FortyTwo Talks:

Forfeiture Miniseries – Episode 6 Part 2

Forfeiture & Insolvency: Lessons from Recent Cases

Paul Fuller: Hello and a very warm welcome to the final episode in *FortyTwoTalks'* latest mini-series covering topics relating to forfeiture.

I'm Paul Fuller and I'm joined again by Alex Bailey. We're both members of 42BR Barristers' Business and Property Team, my practice area covers all areas of Commercial Litigation and Traditional Chancery work.

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

Paul Fuller: In the last episode, we had a look at some of the main corporate insolvency procedures, as well as whether and the extent to which those procedures can impact on a landlord's right to forfeit.

In this episode, Alex and I will be having a look at some recent cases that give insight into the approach the courts adopt where a landlord seeks to exercise a contractual right to forfeiture on the occurrence of what is often termed a 'insolvency event'.

Alex Bailey: Thanks Paul, and yes, I suppose for the really exciting bit now, we get to turn to some of the case law and have a look at how the court has approached these instances.

And so, if a landlord does make an application under the Insolvency Act 1986, the criteria that the court will take into account were set out in the judgment of *Ray Atlantic Computer Systems*, and the reference is [1992] 1 All England Reports 476, and in that casethe court made the general observation that if granting leave to a landlord to exercise its

proprietary rights was unlikely to impede the achievement of the purposes of the administration, then leave should usually be given.

On the other hand, if it is likely to impede the purposes of administration, then the court must balance the proper exercise of the landlord's proprietary rights on one hand and administrators and their objective or rescuing a company and maximising returns to the creditors on the other.

Paul Fuller: So, if we take a look at a recent case which applied these principles in practice, in *RE SSRL Realisations Limited (In Administration)* and the natural citation, there is [2015] EWHC 2590 (Chancery). The court considered an application by the landlord relating to the lease of a property where the tenant had been in administration for approximately a year.

Now, during that year the administrators had sold the business and the assets to a third party and had given that third party a license to occupy the premises, pending an application to the landlord for formal consent to assign the lease.

Well, that application was made but the landlord ultimately refused it on the basis that the third party was a newly incorporated organisation, and so not in the landlord's eyes a good covenant.

The landlord then issued the application or an application for permission to forfeit the lease under Schedule B1 paragraph 43 of the Insolvency Act 1986, and the administrators in response sought more time to market the property and assign the lease to an acceptable assignee.

Mr. Richard Spearman QC, as he was then, sitting as a Deputy High Court Judge, ultimately granted the landlord's application for

permission to forfeit and gave permission to forfeit by peaceable re-entry.

The judge held in that case that forfeiture would not impede the purpose of the administration, firstly, because the administrators had not demonstrated that they'd be able to achieve a premium by assigning the lease, and that even if they were able to achieve a premium, that any benefit that might be gained was considered negligible compared to the significant arrears of something in the order of £11,000,000 at that time, so it wasn't considered sufficient to justify the granting of the extension.

Commercial leases will often include provisions ostensibly permitting a landlord to forfeit a lease, as we touched on earlier on the occurrence of what's known as an insolvency event, and what constitutes an insolvency event will vary from lease to lease and depend on how the term is defined, often insolvency events will be defined, especially in landlord friendly leases, very widely and beyond the scope of the quite narrow statutory definitions for insolvency, inability to pay debts or the balance sheet test.

It's easy to see why as a matter of policy this could be problematic, in most cases the right to forfeit a lease accrues upon the tenant's breach of a term of the lease. For example, the obligation to pay rent, in full or in time, or some other breach, maybe unlawful alienation or alterations.

But a landlord's contractual right to forfeit upon the occurrence of an insolvency event can accrue notwithstanding there having been no actionable breach by the tenant. The tenant might have complied fully and diligently with all of their leasehold obligations, only to be confronted by efforts, by the landlord, to forfeit the lease whether by peaceable re-entry or by court action because of some alleged

insolvency event, which as we've seen can be drafted in very wide and nebulous terms.

Alex, do we have any cases that provide guidance on how the courts approach the exercise of these provisions?

Alex Bailey: Yes, we do, and one example is *SBP 2 SARL v2 Southbank Tenant Limited* and the natural citation is [2025] EWHC 16 (Ch).

Now, just looking at this case and the facts, it concerned the second of two forfeiture claims brought by the landlord against its tenant in relation to leases of commercial premises in London.

The leases reserved the usual right of re-entry for nonpayment of rent, breach of tenant covenants or specified conditions. They also provided that a right of re-entry arose where the tenant or its guarantor was unable, or was deemed unable, to pay its debts within the meaning of Sections 122 and 133 of the Insolvency Act 1986. Following corporate restructuring in the United States affecting the guarantor under the leases the landlord sought to forfeit the leases by court proceedings contending, amongst other things, that the guarantor was unable to pay its debts within the meaning of the 1986 Act.

The tenant then sought to strike out the claims, arguing that it was not in breach of the condition because the test of whether a company is unable to pay its debts, within the meaning of the 1986 Act, require it to be proved to the satisfaction of the court.

The result was the court struck out the application, having concluded that the right to forfeit had not yet been triggered. Its agreed with the tenant that the breach of condition relied upon by the landlord required the guarantor's inability to pay its debts to have been proved

to the satisfaction of the court prior to the service of the Section 146 notice, only then would the right to forfeit have been triggered.

Paul Fuller: So, that's a quick look at some of the recent cases that provide insight into the kinds of approaches that the courts adopt when landlords seek to invoke these forfeiture provisions arising upon the occurrence of insolvency events, and of course, in our first of these what turned out to be two episodes, where Alex and I discussed forfeiture and insolvency we looked at some of the legislation relating to insolvency, insolvency procedures, insolvency processes and how those processes can impact on a landlords right to forfeit.

So, what are some of the takeaways from these two podcasts?

Well, for landlords, the first point to note really is that landlords should take care where a tenant has entered into some kind of insolvency process, because dependent on the process that the tenant enters into it can give rise to a statutory moratorium, which can prevent, or at least limit, the landlord's ability to forfeit and often it'll be the case that the landlord has to first seek and obtain the mission of the court, so that's something to check.

If a landlord is seeking to invoke a right to forfeit upon the occurrence of an insolvency event, then it's right that the landlord's legal advisors check the lease carefully to ensure that they're satisfied on the terms and the wording of the relevant clause that the right to forfeit has indeed arisen.

It may be that a landlord is embarking on potentially complex and expensive litigation to prove that a company is unable to pay its debt as they feel due, or the sum insolvency event has occurred before it's actually able to exercise the rights of re-entry based on the terms of the lease. And it may therefore be preferable to rely instead on a determination in proceedings bought either by the landlord or by a

third party creditor. Alternatively, a landlord may wish to rely on one of the other events upon which a right of forfeiture can arise.

Alex Bailey: And a few key takeaways for tenants.

The first is insolvency must be proven. Relief is possible, with full payment and CVAs reduce liabilities, but not breach consequences and so these three factors are very important to bear in mind, they offer protection in a way, but they also give a warning as to the fact that if for instance, if you are in a CVA, yes, it might reduce that liability, but the consequence of breach and the possibility of forfeiture might not go away.

Paul Fuller: So that wraps up our review and our series of podcasts on forfeiture generally.

We do hope you found them to be interesting and informative.

Alex Bailey: Thank you for tuning into this episode of *FortyTwoTalks*. We hope, as Paul says, you've enjoyed it.

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Thank you for listening and goodbye.

Paul Fuller: Goodbye.