4 KING'S BENCH WALK
THE CHAMBERS OF TIMOTHY RAGGATT QC
PROPERTY & HOUSING TEAM

# Property and housing law update

## Relief from forfeiture— if at first you don't comply, try, try again?

*David Sawtell (2005)*

The remedy of forfeiture is pregnant with the possibility that a lessor will gain an unwarranted windfall from its tenant's breach. At the same time, if relief from forfeiture is granted too readily, it is likely to lose its chilling effect on tenants in default. The Court of Appeal has had to consider the correct balance to strike in a number of recent cases that have re-stated the basic principles involved.

Relief from forfeiture is discretionary and the conduct of the lessee is relevant. It was made clear in *Hyman v Rose* [1912] AC 623 by Lord Loreburn that the discretion is wide and is not to be subjected to rigid rules. It means 'to prevent one man from forfeiting what in fair dealing belongs to someone else, by taking advantage of a breach from which he is not commensurately and irreparably damaged' (at 631).

### The starting point

The starting point was re-stated in *Magnic Ltd v Ul-Hassan and Malik* [2015] EWCA Civ 224. There was a long running dispute regarding the lease of ground floor commercial premises from which was operated a take-away pizza restaurant in Heston, Middlesex. Proceedings were compromised in a consent order in 2010. The tenant did not comply with the order and the Judge gave relief from forfeiture on condition that the takeaway business ceased completely by 11 February 2011. The defendant appealed and sought a stay of execution of this requirement. A stay was granted and they continued to operate the business until the appeal was dismissed. The claimant contended that the stay was not effective to vary the condition of relief. The claimant therefore sought a declaration and the defendant applied for relief. The district judge refused to give any further relief to the tenant and ordered possession.

On appeal, it was held by the Court of Appeal the district judge had erred in refusing relief from forfeiture. The tenants' non-compliance with the condition had been based on an erroneous belief that a stay of execution pending appeal had

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postponed the date on which business had to cease, and it would be disproportionate and unjust for them to be deprived of their property for such an error.

The Court of Appeal made the following points at paragraphs 50 to 51:

- The starting point for the exercise of the discretion has to be that the purpose of the reservation of a right of re-entry in the event of unpaid rent or a breach of covenant is to provide the landlord with some security for the performance of the tenant's covenants.
- The risk of forfeiture is not intended to operate as an additional penalty for a breach. It is an ultimate sanction designed to protect the landlord's reversion from continuing breaches of covenant which remain unremedied and to secure performance of the covenants.
- There may, of course, be breaches which are so serious and irremediable as to justify the refusal of relief: for example, an unlawful sub-letting. But in most cases relief will be granted on the breach being remedied and on terms as to costs.
- Although in the instant case the defendants' conduct will have been a cause for concern for any reasonable landlord, it was not suggested that the breaches of covenant were incapable of being remedied either by the grant of planning permission with suitable conditions for the extraction of fumes or by the cesser of the takeaway business.

Relief on conditions was therefore granted.

**Wilful breach**

In *Freifeld and another v West Kensington Court Ltd* [2015] EWCA Civ 806 the head lessees were culpable of what Arden LJ called 'highly unsatisfactory conduct'. The demise consisted of seven commercial retail units forming part of a block of flats at West Kensington Court, London W14. One of the units was sublet to a controversially-run Chinese restaurant which caused nuisance and annoyance to the residential lessees. In breach of the alienation provision in the head lease, the lessee deliberately granted a further sublease to the restaurant.

The head lease was granted in 1982 for a term of 99 years. It was acquired at a premium and the rack rent achievable was c.£133,000 per annum. It therefore had considerable value. The lessees argued that they had mended their ways somewhat and that forfeiture would result in an uncovenanted windfall for the landlord.

The landlord succeeded in its claim for forfeiture and relief from forfeiture was refused. Before judgment was formally handed down, the head lessee procured the surrender of the further sublease. A further application for relief was refused, however.

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The appellant head lessee submitted that the judge's refusal to grant relief on any conditions, whilst handing to the respondent landlord a multi-million pound asset belonging to the head lessee, was wholly disproportionate to any damage suffered by the landlord as a result of the original breach.

Arden LJ made the following points:

- Even if a breach is wilful, that does not mean that relief could only be granted in exceptional circumstances.
- Even where the breach is wilful, the relevant question is whether the damage sustained by the landlord as a result of the breach is proportionate to the advantage that he would obtain if relief was not granted.
- The value of the leasehold interest is a relevant consideration.
- At the same time, the fact that this was the first time that steps had been taken to forfeit the head lease was held to be 'an appeal to pity rather than logic and experience' (para 45) as the course of conduct here was sustained.
- At para 47, Arden LJ stated that: 'The windfall point is about proportionality. The appellants' egregious conduct is not relevant to the question of the windfall, which was a self-standing consideration to be considered on its own merits and *then* weighed against the appellants' egregious conduct. Once it has been appreciated that the value of the leasehold interest is an advantage which the respondent will obtain from forfeiture, it has to be thrown into the balance with all the other circumstances.'

The Court of Appeal exercised the judge's discretion so as to grant relief, on condition that the head lease was sold.

**Consent order**

*Safin (Fursecroft) Ltd v the estate of Dr Said Ahmed Said Badrig (deceased)* [2015] EWCA Civ 739 was concerned with the principles governing the exercise of the court's discretion to extent the time for complying with a consent order where, by that order, relief from forfeiture had been granted.

Two days before the hearing of the defendant's application for relief from forfeiture, the parties entered into a consent order which imposed time limits on the payment of arrears of rent, service charge and costs as well as repairs, with time being deemed to be of the essence; otherwise, the property would be forfeit. Almost at the expiry of this time limit the tenant made an application to extend time for compliance. At the hearing of the application it was accepted that the tenant had done everything required by the consent order and that the dispute was in relation to the timescale.

The Judge extended time for the conditions. The landlord appealed.

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The Court of Appeal held that the Judge did not make any error of principle or wrongly take into account matters that he ought not to have done. In *Pannone LLP v Aadvark Digital Ltd* [2011] EWCA Civ 803, [2011] 1 WLR 2275 it was made clear that the CPR conferred on the Judge a real discretion whether or not to extend the time in the consent order.

In *Ropac Ltd v Inntrepreneur Pub Co CPC Ltd* [2011] L&TR 5, it had been stated that there is a real difference in the way in which this discretion is to be exercised between a case management decision made at the insistence of one party to which the other party does not object and a genuine settlement of a substantive dispute of the parties' rights (which takes on contractual force). *Pannone* made it clear that the fact that the order is made by agreement is but one of the circumstances of the case which the court will have regard. Although it may be an important factor it is not inherently decisive so as to render it unnecessary and irrelevant to examine the other relevant circumstances.

In the instant case the Judge was right to take into particular account the context was one in which a tenant sought relief from forfeiture: the court regards a condition of re-entry under a lease as merely being security for the rent. In *Chandless-Chandless v Nicholson* [1942] 2 KB 321, at 323-5, Lord Greene MR observed that a tenant who obtained relief on conditions had to show good grounds to get further indulgence 'but in a case where on all equitable ground a period limitation ought in fairness to be extended and its extension will do no more than apply the principle that the condition of re-entry is nothing more than security for the rent, there is no reason why equity should not lend its aid notwithstanding the original order'.

**Conclusion**

The landlord's right of re-entry is intended to be security for the tenant's compliance with the terms of his lease. The court should take into account any unwarranted windfall that forfeiture will create for the landlord. In so doing, the value of the leasehold interest will be relevant, as will the prejudice caused to the landlord by the breach. Even if a party is in breach of a consent order that represented a substantial compromise of the parties' positions, the court is entitled to exercise its discretion to extend the time limits contained in that consent order. Forfeiture is, in many ways, the ultimate remedy, and the court should not deprive a tenant of its property lightly.

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