Case Commentary

Peaceable Re-entry and Relief from Forfeiture for Non-payment of Rent

Pineport Ltd v Grangeglen Ltd [2016] EWHC 1318 (Ch)

In this case, a tenant was granted relief from forfeiture of an underlease for non-payment of rent following a peaceable re-entry of an industrial unit. This was despite a delay of 14 months in bringing the claim for relief and the claimant's illegality relating to its use of the premises. The court held that the application had still be made with reasonable promptitude given the special circumstances of the case.

Introduction

The provisions of ss.210-212 of the Common Law Procedure Act 1852 govern applications for relief against forfeiture for non-payment of rent where the landlord is enforcing his right of forfeiture by action through the courts. Under s.212, the tenant is entitled to be relieved in equity if at least six months' rent is in arrears and, at any time before the trial of the landlord's action, he pays or tenders all the arrears in full (with interest) and costs to the landlord or into court. Readiness, therefore, to pay the arrears and costs (on an indemnity basis) within the time specified by the court is normally a pre-condition of a tenant's claim for relief. This is because the landlord is entitled to be put into the position he would have been if the forfeiture had not occurred (*Innterpreneur Pub Co (CPC) Ltd v Langton* [2000] 1 E.G.L.R. 34) which accords with the more general principle that the proviso for re-entry in the lease is merely a security for the rent: *Ladup Ltd v Williams and Glynn's Bank plc* [1985] 1 W.L.R. 815, at 860, *per* Warner J. As a starting point, therefore, the court leans heavily in favour of granting relief provided that it is satisfied, with a sufficient degree of certainty, that the rent will, in fact, be paid.

The statutory provisions contained in the 1852 Act have no application, however, where the landlord proceeds to forfeit the lease for non-payment of rent by actually physically re-entering the demised property without recourse to legal proceedings. Here, the tenant is entitled to rely upon equitable relief without any fixed time limit, although by analogy with s.210 of the 1852 Act, a time-span of six months is used by the court as a guide in the exercise of its equitable jurisdiction: see, *Howard v Fanshawe* [1895] 2 Ch. 581 and *Lovelock v Margo* [1963] 2 Q.B. 787.

The leading case is *Thatcher v C.H. Pearce & Sons (Contractors) Ltd* [1968] 1 W.L.R. 748, where the landlords peaceably re-entered the demised property for non-payment of rent. The tenant applied for relief, but the landlords argued that his application was out of time, not having been issued within six months, as required by s.210 of the 185 Act. Sir Jocelyn Simon P. held that, since the landlord's had re-entered peaceably without court proceedings, the court's power to grant relief from forfeiture was not statutory but arose from its inherent equitable jurisdiction to which no statutory rules of limitation applied. In his Lordship's words:

> ". . . a court of equity . . . would look at the situation of the plaintiff to see whether in all the circumstances he acted with reasonable promptitude. Naturally, it would also look at the situation of the defendants to see if anything has happened, particularly by way of delay on the part of the plaintiff which would cause a greater hardship to them by the extension of the relief sought than by its denial to the plaintiff."

This approach has been adopted in more recent case law, notably, by the Court of Appeal in *Billson v Residential Apartments* [1992] 3 W.L.R. 264, where Nicholls L.J. observed that "the concurrent equitable jurisdiction can only be invoked by those who apply with reasonable promptitude [and] what is reasonable will depend on all the circumstances, having due regard to the statutory time limits."

Facts in Pineport

The tenant company held an underlease, dated 20 July 1981, of Unit 4, Endsleigh Industrial Estate, Southall, Middlesex, which was used as an MOT garage and workshop, for a term of 125 years less 10 days for a premium of £90,000. The rent payable comprised three elements: (1) a ground rent of £100 per year; (2) a sum equivalent to the amount spent by the landlord in insuring the unit; and (3) a service charge which reflected the landlord's expenditure in managing the estate, as well as the costs of collection and audit and the creation of a reserve. Clause 6(1) of the underlease included a right of re-entry in the event of non-payment of rent for a period of 21 days, whether formally demanded or not.

In April 2014, the landlord forfeited the underlease by peaceable re-entry based on unpaid rent comprising service charges amounting to £2,155. The tenant's claim, however, seeking relief against forfeiture, was not issued until June 2015, some 14 months later. In view of this delay, the landlord contended that the claim should be disallowed, especially as no good reason for the delay had been given. Moreover, the landlord relied on the fact that the claimant had used the premises for an illegal activity. In this connection, one of its directors had been convicted of various offences relating to the issue of MOT certificates without the correct procedure being followed. Over 1,400 such certificates had been issued, in some cases without the vehicle being examined and, in other cases, following examination by a person who was not authorised. The director was, at the time of the hearing, serving a sentence of 18 months imprisonment.

Ruling

The claim for relief was heard by Chief Master Marsh. On his calculations, the claimant was indebted to the landlord for the sum of £24,530 at the date of the hearing, comprising insurance, business rates, legal expenses, ground rent and service charges with interest thereon at 1 per cent over the base rate during the period since re-entry onto the premises. Despite this large amount of indebtedness, there was a likelihood that the money would be available within 12-16 weeks since the director's brother had offered to sell his flat and lend the claimant sufficient money to discharge the debt. The flat was already on the market with a willing buyer with the possibility of sale taking place within a matter of weeks. In the Master's view, that was sufficiently soon to fall within the "immediately foreseeable future" test indicated by Arden J. in *Inntrepeneur*, mentioned earlier.

So far as the illegality was concerned which led to one of the director's conviction and sentence of imprisonment, it was apparent that the offences were well over the custody threshold and merited a moderately sever sentence. Moreover, the conduct involved activity which was directly connected with the claimant's business carried on at the premises. In the Master's view, however, this did not justify refusal of relief. There was no risk here of the court "appearing to be complicit in the continued use of the premises for unlawful or illegal activity by granting relief in the knowledge that that such conduct was likely to continue": at [61]. The claimant had already lost its licence to grant MOT certificates and there was nothing to suggest that the premises had been tainted by the past illegality.

There were also other considerations which favoured the grant of relief. First, the underlease had been granted for substantial premium (£90,000) at a ground rent of £100. According to the Master, this was an important factor which weighed heavily in the balance. In his words, at [62]:

> "The court should have regard to the value of the asset which the defendant will obtain if relief is refused compared with the rent outstanding at the date of forfeiture and the sum payable as a condition as the grant of relief."

In the present case, the rent unpaid at the time of forfeiture was £2,155 (i.e., less than 1 per cent of the capital value of the underlease of £275,000) and, if relief was granted, the sum payable (£24,530) would be about 10 per cent of its value. This, on any view, would produce a "severe disproportion, if relief was refused, between the value obtained by the defendant as a windfall and the sum due to him: *ibid*, at [62]. Secondly, there was no evidence of any likely prejudice to the defendant (or a third party) if relief was to be granted. In particular, the defendant had taken no steps to market the premises: *ibid*, at [63]. Thirdly, the lengthy period of delay (although a matter of "great difficulty for the claimant") was not an insurmountable obstacle. The test to be applied, as mentioned earlier, was whether the application had been made with reasonable promptitude taking a six month period only as a guide. In the instant case, there were good reasons for the delay including ill health (the claimant's director was suffering from depression), lack of money and the absence of specialist advice. On this point, the Master stated, at [64]:

> "Reasonable promptitude is an elastic concept which is capable of taking into account human factors . . . Although 14 months is more than double the guide period of six months (and near to the breaking point for the concept's elasticity), I am satisfied that it would be wrong to bar the claimant from obtaining relief in the circumstances of this case."

Accordingly. The Master made an order granting the claimant relief from forfeiture on terms that it paid the defendant the sum of £24,530 within a period to be determined at a later hearing.

Commentary

Apart from the issue of delay, the case raises the interesting question as to whether a tenant's illegal activities relating to the use of the premises can be taken into account in the exercise of the court's equitable jurisdiction whether or not to grant relief from forfeiture.

Generally speaking, it is not legitimate to consider other breaches of covenant committed by the tenant. Save in very exceptional circumstances, the court is bound to exercise its discretion by granting relief (upon payment of all the rent with interest and costs) without regard to any other matters of complaint that the landlord may have against the tenant. In *Gill v Lewis* [1956] 2 Q.B. 1, a case decided under s.212 of the 1852 Act and referred to by the Master in the course of his judgment, Jenkins L.J. said, at p. 13:

> "The question is whether, provided all is paid up, the landlord will not have been fully compensated; and the view taken by the court is that if he gets the whole of his rent and costs, then he has got all he is entitled to so far as rent is concerned, and extraneous matters of breach of covenant, and so forth, are, generally speaking, irrelevant."

In the course of his judgment, at p. 14, his Lordship alluded to an immoral user of the premises as constituting an exceptional circumstance disqualifying the tenant from seeking equitable relief. In *Gill* itself, evidence (1) that the landlords had experienced difficulties in extracting rent from the tenants in the past; (2) that they had experienced difficulties in finding the tenants for the purpose of bringing proceedings against them to recover the arrears of rent; and (3) one of the tenants had been convicted of two acts of indecent assault against two boys on the premises, was considered insufficient to warrant a denial of relief. In relation to (3), the acts of indecency involved one isolated incident and not a continuous course of conduct. By contrast, in *Tyfonos v D. Landau & Son Ltd* (1961) 181 E.G. 405, Stevenson J. held that there were exceptional circumstances which entitled him to refuse relief in that one of the joint tenants was serving a prison sentence for arson, both tenants were insolvent, there were grave breaches of the covenant to repair and the landlords were well advanced in negotiations to dispose of the premises elsewhere: see also, *Church Commissioners for England and Wales v Nodjoumi* (1986) 51 P. & C.R. 155, at 160-161, (tenant convicted of conspiring to defraud the Iranian Government). In the light of these authorities, it is, perhaps, not surprising that the Master in *Pineport* decided not to treat the illegality as a bar to relief. On this point, he noted, at [24]:

> "It seems to me that a significant factor for the court in deciding whether there are exceptional circumstances is whether the grant of relief may have the effect of assisting the tenant to continue a breach of covenant. If the breach is past and unlikely to continue, even a serious breach may not be sufficient to permit the court to decline to grant relief."

The Master did, however, enter an important caveat that, in some circumstances, a landlord may be able to persuade the court to refuse relief if there was evidence that his reversionary interest had been damaged by an historic breach of covenant: *ibid*, at [24].

One other aspect of the case calls for comment. Although there was no evidence of any prejudice to the defendant as a result of the delay in making the application for relief (because the defendant had not sought to market the premises), it is apparent that the court does retain a discretion to refuse relief where the landlord (and any other interested parties) cannot be put back into their original position. In *Stanhope v Haworth* (1866) 3 T.L.R. 34, for example, the tenant's application for relief (which was made towards the end of the period of six months allowed by s.210 of the 1852 Act) was rejected on the ground that the landlord had so altered his position in the meantime that it would be inequitable to grant relief. In particular, the landlord had relet the premises (a colliery) to a third party who, in turn, had laid out substantial

sums in purchasing plant to work it: see also, *Newbolt v Bingham* (1895) 72 T.L.R. 852, 853, *per* Lord Esher M.R. Similarly, in *Silverman v AFCO (UK) Ltd* [1988] 1 E.G.L.R. 51, the tenants had made a last minute application for relief following an assurance that they would not contest the landlord's proceedings for possession. The landlords had, on the basis of this assurance and an order for possession which had not been defended by the tenants, executed a new lease of the premises to a third party. The Court of Appeal held that relief should be refused on the ground that the position of the parties had altered and the right of a third party had intervened. In these circumstances, the grant of relief would have caused obvious prejudice and injustice to the landlords.

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