FortyTwo Talks:

Forfeiture Miniseries – Episode 5

Re-entry of Residential Premises

Michael Grant: Hello and welcome to *FortyTwo Talks*. This is the fifth podcast in our latest mini-series covering topics relating to forfeiture.

My name is Michael Grant, and I specialise in Chancery and Property Litigation, and I'm joined today by Anne Hogarth, one of our most recent additions to the 42BR family.

Anne Hogarth: Thank you, I'm a member of the Family and Property team, very excited to be here today.

Michael Grant: Now, todays podcast focuses on a scenario which is more common than one might think. Namely, landlord forfeits the lease by peaceable re-entry and then relets the premises to a new tenant, the former tenant makes an application for relief from forfeiture, what is the court to do?

Now that question is at the centre of this entire podcast and I think we've got some very interesting cases to talk about, wouldn't you say Anne?

Anne Hogarth: I certainly think they're interesting.

Michael Grant: Well, we'll be taking you through a number of those authorities who have grappled with that very scenario, so I think Anne you'll be taking us through the first one, over to you.

Anne Hogarth: Thank you, so the first case we're dealing with is the case of *Silverman v AFCO* which is a 1988 case. I would say that most of the authorities dealing with this issue are slightly more historic and I think both of us have updated the back pattern, removing words such as writ and changing it to claim, so if you are to read the authorities

just be aware that some of the legal basis has been updated slightly, but we're making it simple today.

So, this was initially an application for possession and arrears by a landlord where the tenant had stated that they did not intend to dispute the order sought, and as such an order was made in those terms providing the landlord with possession on the 28th September 1987.

You would think that would be very clear in those circumstances and as such the landlord started negotiations in order to re-let the property, however shortly thereafter the tenant made an application to stay the execution of the money judgment and that was dismissed on the 20th October and then on the same day the tenant made an application for relief from forfeiture.

Now that was heard on the 1st December and the tenant didn't file any evidence and support and only provided a post-dated check in settlement of the initial money judgment made on the 28th September, now clearly that was insufficient and therefore that application was dismissed.

On the 2nd December the landlords therefore executed a new lease and on the 3rd December the tenants having an automatic right of appeal at that point issued a notice of appeal.

Unsurprisingly the court were quite critical in this situation and ultimately their application was dismissed.

Michael Grant: Why do you think they were critical?

Anne Hogarth: Well, there are various points here, so firstly you had the fact that at this point, by the point of the appeal, the landlord was said to have acted reasonably in re-letting the property.

The court considered the test in *Gil v Lewis*, which is the exceptional circumstance test, and effectively whether or not the application for

relief should or shouldn't be granted, effectively setting out that if only in exceptional circumstance that the court won't provide that relief. The third point to consider was the lateness of the application and the lateness specifically of the tender of payment, now that only actually was given days before the second appeal.

Michael Grant: Is that the payment of rent?

Anne Hogarth: The payment of rent. So, taking all that together, the court were very clear that this was effectively an exceptional case.

Michael Grant: I've got a question Anne, so is it fair to say that the court usually just grants relief upon any outstanding rent being paid?

Anne Hogarth: Usually the court will do so and there's very clear authority both here and in other cases setting out that if the rent is payable or can be paid in a reasonable period of time relief should be granted.

But there is an exception always in these cases and that is the fact that in this instance there was a third party who is already in situ and that meant that the court had to look at whether or not the landlord was unreasonable in letting the property.

Michael Grant: So overall, what do you think it was about the facts in Silverman that tipped this into the exceptional circumstances bracket?

Anne Hogarth: The fact that the payment was actually only made days before the second appeal was really crucially important in the courts decision here because there have been cases and I think it might be discussed in this one but certainly in other judgments, where a delay of even a year and a half has been discussed as being potentially capable of being granted relief in those circumstances, but where there's then a third party in situ and you then have to look at

whether or not a landlord was unreasonable in the way they've acted, the fact that at the initial hearing the tenant couldn't pay and it was

only moments before they were actually going to have their application heard again that they were able to come up with payment, and consistently throughout this case they hadn't been able to pay, the court said a landlords not unreasonable effectively in mitigating their losses and actually re-letting this property.

Michael Grant: So, you would say that the exceptional circumstances was that the tenant was dithering?

Anne Hogarth: It's not even just the tenant was dithering, the tenant couldn't pay in this case, right up until the last moment.

It's not just dithering it's the fact that at some point there needs to be an end of litigation, the fact that there was a right of appeal didn't mean that the landlord was unreasonable in the circumstance of re-letting on the 2nd , when there couldn't be prompt payment of the rent that was outstanding at that point.

So, *Silverman* really is a great example of where the courts have shown a reluctance to grant relief where there is an innocent new tenant in situ, but Michael you found a case I understand where the court has taken a more creative approach, is that right?

Michael Grant: That is right yes, the case that I found was a Court of Appeal authority by the name of *Fuller v Judy Properties Ltd*, which really shows how flexible the court can be when granting relief from forfeiture after a landlord has already re-let the premises.

Judy Properties let a shop and two flats on a 20-year lease with a covenant against assignment without the landlord's consent, I'll refer hereafter to *Judy Properties* as the landlord just to avoid any confusion.

By 1988, *G* was the tenant and without getting the landlord's written consent, *G* assigned to the *Fullers*, who I'm going to refer to as *F*. Now *F* paid a premium of £30,000, *F* became the tenant and started

paying rent directly to the landlord, but the landlord didn't realise that *F* had become the tenant, as this was an unlawful assignment.

F wished to use the premises as an estate agency but needed planning permission to do so. Upon making an application to the local planning authority its application was unsuccessful, and it just couldn't get planning permission. So, they tried to assign on, they didn't want to waste the premium that they'd already paid, they tried to recover that, but during the process of trying to assign on, the landlord became alerted to *G*'s original breach of its lease by carrying out an unlawful assignment.

The landlord served a Section 146 notice on *G*, which was invalid as *G* was no longer the tenant, but then peaceably re-entered in reliance on that notice, it later served a second valid Section 146 notice on *F*.

F quickly issued proceedings for relief from forfeiture, and while that claim was pending, the landlord granted a new lease to *Hirestar*, this is a new company, at a higher rent and a premium.

So *Hirestar* took a legal lease for value and had no notice of *F*'s claim. So, at both trial and on appeal, the courts held that firstly, the assignment to *F* by *G* had been in breach of covenant, secondly, there was no waiver and thirdly, the second notice served on *F* and the landlord's re-entry was held to have validly forfeited *F*'s lease before *Hirestar*'s lease was granted.

So crucially because *F* acted promptly, it still had an equitable right to relief, so the court didn't wish to disturb *Hirestar*'s lease because they didn't know about *F*'s claim for relief from forfeiture, but instead,

they granted relief from forfeiture to *F* by creating a new head lease in *F*'s favour. So that made *F Hirestar*'s immediate landlord who were entitled to the premium and rents that had already been paid by *Hirestar* to the landlord.

So, *F* was also required to pay rent up the chain to the landlord - *Judy Properties*.

So, the practical lesson is this, even if the landlord has forfeited and relet, the court can still grant relief from forfeiture in a way that preserves the new tenant's lease but reinstates the old tenant as an intermediate landlord to protect their financial stake.

Anne Hogarth: So Michael, one thing I quite enjoyed about this judgment was reading that *Fuller* had at one point let themselves back into the property, that doesn't seem to have been a significant concern for the court, but what would've happened if *Fuller* had let themselves into the property knowing *Hirestar* were in occupation?

Michael Grant: That's a really interesting question actually, and it's something I didn't actually read out in the facts but your right when you picked up when you read through the judgment.

At the time when they made their claim for relief from forfeiture, it was before *Hirestar* had entered into occupation, there was a period where the *Fullers* changed the locks to try and gain entry although they couldn't trade from there but they just wanted to change the locks, but those locks were then changed back by the landlords agent, and after that point no one was in occupation and then *Hirestar* had entered into occupation.

Your question is what if they had changed the locks while they knew *Hirestar* was in occupation, because any claims for relief from forfeiture are founded on equitable principles rather than a legal basis they have to come to equity with clean hands. I think it's highly likely a

court would find if a former tenant who has a claim for relief from forfeiture knowing that there's someone else in occupation had changed the locks I think you would find they'd come to court without clean hands and I don't think relief would be granted in that situation.

Anne Hogarth: But changing it the other way round and let's say *Hirestar* were the more dubious party, and they knew about the *Fullers* claim in relation to the relief, how do you think that could've impacted on the judgment?

Michael Grant: Good question, so essentially what you're saying is, even though in the *Fuller* case you had an innocent new tenant, you're asking if they entered into occupation without having any innocence, if they knew of a prior claim for relief to forfeiture - I think that might shift the tables a bit, I don't think the court would've been so willing to do right by both the new tenant and the former tenant.

I think in that case it may very well have been that they would've just granted relief and created some scenario where by the landlord would've had to evict the now new tenant. Personal view it's not actually reached before the court but I do think that it's probably likely.

Anne Hogarth: I think so too, I can't really see a situation where they're going to allow an un-innocent party to remain, especially if *Fuller* actually wanted to be back in there.

Michael Grant: Well, that's right.

So that's one way they thread the needle where there's already a new tenant in place, but of course *Fuller* assumes the original tenant moved quickly enough to get their claim in before anything was set in stone, I think timing does appear to be critical in these cases, and I think that does actually bring us neatly to a recent authority I think you found, Anne.

Anne Hogarth: Yes, so this is the case of *Keshwala v Bhalsod* which was a 2021 case in the Court of Appeal. This was a instance where the arrears in terms of rent were just £500 caused by a mistake, effectively the tenants not realising there had been an increase, despite having paid the rent but for the increase and then a second lot of rent, the landlord effected to peaceable re-entry for the non-payment on the

13th September 2018 and the rent arrears were cleared on 17th September.

Now it took the tenants five months and about one to two weeks into the ordinary six month period to make an application for a relief from forfeiture. The landlord re-let the property at the five months point. It should be made clear that both the first instance decision and the Court of Appeal were clear that the eviction was harsh but lawful, there'd be no notice in this instance, but the difficulty certainly the first instance judge had was there was a delay between October 2018 and late January 2019 where the tenants weren't in communication with the landlord.

Saying that, the landlord certainly hadn't helped matters. The landlords solicitors had told the tenants to talk to agents while the landlord had dis-instructed the agents, the landlord then himself didn't respond to email correspondence, although there was an issue whereby I believe in January the email address was wrong. But really what the court focused on was the fact that one of the tenants, because there was two on the lease, was absent and the reason why it was said there was delay between October and January was because they were trying to get the signature and engagement of this tenant, who quite frankly lived in India and didn't care about this property but was willing to engage for the purpose of helping the tenant actually in situ at the time.

What was made very clear by the Court of Appeal was that there is no strict rule of six months meaning that anything is reasonable. The

court found that this was an exceptional circumstance again, due to the fact that there was a delay, an unexplained delay, as to why during the period of October to January where nothing appeared to happen and as such while the landlord was probably less scrupulous than he could've been, equally the tenants were under an obligation to be in communication and the onus remains on the tenants at all times.

One thing though I would say about this judgment is that the Court of Appeal were clear, this was not an appeal based on what they would've done in this situation. The High Court actually reversed this and did grant relief, but the question was whether or not the exercise of discretion had been wrong, and the court considering all the factors raised in the first instance couldn't say the discretion was wrongly exercised.

It is a helpful authority to show situations where the court may be sympathetic but ultimately if you're a tenant you need to be in communication and that's what this case really highlights.

Michael Grant: Okay so, it seems that the courts identified a common mistake in thinking that if you're within six months that automatically means you've acted promptly and you should get relief.

I think what the courts were saying therefore is that the six month is a limit but not the magic pass to relief, would you agree with that?

Anne Hogarth: Michael you're absolutely right, you're clearly in agreement with the Court of Appeal there.

Michael Grant: So, to conclude I think where does it all take us really? This is the question.

There are three authorities, *Silverman* seems to show that there comes a point where delay in a perfectly proper new lease means relief will be refused even if the tenant can now pay.

But *Fuller* shows that the court can, in the right case, protect both the new tenant and the old tenant by repositioning their interest rather than choosing one clear winner over the other.

And more recently *Keshwala* offers a warning, that six months is not necessarily a safe harbour, if you want relief after forfeiture you have to move fast, you have to keep the landlord informed and never

assume that the court will unscramble a reasonable re-letting just because you've eventually turned up with the money.

That marks the end of our podcast, 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 our colleagues Paul Fuller and Alex Bailey who will be discussing how insolvency issues can affect forfeiture.

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So, it's goodbye from me.

Anne Hogarth: And goodbye from me.

Michael Grant: Thanks for listening.