

## Forfeiture of commercial leases: a reminder

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The recent case of [The Tropical Zoo Limited v The London Borough of Hounslow](#) provides some useful reminders and guidance in relation to the law surrounding the forfeiture of commercial leases.

### Background

The case concerned a lease granted by Hounslow LBC to the tenant (TZL) over land and buildings which would be developed to create a zoo together with associated facilities including a restaurant, shop, animal welfare centre and adventure play area. The tenant covenants in the lease included specific obligations in relation to the development works which were to be carried out within a specific timeframe. The lease contained step in rights to allow the Local Authority to carry out the works if the tenant failed to complete them in time.

The lease also contained a standard forfeiture clause and a further clause (a Remediation Clause) requiring the tenant to remedy breaches on notice and an ability for the landlord to re-enter and remedy breaches at the tenant's cost if the tenant failed to comply with any such notice. Such clauses are commonly used in commercial leases in connection with wants of repair and, in that context, are known as *Jervis v Harris* clauses but can, as in this case, cover any material breach of a lease.

TZL was unable to complete the redevelopment works due to an inability to secure funding. This led to the Local Authority serving notice under the Remediation Clause requiring it to comply with the development obligations. TZL failed and the landlord thereafter served notice of forfeiture (a s146 Notice). The breached relied on was a failure to comply with the Remediation Clause.

In the case of certain breaches of lease the right to forfeit the lease can be lost or 'waived' if the landlord's



conduct assumes the lease is continuing. To avoid this happening the landlord put a stop on demanding rent. In this case TZL continued to tender rent and in the case of all but three payments the rent was promptly returned. As to those three instances, the rent payments were returned a number of months after payment. In two cases this was down to the landlord's agent using the wrong account number to return funds. In the other case it was down to a change in personnel at the agent's office meaning a return payment had not been fully actioned.

## The proceedings

TZL commenced these proceedings, seeking a declaration that it was not in breach of the Remediation Clause and that the landlord had in any event waived the right to forfeit by not returning all payments promptly. TZL also sought relief from forfeiture in the event the court determined the landlord was otherwise entitled to terminate the lease.

## The Remediation Clause

The question the court had to consider was whether a failure to comply with the Remediation Clause itself gave rise to an entitlement to forfeit. TZL contended all the Remediation Clause did was set a series of conditions precedent to the landlord being able to remedy matters itself and recharge costs to the tenant. The Court disagreed. The wording of the clause was clear and in two distinct parts. The first part was the requirement to remediate following service of notice. The second, separate, provision, was the landlord's rights to remediate. To exercise the right to remediate a notice must first have been served, but that did not mean the failure to comply with notice under the Remediation Clause could not itself be a breach on which to seek to forfeit.

Jervis v Harris clauses became commonplace, in part to avoid the restrictions on the enforcement of repairing covenants prior to the last few years of the term, including enforcement by forfeiture. The Court in this case was clear that a failure to comply with a notice to repair under a Jervis v Harris clause could in and of itself give rise to an ability to forfeit a commercial lease, though as this case did not concern a breach by TZL of a repairing covenant the court did not have to consider in any detail the interrelationship between this right and the aforementioned restrictions.

## Waiver

The argument on waiver was quite simple. The failure to promptly repay rent should be considered as an acceptance by the landlord which waives the right to forfeit. It is correct that the acceptance of rent by a landlord waives the right to forfeit in respect of pre-existing breaches that it is aware of and on this point the case turned on the 'acceptance' of rent by the landlord and the delay in returning payments. As to the acceptance, payments were made to the landlord's agents who was performing nothing other than an administrative accounting function. A delay in returning funds by the agent could not be considered to reflect a decision by the landlord to retain funds given the circumstances for late return in each case was consistent with the landlord wishing to retain the funds.

## Payments of rent during the life of a s146 Notice

A notice of forfeiture will, in the case of a breach that is capable of remedy, provide that the tenant is to remedy the breach within a specified period. It is a failure to adhere to that which entitles the landlord to forfeit. The court was asked to consider whether it was possible to accept payments of rent during this remediation period without waiving the right to forfeit. The rationale was that the landlord was giving the tenant the benefit of the lease during the remediation period and as such the tenant should be required (and the landlord entitled to receive) payment irrespective of whether the breach is remedied. The basis of this argument was a New Zealand case. While the Court found merit on some of the arguments raised the conclusion on this point was that in

order to be susceptible to waiver, the right to forfeit must have arisen. The service of notice or the expiry of a remediation period specified in such a notice is not relevant.

## Relief

Having determined the landlord's entitlement to forfeit and the absence of waiver, the final question for the court was whether the former tenant was entitled to relief from forfeiture. Relief is a discretionary remedy whereby a court can determine that, notwithstanding the existence of breaches the lease will be allowed to continue if the tenant take certain steps (typically remediating breaches and/or paying damages or costs to the landlord within a set period of time). In deciding whether to grant relief the court has to weigh up all of the facts of the case. In this case the court was satisfied that the overwhelming reason for granting the lease was the prospect of the development and, as there was no evidence that the development could be implemented by TZL, there was no basis to grant relief.

## Concluding comments

The case does not make new law but it does serve as a useful reminder of how Jervis v Harris clauses could be utilised as a precursor to forfeiture as well as the law of waiver and what constitutes acceptance of rent for that purpose.

## How we can help

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