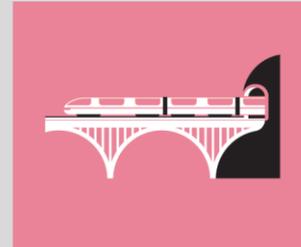


# Relief from Forfeiture

Will it always be granted?

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Falcon Chambers  
07 November 2019



Falcon Chambers

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# RELIEF FROM FORFEITURE

Forfeiture – nature of right

- Unilateral
- Results in termination of the lease = expropriatory
- Earnest for performance/performance bond

Court “leans against forfeiture”



# RELIEF FROM FORFEITURE

## Relief from forfeiture

- High Court has inherent
  - County Court has statutory jurisdiction under section 146 of the LPA 1925
- Restrictions on exercise of right
- Principles governing grant of relief

# RELIEF FROM FORFEITURE

## Section 146 (2) LPA 1925

*“Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor’s action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, **having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit**; and in case of relief **may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.**”*

# RELIEF FROM FORFEITURE

Conventional view:

**Court will grant relief from forfeiture  
provided the breach is remedied**

# RELIEF FROM FORFEITURE

What if:

The breach cannot or will not be remedied?

# RELIEF FROM FORFEITURE

Freifeld v West Kensington Court Limited [2015] EWCA Civ 806

- Persistent breaches of covenant
- Wilful breaches
- Found: breaches would continue
- Offer to assign the lease

# RELIEF FROM FORFEITURE

HHJ Gerald:

- Breach of covenant against assignment was wilful and therefore tenant had a vertiginous climb to persuade the court to grant relief
- Rejected offer to assign within time period on basis on the lease had no value because it had been forfeited and so there was no prejudice to the tenant.

# RELIEF FROM FORFEITURE

## Court of Appeal

- Rejected principle that because the breach had been wilful the tenant faced a vertiginous climb (sub lease had been surrendered)
- Rejected finding that lease had no value because forfeited
- Allowed 6 months to assign
- Amount of the windfall to the landlord was a relevant factor when exercising the discretion

# RELIEF FROM FORFEITURE

Lord Justice Briggs ([68])

*“This conclusion should not be misinterpreted as conferring carte blanche on tenants to disregard their covenants, wherever there is value in their leasehold interest which would be lost by an unrelieved forfeiture. In every case a balance will have to be struck, and **there may well be cases where even substantial value has to be passed to the landlord, if no other way of securing the performance of the tenants' covenants can be found.**”*

# RELIEF FROM FORFEITURE

What if the lease  
**cannot be assigned?**

# RELIEF FROM FORFEITURE

## SHB Realisations Ltd v Cribbs Mall Nominees [2019] 3 WLUK 588

# RELIEF FROM FORFEITURE

## Lease

- Cribbs Mall – shopping centre outside Bristol
- 125 year lease granted to BHS in 1987 for premium of £7m
- One of four anchor stores
- Keep open covenant
- Service costs - £760,000 p.a.
- Right of pre-emption if BHS wished to assign whole of demised premises



# RELIEF FROM FORFEITURE

## Subsequent events

- Feb 2016 - Gordon Brothers lent £9.4m secured against the lease
- 25 Apr 2016 - BHS went into administration
- June 2018 – marketing of lease begins
- 28 Aug 2016 – Cribbs Mall store closed
- Obvious and admitted breach of keep open covenant
- No prospect of BHS ever performing the covenant
- No prospect of Gordon Bros ever performing the covenant
- LL serves section 146 notice
- BHS/Gordons apply for relief



# RELIEF FROM FORFEITURE

## **Trial**

- Breach admitted
- Inability to remedy admitted
- Willingness to assign
- Issues

What market if any was there in the Lease?

What was the value of the Lease

To BHS?

To the tenant?

# RELIEF FROM FORFEITURE

## Evidence of market interest

- 7 Nov 2017 – BHS serve a pre-emption notice offering the lease to the LL at £8.65m
- In fact there was no offer for lease at that or any price
  - *“Insofar as it can be said that there is a line between hard commerce and fraud the above tactics must come close to straying into the latter and SHB’s/ GB’s conduct is exceedingly questionable.”*
- 7 Sep 2018 – Days (Edinburgh Woollen Mill) make an email offer at £2m subject to contract
  - Held to be no more than “taking a bit of a punt”
- Jan 19 – emails from Sports Direct indicating they might be willing to make an offer which involved buying the debt as well as the lease

# RELIEF FROM FORFEITURE

Held:

- Some albeit limited interest in the lease from Sports Direct
- The value of the lease was £1m
- Relief granted on condition the lease was assigned or surrendered pursuant to the pre-emption conditions by 28 June 2019
- BHS/Gordons had to pay LL's costs on indemnity basis
- That rendered irrelevant the LL's application to amend its costs budget

# RELIEF FROM FORFEITURE

Take away points where breaches will/can not be remedied:

- (1) Where there is a market for a lease, the lease has value.
- (2) The relative value to lease to the landlord and to the tenant is relevant to the exercise of the discretion unless there is no market (the “windfall” argument).
- (3) Time will be allowed to find an assignee but only if there is evidence of market interest.
- (4) It will be an odd lease which has no value to anyone, though these facts came as close to that as possible – without Mike Ashley there would have been no market.
- (5) Relief will pretty much always be granted if the tenant is prepared to assign.
- (6) Remember costs will be awarded on an indemnity basis unless the landlord had acted unreasonably. Take care the costs do not outweigh the value of the lease.

# RELIEF FROM FORFEITURE

## What happened?

An offer was made, though the mechanics could not be completed in time for compliance with the condition imposed by the court

A pre-emption notice was served

The genuineness of the pre-emption offer was accepted by LL

Time for compliance with the precondition was extended by consent

BHS/Gordons agreed to pay all subsequent costs on the indemnity basis

# RELIEF FROM FORFEITURE

What was the price offered?

Who offered it?

May have to wait until the surrender of the lease is registered to find out the price.

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