

FortyTwo Talks:
Forfeiture Miniseries – Episode 3
Relief from Forfeiture

Stephen Willmer: Hello and welcome to the third episode of *FortyTwo Talks*, the latest mini-series covering topics relating to forfeiture.

I'm Stephen Willmer, a Business and Property specialist at 42BR.

Iris Ferber KC: And I am Iris Ferber KC, I am also a Property and Business specialist at 42BR, and today, Stephen, we are going to be talking about relief from forfeiture.

Stephen Willmer: So, Iris, can you give us something of the history relating to relief of forfeiture before we get any further into the subject.

Iris Ferber KC: Yes, I think that's a good idea because forfeiture is quite an old-fashioned area of law and history can be quite illuminating, so let's start with that.

As you know from previous episodes of this podcast series the proviso for re-entry in cases of breach of covenant in leases, which is what the right of forfeiture is, has a very, very, very long history, really, as long as leases have existed in English Law there have been rights to terminate leases for breaches of covenant.

So that means that the right has existed for long before what we both remember, don't we Stephen, as the unification of The Courts of Law and Equity in 1873.

Stephen Willmer: Very well remembered.

Iris Ferber KC: Very well remembered.

Now, before that, before the unification of The Courts of Law and Equity, there were two separate court systems in England, The Courts of Law and The Courts of Equity.

Courts of Law applied the black letter law, they leaned against forfeiture and the two ways in which a right to forfeit could be challenged in a court of law used to be, before 1873, construing the proviso for re-entry, the right of re-entry, very strictly against the landlord number one and number two, the court developing very ridged rules about waiver of the right to forfeit, something you will hear about in the next podcast episode.

But otherwise, the courts of law had to give effect to the provision in the lease, however great the hardship to the lessee and for those of you who love legal history, you will know that that's just the sort of thing that The Courts of Equity were interested in dealing with, and so a Court of Equity could act to do equity between the landlord and a tenant, lessees therefore used to apply to The Court of Equity for relief, at that stage it was relief by way of injunction, in other words, an order from The Court of Equity to restrain the landlord from being able to take possession for breach.

Now that is a very, very long-established type of claim, as I said, especially relief from the failure to pay rent, that's still now isn't it, Stephen, is by far the most common type of forfeiture and relief from forfeiture and in fact it has always been like that, ever since forfeiture existed.

Stephen Willmer: So, having looked at the history of forfeiture and relief from forfeiture can you tell us a little bit about the current law, what is the position in 2026?

Iris Ferber KC: Well, it's easy in some ways at least to state that, because we have a complete code for both forfeiture, and for the

purposes of this episode importantly, for relief from forfeiture in Section 146 of the Law of Property Act 1925.

Now you've heard of Section 146 notices I'm sure, and previous episodes of this podcast series have discussed Section 146 in relation to the right to forfeit, but importantly for relief from forfeiture, Section 146 subsection 2, provides a complete code for relief from forfeiture. If the principles in 146 (2), don't apply, the court can't grant relief That's true for all but a few exceptions, most of them so marginal that it's not worth discussing them on this podcast, but one of them is a massive exception which is nonpayment of rent, and relief for nonpayment of rent is expressly excluded from the effect of Section 146, and that means that the principles which apply to relief of forfeiture for nonpayment of rent come from a 1973 House of Lords Case, which we all learnt about in Law school called *Shiloh Spinners v Harding*, and that's the case where Lord Wilberforce famously said *that relief requires consideration of the conduct of the applicant for relief, in particular whether his default was wilful, the gravity of the breaches and the disparity between the value of the property compared with the damage caused by the breach.*

So that's the position for rent arrears relief, for everything else were looking at Section 146 itself.

Stephen Willmer: So, Iris, what does Section 146 actually say about relief?

Iris Ferber KC: Well, funnily enough, it is very close to what I was just citing Lord Wilberforce as saying from the *Shiloh Spinners* case. It's Section 146, as we said, subsection 2, and that says the court may grant or refuse relief as it thinks fit, which is in some ways not very useful, is it, but then the subsection goes on to explain that that means or includes having regard to the proceedings, having regard to the conduct parties and all the other circumstances, so it's as broad as that, and then the subsection 146(2) also says, that the court may grant relief again on such terms as that the court may think fit and the

terms are expressed in Section 146(2) as including terms about costs, expenses, damages, compensation even penalties for breach are included as a possible term for relief and it's also possible to include in the grant of relief to the tenant an injunction, a court injunction, to restrain that tenant from similar breaches in the future.

So, whilst Section 146(2) that deals with relief is very broad, talks about granting or refusing relief as the court sees fit, there are some principles that apply, that the statute sets out, so as we said, having regard to the proceedings, having regard to the conduct of the parties and all the other circumstances.

So the sorts of factors that the court is going to be interested in when considering relief from forfeiture are going to be things like - the conduct of the tenant, that's a really important one, the nature of the breach, so in other words the type of behaviour that has led to the breach, the gravity of the breach, so for example, being behind in your rent by a week is different from being behind with your rent by a year, it's the same type of breach, but it's a much more serious breach.

So, conduct of the tenant, nature of the breach, gravity of the breach and the other one that the courts will almost always be interested in is the relation of the breach to the value of the property, in other words how much of a windfall is the landlord actually getting by seeking forfeiture and that's going to be relevant to relief.

So, some common factors then, that a judge will be interested in when cohering an application for relief are going to be things like this, was the breach wilful?

Or, on the other hand was the breach inadvertent? A mistake? Caused by a third party? Caused by circumstances beyond the tenants control? All of those things, why the breach happened, are going to be relevant and a landlord will rely on breaches that were wilful, and a tenant will want to rely on breaches that were inadvertent.

There might also be breaches of terms which rely, if they're going to be complied with properly, on consent of the landlord, for example, let's say consent to alterations is quite common, now what if the tenant made some alterations without consent, but they want to argue that if they had sought consent, the landlord would have been reasonable to agree the alterations, well in that case they can raise that as a basis for relief.

Has the tenant made good the breach? Have they paid these service charges that are overdue? Have they removed the alterations that they made? Is the tenant demonstrating that they are willing and able to fulfil their obligations in the future?

You may think that that's an obvious one, but you would be amazed at how many tenants aren't actually willing to continue to comply with the terms of their lease whilst at the same times seeking relief from forfeiture and then items that are relevant more to the personal situation of the tenant, what sort of personal hardship is going to be caused to the tenant if relief is refused?

Balance that against, has there actually been any lasting damage to the landlord or to the landlord's reversion at all from the breach? And indeed, is the advantage of the forfeiture to the landlord disproportionate to the damage that they've been caused? Are they getting the windfall that we talked about earlier?

And then the final one that's worth thinking about is that there are lots of breaches which are not rent, but they are a lot like rent, so payments of other periodical sums, in other words, under the lease like service charges and maintenance charges.

Well those sorts of charges which might be in arrears and are similar to rent, but are not rent, those are the sorts of breaches where the court should think about relief in the same way that it thinks about rent arrears relief from forfeiture, which is to say, as long as the tenant

can pay all of the arrears, the costs, the interest and expenses resulting from the rent then the court will grant relief, it's much more than other types of breach, it's really a financial question of whether the tenant is going to cover the losses of the landlord.

So, there we are, in a nutshell, Stephen, that is the history, a little bit of the history, of relief from forfeiture and the law in Section 146 that tells us how relief from forfeiture operates.

Now what about procedure, Stephen, how does a tenant go about seeking relief from forfeiture?

Stephen Willmer: Thank you, Iris. Well, I think the first thing I should say is you should have an eye to part 55 and practice direction 55, they will guide you through the procedure, you will be familiar with that part and that practice direction from most cases dealing with possession claims.

I think the second thing I would emphasise, as Iris has already mentioned, is that this is an equitable remedy, so the maxims of equity are significant here, in fact they're crucial because the Court as with all equitable remedies has the discretion whether or not to apply them.

In my experience clean hands is the principle one which comes to the fore, but then there are what? 12, 15 equitable maxims, so always bear those in mind, it's not just clean hands, it's used such as, equity follows the law, one who seeks equity must do equity and equity does not punish, but there are plenty of others besides.

But the one I would emphasise above all is clean hands, you must come to Court of Equity with clean hands because ultimately it is within the courts discretion whether or not to grant the remedy.

The other thing I would emphasise, the third point, is that if the parties agree by themselves, as it were, to overlook an act of forfeiture, and they do not seek the assistance of the court by way of relief from

forfeiture, well, that's a matter for them they can do that if they want, but the effect will be to grant a new tenancy.

So, it's probably sensible from the perspective of all parties, in the event of forfeiture, to go to the court and seek the courts stamp of approval.

The court will generally exercise the equitable discretion in favour of the tenant, if the tenant acts quickly, pays any arrears, remedies any other breaches of covenants and pays the landlords costs.

Now in relation to how you go about this, it's not an application form, you would have to use either a claim form or if there are proceedings afoot already in court you can deal with an application for relief by way of a counter claim.

In almost all cases, it's going to be a County Court claim, it would be most unusual for a High Court Judge to deal with a claim for relief from forfeiture and in most cases, it's going to be a District Judge that will deal with it. Again, in most cases the request for relief from forfeiture is going to take a hearing, possibly two, it depends how contentious it is, but in the great many cases the parties are going to be agreed before they ever get to court.

In relation to timings, the courts indulgence can be sought at any time prior to enforcement of a possession order or otherwise if it is equitable. Remember this is always a matter of a court's equitable discretion. Above all the court is considering in its discretion, whether to put the parties back in the position in which they would otherwise have been, had the forfeiture not taken place. The courts discretion is wide but broadly speaking it focuses on the tenant's remedy of any breach, including payments of compensation, and on whether the tenant will in future behave in a manner which will not once again, in a like way, give rights to forfeiture.

So, these are the four most issues which will need to be focussed on in any claim for relief from forfeiture, and in any evidence in support of or opposing the claim.

The secondary issues, as somewhat like those in relation to relief from sanctions, somewhat like but not identical, and they will focus as Iris has already touched upon, on the parties conduct, on issues of delay, delay again being one of those equitable maxims that you have to have at the back of your mind.

What exactly has gone wrong? And why it has gone wrong? Again, as Iris mentioned already whether or not the default on behalf of the tenant was deliberate, and then on issues such as proportionality between the parties and whether there is a new tenant in occupation.

So, Iris, those are the procedural aspects, it's not procedurally complex but there is a huge amount of case law and perhaps the note we should end on is that while there are broad principles that anybody needs to bear in mind, everything is fact and case specific, as is true most of the time.

Iris Ferber KC: Absolutely, and you know, Stephen, because we went through it earlier, that the two different types of rules, the one for most types of relief in Section 146(2) and the Shiloh Spinners principles which relate to rent arrears, they both, broadly speaking, say the court should take all the circumstances into account don't they, which is very much the way that equitable remedies tend to operate.

Stephen, just one question for you, if you Google relief from forfeiture you tend to see a six-month time limit come up, is that a strict time limit?

Stephen Willmer: It's a very good guideline and I would treat it as strict, but it is not set in stone.

Iris Ferber KC: Fine, and it is six months from the forfeiture taking affect, isn't it?

Stephen Willmer: Yes.

Iris Ferber KC: So if forfeiture is taken by peaceable re-entry, which would be from previous podcasts in this series, could only be where there's not a residential element to the letting, but nevertheless if there's a peaceable re-entry its six months, as a rule of thumb, from the date of peaceable re-entry, if there's been a possession order for residential premises based on forfeiture, then it's the date that that possession order was enforced, plus 6 months.

Stephen Willmer: That's right, and I suppose I would re-emphasise the point about lashes, I think that's fundamentally the point here, six months is a very useful and almost always determinative longstop date, but basically, you need to get your skates on.

Iris Ferber KC: Not least because as you said, Stephen, if the landlord has taken back possession, particularly with a court order, but also peaceable re-entry and then has quite innocently and properly, re-let, then your delay is going to probably prejudice you to the point of not being able to get relief because a third party has now obtained rights over that same land.

Stephen Willmer: Absolutely right.

Iris Ferber KC: Great well, thank you very much, Stephen.

Stephen Willmer: Thank you, Iris.

Iris Ferber KC: And thank you all for tuning into this episode of *FortyTwo Talks*, we hope you enjoyed it, the next episode in the series, which will be coming out in a week or so, is going to be hosted by Michael Grant and James Hoile of 42BR Barristers and they will cover Waiver of Forfeiture.

To listen to all our podcasts you can find us on Apple Podcasts, Spotify, the Chambers website or wherever else you get your podcasts.

Thank you and goodbye.