



Property Law Conference

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Forfeiture in the context of costs

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Topics to address

Scenario

Background case
law

Stemp in detail

The clause in
question

Ingredients of
waiver

Outcome in *Stemp*

Background
legislation

Stemp scenario

Where does *Stemp*
leave us?



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Scenario

Dispute about service charge

On L's application,
FTT makes a determination about how much service charge is payable

FTT makes no order as to costs

L makes a demand from T for costs incurred in FTT service charge proceedings

T disputes that the costs are payable under the lease



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The clause in question

"That the Lessee will pay to the Lessor on demand all costs charges and expenses (including legal costs and Surveyor's fees) which may be incurred by the Lessor or which may under the terms of the Lease or otherwise become payable by the Lessor under or in contemplation of any proceedings in respect of the property under section 146 or 147 of the Law of Property Act 1925 or in preparation and service of any Notice thereunder respectively notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court"



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Background legislation

Section 81, Housing Act 1996

(1) A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge or administration charge unless—

(a) it is finally determined by (or on appeal from) the appropriate tribunal or by a court, or by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, that the amount of the service charge or administration charge is payable by him, or

(b) the tenant has admitted that it is so payable.

...

(4A) References in this section to the exercise of a right of re-entry or forfeiture include the service of a notice under section 146(1) of the Law of Property Act 1925 (restriction on re-entry or forfeiture).

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Background legislation

Section 146, Law of Property Act 1925

(1) *A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—*

- (a) specifying the particular breach complained of; and*
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and*
- (c) in any case, requiring the lessee to make compensation in money for the breach;*

and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.



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Background Case Law

Freeholders of 69 Marina v Oram [2011] EWCA Civ 1258:

- Where service charge is reserved as rent, a landlord still needs to serve a s.146 notice and obtain a determination for the purposes of s.81.
- Where Tribunal proceedings were brought by the landlord for a determination of service charge payable, the costs of those proceedings can be recovered under a forfeiture costs clause because Tribunal proceedings are a condition precedent to forfeiture for non-payment of service charges.



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Background Case Law

Barrett v Robinson [2014] UKUT 322 (LC)

- Restrictions on the use of this clause
- Question of fact whether forfeiture actually was contemplated by the landlord. Sometimes it would not be and landlord is just interested in recovering the money sums rather than actually forfeiting the lease.
- Where there was either (1) no breach of covenant in the first place or (2) breach but right to forfeit for that breach has been waived, it cannot be said that costs were incurred in contemplation of forfeiture because forfeiture was not a possibility. There would not have been the opportunity to forfeit.



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Reminder of the ingredients of waiver of the right to forfeit

Knowledge of facts upon
which right to re-enter arises



Unequivocal act recognising
the continued existence of
the lease



Communicated to the tenant

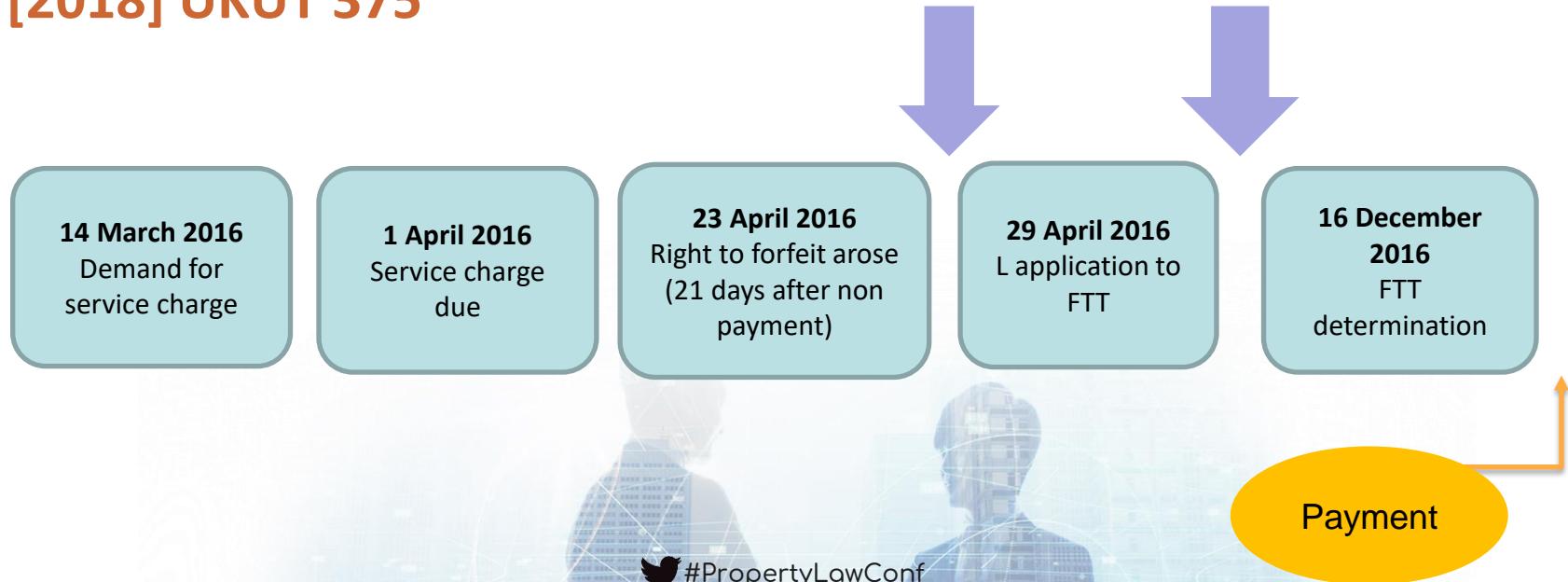


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The facts of *Stemp v 6 Ladbroke Gardens Management Limited* [2018] UKUT 375



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The facts of *Stemp v 6 Ladbroke Gardens Management Limited* [2018] UKUT 375

February 2016
Fire order

Application expressly stated intention was to forfeit

17 June 2016
Contributions + fire marshals

8 August 2016
Request for access + quoting lease

3 September 2016
Demand for service charge on account

23 April 2016
Right to forfeit arose (21 days after non payment)

29 April 2016
L application to FTT

5 July 2016
L repair and T repair + s.20 notice

23 August 2016
Statement of estimates for works

16 December 2016
FTT determination

26 April 2016
"Dear leaseholders"

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Issues arising in *Stemp*

1. Does the Tribunal have jurisdiction to determine the issue of waiver of the right to forfeit?
2. Is it possible for a landlord to waive the right to forfeit during the period prior to the determination for purposes of s.81?
3. Was there a waiver on the facts of this case?
4. Did the Upper Tribunal have enough evidence on which to make a finding about the costs incurred prior to any specific act of waiver?



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Outcome in *Stemp*

1. Does the Tribunal have jurisdiction to determine the issue of waiver of the right to forfeit? YES.
2. Is it possible for a landlord to waive the right to forfeit during the period prior to the determination for purposes of s.81? YES.
3. Was there a waiver on the facts of this case? YES, BY DEMAND FOR SERVICE CHARGE IN SEPTEMBER 2016.
4. Did the Upper Tribunal have enough evidence on which to make a finding about the costs incurred prior to any specific act of waiver? YES.



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Where does *Stamp* leave us?

Landlord is at risk of waiving the right to forfeit at all times from when right to forfeit arises under terms of lease until payment.

Acceptance and demand for rent and service charge present the greatest risk of waiver for landlord.

Arguments about waiver in the FTT are likely to become more common because period in which waiver is possible is now significantly lengthened.

Generous approach to waiver in respect of acts other than acceptance and demand for rent. Repair, consultation and access demands were found not to be acts of waiver, although all context dependent.

Is the decision correct?

Is the decision going to be appealed?



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