SQUIRE PATTON BOGGS

Can a Claim for Relief From Forfeiture Be "a Defence" to an Order for Possession?

In March, the Court of Appeal handed down its decision in *Dean Golding v. Deborah Allen Martin* [2019] EWCA Civ 446.

A landlord has two options when forfeiting a lease. They can physically take back possession of the premises by re-entry, or issue proceedings. This case relates to a landlord who issued and served proceedings on their tenant.

In a typical forfeiture action, the landlord will apply for an order for possession. If successful, the tenant may be able to apply for relief against forfeiture, but that does not alter the fact that the landlord has obtained the order that was sought. In other words, the existence of a possible right to relief against forfeiture has historically not been assessed as a defence to possession proceedings.

The Court of Appeal recently challenged this view through a new interpretation of section 138 County Courts Act 1984 (the Act), which contains provisions as to forfeiture of leases for non-payment of rent. The Court concluded that relief from forfeiture following the grant of a possession order under section 138 counted as a "success at the trial" for the purpose of CPR Part 39.3(5)(c), even though that provision only applied by analogy.

Facts

Ms Martin held a long lease over a flat in Sidcup. The lease included an obligation to pay service charge, which was reserved as rent. The lease provided a right to forfeit if the rent remained unpaid for 21 days.

In 2003, Ms Martin moved to Majorca, leaving the flat unoccupied and without providing a forwarding address. Mr Golding acquired the reversion in 2012 and carried out extensive refurbishment works to the block containing Ms Martin's flat, the costs of which were partially recoverable as service charge.

In 2016, Mr Golding began proceedings in the county court seeking forfeiture of the lease due to non-payment of service charge under section 138 of the Act. A possession order was made in July and, in August, Mr Golding took possession of the empty flat, which was subsequently re-let. In early December 2016, Ms Martin learned of the existence of the possession order and, in January 2017, she applied to have it set aside under Civil Procedure Rules (CPR) Part 39.3(5).

The judge who heard Ms Martin's application in the first instance decided that Ms Martin had acted promptly in seeking to set the order aside and had a good reason for not attending the hearing, but she did not have a good prospect of success at trial because there was no defence to the claim for possession. Although Ms Martin could have applied for relief against forfeiture, it was not a defence to the claim for possession.

Ms Martin appealed, and the judge hearing the appeal held that if the tenant has a reasonable prospect of obtaining relief against forfeiture at a hearing following the setting aside of the possession order, it would count as "success at the trial". Mr Golding subsequently brought this second appeal.

Court of Appeal Decision

Despite the Court ultimately dismissing Mr Golding's appeal on other grounds, the Court considered the question of what counts as "success at trial" a point of importance, and provided a helpful interpretation of this in obiter.

The Court found that, historically, a right to relief against forfeiture was an equitable defence. It further clarified that a claim for relief was inextricably involved with the claim, particularly where the claim was governed by section 138 of the Act.

The Court also considered more recent case law where, for the purposes of the CPR, the grant of relief against forfeiture had been treated as a *defence* to an order for possession and, therefore, a "success at the trial". However, as a result of *Forcelux Ltd v Binnie* [2009] EWCA Civ 854, the case at hand did not, strictly speaking, fall within the ambit of CPR Part 39.3(5) as the disposal of a claim under Part 55 was not a "trial". Like the Court in *Forcelux*, in the present application, the Court would be able to use alternative powers to set aside the order for possession and consequently CPR Part 39.3(5) would only apply by analogy.

The Court concluded that in circumstances where the potential loss of a valuable capital asset was involved, the Court was entitled to take a broad view of the meaning of "success". In this case, the restoration of the long lease was, from Ms Martin's point of view, a "success".

Lessons to Learn

Importantly, this decision highlights a willingness to take a broad interpretation of section 138 of the Act, by recognising the importance of a tenant's ability to apply for relief from forfeiture even though this has, historically, not been viewed as a defence at "trial".

In light of this decision, tenants can take comfort from the fact that if their landlord has successfully obtained an order for possession over a valuable asset for non-payment of rent, the courts may be willing to restore the lease if they find that, at another hearing, the tenant would be likely to obtain an order that is far more favourable than the order that is currently in place.

On a more practical note, this case should also heed as a warning to tenants to provide a forwarding address to their landlord when leaving a property unoccupied in order to avoid any potential future issues.