenant
4. Time limits

BREACH OF COVENANT TO PAY RENT		BREACH OF OTHER COVENANTS		
	Proceedings	Peaceable Re-entry	Proceedings	Peaceable Re-entry
High Court	<p>Automatic relief if at least 6 months' rent in arrear and conditions satisfied: section 210-212, Common Law Procedure Act 1852</p> <p>Time limit: 6 months from execution of order (s.210)</p> <p>Discretion: section 38, Senior Courts Act 1981 and s.210 1852 Act</p> <p>Time limit: 6 months from execution (s.210)</p>	<p>Discretion: equitable jurisdiction</p> <p>Time limit: no strict time limit, 6 months applied as a guide by analogy</p>	<p>Section 146(2), LPA 1925</p> <p>Time limit: from receipt of section 146 notice until when possession order is enforced.</p>	<p>Section 146(2), LPA 1925</p> <p>Time limit: from receipt of section 146 notice. No strict time limit on when relief can be granted, but 6 months from re-entry applied as a guide.</p>
	County Court	<p>Automatic relief: section 138(2) and 138(3), County Courts Act 1984</p> <p>Discretionary relief: section 138(9A)</p> <p>Time limit: for section 138(9A), 6 months from execution</p>	<p>Discretion: section 139(2)</p> <p>Time limit: 6 months from re-entry</p>	

The guiding principle

The right to forfeit is 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.

The effect of 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.

Does the court need to order relief or can relief just be agreed between the parties?

- The better position is that the parties 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.

RENT

County Court

- Section 138, County Courts Act 1984
- Automatic relief
- Discretionary relief
- Time limit: 6 months from execution of order
- Cf. Peaceable re-entry

High Court

- Section 210 -212, Common Law Procedure Act 1852
- Section 38, Senior Courts Act 1981
- Automatic relief
- Discretionary relief
- Time limit: 6 months from execution of order
- Cf. Peaceable re-entry
- See *Gibbs v Lakeside Developments* [2018] EWCA Civ 2874 doubting even the High Court's jurisdiction to grant relief out of time.

RENT: Relief in the County Court (1)

- 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.*

RENT: Relief in the County Court (2)

- The return day = the hearing date;
- 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;
- Rent includes interest on the same;
- Costs = costs on the indemnity basis;
- 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).

RENT: Relief in the County Court (3)

- 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.***

RENT: Relief in the County Court (4)

- 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).
- An order made under section 138 must be in the correct form: Civil Procedure Rules, Form N27.
- *Golding v Martin* [2019] EWCA Civ 446 (CA): an order that did not comply with s.138 (4 weeks and conditional) would be defective and could be set aside.

RENT: Relief in the County Court (5)

- 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.*

RENT: Relief in the County Court (6)

- 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.

NON – RENT COVENANTS (1)

- Section 146(2), Law of Property Act 1925:

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.

NON – RENT COVENANTS (2)

When does a claim/counter-claim need to be made?

- Earliest: as soon as a section 146 notice is received
- Latest:
 - Court proceedings: up until the possession order is enforced;
 - Peaceable re-entry: technically at any time, but a 6 month time limit is applied as a guide.



Underlessees and Mortgagees (1)

- Underlessees and mortgagees can seek relief from forfeiture under section 146(2): *Smith v Metropolitan City Properties Ltd* [1986] 1 EGLR 52.
- 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.*

Underlessees and Mortgagees (2)

- Section 146(4) by its express terms extends to non-payment of rent;
- 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;
- 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);
- The vesting order is prospective in nature;
- The court has a wide discretion in relation to the terms of the vested lease;

Underlessees and Mortgagees (3)

- The term of the new lease cannot be longer than the term of the original underlease;
- The underlessee must pay the costs of obtaining relief;
- 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 – section 146(3)

- 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.*

Costs – section 146(3)

- 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.
- 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.
- 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.

Relief or no relief?

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

Canal company granted a licence to Vauxhall to discharge surface water

Value of right to discharge water was £300,000-£440,000 per annum

Licence terminated in March 2014; application for relief made in March 2015

Vauxhall continued to exercise rights under the licence

Licence could be terminated if the annual payment of £50 not made

Licence granted the right to construct, repair and renew pipes

Breach = failure to pay £50 annual fee

Vauxhall made immediate offer to pay the outstanding sum

Relief or no relief?

SHB Realisations Limited v Cribbs Mall Nominee Ltd [2019] L&TR 25

125 year lease

Breach of a
keep open
covenant

Other tenants
in mall were
suffering
damage
because of
store being
boarded up

Tenant had
falsely
claimed they
had an offer
for the lease

Premium of
£7,050,000 plus VAT
paid in 1998

BHS in
administration
and then
liquidation

Breach was
incurable and
would continue
until an assignee
was found
32 months
passed without
assignee

There was a
real prospect of
finding an
assignee in the
market

Thank you for listening

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