

FortyTwo Talks:

Forfeiture Miniseries – Episode 1

Forfeiting for different types of breach of a lease

Karolina Zielinska: Welcome to the latest episode of *FortyTwo Talks*, the 42BR Podcast.

My name is Karolina Zielinska and joining me is Howard Lederman, we are both members of the Housing and Business & Property teams within Chambers.

This episode marks the beginning of a mini-series all about forfeiture.

Howard Lederman: Good afternoon, in this mini-series members of both teams will be considering various aspects of the law of forfeiture.

Karolina Zielinska: Today however, we'll be giving you an overview of the process of forfeiting for different common types of breach of a lease. The process can be quite different depending on the nature of the breach in question.

Howard Lederman: So first of all, you will need to check the lease to see which sorts of breaches create a right to forfeit. This depends on the terms of each individual lease. So common types of breach that typically lead to forfeiture include failure to pay rent, failure to pay service charge or administration charges and a failure to keep a property in repair.

Karolina Zielinska: Let's look at each of these three in turn, perhaps starting with a failure to pay rent?

Howard Lederman: Yes so, when were looking to forfeit for non-payment of rent, a landlord should start by checking the lease, does it

require the landlord to demand the rent in a particular way? For example by way of a formal demand, if so, has that been done?

This is the main control on forfeiture of a commercial lease for rent arrears. In relation to residential leases there are other conditions that need to be satisfied.

Karolina Zielinska: And of course, presumably that's keeping within the residential context, the forfeiture of a lease can be much more personally, immediately affecting to tenants of those long residential leases.

So, if a lease is a long residential lease Section 166 of the Commonhold and Leasehold Reform Act 2002 comes into play. This requires a service of a rent demand notice, in a prescribed form, which you can find online. This needs to be served on the tenant at their property, unless the landlord's been told of an alternative address that these sorts of documents ought to be served to.

Howard Lederman: In addition, the tenants of residential properties isn't liable to pay rent, service charges or administration charges unless the landlord has served notice of its address in England and Wales at which notices can be served. This is a requirement in Section 48 of the Landlord and Tenant Act 1987.

Karolina Zielinska: And there is of course one more important control on forfeiture of residential leases for rent arrears, section 167 of the Commonhold and Leasehold Reform Act 2002, provides that a landlord can't forfeit a residential long lease, unless the amount of rent, service charge or administration charge is payable, either exceeds a prescribed amount, which is currently £350, or it has been outstanding for more than a prescribed length of time, so there has been a debt outstanding for more than 3 years.

That's quite a low sum, isn't it Howard, £350 in the grand scheme of things?

Howard Lederman: Yes, it's very easy for residential tenants to accrue those arrears quite quickly. Not everyone realises how serious the consequences for such arrears could be.

Karolina Zielinska: Very true. Perhaps we can take a look then next at how landlords ought to approach a failure to pay service or administration charges when seeking to forfeit a lease.

Howard Lederman: Yes so, in relation to leases of residential premises, a landlord can't forfeit a lease for this type of breach, unless the amount of the service charge or administration charge has been either admitted by the tenant or finally determined by a court, the first-tier tribunal or an arbitral tribunal.

Karolina Zielinska: So again, additional protections there for residential tenants, and even then of course, once these amounts have been determined landlords need to wait at least 14 days from the day after the determination is made, before going on to serve at what's known as a Section 146 notice, which is of course the second key control on forfeiture, for service charge or administration charge arrears. This refers to a notice under Section 146 of the Law of Property Act 1925, unlike a Section 166 notice, which we were previously talking about for rent arrears. It has no prescribed form, but instead it must contain certain information. What sorts of things must it contain Howard?

Howard Lederman: So, a notice under Section 146 of the 1925 Act has to specify the breach that is complained of, and secondly it must require the tenant to remedy the breach, if the breach is capable of remedy.

Not all breaches are capable of a remedy.

Karolina Zielinska: Whilst we were talking about requiring the tenant to remedy a breach, it's fair to say isn't it, that there's no need to set out in these notices, how the tenant must remedy that breach or what would be a reasonable time for doing so. It's also worth noting that if you're not sure about whether or not a breach is remedial, look online, there are long lists online of both previous case law but also generally how all different breaches are treated, it's not possible to give an exhausted list of what's remediable or not in this podcast but to give a few examples, failing to pay money, so failing to pay your rent or service charge, that's usually remediable, you simply would go and pay that money within a reasonable time period, but things like tenant insolvency or unauthorised subletting by a tenant those breaches are typically considered irreparable.

Howard Lederman: So, in addition to that, the notice under Section 146 of 1925 Act, must require the tenant to pay compensation to the landlord, in money, for the breach.

So strictly speaking, this isn't an absolute requirement, and it won't invalidate the notice, but if you don't put that in the notice, it's going to be very difficult to see damages later on.

Karolina Zielinska: So practically speaking, it needs a requirement unless you're not seeking damages.

One more important thing, of course, the notice has to be served before any breach is remedied. Now, if we have a think next perhaps about the effect of serving this notice, what happens as a consequence?

Howard Lederman: Well, once the notice is served, if the tenant doesn't remedy the breach and compensate the landlord, if compensation was asked within a reasonable time, then the right to forfeit can be exercised, and we'll hear in later podcasts in this series how landlords can take court action or, in some cases, take matters into their own hands to obtain forfeiture, once the necessary conditions have been fulfilled.

Karolina Zielinska: What about if we are dealing with forfeiture in respect of a sum, such as service charges, that are reserved as rent in the lease. Are those typically treated as rent arrears as the purposes of forfeiture?

Howard Lederman: Yes, there are additional controls on forfeiture when we are dealing with service charges and administration charges that are reserved as rent, these can sometimes catch landlords out.

Karolina Zielinska: I suppose because even though those sums are treated as rent, especially in the context of residential leases, the additional controls on service charge and administration charge arrears will still apply.

Now it's worth thinking also about the extent to which controls on service and administration charge arrears also apply to commercial leases. Howard, are you able to weigh in on that?

Howard Lederman: Yes so, in relation to commercial leases, the principal requirement is to serve a Section 146 notice under the Section 146 of the 1925 Act, so there's no requirement, as there is in residential leases to obtain an admission or a final determination in respect of the sums that are claimed as arrears or a breach.

Karolina Zielinska: Finally, then let's come onto considering how to deal with breaches of repairing covenants. This being another typical basis for forfeiture of leases.

Howard Lederman: Yes, so when dealing with breaches of a repairing covenant, if you're considering forfeiture, if a lease is granted for a term of less than 7 years or has less than 3 years of the term to run, a Section 146 notice will still be required.

Karolina Zielinska: And again, the Section 146 notice is, as we described before, a notice that has content requirements, the three specific bits of information that Howard and I have discussed.

Now what about if the lease falls outside of that category?

So if it's for longer than 7 years, or if it's got longer than 3 years to run?

Howard Lederman: So, in that case, you still need to serve a notice under the Section 146 of the 1925 Act, but that notice will need to include additional wording, which is required by the Leasehold Property Repairs Act 1938.

That wording informs the tenant of their rights to serve a counter notice and to apply to the court if necessary.

Karolina Zielinska: And if the tenant does indeed rely on its rights under the Leasehold Property Repairs Act 1938, as a consequence the landlord then can't commence forfeiture proceedings without the courts permissions, and to get that permission the landlord will need to prove that the breaches of the lease are serious, so worth bearing that in mind as a possible consequence of the tenants asserting their rights under that act.

Howard Lederman: That's right, so Karolina, could you tell us if there's any difference in the approach that should be taken to

commercial leases as opposed to residential leases whether a breach of repairing covenant.

Karolina Zielinska: Well, when we're dealing with breach of repairing covenant, a Section 146 notice can only be served on a tenant of a long lease in a residential dwelling if the breach has either been admitted by the tenant or finally determined by a court or an arbitral tribunal or the first-tier property tribunal.

So again, we have that control on the breach itself, it has to be admitted or determined, and again, following from that, the landlord will need to wait 14 days from the day after either that breach has been agreed or admitted or determined in order to serve that Section 146 notice.

So, there is a bit of a delay built in there as well.

Howard Lederman: Thank you very much Karolina and thank you to everyone for joining us in our overview of the process of forfeiting for different common types of breach of lease. We hope you're enjoying this podcast and this mini-series on forfeiture.

Karolina Zielinska: Our next episode will feature Mathew McDermott and Natalie Foster, discussing how to find a forfeiture clause in a lease.

For more episodes, you can find us on Spotify, Apple Podcasts, and the 42 B Chambers website. Thank you for listening.