

FortyTwo Talks:
Forfeiture Miniseries – Episode 2
An Introduction to Forfeiture Clauses in Leases

Natalie Foster: Hello and welcome to *FortyTwo Talks*. This is our latest mini-series covering topics relating to forfeiture. My name is Natalie Foster, a Housing and Property specialist at 42BR.

Mathew McDermott: And I'm Mathew McDermott, also a Housing and Property specialist at 42BR.

Natalie Foster: And today we will be covering contractual provisions - how to find a forfeiture clause in a lease.

Mathew McDermott: Let me start with an overview of the topic. Before I do, forfeiture is a large topic that at times can get complicated and in some areas, especially relating to residential leases, there's been significant statutory intervention impacting the right to forfeit. So, it might be helpful to outline what we are not covering, as well as what we are. We, today, focusing on these essential features and we won't be covering the concept of waiver, what I mean by that is waiving the right to forfeit once it has arisen, or getting relief from forfeiture, or the conditions that are often attached to getting relief from forfeiture.

But let's start with a brief introduction to the topic. What in simple terms is forfeiture?

It's a method by which a lease determines a means of bringing the lease to an end early, earlier than it otherwise might determine. So, in effect, something important has happened, a default, a breach or a failure to act. This default, breach or failure to act is then, usually

expressly, covered by a term of the lease, allowing the landlord to forfeit it, that is to end it early because of what's been done or not been done. But more practically, on the ground if you like, forfeiture

of a lease is a useful way of getting a tenant to comply with their covenants, their promises to the landlord made under the lease.

It's not a security, but it's a useful tool, but differently, it's a means by which a landlord can say you've done x, and because of that the lease has ended. Although it's referred to as a right to forfeit, it's better to understand it as a condition that's attached to the term of the lease, the effect of which is to say this 'term will end if you fail to satisfy this condition'.

Now often this can lead to the tenant righting the wrong, whether the landlord agrees to that is a different matter, and it may be that a court eventually has to determine whether the lease should be reinstated, but the point is that it provides a useful mechanism to get the tenant to comply.

What it often also involves is a choice or as it's often referred to an election on the landlord's behalf. Once there is knowledge of breach the landlord must choose, treat the lease as forfeited or continue. That's a broad overview of the topic, and now Natalie will look at what forfeiture clauses look like.

Natalie Foster: So, forfeiture depends on the terms of the lease. You shouldn't simply assume a landlord has the right to forfeit, it's something that must be built into a lease, usually through an express clause.

That's what we mean when we refer to a forfeiture clause, it's a contractual term, allowing the landlord to re-enter and bring the lease to an end if the tenant breaches certain obligations. Although as bit of

a nuance, if the lease contains a conditioned precedent that's been breached, particularly one going to the root of the contract, the landlord may sometimes rely on that without an express forfeiture clause. So, it's sort of an implied right to forfeit essentially.

So now, forfeiture clauses themselves, if you are looking for them, tend to appear towards the end of the lease. They're usually after the various tenant covenants, so things like payment of rent, keeping the property in repair or not assigning without consent. That's because the forfeiture clause is about how the lease can be brought to an end early, if one of those covenants is breached.

If you are looking for the clause within the lease, the phrase you're looking for is 're-entry'. That is really the hallmark of a forfeiture clause. So, look for language like 'proviso for re-entry' or 'right of re-entry'.

A typical clause might read something like this, *'If the rent hereby reserved shall be in arrears for 21 days, whether formally demanded or not, or if the tenant shall at any time fail to observe or perform any of the covenants or conditions contained in the lease, then the landlord may re-enter upon the premises and determine the term'*.

That sort of formulaic language is very common. The key thing to watch out for are number one - the triggering events, so usually rent arrears or some other breach of covenant, and number two - the express right to re-enter and determine the lease. Those words are crucial.

I think it's also important to refer to the Supreme Court case of *Croydon London Borough Council v Kalonga*.

It's a 2022 case and in that case they considered the circumstances when there is a forfeiture under contractual provisions for

termination. Lord Briggs made some important references at paragraphs 50 and 51, but I've summarised the phrase here that is relevant to this particular topic of what exactly is a forfeiture clause and what it looks like.

What Lord Briggs said is *'whether a particular clause is or is not a forfeiture clause is a question of substance, not form'*. So, the clause in question contained the wording *'may also take eviction action'* emphasis added here *'at any time, if one or more of the grounds for possession set out in schedule two of these conditions apply.'*

So, the Supreme Court here held that although these were not expressed as forfeiture provisions, in substance they were, to the extent that they related to seeking possession early on grounds that amounted to breaches of obligations.

Mathew McDermott: Okay, so let's move on and summarise where we are. So, as Natalie was explaining, often you'll see the right expressed in the lease. What then do you want to do once you've got that right?

So, let's assume as Natalie was saying, that there is an express right to forfeit, the following will usually apply and will fall for consideration.

So, number one - the landlord, more accurately the reversioner, will be considering what has taken place, this is, as we've alluded to, a unilateral right, that they have to end the lease. They will therefore of course need knowledge of the breach, which becomes particularly important if ever looking into the subject of waiver of the right to forfeit and what I mean by that is in the sense that one usually needs to know about a right to do a thing before they can waive that right.

So, if you like, step one is taking stock, step two - construction, interpretation, look at the clause, as Natalie said, has the proviso been

triggered? Or if you like, ensure that the contractual provision relying upon to forfeit the lease, that is to end it earlier than it may naturally end, is satisfied. So, to try and add some colour to this, as an example, one of the more common ones is of course nonpayment of rent, and that's the example that Natalie gave.

If a lease is liable to be forfeited because of nonpayment of rent, you need to make sure that the terms are satisfied, you'll need to make sure that rent has not been paid. Now, this might be straightforward in most cases, I'm sure it will be, but sometimes sums within the lease that are to be paid are defined in that lease as 'rent' and so, a failure to pay that sum or similar sums may fall within the scope of the proviso.

Another example- If the tenant has promised to keep the property in a particular condition, is the person entitled to the right satisfied that the requirement relating to the condition of the property is not met? Again, to invoke that phrase, has the right been triggered?

You then might need to consider a period of time. There's usually a period of time you have to wait, and again, Natalie's example illustrates this perfectly, the 21 days after nonpayment. If there is a period of time, it's likely not going to be possible to forfeit until that condition is satisfied or, if you like, until that time period has passed.

So, take stock of the breach, construe the provision, ensure it's satisfied, and then effectively take action. What, if anything, will the landlord then do about it? How do they go about doing that thing? And this is something that Natalie will now address.

Natalie Foster: What amounts to forfeiture? Forfeiture is an action by which the landlord seeks to bring the lease to an end.

That can happen in one of two ways. So, either by peaceable re-entry or by issuing possession proceedings in court.

So, let's look at those two options.

So, the first - peaceable re-entry, what that essentially means is the landlord physically going back into the premises and changing the

locks, although in practice this is often limited to commercial properties.

However, when there is a risk of dispute. The second thing happens, it's the issuing of possession proceedings. So, the landlord will rely on that as their forfeiture.

What they will do is they will serve a notice, issue a claim form and ask the court to declare the lease forfeited. You may often hear the phrase '*forfeiture operates by the landlord's election*'.

What's important is it is the landlord deciding to bring the lease to an end by invoking that clause. So, the moment the landlord re-enters or brings proceedings, that is when forfeiture takes effect.

Mathew McDermott: Thank you, Natalie, and thank you also for tuning into this episode of *FortyTwo Talks*. We hope you enjoyed it.

The next episode in this forfeiture series, coming out weekly, will be hosted by our colleague Stephen Willmer and Iris Ferber KC, discussing Relief from Forfeiture.

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Thank you and goodbye.

Natalie Foster: Goodbye.