Costs, forfeiture and waiver: an unholy trinity

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Introduction

On 5th December 2018 HHJ Huskinson handed down his decision in *Stemp and anor v 6 Ladbroke Gardens Management Ltd* [2018] UKUT 375 (LC).

This was an appeal to the Upper Tribunal ("UT") from a decision of the First-tier Tribunal Property Chamber (Residential Property) ("FTT") that the Stemps ("A") should pay an administration charge of £26,381.98 in relation to certain costs which had been incurred by the respondent ("R") in contemplation of proceedings under section 146 of the Law of Property Act 1925.

The relevant demand

On 15 March 2016, R served a demand for £18,971.72 on A, for advance service charges, payable on 1 April 2016 ("the relevant demand").

The contractual right to re-enter and forfeit

R's contractual right for to re-enter and forfeit the lease arose after 21 days had elapsed from 1 April 2016, i.e. 22 April 2016, subject to the relevant demand remaining unpaid. This contractual right was, however, subject to the statutory hurdles arising under section 81 of the Housing Act 1996 ("the Application") and section 146 of the Law of Property Act 1925 ("the Notice").

The Application

R made an application to the FTT on 29 April 2016 for a determination of A's liability to pay the 2016/17 service charges as a first preliminary and necessary step in the preparation and service of the Notice.

On 3 September 2016, R served a demand for £18,971.72 for service charges due in advance on 1 October 2016 ("the second demand"), which charges were expressly reserved by the lease as rent.

By a decision dated 16 December 2016, the FTT determined that the estimated budget for the year ending 1 April 2017 was £37,943.44, i.e. the relevant demand plus the second demand ("the Determination").

R obtained payment of the two demands and, as a result, forfeiture of A's lease could no longer be in R's contemplation.

The costs decision

R, however, sought to recover from A the costs incurred in the proceedings which had led to the Determination, and accordingly served a demand dated 6 March 2017 for £43,969.96.

A did not pay, and so R made an application to the FTT, dated 1 June 2017, for a determination as to A's liability to pay the costs pursuant to clause 2(vi) of the lease as a necessary step in contemplation of forfeiting A's lease for non-payment.

A pursued a number of lines of argument, in particular as to whether or not R had waived the right to forfeit for non-payment of the relevant demand. The FTT decided it did not have the jurisdiction to consider the waiver point, but that in any event there had been no waiver, and determined on 4 December 2017 that A should pay R the sum of £26,381.98 by way of reasonable administration charges for legal costs and fees ("the costs decision").

The Appeal

A obtained permission to advance two grounds of appeal, *viz*. (i) whether the FTT had jurisdiction to decide if R's right to forfeit for non-payment of the relevant demand was waived and (ii) if so, whether that right had in fact been waived and when.

At the hearing, however, it was common ground between the parties (and the judge also agreed) that the FTT was wrong in concluding that it had no jurisdiction to decide whether there had been a waiver by R of the right to forfeit the lease for non-payment of the relevant demand.

This was because without reaching a decision on the waiver point the FTT could not decide the very question which was before it as regards the reasonable costs: see *Swanston Grange (Luton) Management Limited v Langley-Essen* [2008] L & TR 20 - a decision under section 168 of the Commonhold and Leasehold Reform Act 2002 (no

section 146 notice without a determination by the FTT that there has been a breach) – in which the leasehold valuation tribunal was said to have jurisdiction to decide whether the right to rely on a covenant at all had been waived.

Furthermore, in *Barrett v Robinson* [2014] UKUT 322 (LC) the UT held, in relation to a covenant similar to clause 2(vi), that such a clause would not oblige a tenant to pay the costs incurred by their landlord in taking steps preparatory to the service of a s.146 notice if the right to forfeit had previously been waived by the landlord such that the opportunity to forfeit would have been lost before the relevant costs had been incurred.

As regards the acts of waiver, A sought to rely on a medley of communications which had been addressed "Dear Leaseholders", some of which referred to leasehold covenants and others which referred to potential liability for service charges, the lease and in another case as being from "your Landlord", as well as section 20 consultation notices, and the second demand.

Waiver

It is settled law that a landlord, with knowledge of the right to forfeit, who accepts rent due after the right to forfeit has accrued will have waived that right. A demand for such rent has also been held to give rise to such a waiver, albeit at first instance: see e.g. *Greenwood Reversions Ltd v World Entertainment Foundation* Ltd [2008] H.L.R. 31 at paragraph 26 and see also the decision of Master Teverson in *R Square Properties Ltd V Reach Learning Ltd* [2017] EWHC 2947 (Ch).

Otherwise, it is necessary "to consider objectively whether in all the circumstances the act relied on as constituting waiver is so unequivocal that when considered objectively it could only be regarded as being consistent with the lease continuing", per Thomas LJ in *Greenwood Reversions* at paragraph 30.

Whether or not there has been a waiver turns entirely on the "quality of the act" in question, in respect of which the motive or intention of the landlord is irrelevant, see per Buckley LJ in *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048.

R's rejected submissions

HHJ Huskinson rejected R's submission that a landlord is unable to waive a right to re-enter because there is some other fetter upon exercising a right of re-entry, for an irremediable breach, which has not yet been worked through. He considered, however, that the position may be different where the breach is remediable because in such a case, the right to forfeit has not arisen until the section 146 notice has expired, and an acceptance of rent due during its currency would not waive the right to forfeit for the breach if the breach continued thereafter and after the expiry of that notice: see *Woodfall: Landlord and Tenant* para 17.098.1 and *Segal v Thoseby* [1963] 1 QB 889.

HHJ Huskinson also rejected R's submission that there could be no waiver of the right to re-enter based upon non-payment of the relevant demand until it had been established, through a decision of the FTT, what if anything was actually owing.

Accordingly, it was possible for R to waive the right to re-enter for non-payment of the relevant demand from 22 April 2016 when the right to re-enter arose.

The Decision on Appeal

HHJ Huskinson followed the first instance line of authority which had held that a demand for rent could amount to a waiver. He considered that R had, through its agents, made the second demand in circumstances where R knew of the facts giving rise to a right to re-enter, such that the demand constituted a waiver of the right to re-enter.

Alternatively, the making of the second demand was for a large sum, reserved as rent payable on 1 October, to provide funds to carry out major works so as to put the building into a proper state of repair for the future. It was clearly inconsistent with the contention that the lease was forfeit and that A should in the future have no enjoyment of the building under the lease. It was an act so unequivocal that when considered objectively it could only be regarded as being consistent with the lease continuing, and with A continuing to enjoy the building in respect of which they were being required to pay so large a sum for repairs, and on this basis also amounted to a waiver of the right to forfeit for non-payment of the relevant demand.

The judge gave rather short shrift to the other submissions. At all relevant times A were the lessees of the maisonette, so letters which referred to the "leaseholders" did not constitute an unequivocal act of waiver as A were in fact leaseholders and this was a convenient phraseology for the respondent's agents to use.

He also did not consider that R's action in including A within the consultation process on the basis of A being leaseholders (which is what they in fact still were) was an action so unequivocal that when considered objectively it could only be regarded as being consistent with the lease continuing.

Likewise HHJ Huskinson considered that where a landlord has proclaimed that it is proceeding towards forfeiture of a lease for an identified breach and where the landlord in the meantime performs its responsibilities (which it could not properly omit) regarding the building (including under a threat of legal proceedings if it did not) then reliance by the landlord upon the terms of the lease for the purpose of performing these responsibilities did not amount to a waiver. The judge distinguished the case of *Cornillie v Saha* [1996] 2 WLUK 72, CA on the basis that in that case, the landlord had actually launched legal proceedings asserting the terms of the lease against the tenant, and also that it appeared to have been conceded, upon the facts of that case, that by commencing those proceedings there was an unequivocal act recognising the subsistence of the lease.

R, therefore, was only able to recover by way of an administration charge the amount of the reasonable costs incurred prior to 3 September 2016 in contemplation of the forfeiture, but not thereafter. The FTT had allowed 60% of the costs, which percentage had not been appealed, and which broadbrush approach the UT was not prepared to criticise. HHJ Huskinson therefore allowed 60% of the costs incurred before 3 September, which amounted to £10,766.

Observations

In this case, costs of nearly £44k were expended chasing forfeiture for around £19k of arrears, cut down by the FTT to some £26k, leading to an appeal (with further costs) and after which only costs of some £11k were finally recovered from A. As ever it is always easy to be wise after the event, but it is an heroic landlord (or his agent) who

serves a demand for rent in circumstances where he knows that a right to elect to forfeit a lease has arisen.

No point was taken on whether or not it was the date of the demand or the date of the receipt of the demand by A that was the operative date for the waiver, possibly because it made no difference to the final costs calculation. Although demand and acceptance of rent are treated as the same thing, and are both elections by the landlord not to avoid the lease (per Sachs J. in *Segal* at 898 and the opinion of Mr. Baron Bramwell in *Croft v. Lumley* [1858] VI H.L.C. (Clark's) 672 at 704), in *David Blackstone Ltd v Burnetts (West End) Ltd* [1973] 1 W.L.R. 1487, QBD per Swanwick J. at 1499B-C, that election by way of demand does not become effective until communicated to the tenant.

It is often said that the courts have always leaned against forfeiture (*Goodright d. Walter v Davids* (1778) cowp. 803, 805). Perhaps it also pays to bear in mind the observation of Sachs J. in *Segal* at 897 that '[w]hen one approaches the law relating to waiver of forfeiture, one comes upon a field - one might say a minefield - in which it is necessary to tread with diffidence and warily'.

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