

## FortyTwo Talks:

### Forfeiture Miniseries – Episode 6 Part 1

#### Forfeiture & Insolvency: Landlord Rights Explained

**Paul Fuller:** Hello and a very warm welcome to these final episodes of *FortyTwoTalks'* latest mini-series covering topics relating to forfeiture.

I'm Paul Fuller and I'm joined today by Alex Bailey.

Alex and I are both members of 42BR Barristers' Business and Property Team, my practice covers all areas of Commercial Litigation and Traditional Chancery work.

**Alex Bailey:** And as very kindly introduced by Paul, I'm Alex and my practice also covers Commercial Litigation and Traditional Chancery work.

This was intended to be a single podcast, but we've now realised there's so much to work through, and so it's become two podcasts.

In the first podcast we deal with forfeiture and some of the legislation surrounding forfeiture and insolvency events and how certain insolvency processes can impact a landlord's ability to exercise the right of forfeiture.

In the second episode we will be looking at some recent case law examining how to courts have approaches clauses that have been designed to give landlords the right to forfeit on the occurrence of an insolvency event.

**Paul Fuller:** Whether you're a landlord, a tenant, a surveyor or a legal advisor, we hope these episodes will walk you through the

intersection between commercial lease law and financial distress, and as Alex has touched upon we're going to start with looking at some of the main corporate insolvency processes that might give rise to or coincide with the landlord wishing to exercise a right to forfeit under a lease.

There are broadly two types of winding up available under the Insolvency Act 1986, those being the voluntary and compulsory or court ordered winding up processes.

Voluntary winding up can take effect either by way of what's known as a members voluntary liquidation or a creditors voluntary liquidation, in both cases the process is commenced by way of a special resolution, that's a vote of 75% or higher of the members of the company or shareholders with the right to vote under the Section 84 1B of the 1986 Act.

The difference between members and creditors voluntary liquidation though is informed by whether directors take the view that the company is solvent or not. In the case of members voluntary liquidation that's commenced where the directors of the company are able to swear a statutory declaration that the company is able to pay its debts in full within a maximum of twelve months under Section 89 of the 1986 Act.

Whereas a creditors voluntary liquidation takes effect absent a directors' resolution as to solvency and enables an insolvent company's view to be wound up by the resolution of the members under Section 84, that we've already touched upon.

A landlord's contractual right to forfeit a lease by court action or peaceable re-entry is not affected either by members voluntary liquidation or a creditors voluntary liquidation, however, under

Section 126 of the 1986 Act a creditor, liquidator or contributory can apply to the court to restrain any action or proceeding.

The authorities tell us that that includes the right to stay, cyst or restrain on such terms as the court thinks fit any action by a landlord to forfeit.

**Alex Bailey:** Now, just taking a look at those two ways of liquidation, or going into liquidation, firstly we've got compulsory liquidation, or compulsory winding up as it might most commonly be termed, and that's instigated most often by a creditor because the company is simply unable to pay its debts.

The action of winding up is instigated with a presentation of a winding up petition in the court, and it concludes with an order for the company to be wound up.

Whether the landlord can exercise a right of forfeiture is going to depend on two factors, first we've got A - on how the landlord intends to go about exercising the right and secondly B - the stage of the forfeiture proceedings.

For a court ordered forfeiture before a winding up order is made, leave of the court is not needed but the forfeiture action can be stayed, and that's Section 126 of the Insolvency Act 1986.

Now, differently after the winding up order has been made or even after a provisional liquidator has been appointed, leave of the court is needed, and that's Section 130 of the Insolvency Act 1986.

In the case of forfeiture by peaceable re-entry between the presentation of the petition and the making of an order or the appointment of a provisional liquidator, leave would not be needed

but another creditor, the company or a contributory can apply for a stay, and that's Section 126 of the Insolvency Act 1986.

Now after the winding up order has been made, leave of the court is then needed and that's Section 130 of the Insolvency Act 1986.

**Paul Fuller:** Moving on then to creditors voluntary administration. Well, that's essentially a multilateral contractual arrangement between the company and some or all of its creditors that essentially settles the debts of the company on terms which are agreed.

The creditors voluntary arrangement, or CVA as it's known, is initiated by the directors of the company who summon a meeting of the company to consider the CVA proposals and seek a decision of the creditors on those proposals, under what's known as a qualifying decision procedure, which is set out in Section 246ZE of the 1986 Act, together with rule 1.2 of the Insolvency Rules 2016 and part 15 of the Insolvency Rules 2016, and again any contractual right the landlord has to forfeit the lease is unaffected by the CVA, but of course a tenant can still apply for relief from forfeiture and there are conflicting authorities on whether on an application for relief from forfeiture in respect of rent arrears the tenant would be expected to pay the full rent arrears as is ordinarily the case or the reduced rent arrears under the terms of the CVA.

Unfortunately, we don't appear to have the higher court authority on that point yet, so as I say the authorities appear to be conflicting, but the prevailing view appears to be that the courts are more likely to adopt the position that the tenant only needs to pay the reduced rent under the terms of the CVA.

**Alex Bailey:** Moving onto administration, this can be initiated by an application to the court for an administration order, and that's paragraph 12 Schedule B1 of the Insolvency Act 1986.

Now an application of this sort can be made by the company, that is the shareholders, by the directors or by a creditor.

When the application is made to the court and interim moratorium comes into effect, that's paragraph 44, again Schedule B1 Insolvency Act 1986. Now as long as the correct process is followed and the court is satisfied that the making of an administration order is likely to achieve the statutory purpose of administration, the court will make an administration order.

When the administrator is then appointed, a moratorium comes into effect, that's paragraphs 42 and 43, again Schedule B1 Insolvency Act 1986.

During the interim moratorium period and there's an important difference to highlight here, during that period the permission of the court is needed and during the full moratorium period, either the permission of the court or the consent of the administrator is needed before the landlord is allowed to forfeit a lease by peaceable re-entry, and that's paragraph 43.4, again Schedule B1 Insolvency Act 1986.

**Paul Fuller:** Then we've got some more recent legislation now, and the Corporate Insolvency and Governance Act 2020 introduced what's known as the part A1 moratorium.

That allows eligible companies to apply for a short moratorium, providing immunity from enforcement action by some creditors.

The moratorium lasts initially twenty business days but it can be extended, either for a further twenty business days without the

creditors consent or up to a year with the consent of a creditor or to another date on the discretion of the courts. And under Section A 21 of the 1986 Insolvency Act, during the moratorium, landlords are prohibited from exercising any rights of forfeiture in relation to rent arrears that accrued before the start of the moratorium without the permission of the courts.

However, under Section A18 sub 3 of the 1986 Act, the tenant company does have to pay rent that falls due during the period of the moratorium, so that's after the moratorium commences, as that's classified as what is known as 'priority debt'.

If the tenants unable to pay those priority debts, then the moratorium monitor has to bring the moratorium to an end, and that will of course mean that the landlord will then be in a position to exercise rights of forfeiture under the lease.

**Alex Bailey:** I think that covers off some of the main corporate insolvency procedures that can arise as well as whether, and to the extent to which those procedures can impact on landlords and their right to forfeiture and as we've seen it can be technical, it can be quite tricky, and the rights to forfeiture do depend on where those proceedings are up to and what's happening, whether there's a moratorium, whether there's not a moratorium, and just generally what stage we're at in proceedings.

So, it's very, very important to look at what stage we are at when an insolvency action is being taken.

In the next episode, Paul and I will be having a look at some recent cases that give an insight into the approach the courts have adopted in cases where a landlord is seeking to exercise a contractual right of forfeiture on the occurrence of one of these insolvency events.

**Paul Fuller:** Thank you for tuning into this episode of *FortyTwoTalks*, we hope you enjoyed it.

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Thanks very much for listening and goodbye.

**Alex Bailey:** Goodbye.