

Commercial Tenancies Forfeiture

Introduction

This Guide Note sets out in relation to commercial tenancies, a landlord's right to forfeit, restrictions on the right to forfeit and the methods of forfeiting.

Right to forfeit

In order to forfeit a commercial tenancy, either a specific event which the lease expressly provides permits the landlord to forfeit (known as the Proviso for Re-entry), or an event specified in a condition subject to which the term was created must occur. In order to put the issue of whether there is a right to forfeit beyond doubt, a commercial lease should contain an express proviso for re-entry. The specified events normally include non-payment of rent, non-performance or non-observance by the tenant of the covenants of the lease, or the bankruptcy of the tenant.

Restrictions on the Right to Forfeit

Section 146 Notices

A right to forfeit for a breach of any covenant or condition in the lease (save in the case of non-payment of rent) shall not be enforceable unless and until first the landlord serves on the tenant a notice :

- a) Specifying the particular breach complained of; and
- b) If the breach is capable of remedy, required the

- Lessee to remedy the breach; and
- c) In any case, requiring the Lessee to make compensation in money for the breach

and secondly, the tenant fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and fails to make reasonable compensation in money, to the satisfaction of the landlord for the breach (section 146 Law of Property Act 1925). The Notice required is known as a section 146 Notice.

Repairs

There are further restrictions on the right to forfeit, where the breach of covenant complained of relates to disrepair.

First, the right of re-entry cannot be lawfully exercised unless the landlord proves that the fact that a section 146 Notice had been served on the tenant was known to either :

- a) The tenant; or
- b) A sub-tenant; or
- c) The person who last paid the rent due under the lease, either on his own behalf or as agent for the tenant or sub-tenant; and

- d) That a time reasonably sufficient to enable the repairs to be executed has elapsed since the time when the fact of the service of the Notice came to the knowledge of such person (section 18(2) of the Landlord and Tenant Act 1927).

Secondly, if the lease is for a term of seven years or more of which there are at least three years unexpired, there are two additional restrictions :

- i. If the tenant serves a counter notice, forfeiture proceedings cannot be started without leave of the Court. There are five grounds for obtaining leave of the Court :
 - a. The value of the reversion has been substantially diminished or will be unless the breach is remedied immediately;
 - b. Immediate remedy is required to comply with legislation;
 - c. Immediate remedy is required in the interests of the other occupiers;
 - d. An immediate remedy will be relatively inexpensive compared

with the much greater expense if there is delay; and

- e. The existence of special circumstances rendering it just and equitable to grant leave.
- ii. The section 146 Notice must inform the tenant of the tenant's right to serve a Counter Notice and how to do so.

Effecting the re-entry

A landlord should carefully consider whether forfeiture is desirable, before effecting re-entry. In particular, if a landlord forfeits, is it going to be possible to find an alternative tenant for as good a rent and if so, how quickly? There are other options available including levying distress, serving and Statutory Demand, or obtaining an injunction to restrain a breach of covenant, but these alternatives are outside the scope of this Guide Note.

Crucially, once forfeiture is effected and the tenant does not contest that the forfeiture was effective, the lease is forfeit and there is no going back.

Forfeiture can be effected in three ways :

1. Peaceable re-entry;
2. Service of proceedings;
3. Re-letting.

Peaceable re-entry

This requires some form of actual physical re-entry onto the whole of the demised land. Changing the locks is the best evidence of re-entry where possible. It is advisable to instruct bailiffs to effect peaceable re-entry on behalf of the landlord.

When effecting physical re-entry it is worth bearing in mind that it is a criminal offence to use or

threaten violence to secure entry into premises if there is someone physically on the premises at the time who is opposed to the entry, in respect of which violence is threatened or used and the person using or threatening violence knows this to be the case (section 6 Criminal Law Act 1977).

Peaceable re-entry is only advisable in respect of premises that are purely commercial, ie no person is lawfully residing in the demised property or part of it. It is a criminal offence to enforce a right of re-entry otherwise than by service of proceedings whilst a person is lawfully residing in the demised premises.

Service of proceedings

The service of proceedings by the landlord, unequivocally claiming possession against the tenant, is equivalent to a physical re-entry. It is the service of the proceedings upon the tenant which actually effects the forfeiture. Service must conform with the relevant provisions in Part 6 of the Civil Procedure Rules, further detailed consideration of which is outside the scope of this Guide Note.

Re-letting

It is possible to have a constructive physical re-entry of demised premises by the grant of a new tenancy to a third party, possibly a sub-tenant, provided that it is clearly intended that the sub-tenant is in occupation otherwise than pursuant to the existing sub-tenancy.

Which method should be used?

Service of proceedings or by peaceable re-entry are the most common methods of effecting forfeiture and generally are to be preferred to re-letting. Where the landlord has a choice,

whether to forfeit by service of proceedings or by re-entry should be considered in light of the following factors :

1. Speed of peaceable re-entry as opposed to the speed of serving proceedings;
2. Cost of peaceable re-entry as opposed to the cost of serving proceedings;
3. The cost of a wrongful forfeiture by peaceable re-entry which will probably include damages for trespass, whereas no damages following from entering pursuant to a Warrant (obtained following service of proceedings) even if it is set aside subsequently;
4. Finding the locks changed may cause the tenant to concentrate on the desirability of performing his obligations under the tenancy;
5. Effecting a re-entry may result in the landlord taking possession of the tenant's goods, giving rise to insurance issues and even possibly claims for damages by the tenant;
6. A Court Order gives the landlord a greater degree of certainty.

Our Commercial Property Team can assist in the drawing up of commercial leases. Our Property Litigation Team can assist you with serving Section 146 Notices and effecting forfeiture. We can provide specialist advice in all commercial property and property litigation matters and would be happy to speak with you without commitment to see if we could help you, whatever your problem.

Please call Darren Thorneycroft on 01233 625711 for more information or email him on dct@hallettandco.co.uk.