Forfeiture of a lease by physical re-entry

Mark Pawlowski examines the case law on what constitutes a forfeiture of a lease by physical re-entry and what relief against forfeiture is available to the tenant

In order to bring about an effective forfeiture of a lease, the landlord must take some positive and unequivocal step to signify to the tenant his intention of treating the lease as at an end as a consequence of the tenant's default. This may be done, under a forfeiture clause, either by the landlord suing the tenant for possession or physically re-entering on the demised premises. If the landlord opts for the latter mode of forfeiture, how does the landlord effect a physical re-entry and what are the restrictions on him doing so, given that the tenant may be opposed to a physical re-possession?

What constitutes a physical re-entry?

A re-entry will occur if the landlord retakes control of the demised premises, usually by changing the locks. In *Thatcher v CH Pearce & Sons (Contractors) Ltd* [1968] 1 WLR 748, the landlords peaceably re-entered the demised premises (comprising a scrap-yard), whilst the tenant was in prison, and changed the locks. This was held to be an effective re-entry for the purpose of determining the lease. The retention of a key to the main gates was considered to be of particular significance as evidencing an intention to re-enter: see, also, *Kataria v Safeland plc* [1998] 1 EGLR 39, (change of locks).

Re-entry may also be effected by the landlord letting a new tenant into occupation or by accepting an existing occupier as tenant since this shows that the previous lease has ended. Thus, in *Edward H. Lewis & Son Ltd v Morelli* [1948] 1 All ER 433, restaurant premises were occupied by a manager who ran the business as the tenant's partner. The tenant subsequently went to Italy and was resident there when war broke out between Great Britain and Italy. The landlord then let the premises to the manager on a weekly tenancy. Denning J held that, on the outbreak of war with Italy, the tenant had become an alien enemy and the contract between him and the manager was dissolved with the consequence that there was no one in this country authorised to pay rent or perform the covenants on behalf of the tenant. The landlord was, therefore, in a position to forfeit the lease and his action in granting a tenancy to the manager was in law a re-entry which constituted a forfeiture. Similarly, in *Baylis v Le Gros* (1858) 4 CB (NS) 537, the landlord, intending to take advantage of a forfeiture clause in the lease, granted a yearly tenancy to a sub-tenant who was in possession of the premises, and later received rent from him. These acts were held to amount to a sufficient election to determine the lease despite the fact that the tenant was unaware of the landlord's actions.

The decision in *Baylis* was applied in *London and County (AD) Ltd v Wilfred Sportsman Ltd* [1971] Ch 764, where the defendants, who occupied adjoining premises, entered into possession of the demised property as trespassers, at the invitation of the tenant's guarantor, in anticipation of the grant by the head landlords of a reversionary lease to the guarantor. The head landlords subsequently granted the lease to the guarantor and this was held to perfect the guarantor's peaceable re-entry. The mere continuance of the defendants' possession following the grant of the lease was sufficient to operate as a re-entry since their trespass did not need to be discontinued before there could be an effective forfeiture. In the *Baylis* case, the position was very much the same since there was a sufficient re-entry by the mere acceptance of the sub-tenant already in occupation as tenant of the forfeiting landlord. In neither case, therefore, was it necessary for the parties to go through the "idle ceremony" of withdrawing from the demised premises and then re-entering physically shortly thereafter in order to achieve a forfeiture.

No effective re-entry

There will be no effective re-entry, however, where the continuance of a sub-tenancy is entirely inconsistent with the forfeiture of the headlease. In *Ashton v Sobelman* [1987] 1 WLR 171, the tenants had defaulted in the payment of rent and the landlords wrote to the subtenant explaining that they intended to forfeit the premises and re-take possession by changing the locks on the front door. They also instructed the subtenant to pay all future rent directly to them as their direct tenant. On the landlord's assurance that his rights of occupation under the subtenancy would not be affected, the subtenant agreed to the change of locks and to the arrangement regarding the payment of rent. In this case, therefore, the landlords had sought to effect a re-entry against their tenant by an arrangement with an existing subtenant under which the latter was to remain in occupation as tenant of the landlords upon the terms not of a new tenancy and for a different term, as in the *Baylis* case, but upon the terms of his existing sublease. Since this was entirely consistent with the continued existence of the headlease, the landlord's conduct was held not to amount to a re-entry: see, also, *Cromwell Developments v Godfrey* [1998] 2 EGLR 62.

Equivocal acts

The importance of showing some unequivocal act evidencing a physical re-entry is particularly significant if the landlord wears two hats, for example, that of a landlord and also that of a mortgagee. In these circumstances, the landlord must make clear that the lease is being forfeited and not simply that he is re-entering in his capacity as mortgagee: *Home v Daejan Properties Ltd* (1976) 120 SJ 488. In *Revlok Properties Ltd v Dixon* (1973) 25 P & CR 1, the tenant vacated the premises without informing the landlords. When this was discovered by the landlords, they changed the locks but only with the intention of securing the premises and not to shut him out. The Court of Appeal held that the landlords could still maintain an action for the rent as their act of taking possession did not constitute either a re-

entry or an acceptance of a surrender offered by the abandonment of the premises by the tenant: see also, *Oastler v Henderson* (1877) 2 QBD 575, (short occupation by landlords' workmen not inconsistent with the continuance of the tenant's lease); *Bellcourt Estates Ltd Adesina* [2005] EWCA Civ 208, (landlord's omission to demand rent arrears or service charges not sufficient to amount to an acceptance of surrender of the tenancy) and *Artworld Financial Corporation v Safaryan* [2009] EWCA Civ 303, (landlord held to have accepted a surrender by authorising a third party to move into the empty property and carry out redecoration).

More recently, in *NPS (40GP) Ltd v Liberty Commodities Ltd* [2023] EWHC 2137 (Ch), the landlord carried out works to upgrade the entry barrier system in the building. This involved deactivating all of the occupants' keycards and reissuing new keycards. A secondary security system on the second floor, which was demised to the tenant, remained unaffected. The tenant argued that the landlord had forfeited the lease by deactivating the keycards granting access to the building's common parts, failing to provide new keycards and preventing the tenant's employees from accessing the premises. Those actions, however, were held not amount to an unequivocal retaking of possession by the landlord:

- If the tenant's contentions were correct, the landlord would have unlawfully forfeited the leases of the other tenants in the building when it deactivated the keycards. There was no suggestion that that had happened.
- The tenant had already indicated its intention to vacate the premises. The tenant later told the landlord that it had actually vacated the premises.
- The evidence indicated that there were ongoing discussions about a possible surrender of the lease. Subsequent correspondence indicated that neither party at that point considered that deactivating the keycards had effected a peaceable re-entry.
- There was no evidence that any of the tenant's employees requested and was refused keycards. That was consistent with the fact that the tenant had vacated the premises.

Statutory restrictions

When the landlord effects a physical re-entry, he will be taken to have elected to forfeit the lease from the moment he physically takes possession of the premises. However, the landlord must ensure that his re-entry is peaceable and does not contravene the provisions of s.6 of the Criminal Law Act 1977. If the landlord uses or threatens violence for the purpose of securing entry onto the premises, he will be guilty of a criminal offence provided that (1) there is someone present on the premises at the time who is opposed to the entry and (2) the landlord knows that this is the case: s.6(1). The word "violence" covers any application of force to the person but, in relation to property, carries a more restricted meaning. For example, splintering a door or window would be violence, but forcing a window catch with a thin piece of metal would not: see, Law Commission Report, *Conspiracy and Criminal Law Reform*, (Law Com No 76), at para. 2.61. It is immaterial whether the violence is directed against the person or against the premises and whether the entry is for the purpose of acquiring possession of the premises or for any other purpose: s.6(4).

It should also be noted that physical re-entry is not available at all to a landlord where the premises are let as a dwelling and whilst any person (not just the tenant under the forfeited lease) is lawfully residing therein: s.2 of the Protection from Eviction Act 1977, which declares that it is unlawful to enforce a right of re-entry or forfeiture in such circumstances otherwise than by proceedings in court. The ban on physical re-entry also applies to mixed use premises, so that a landlord is not permitted to enter the business part only without first applying to court for a possession order: *Patel v Pirakaraban* [2006] EWCA Civ 685. There is also a further restriction on forfeiture (whether by physical re-entry or otherwise) if the premises are let as a dwelling and the breach comprises the failure to pay a service charge. The landlord cannot forfeit unless the amount payable has been agreed, admitted, settled by arbitration or determined by a Leasehold Valuation Tribunal: s.168 of the Commonhold and Leasehold Reform Act 2002 and s.81 of the Housing Act 1996.

In addition, if the tenant is a company in administration, no steps can be taken by the landlord to exercise a right of forfeiture by way of peaceable re-entry (or otherwise) except with the consent of the administrator or the permission of the court: see, para. 43 of Schedule B1 to the Insolvency Act 1986.

Relief against forfeiture

There is no requirement of prior notice to the tenant in order to effect a peaceable re-entry for non-payment of rent: s.146(11) of the 1925 Act. Thus, if the forfeiture clause permits a right of re-entry after a prescribed period (for example, 21 days after the rent becomes due), the landlord is entitled to re-possess immediately after the expiry of the period. The remedy is particularly draconian in this context because the tenant will immediately lose his right to remove tenant's fixtures upon peaceable re-entry: *Re Palmiero* [1999] 3 EGLR 27 and *Pugh v Arton* (1869) LR 8 Eq 626. However, relief against forfeiture is available in the High Court under the court's inherent equitable jurisdiction without any fixed (statutory) time limit but, by analogy with s.210 of the Common Law Procedure Act 1852, a time span of six months is used by the court as a guide in the exercise of its equitable jurisdiction: see, *Keshwala v Bhalsod* [2021] EWCA Civ 492 and M. Pawlowski, "Relief Against Forfeiture for Non-payment of Rent - An Update", (2021) 25 L&T Rev 210. In *Pineport Ltd v Grangeglen Ltd* [2016] EWHC 1318 (Ch), despite a delay of 14 months, relief was granted where the application had still been made with "reasonable promptitude" given the special circumstances of the case. In the Court County, the statutory right to apply for relief for non-payment of rent is subject to a six-month time limit from the date of the landlord's peaceable re-entry: s.139(2) of the County Courts Act 1984.

So far as breaches of other covenants are concerned (other than non-payment of rent), the landlord is required to serve a s.146 notice (which may also need to comply with the Leasehold Property (Repairs) Act 1938 in cases involving re-entry for disrepair) as a preliminary to a forfeiture by peaceable re-entry. If he re-enters without a notice, his repossession will constitute a trespass: *Fuller v Judy Properties Ltd* [1992] 1 EGLR 75. In

Billson v Residential Apartments Ltd [1992] 1 AC 494, the House of Lords held that a tenant has the right to apply for relief from forfeiture, under s.146(2) of the 1925 Act, even after the landlord has forfeited the lease by physically re-entering on the premises. However, by analogy with the time limit imposed for relief against forfeiture for non-payment of rent, it is likely that the tenant would be allowed a similar period from the date of re-entry in which to claim relief in cases involving other breaches of covenant. In *Billson* itself, both Lords Templeman and Lord Oliver opined that a landlord could theoretically remain vulnerable to a claim for relief against forfeiture until he obtained a judgment for possession or the tenant was guilty of unreasonable delay in claiming relief.

Conclusion

The effect of *Billson* decision, together with the provisions of s.6 of the 1977 Act, mentioned above, is that it is unlikely that landlords will opt to exercise their right of forfeiture for breaches other than non-payment of rent by physical re-entry, as opposed to recovering possession by court action. Prior to *Billson*, the major attraction to commercial landlords of physical re-entry, in this context, was that it was inexpensive, fast and, above all, avoided prolonged litigation. That attraction has now been largely removed and, except in cases where there is little chance of the tenant applying for relief, a landlord will be better advised to forfeit by issuing and serving proceedings for possession of the premises.

There are other practical difficulties associated with physical repossession in cases involving non-payment of rent or other breaches. A landlord who physically re-enters may well find that the tenant will simply re-possess the premises following re-entry or, alternatively, apply to the court for an order entitling him to resume possession pending the outcome of his application for relief. Moreover, since the landlord will remain vulnerable to a tenant's application for relief for some time after re-entry (at least, six months in cases of non-payment of rent), his safest course will be to obtain a final judgment for possession by court action thereby precluding the tenant from seeking relief in the future.

Apart from the obvious risk of the tenant simply moving back into the premises, there is also the real concern (except in clear cases of breach) that the tenant may seek to challenge the forfeiture and repossession as being unlawful and, consequently, seek damages for breach of the landlord's covenant for quiet enjoyment and trespass. Moreover, if the tenant has left plant and machinery on the premises, the landlord will be faced with the unenviable task of taking out insurance to cover the risk of damage or theft whilst these remain on the premises.

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