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42 BEDFORD ROW

Housing Law BULLETIN

BULLETIN No18

Forfeiture for non-payment of service charges

Last month, we ran a workshop in Chambers exploring the law and procedure of forfeiting a long lease for non-payment of service charges. In fact, it was so popular that we ran it twice!

Attendees, and others who could not attend, asked us for follow-up notes. This Bulletin is intended as a follow-up for those of you who attended the workshop, and as a general practice note for those of you who missed it.

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What is Forfeiture, and Why is it Useful?

The lease must contain a clause giving the landlord a right to forfeit in the event of a breach of the lease (often the words "a right to re-enter" are used: this is the same thing as a "right to forfeit").

If the landlord is a private owner, unconstrained by rules about the disposition of land (unlike a local authority), a successful forfeiture will lead to the recovery of a valuable asset, which can then be re-sold on a new long lease, without having to account to the leaseholder for the profit on the sale.

Because of the risk to the leaseholder of losing the property without compensation, a genuine threat of forfeiture (on good legal grounds) almost always results in the leaseholder remedying their breach of the lease: usually, paying the debt that is owed, plus the landlord's legal costs (so long as there is a costs clause in the lease). If the property is mortgaged, the mortgage company will usually pay off the debt if the leaseholder does not, in order to avoid forfeiture and the loss of its security.

But forfeiture is an ancient, "self-help" remedy, putting enormous power in the hands of the landlord, and therefore these days the process is a series of complex technical hurdles, making it very easy to make a mistake, and lose the effect of a genuine threat of forfeiture.

What are the Conditions for Forfeiture?

- The lease must contain a clause giving the landlord a right to forfeiture, in the event of a breach of the lease (often the words "a right to re-enter" are used: this is the same thing as a "right to forfeiture").
- A breach of the lease must have taken place, of a kind specified in the forfeiture clause in the lease.
- In the case of unpaid service charges, this means that the landlord must be able to prove that the service charges were demanded according to the terms of the lease, as well as within the statutory 18-month time limit, and also that demands gave the landlord's address and included a statement of the leaseholder's statutory rights and obligations. If the demand is not valid, for any of those reasons, then there is no breach and the landlord cannot forfeit.

- If the breach is the non-payment of ground rent, service charges or administration charges (or any combination of those three), the amount unpaid must be either over £350.00 (excluding interest), or must have remained unpaid for longer than 3 years (s167 of the Commonhold and Leasehold Reform Act 2002 and the Rights of Re-entry and Forfeiture (Prescribed Sum and Period) Regulations 2004). Otherwise, there is no right to forfeiture, whatever the lease may say.
- Unless the breach of the lease has been admitted by the leaseholder, the landlord must obtain a "determination" of the breach: that is, a judgment for the sum due, in either the County Court or the First-Tier Tribunal (Property Chamber). That must be done before any further steps can be taken towards forfeiture (s168 of the Commonhold and Leasehold Reform Act 2002 and s81 of the Housing Act 1996).
- If you are choosing to proceed in the County Court, be careful of asking for a default judgment if no defence is filed, since that may not count as a "determination". It is safer to ask the County Court to list a hearing, so that a judge can consider the claim filed, and give a normal money judgment.
- No less than 14 days after the determination (or admission) is obtained, the landlord must send a notice to the leaseholder under s146 of the Law of Property Act 1925, specifying the breach (and using the exact words of the Court or Tribunal's determination), and requiring the leaseholder to remedy it (if it is capable of remedy) within a reasonable time.
- The only type of breach to which the s146 requirement does not apply is the non-payment of ground rent. EVEN IF service charges are "reserved as rent" under the lease, a s146 notice must still be served once unpaid service charges have been admitted or determined: see Freeholders of 69 Marina, St Leonards on Sea v Oram [2011] EWCA Civ 1258).
- The landlord must not "waive the breach", at any time between the breach happening, and the lease being forfeited. In other words, after the breach, the landlord must not do any act which unequivocally treats the lease as continuing. This is extremely difficult to avoid, and requires very tight control of IT systems and staff actions, since common acts of waiver include:
  - ***Accepting*** any payment or part-payment of ground rent or service charges
  - ***Demanding*** service charges or ground rent
  - Sending ***reminder*** notices about unpaid service charges or ground rent
  - Serving s20 ***consultation*** notices
  - Demanding the payment of legal costs by relying on the ***costs clause*** in the lease (e.g. during the determination proceedings)

- The safest way to avoid waiver is to put an absolute block on ***any*** communications with the leaseholder (other than getting the determination judgment, and serving the s146 notice), once a decision has been taken to pursue forfeiture.

What is the litigation procedure?

The claim is a claim for possession under CPR Part 55, and it is safest to prepare full Particulars of Claim rather than using the N119 form (which is badly suited to forfeiture claims).

The Particulars will need to include the following (non-exhaustive) points:

- A statement that the lease has been forfeited by the issue of the claim;
- Particulars of the lease, with a full copy of the lease exhibited;
- Particulars of the determination or admission, with the judgment or proof of admission exhibited;
- Particulars of the s146 notice (unless it is purely a ground rent forfeiture), with a copy of the notice exhibited;
- Particulars of any person (including a mortgagee) entitled to claim relief from forfeiture as an underlessee;
- A request for legal costs to be paid as a contractual right under the lease (if the lease contains a costs clause covering forfeiture costs).

A witness statement must also be prepared, setting out the evidence relied on, which must be filed and served at least 2 clear days before the return hearing.

A draft order should also be prepared, setting out the details of the lease, the amount in the admission or determination, the interest and the costs claimed, and also including a standard "relief from forfeiture" paragraph, allowing the leaseholder to pay off the debt within 28 days in order to avoid the possession order taking effect.

Conclusion

The forfeiture process very, very rarely results in the forfeiture of a lease. Either the technicalities are not complied with and the claim fails, or the leaseholder (or his mortgage company) pays off the debt, or the Court grants "relief from forfeiture" – giving the leaseholder more time to pay off the debt, even after the final order is made.

The cards are stacked against landlords: judges hate making possession orders in forfeiture proceedings, which are often based on small sums of money, and result in the loss of a very valuable asset with no compensation. If they can find any fault in the procedure, they will refuse to make the order.

Before embarking on the process of forfeiture, therefore, it is worth considering what the landlord is really trying to achieve: forfeiture is not necessarily the best way of remedying breaches of a long lease.

If you would like any to discuss any aspects of this complex procedure, please do get in touch – we will be happy to assist.

This practice note has been written by Angela Piears and Iris Ferber, tenants at 42 Bedford Row who regularly undertake service charge work in the County Court, the High Court and the First-Tier Tribunal.