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Case Report: *Golding v Martin (2022) EW Misc 2 (CC)*

Winning the Battle but Losing the War…

A salutary reminder that property litigators must identify and act on all relevant issues at the earliest opportunity.

Golding v Martin [2019] Ch 489 (Court of Appeal); (2022) EW Misc 2 (County Court)

https://www.bailii.org/ew/cases/EWCA/Civ/2019/446.html

https://www.bailii.org/ew/cases/Misc/2022/2.html

Introduction

The case of *Golding v Martin* serves as a reminder to property litigators that it is no good focussing on winning the immediate application, unless an overall strategy has been identified and acted on which will secure the client's objectives. Here, the tenant of unoccupied residential premises held under a long lease, which was forfeited in August 2017, succeeded in setting aside the possession order obtained by the landlord. But that proved to be a pyrrhic victory, since the landlord had nonetheless forfeited the lease by peaceable re-entry, and the tenant had not made an application for relief from forfeiture within the statutory time limit.

Facts

Ms Martin was the lessee of a flat in Sidcup under a long lease, which in the usual way included an obligation to pay a service charge, reserved as rent. In 2003, Ms Martin moved to Mallorca, leaving the flat unoccupied and no forwarding address. Mr Golding acquired the reversion in 2012 and carried out extensive refurbishment works. There was a dispute as to how much of those costs could be recovered by way of service charge, which Ms Martin left to her brother to deal with.

In November 2015, Mr Golding's solicitors sent a service charge demand to Ms Martin at the flat, since they had no correspondence address. A determination that the service charge was payable was then obtained from the First Tier Tribunal on 23 February 2016.

On 15 June 2016, Mr Golding issued possession proceedings on grounds of forfeiture, relying on non-payment of the service charge. At the first hearing of the claim on 15 July 2016, and in the absence of any defence, the deputy district judge granted a possession order. A few weeks later, on 23 August 2016, Mr Golding took possession of the empty flat. Ms Martin only learnt of the possession order in early December 2016. On 23 January 2017, she applied to set it aside under CPR r. 39.3(5). The set-aside application was dismissed by the deputy district judge on the ground that, although Ms Martin had acted promptly and had good reason for not attending the hearing, she had no prospect of 'success at trial', because there was no defence to possession. All she had was a right to apply for relief from forfeiture, which was not in itself a defence. Ms Martin appealed.

First Appeal; Issues on the Second Appeal

The first appeal was heard by HHJ Luba QC, who allowed the appeal on the basis that for the purposes of CPR r.39.3(5), 'success at trial' included a situation where a tenant had a reasonable prospect of obtaining relief from forfeiture. As Ms Martin had a good prospect of obtaining relief, the conditions in CPR r.39.3(5) were met and the possession order should be set aside.

The landlord appealed. With the Court of Appeal's permission, Ms Martin raised for the first time a further ground for setting aside the possession order: namely that it was defective and outside the Court's jurisdiction, since it failed to comply with the provisions of s.138(3) of the County Courts Act 1984.

Court of Appeal

The Court of Appeal dismissed the landlord's appeal, upholding both the tenant's arguments explained above.

The principal ground for setting aside the possession order was lack of jurisdiction. In a case where a landlord proceeds by action in the County Court to forfeit a lease for non-payment of rent, s.138 of the 1984 Act applies. In those circumstances:

- The action 'shall cease' if the lessee pays all the rent in arrear and the costs of the action at least 5 clear days before the return day: s.138(2). In such a case the Court's jurisdiction is spent.
- If there is no such payment, and the court at trial is satisfied that the landlord is entitled to forfeit, it 'shall' make a possession order effective at the expiration of a period of at least 4 weeks, unless within that period the tenant pays into court or to the lessor all the rent in arrear and the costs of the action: s.138(3).
- The period so set by the court can be extended on application at any time until the possession order is enforced: s.138(4)-(9).
- Even after the possession order is enforced, the tenant can make an application for relief from forfeiture up to 6 months from the date on which possession is regained: s.139(9A).

The possession order made by the deputy district judge was defective for the simple reason that it was an absolute possession order: it did not provide for its enforcement only after a fixed period of time, and did not provide that the tenant could pay the rent in arrear and costs of the action within that period and thereby obtain relief from forfeiture. Accordingly, Ms Martin's application succeeded as of right, since the order made exceeded the County Court's statutory jurisdiction.

While that meant that the Court of Appeal did not strictly need to consider CPR r.39.3(5), the point had been fully argued and the Court in its judgment upheld the reasoning of HHJ Luba QC below. 'Success at trial' was a phrase that should not be interpreted with excessive technicality. Even if relief from forfeiture was not as such a defence to a possession claim, if relief were granted the result would be that a possession order would not be made, or would be made on terms that enabled the tenant to obtain relief: that would be a result better than that sought by the landlord. As the Court put it: "*If the order is set aside, and a new trial or hearing*

takes place, Ms Martin will obtain an order which is far more favourable to her than the order that is currently in place. In our judgment, that will be a 'success'." Furthermore, since r.39.3(5) did not strictly apply to a first hearing of a possession claim (which was not a 'trial'), it was only to be applied by analogy, with such adaptation as was necessary to meet the facts of the case.

Re-trial before HHJ Luba QC

The consequence of the Court of Appeal's decision was that the possession order was set aside, and the claim was remitted to the County Court for trial. Anyone reading the Court's judgment could be forgiven for thinking that the outcome of the possession claim was a foregone conclusion: even if the landlord was entitled to possession, the Court had no choice but to make a conditional possession order, so as to enable Ms Martin to pay the rent arrears and the costs of the claim and thereby obtain relief. Alas for Ms Martin, that was not to be.

By the time of closing submissions at the trial before HHJ Luba QC in December 2021, Ms Martin's Counsel had conceded that (a) the landlord's right of forfeiture had not been waived and (b) the landlord had been entitled to forfeit the lease by reason of the unpaid service charges.

This left a very limited line of attack for Ms Martin: in effect, she had to argue that the landlord had taken possession pursuant to the (now set aside) possession order; that the court was still seized of the 'action', i.e. the landlord's claim for possession; and that as a result the usual possession order had to be made, so that Ms Martin could obtain relief.

The Judge rejected this argument.

- First, he found as a fact the landlord had effected re-entry on 23 August 2016 when he took possession of the flat. Since the flat was unoccupied, s.1(2) of the Protection from Eviction Act 1977 did not apply and it was not strictly necessary to obtain a possession order; in fact, the landlord had additionally sought declaratory relief confirming his right to forfeit by peaceable re-entry.

- Second, it could not be said that this re-entry was 'pursuant to' the (now set aside) possession order and could therefore somehow be set aside. There was no subjective element to the re-taking of possession: it was an objective fact. While the court's order granting possession had been set aside, the landlord has still been entitled to effect peaceable re-entry, and had done so.
- Third, the Judge did not accept that the Court could be compelled to make a possession order, which would be subject to the conditions in s.138(3) of the Act, if this was not sought by the landlord. By the time of the trial, the landlord was no longer seeking a possession order, being to content to rely on his possession obtained through peaceable re-entry. The Court would not make an order which the claimant was no longer asking for.

Ms Martin would not have been without a remedy, had prompt steps been taken under s.139(2) of the County Courts Act 1984. That sub-section provides that where a landlord has forfeited a lease for non-payment of rent without legal proceedings, the County Court may grant relief from forfeiture on an application by the tenant made within 6 months of the landlord re-taking possession. The difficulty was that such an application should have been made by 23 February 2017. Her application for relief was not in fact issued until 10 March 2020.

Consequently, the Judge made no possession order in respect of the claim, but dismissed the application for relief from forfeiture, which had been made out of time.

Lessons for Property Litigators

The lessons for litigants and their legal advisers are clear:

1. A tenant who is not occupying a residential property held under a valuable long lease needs to take steps to ensure that any correspondence from the landlord reaches him, and should leave the care and management in the hands of a professional who can be trusted to deal with it effectively, and is backed by professional indemnity insurance if mistakes are made.

2. Where a dwelling let under a long lease is left unoccupied, this means that the tenant cannot rely on the protection afforded by s.1(2) of the Protection from Eviction Act 1977: namely, that the landlord can only forfeit by legal proceedings, which are far more likely to come to the tenant's attention.

3. Landlords seeking to forfeit should consider carefully both the grounds on which forfeiture can be effected, and the modes of re-entry available. In many cases, peaceable re-entry will either be unavailable or impractical. But where it is available, there can be considerable practical advantages to using it; and even if legal proceedings are issued, there is nothing wrong with seeking declaratory relief to confirm the landlord's right to simply re-take possession.

4. A tenant who has been caught on the back foot by forfeiture proceedings needs to act quickly, and take the best possible advice. While it is easy to judge after the event, the application made by Ms Martin was evidently not sufficient as a strategy for protecting her interests. Instead, she should have issued an application:

    - To set aside the possession order immediately for excess of jurisdiction and made an application for relief from forfeiture under s.139(2) of the County Courts Act 1984. That application would have been in time, and the landlord would have had no answer to it; alternatively

    - To vary the possession order so that it complied with the provisions of s.138(3) and (9A) of the County Courts Act 1984, coupled with an application for relief from forfeiture. Ms Martin would then have had a right pursuant to the order and by statute to have her application for relief from forfeiture considered by the Court.

Property law, and landlord & tenant law in particular, is a complex field which too often yields technical or procedural traps for the unwary. Litigants—and their advisers—should be astute to identify all the key issues as soon as a dispute arises, and formulate a strategy which

maximises their chances of success: success, that is, not just in fighting the battle immediately in hand, but in terms of the overall outcome of the proceedings.

This article was originally published by Property Law UK.