Landmark CHAMBERS

Restrictions on the right to forfeit

Luke Wilcox

Introduction

- Topics to be covered:
  - Forfeiture clauses
  - S. 146 notices
  - Forfeiture for disrepair
  - Long residential leases

What is forfeiture?

Landlord's election to exercise a contractual right to determine a lease upon the happening of a specified event

The forfeiture clause

- Forfeiture depends upon presence of the clause
- Not intrinsic to the L&T relationship – requires express provision
- Clause is an incident of the landlord's legal estate … so passes with the reversion if transferred

How to spot a forfeiture clause

- Often described as a “re-entry” clause
- Clause itself will specify:
  - Events which trigger the right (e.g. breach of covenants; arrears of rent for a specified period; tenant’s insolvency)
  - The consequences of those events: (forfeit; re-entry; determination of the lease)

Practical tips: non-payment of rent

- Two issues to look out for when considering forfeiture for non-payment of rent:
  - Is rent due “whether demanded or not”? Usually yes, but <u>check</u> – if not, can’t forfeit without common law formal demand (which is very difficult to do!)
  - Is there a “grace period” built into the clause (i.e. right arises if rent unpaid 21 days after falling due)? Right to forfeit does <u>not</u> exist until grace period has expired – don’t jump the gun!

Section 146 notices

- S. 146 of the Law of Property Act 1925
- Relevant to all forfeitures except non-payment of rent (s. 146(11))
- Where it applies, s. 146 prevents enforcement of right to forfeit, by action or otherwise (i.e. no physical re-entry either), unless and until the requisite notice is served.

Requirements of a s. 146 notice (1)

- Must be served by the lessee
- On the lessor
  - Tip: s. 196 LPA 1925 – legitimate to address s. 146 notice to “the lessor” from “the lessee”. Avoids dangers of misidentification
- Specifying the particular breaches complained of
  - Note – it is the breach which must be specified … not the remedy
  - Aim is to identify to the tenant, with reasonable certainty, the things which it must remedy to avoid forfeiture (***Fletcher v Noakes*** [1897])

Requirements of a s. 146 notice (2)

- Must require the lessee to <u>remedy</u> the breach if it is capable of remedy
  - No need to specify what the remedy is to be
  - No need to specify whether the breach is capable of remedy. Indeed, advisable <u>not</u> to attempt this
  - In practice, almost all breaches are capable of remedy – question is whether the mischief caused by the breach can be put right (see the discussion by Neuberger LJ in ***Akici v LR Butlin*** [2006])
    - One or two exceptions to this rule … but unlikely to survive a visit to the UKSC

Requirements of a s. 146 notice (3)

- Lessor requires the lessee to make monetary compensation for the breach
  - Drafted in mandatory terms
  - But since solely for the benefit of the landlord, it can choose not to comply with it (***Hoffman v Fineberg*** [1949])
  - If requested, <u>use the statutory wording</u>

Requirements of a s. 146 notice (4)

- A reasonable time for the remedy of the specified breaches must be allowed, before the landlord can forfeit
- What is reasonable depends on the facts of each case
- Even if breach is irremediable, must still allow tenant time to consider its options (***Fuller v Judy Properties*** [1992])
- But no need to allow further time if tenant states/implies that it will neither remedy the breaches nor seek relief (***Billson v Residential Apartments*** (CoA))

After service of a notice

- If breaches remain unremedied, and if a reasonable time has elapsed, then landlord can (subject to certain special cases) proceed to forfeit the lease
- Two ways of doing so:
  - Physical re-entry (never advisable!)
  - Service of a claim for possession/a declaration that the lease is determined
- Tip: where breach is a continuing one (esp. disrepair), no need for a new s. 146 notice if breach is waived (***Penton v Barnett*** [1898])

Special cases: disrepair

- Leasehold Property (Repairs) Act 1938
- Applies to all s. 146 notices served for breach of repairing covenants, except:
  - Tenancies with a term certain of less than 7 years
  - Tenancies with less than 3 years remaining
  - Where the breach is failure to pay sums to the landlord following a ***Jervis v Harris*** entry (because tenant's liability to landlord under a ***Jervis*** clause is a debt, not damages)

Special cases: disrepair (2)

- What does the 1938 Act require?
  - S. 146 notice must state that the tenant is entitled to rely on the 1938 Act to serve a counter notice
    - Statement must be no less conspicuous than the rest of the notice
  - Tenant has 28 days to serve a counter notice
  - If no counter-notice, landlord can proceed as usual
  - If counter notice served, landlord can only forfeit with the Court's permission (grounds for permission as per s. 1 of the 1938 Act)

Disrepair: the statutory grounds

- "(a) that the immediate remedying of the breach in question is requisite for preventing substantial diminution in the value of his reversion, or that the value thereof has been substantially diminished by the breach;
- (b) that the immediate remedying of the breach is required for giving effect in relation to the premises to the purposes of any enactment, or of any byelaw or other provision having effect under an enactment, or for giving effect to any order of a court or requirement of any authority under any enactment or any such byelaw or other provision as aforesaid;
- (c) in a case in which the lessee is not in occupation of the whole of the premises as respects which the covenant or agreement is proposed to be enforced, that the immediate remedying of the breach is required in the interests of the occupier of those premises or of part thereof;
- (d) that the breach can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement of the necessary work; or
- (e) special circumstances which in the opinion of the court, render it just and equitable that leave should be given."

Special cases: long residential leases

- Various protections afforded to long residential leaseholders, primarily under Commonhold and Leasehold Reform Act 2002
- A lease is long if it is for more than 21 years: s. 76(2)(a)
- A lease is not residential if:
  - It is a business tenancy under art 2 of L&TA 1954
  - It is a tenancy of an agricultural holding
  - It is a farm business tenancy

Long residential leases: arrears of rent

- S. 166 of the 2002 Act
- Tenant not liable to pay rent unless served with a notice:
  - In the prescribed form
  - Specifying the amount of the payment
  - Specifying the date (not less than 30 days or more than 60 from notice date) on which the tenant becomes liable for the payment
  - The date on which the tenant is liable under the lease

Long residential leases: arrears of rent (2)

- Cannot require payment before the date it is due under the lease: s. 166(3)(b)
- "Rent" for s. 166 purposes does not include
  - Service charges
  - Administration charges
- Effect of s. 166 is that landlord cannot forfeit for non-payment of rent without giving notice of the liability
  - Necessary because s. 146 doesn't apply to arrears of rent

Long residential leases: arrears of rent (3)

- S. 167 of the 2002 Act, and SIs made thereunder
- Landlord cannot forfeit for arrears of rent unless the arrears are either:
  - More than £350; or
  - Outstanding for more than 3 years

Long residential leases: breaches of covenant

- S. 168 of the 2002 Act
- Landlord cannot serve a s. 146 notice on a long residential lessee until:
  - Tenant admits the breach
  - 14 days after the FtT has finally determined that a breach has occurred
  - 14 days after a Court in any proceedings has finally determined that a breach has occurred

Long residential leases: breaches of covenant (2)

- Court/FtT determination is not final until any right of appeal (or further appeal, if an appeal is made) against the determination has expired: s. 169
- Parties can agree to refer a dispute over an alleged breach of covenant to arbitration, in which case s. 146 notice cannot be served until 14 days after final determination of the arbitral process
- Any provision in a lease which purports to provide for any other mode of determination is null and void: s. 169(1)

lwilcox@landmarkchambers.co.uk