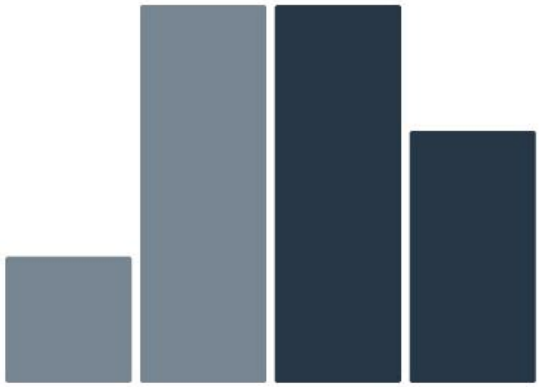
The Insider's Guide to: Forfeiture



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What is Forfeiture?

All commercial landlords are likely to be familiar with the term ‘forfeiture’. Particularly as the property market evolves, it is not a remedy used lightly, presenting landlords with empty properties, possible reputational damage and the challenge to re-let at equal or better rates of return.

Also known as the landlord’s right of re-entry, the exercise of the right of forfeiture has the effect of bringing to an end a lease at a point earlier than that allowed for under the terms of the lease. It is exclusive to the landlord, and generally exercised following a breach of covenant or default by the tenant, such as non-payment of rent.

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Operation of forfeiture

For a landlord's right of forfeiture to exist, this essential 'boilerplate' clause must be expressly incorporated within the lease. Wording of a forfeiture clause generally takes a fairly standard form, allowing a landlord to take steps to forfeit the lease in the event that:

- the rent remains unpaid by the tenant for a defined period following its due date for payment;
- the tenant becomes insolvent; or
- the tenant breaches one of its covenants under the lease.

The wording of the clause will allow the landlord to re-enter the premises and immediately determine the lease, often without prejudice to any other remedies the landlord may seek in respect of breaches of covenant, such as damages.

A breach of covenant or non-payment of rent by a tenant, or a tenant's insolvency, does not automatically bring about forfeiture of a lease; the clause simply allows the landlord to terminate the lease if it wishes, and the landlord must act in order to do so by issuing proceedings to recover possession of the property and bring the lease to an end.

If a landlord fails to act on a breach by the tenant, it may be considered as having 'waived' the breach and therefore accepted it, in the process losing its right to forfeit. Waiver of forfeiture may include actions such as acceptance of rent in the knowledge that a tenant has breached a covenant such as that to repair, or pursuing an action for recovery of rent arrears without incorporating within that claim a request for forfeiture.

Assured shorthold tenancies are protected by the Housing Act 1988 and cannot be forfeited.

Procedure

In theory, a landlord can forfeit a lease through simple re-entry of the premises and changing the locks. However, far more common is the issue of a formal possession claim.

A landlord will commence any forfeiture proceedings by issuing a Section 146 Notice. Set out under s.146 of the Law of Property Act 1925, the S.146 Notice is a formal warning to a tenant before forfeiture is sought.

The S.146 Notice will specify the breach, give the tenant opportunity – including adequate time - to remedy it and require the tenant to compensate the landlord financially if required.

Where the landlord chooses to continue to effect forfeiture, it will do so through either peaceable re-entry or the issue and service of court proceedings under Part 55 of the Civil Procedure Rules. The intention to forfeit must be clear, with full details of the claim and supporting evidence.

Landlords generally receive an award for costs, regardless of whether or not the claim is decided in their favour. It is the Courts' common view that landlords should not be penalised for pursuing claims which are designed to protect their interest.

Points to consider

J B Leitch includes as standard express forfeiture provisions in draft leases allowing landlords the right to terminate on a tenant breach. It is recommended that such provisions are kept as wide as possible, giving the landlord maximum flexibility when a need to forfeit arises.

Landlords and managing agents are advised to monitor tenant performance carefully; any waiver of breach may mean that the right to forfeit is lost and the recovery of any other remedy made more difficult in an already damaged landlord and tenant relationship.

Perhaps the most crucial point to consider, however, is whether to forfeit at all; how easily can the premises be re-let? Could the breach be remedied in any way other than forfeiture? How damaged is the relationship between the parties? Forfeiture is a powerful remedy which, once exercised, cannot be undone. In the majority of cases, it should be undertaken only when all other possible avenues have been exhausted.