

To what extent are the courts allowing any one party to gain an edge in the event of tenant default and forfeiture, both in and out of insolvency?

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Simple scenario

A corporate tenant of general commercial premises fails to pay its rent, or commits a breach of other covenants in the lease and the landlord serves a s.146 notice.

The landlord then decides to forfeit the lease.

Questions

- 1) **Have the recent cases shown a shift regarding restrictions on the landlord's forfeiture rights in insolvency?**
- 2) **How are the courts responding to delay by the tenant in applying for relief from forfeiture?**
- 3) **Will the landlord always recover its costs, and on the indemnity basis?**
- 4) **Is the grant of relief from forfeiture final?**
- 5) **How readily can relief be obtained against deliberate breaches?**

Answers

1) Have the recent cases shown a shift regarding restrictions on the landlord's forfeiture rights in insolvency?

a) Can there be an interim moratorium in all cases pending a Company Voluntary Arrangement?

No; or at least not yet: JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Ltd [2017] EWCA Civ 267.

But there is a possibility that the law will be changed by Parliament.

b) If and when a statutory moratorium arises, what are the landlord's prospects of being allowed to proceed with forfeiture?

Law settled many years ago, in Re Atlantic Computer Systems Plc [1992] Ch 505.

Confirmed in Sunberry Properties Ltd v Innovate Logistics Ltd [2009] BCC 164 at [18]-[22]) that the same approach applies under the current legislation.

All depends on the facts, but a landlord-friendly decision in Re SSRL Realisations Ltd (in administration) [2015] EWHC 2590 (Ch).

2) How are the courts responding to delay by the tenant in applying for relief from forfeiture?

Where forfeiture is effected other than by proceedings for possession, there is no strict time limit for an application for relief from forfeiture.

Reasonable promptness is a requirement, but even apparently lengthy periods may not prevent relief being granted, at least where a new lease has not yet been granted. Careful consideration of the facts is needed.

Manchester Ship Canal Co. Ltd v General Motors UK Ltd – 12 months

Pineport Ltd v Grange Glen Ltd – 14 months

3) Will the landlord always recover its costs, and on the indemnity basis?

The general rule remains that the landlord will recover indemnity costs: Patel v K & J Restaurants [2010] EWCA Civ 1211; but conduct (including unreasonable or unnecessary

opposition to an application for relief), and relevant but unaccepted offers from the tenant, have always been factors that could affect the final award of costs.

There may now be more signs of a willingness to depart from the general rule, but without putting the onus on the landlord to make the running.

Manchester Ship Canal – costs judgment

Pineport – costs judgment

4) Is the grant of relief from forfeiture final?

Not exactly.

The court can extend the time for compliance with conditions on which relief was granted, even in a consent order under which the parties have agreed that time is of the essence.

Magnic Ltd v Ul-Hassan

Safin (Fursecroft) Ltd v Estate of Badrig, deceased

5) How readily can relief be obtained against deliberate breaches?

Even if a tenant commits deliberate, serious and cynical breaches of covenant, it may still be able to obtain relief, although this may depend on the lease being valuable and on the tenant being willing and able to dispose of it in short order.

Freifeld v West Kensington Court Ltd

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THE FORFEITURE CASES

Manchester Ship Canal Co. Ltd v General Motors UK Ltd [2016] EWHC 2960 (Ch) (HHJ Behrens QC)

Case concerned a perpetual licence at a fixed annual 'rent' of £50 to discharge surface water and trade effluent into the canal.

Licence terminated by notice, preceded by a notice requiring remedy of the default (non-payment of the annual charge of £50, plus VAT of £10), under a clause permitting this in the event of default.

Contains a useful summary of earlier cases on the situations in which relief from forfeiture may be available. Affirmation of applicability of relief beyond agreements conferring proprietary rights strictly so-called, where (as explained in Shiloh Spinners) termination rights have been included by way of security for performance. Already established that it will apply to contracts granting possessory rights, regardless of the type of property involved, at least if the right to possession is indefinite; and that it can apply where the transaction involves a mortgage or charge.

Court held that it was, indeed, a licence, and accordingly did not create any proprietary right in the nature of an easement; but also held that it was nevertheless of such a nature that relief from forfeiture could be granted.

Held that, even if it did not give possessory rights (which the court did not decide either way), it was close to that in substance, such that the rights involved were more than "purely contractual", and the jurisdiction applied.

Relief was also granted, despite submissions that there had been excessive delay in making the application (just under 12 months), and various elements in the applicant's conduct that supported refusal. What seems to have weighed most strongly with the Judge (HHJ Behrens) was that the applicant continued to discharge into the canal, without the canal company taking any proceedings to prevent this (see [122]).

N.B. This judgment was subject to appeal.

Manchester Ship Canal – costs judgment [2017] EWHC 21 (Ch) – complex on the facts, but confirms that the landlord may not recover its own costs – and may have to pay the tenant's costs – if it unreasonably or unnecessarily opposes a claim for relief.

Pineport Ltd v Grange Glen Ltd [2016] EWHC 1318 (Ch) (Chief Master Marsh) – application for relief from forfeiture of a lease, following peaceable re-entry for arrears of service charges of £2,155)

Long term – 125 years – at a premium, plus ground rent, insurance and service charges (all reserved as rent).

Significant delay – 14 months – in applying for relief; but because re-entry was peaceable, the statutory time limit of 6 months from the execution of a judgment for possession did not apply.

Relief granted despite the delay, and despite the tenant having committed fraud in the course of carrying on its business from the premises.

The delay was explained, but the court might be said to have made a very sympathetic decision in favour the tenant in relation to that explanation in finding that, nevertheless, the application for relief had been made with ‘reasonable promptitude’: see [64].

The illegal activity was put to one side. Relevant in non-payment of rent cases only exceptionally, the breach was past, there was no real risk of it being continued, and there was scant evidence that the premises had been tainted by the breach.

Tenant conceded the need to pay a range of sums as a condition of relief, in addition to the arrears; and c.£24,500 had to be paid as a condition of relief, including sums that the tenant would have had to have paid under the lease during the period between the re-entry and the grant of relief.

Length of lease, it being a grant at a premium, and the absence of prejudice to the landlord, were the strongest factors (see [62]-[63]), once the delay had been overcome.

Pineport – costs judgment [2016] EWHC 2170 (Ch)

“8. ... there is no principle of law which constrains the court necessarily to grant the defendant landlord its costs of the claim. To take an extreme example, in the event of a lease being forfeited for non-payment of rent, but before the tenant’s application for relief is issued, the tenant offers to pay all the landlord’s reasonable costs and expenses, as well as the arrears, and the landlord declines to accept that offer, it might well be the case that the court would exercise its discretion as to costs and require the landlord to pay all the tenant’s costs of the claim. All the more so where the forfeiture is by peaceable re-entry, the claimant does not dispute that the forfeiture was lawful and the terms of relief make provision for the

landlord's costs and expenses of the forfeiture (including reasonable legal costs associated with the forfeiture).

9. However, there are features of the claimant's application for relief against forfeiture in this case, particularly one made as in this case so long after the forfeiture took place, which are likely to be relevant to an award of costs. The claimant invited the court to exercise its inherent jurisdiction to grant relief and it is incumbent on the tenant to put itself in the best possible position to persuade the court to do so. It follows that it is necessary for the tenant to provide the landlord with the information and assurances it needs in order to make good its claim for discretionary relief at the earliest opportunity.

10. It seems to me that the proper approach to an award of costs in the circumstances of this case is for the court to consider first whether the tenant has provided the landlord with such information as the landlord may reasonably require in order to consider the application, and, secondly, whether the landlord has behaved reasonably in relation to the application. The second criteria will be of particular significance where, as here, the tenant has made an offer. Even where the landlord stands to gain a substantial windfall by the court refusing to grant relief against forfeiture, I do not consider that there is an obligation on the landlord to 'make the running' on seeking to resolve the tenant's application for relief. The landlord need only act reasonably and respond to the application as it is put forward."

Order: costs on standard basis, both to the landlord for the period before the tenant's offer, and to the tenant for the period starting 10 days after the date of an offer made by the tenant (which the Master held that the landlord should have accepted, having been an offer to pay more than the £24,500 eventually required); Master emphasised that the circumstances were "unusual".

Magnic Ltd v Ul-Hassan [2015] EWCA Civ 224 – relief from forfeiture of a business lease for breach of covenant – very fact specific, but a reminder that the court can extend the time for compliance with conditions on which relief from forfeiture is granted.

Safin (Fursecroft) Ltd v Estate of Badrig, deceased [2015] EWCA Civ 739 – relief from forfeiture of a long residential lease for non-payment of rent – consent order provided for time to be of the essence, and for the application for relief to be dismissed if the conditions were not complied with – very fact specific, but court confirmed that it had jurisdiction to extend time even in this situation, and that the applicable principles were those identified in the earlier case – concerning a procedural order – of **Pannone LLP v Aardvark Digital Ltd** [2011] EWCA Civ 803.

Freifeld v West Kensington Court Ltd [2015] EWCA Civ 806 – application for relief from forfeiture of a long headlease of retail units within a larger, mixed block, granted at a

peppercorn rent plus insurance payments. The tenants committed deliberate, serious and cynical breaches of covenant, which they remedied only after the county court judge had already given judgment refusing to grant them relief. Having remedied their breaches, and having originally applied for relief on such terms as the court might think fit, they then applied for relief on a different basis: i.e. that relief be conditional on them assigning the lease within six months. The judge refused relief on this basis too, but it was granted by the Court of Appeal.

The points of principle are these:

- 1) Relief can be granted even in cases of deliberate breach, and “special circumstances” do not need to be shown. This was not in dispute.
- 2) The value of the leasehold interest is a relevant consideration, as shown by the court’s approach in Magnic. If the value of the lease is such that forfeiture will give the landlord a windfall, then a question of proportionality arises, and the potential windfall must be thrown into the balance with the other relevant considerations.
- 3) The nature, circumstances and significance of the tenants’ conduct was an important consideration. *“When the lessees have concealed important breaches from the lessor and acted in continuous disregard of their obligations, it would not without some security that the future would be different be fair to grant relief and restore the parties to their previous relationship. There can be no such guarantee here since the [tenants] may lapse into their old ways. ... The course of conduct ... was sustained, and amply entitled [the judge] to refuse to grant relief with a view to the parties continuing as lessor and lessees as before.”*

Briggs LJ concluded his concurring judgment at [68] with this warning: *“This conclusion should not be misinterpreted as conferring carte blanche on tenants to disregard their covenants, wherever there is value in their leasehold interest which would be lost by an unrelieved forfeiture. In every case a balance has to be struck, and there may well be cases where even substantial value has to be passed to the landlord, if no other way of securing performance of the tenants’ covenants can be found.”*