Case Commentary Relief Against Forfeiture

for Non-payment of Rent – An Update

Keshwala v Bhalsod [2021] EWCA Civ 492

The Court of Appeal has considered the correct approach to the issue of delay by a tenant in applying for relief against forfeiture for non-payment of rent where a landlord had taken possession by peaceable re-entry. It was incumbent on an applicant for relief to act with due diligence, to keep the landlord informed of his intentions, and to fully explain any delay. Disagreeing with the High Court (see, [2020] EWHC 2372 (QB); M. Pawlowski, "Relief Against Forfeiture for Non-payment of Rent", (2021) 25 L & T Rev 81), there was no principle that a tenant would be deemed to have acted with reasonable promptitude so long as he brought his application for relief within six months.

Facts

The tenants had entered into a lease of mixed commercial and residential premises and spent a considerable sum refurbishing them. On 13 September 2018, the landlords took advantage of a minor shortfall in the payment of rent and forfeited the lease by peaceable re-entry for non-payment of rent. The underpayment of rent was a mistake and the tenants paid the outstanding sum on 17 September 2018. Nearly five months later, the tenants had made no application for relief from forfeiture and the landlords re-let the premises. On 26 February 2019, the tenants applied for relief under s.139(2) of the County Courts Act 1984, which enabled the County Court to grant relief against forfeiture for non-payment of rent within six months after peaceable re-entry. The trial judge dismissed their claim, relying on their inactivity for several months and their unexplained delay in making their application.

High Court decision

In the High Court, Martin Spencer J held that the trial judge had erred in treating the issue as simply one that involved the exercise of a general discretion. In his Lordship's, she had failed to appreciate that the equitable jurisdiction to grant relief from forfeiture in the case of non-payment of rent proceeded on the footing that the proviso for re-entry was a security for the payment of rent and, unless there was some exceptional reason, relief should be granted if the tenant paid the rent.

In this case, therefore, the trial judge should have asked whether the delay comprised such exceptional circumstances that it would be unjust to grant relief. In this context, the principal guidance should have been the statutory six-month limit for the bringing of a claim for relief from forfeiture under s.210 of the Common Law Procedure Act 1852. In reaching this

conclusion, his Lordship referred to a passage from the judgment of Nicholls L.J. in *Billson v Residential Apartments Ltd* [1992] 1 A.C. 494, at 530, who stated:

> "The concurrent equitable jurisdiction can only be invoked by those who apply with reasonable promptitude. What is reasonable will depend on all the circumstances, *having due regard to the statutory time limits*. In the exercise of its jurisdiction courts of equity should apply, by analogy, the statutory time limits … but not with a strictness which in all the circumstances could lead to a result Parliament could never have intended."

Accordingly, Martin Spencer J was in little doubt that an application for relief from forfeiture brought within six months of the landlord's re-entry was to be taken as having been brought with reasonable promptitude. In those circumstances, the factor relied upon by the trial judge in refusing to grant relief, namely, the delay within six months, was not capable of amounting to the kind of exceptional circumstances which it was necessary for a landlord to show when inviting the court to refuse relief despite the application having been brought within six months.

Court of Appeal ruling

The Court of Appeal, disagreeing with the High Court, concluded that the trial judge had not been wrong to take account of delay. The position might be different if she had refused relief on the ground of delay alone, but she had taken account of other factors such as the lack of any attempt by the tenants to communicate with the landlords for several months. There was, therefore, insufficient basis to disturb the exercise of her discretion. The relevant principles were to be found in the obiter comments in *Gill v Lewis* [1956] 2 QB 1:

- In a simple case where there had been no intervening dealings with the property or any other change of position, the court will ordinarily grant relief to a tenant on payment of rent and costs

- The court will not usually refuse relief on the ground of other breaches of covenant, which would generally be irrelevant, but there might be cases where the court will refuse relief because of the tenant's conduct

- If all that has happened is that the landlord has forfeited and then done nothing with the property, delay by itself will be unlikely to justify the court in refusing relief

None of the authorities, however, specifically addressed the question of whether a tenant who applied *within* six months would be taken to have acted reasonably promptly. Most of the cases were concerned with the question as to whether delay *beyond* the six months prevented the court from exercising its equitable jurisdiction. However, there were repeated indications that a tenant who left it to the end of the six months would not necessarily be taken to have acted promptly, and that such a delay could be a relevant factor: ibid, at [54]. 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 re-let the demised premises (a

colliery) to a third party who, in turn, had laid out substantial sums purchasing plant to work it: see also, *Newbolt v Bingham* (1895) 72 T.L.R. 852 and *Silverman v AFCO (UK) Ltd* [1988] 1 E.G.L.R. 51. It was, therefore, incumbent on an applicant for relief to act with due diligence, to keep the lessor informed of their intentions, and to explain fully any delay in applying for relief: see, *Bank of Ireland Home Mortgages Ltd v South Lodge Developments* [1996] 1 E.G.L.R. 91, at 93, per Lightman J. Significantly, there was no principle that a tenant would be deemed to have acted with reasonable promptitude so long as they brought their application for relief before the expiry of six months: *Keshwala*, at [60].

If a landlord had forfeited for non-payment of rent and taken possession by peaceable re-entry, the grant of relief was always discretionary either in the County Court (see, s.139(2) of the 1984 Act) or in the High Court (because it was exercising an equitable jurisdiction). In the County Court, the application must be brought within six months; in the High Court, there is no strict time limit, but the court will have regard to the six months time limit: ibid, at [64]. However, that did not mean that, so long as the tenant applied before the end of six months, he would always be treated as having acted with reasonable promptitude, or that delay would always be regarded as immaterial. The longer that the tenant left it, and if he did not have a good explanation for the delay, and failed to keep the landlord informed of their intention, the more likely it was that the court would conclude that he had failed to act with reasonable promptitude.

In the present case, it was apparent that, apart from the delay, there were many other factors which warranted a refusal of relief. Accordingly, the reason relied on by the High Court, namely, that the trial judge had been wrong to take into account the tenants' delay, was not a sufficient basis to justify disturbing the exercise of her discretion: ibid, at [70].

Commentary

There is no doubt that the High Court, in exercising the equitable jurisdiction to grant relief for non-payment of rent in cases of peaceable re-entry, will have regard to, but not be strictly bound by, the six month time limit under the Common Law Procedure Act 1852.

Unlike the High Court, however, the County Court only has the jurisdiction conferred on it by statute. Thus, s.138 of the County Courts Act 1984 makes provision similar to, but not identical with, the 1852 Act by enabling the tenant to obtain relief by paying the arrears of rent and costs into court, either before the return date or after an order for possession has been made but before it has been executed; and s.138(9A) provides for the tenant to have six months after recovery of possession to apply for relief. Where, however, as in the present case, the landlord recovered possession without a court order, s.139(2) of the 1984 Act enables the tenant to apply to the County Court for relief again within six months from possession being taken. Put simply, s.139(2) allows the County Court to grant relief against forfeiture for non-payment of rent within six months after peaceable re-entry.

The discretion is to be exercised (in both the High Court and the County Court) in accordance with equitable principles, including the well-established principle that equity regards the right of re-entry as a security for the payment of the rent, and, other things being equal, the court

will ordinarily grant relief if the tenant pays all that is due in terms of rent and costs. In the words of Nugee LJ, at [65]:

> "If, therefore, all that has happened is that the landlord has taken possession and then done nothing with the premises, simply sitting back to see what happens, then the mere fact that the tenant has delayed is unlikely to be regarded as sufficient by itself to cause the court to refuse relief."

However, it is now apparent that there is no principle that a tenant will be deemed to have acted with reasonable promptitude (or his delay will always be regarded as reasonable) if he brings his application for relief before the expiry of six months. Again, his Lordship makes this clear, at [66]:

> "The longer that the tenant leaves it – and a fortiori if he does not have a good explanation for the delay, and fails to keep the landlord informed of his intention – the more likely it is that he will find that the court will conclude that he has failed to act with reasonable promptitude, and the more likely it will be that intervening events will make it inequitable to grant relief. If the landlord, acting reasonably and not precipitately, has altered his position, it may be unjust to grant relief; as also it may be if the rights of third parties have intervened."

Interestingly, the shop premises in this case had, since the forfeiture, been re-let by the landlords for a term of three years subject to a one-month's break clause on either side on or after 7 August 2020, at an annual rent of £6,000. The residential premises were also let on an assured shorthold tenancy. This, however, was held to be no bar to granting relief from forfeiture. The landlords had received a summons for non-domestic business rates and, there being no rental income from the property, they could not afford to pay this (and other costs) and that is why the decision was made to re-let the property. It was also significant that, at the time of re-letting, the landlords were unaware that the tenants had been doing anything, or that it was intended to make an application for relief. In *Bank of Ireland*, referred to earlier, Lightman J. alluded to the principle, at [93], that:

> "It is not the legislative policy that the premises shall be sterilised producing no return for the lessor during the six month period, let alone that the lessor shall be occasioned loss. So long as the lessor has given those entitled a reasonable opportunity to apply for relief and has reasonably formed the view that no application will be seriously pursued, he may exercise his rights as owner. What is reasonable in this context must depend on the circumstances of the case (e.g., the amount of rent due, the seriousness of any breach of covenant, the cost to the lessor of retaining, and preserving the value of, the property unlet or unsold and the loss occasioned to the lessor by the delay)."

It was also significant that, in *Keshwala*, there were other factors, apart from delay, which prompted the trial judge to refuse relief. Those factors included: (1) the complete lack of any attempt by the tenants to communicate with the landlords; (2) the fact that the delay itself had not been properly explained; (3) the fact, as we have seen, that the landlords had re-let the premises because they were faced with the need to pay business rates; (4) the ambivalent position of one of the tenants who, although willing to co-operate in principle, was reluctant

to have anything to do with the property; and (5) the fact that, if the landlords needed to pursue him (given that the other tenant might get into financial difficulties), they might have difficulties as he had proved elusive. Taken together, therefore, this was a proper case for the trial judge to have refused the tenants relief from forfeiture.

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