Forfeiture of Commercial Leases

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Key points

- In basic terms, forfeiture is a right expressed in a lease for the landlord to terminate the lease in the event of tenant "default", on the conditions set out in the lease itself.
- Once a landlord is aware of a once and for all breach of lease, they must be careful not to waive the right to forfeit in respect of once and for all breaches.
- If the landlord treats the lease as in any way continuing, then in all likelihood, the right to forfeit will be waived in respect of once and for all breaches.
- With regard to the non-payment of rent, the right to forfeit arises after the requisite number of days specified in the lease has elapsed.
- As soon as a landlord (or their agent) becomes aware that a breach of lease has occurred, then assuming the landlord wishes to consider forfeiture action, the landlord ought to:
  i. Consider whether the breach is a once and for all breach (please see overleaf for some examples);
  ii. If it is a once and for all breach, immediately stop all correspondence and demands being sent to the tenant;
  iii. Take advice on returning monies received after the landlord became aware of the breach, or after the requisite number of days had passed in respect of non-payment of rent; and
  iv. Tell their legal advisers who is in occupation of the premises and whether any part of the premises is used for residential purposes, provide a copy of the lease and any licences granted and provide full details of the breach.

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Once and for all breaches

Examples of once and for all breaches are:

- Non-payment of rent and other sums payable under the lease (e.g. service charges/insurance premiums);
- Tenant insolvency;
- Breaches of covenants not to make alterations or not to make alterations without consent;
- Unlawful assignment, subletting or parting with possession; and
- Failure to "put" repair or carry out works by a specified date.

Top tips

- In respect of forfeiture for the non-payment of rent, the lease ought to contain the magic words that the landlord may re-enter the premises whether or not the rent has been formally demanded. If the lease does not contain those magic words, then the landlord ought to seek advice as soon as possible and before taking steps to forfeit, as a historic rule regarding the demanding of rent will need to be complied with before the requisite period specified in the lease.

- It is not necessary to serve a notice pursuant to Section 146 of the Law of Property Act 1925 when forfeiting in respect of the non-payment of rent. A Section 146 Notice is required for all other breaches before forfeiture action is taken.

- If the breach relates to the covenants to repair, and the lease was originally granted for a term certain of at least seven years and has more than three years remaining, the Section 146 Notice must include a provision that the tenant is entitled to serve a counter-notice pursuant to the Leasehold (Property) Repairs Act 1938. If the tenant serves such a counter-notice within 28 days, then the landlord will not be able to forfeit the lease without the Court's permission.

- Insolvency checks against the tenant ought to be undertaken before forfeiting as this may prevent forfeiture without the consent or the court or the insolvency practitioner.

- Court proceedings will be necessary if any part of the premises demised are used for residential accommodation.

- Once forfeited, a lease may only be resurrected by an Order of the Court.

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