

Relief from forfeiture revisited: *Magnic, Safin and Freifeld*

1. Much like London buses, cases on particular property law issues often come in clusters. This summer it was the turn of relief from forfeiture the principles of which were considered by the Court of Appeal on no less than three occasions in *Magnic v Ul-Hassan and anor* [2015] EWCA Civ 224, *Safin (Fursecroft) Limited v Badrig* [2015] EWCA Civ 739 and *Freifeld v West Kensington Court Limited* [2015] EWCA Civ 806. This paper considers where those decisions have taken us and tentatively questions whether that is a good place for us to be.

(1) *Magnic v Ul-Hassan and anor*

2. In 2007, the landlord issued forfeiture proceedings seeking possession on the grounds that the premises were now being used as a pizza takeaway outlet in breach of planning control. In the usual way, the tenants responded by applying for relief.
3. In January 2010, shortly before trial, the parties entered into a consent order which provided for the tenants to have relief if they obtained planning permission for takeaway use by March 2010 or, alternatively, if planning permission was not forthcoming, ceased the takeaway business within a further 28 days.
4. The tenants did not obtain the requisite planning permission by March 2010 and did not then cease the takeaway business as the consent order required. The landlord therefore applied for an order for possession. The tenants cross-applied for further relief from forfeiture on terms that would effectively extend time for them to obtain the required planning permission.
5. The District Judge who heard that application declined to grant relief on terms that extended the time for the tenants to resolve their planning issues and instead granted relief conditionally on terms that they cease the takeaway business altogether by February 2011.
6. The tenants were disappointed by the outcome and appealed. Permission for that appeal was granted and, at the same time, an interim order staying the District Judge's order was made. Importantly, the tenants and their legal advisers believed that the stay would enable them to continue to operate the takeaway business past the February 2011 deadline. As the Court later found, they were wrong about that:

the stay merely prevented enforcement of the order and did not relieve the tenants of the obligation to comply with it. It was only when their appeal was dismissed (and the stay lifted) in May 2011 that the tenants ultimately ceased trading.

7. In March 2012, the landlord issued fresh proceedings seeking a declaration that the lease was now forfeit, the tenants having failed to obtain relief by ceasing trading by the February 2011 deadline. Once again, the tenants cross-applied for a *third* order granting relief from forfeiture.
8. The application was determined by August 2012 by a District Judge who concluded, correctly as the Court of Appeal later found, that there was jurisdiction for the Court to grant further relief by extending time for compliance with conditions attached to an earlier order for relief (*Starside Properties v Mustapha* [1974] 2 All ER 567, *Fivecourts Limited v JR Leisure Development Co Ltd* [2001] L&TR 5).
9. Applying those principles, the District Judge refused the tenants' application for further relief for these reasons:
 - (1) The decision not to stop trading in time for the February 2011 deadline was, in the view of the District Judge, a "deliberate decision" (there being no distinction between the actions of the tenants themselves and those of their legal advisers).
 - (2) Although it was a well-established legal principle that a landlord's proviso for re-entry was designed to secure performance of the tenant's covenants (rather than a windfall), this was now the tenants' third attempt to obtain relief. The 'no windfall' principle therefore carried little weight.
 - (3) Some 16 months had elapsed since District Judge Allen's order for relief and there had been no substantive change in the tenants' position, other than delay for which they were responsible, during that period.
10. On a first appeal, Judge Powles QC declined to interfere with the District Judge's exercise of the Court's discretion. On a (second) appeal to the Court of Appeal, the tenants argued that each of the three limbs of the District Judge's reasoning revealed an error that vitiated the exercise of his discretion.
11. The Court of Appeal agreed and held that:

- (1) The District Judge had been wrong to characterise the tenants' decision to continue trading as a 'deliberate decision' in the sense of a conscious flouting or non-compliance" with the second order for relief. The tenants and their legal advisers had genuinely (albeit mistakenly) believed that the stay liberated them from any obligation to comply with the order to cease trading.
 - (2) On the question of windfall, although the fact that the tenants had failed to abide by previous orders for relief diminished the force of their application, that fact was not, of itself, sufficient to determine how the discretion should be exercised. The District Judge's treatment of the 'no windfall' principle was, in any event, tarnished by his erroneous view that the tenants' breach had been deliberate. Interestingly, however, the Court of Appeal added that: "If therefore the defendants' conduct in this case had amounted to a conscious disregard of the terms for relief which the court imposed then it would be much more difficult to argue that the refusal of further relief was wrong in principle even though it would produce a windfall for the landlord" (emphasis supplied). As we shall see, some significance was placed on that post scriptum in our third case, *Freifeld v West Kensington Court Limited*.
 - (3) The District Judge had been wrong to conclude that there had been no substantive change in the Defendants' position since the second order for relief. There had: the tenants had ceased trading in breach of covenants in May 2011 when their appeal against the earlier order was dismissed.
12. Having concluded that the District Judge' decision could not stand, the Court of Appeal exercised a fresh discretion and concluded that relief should, once again be granted to the tenants. In reaching that conclusion, the Court of Appeal relied heavily on the 'no windfall' principle and on its view that the only reason for the default in compliance with the terms of the second order for relief was an innocent mistake about the effect of the stay.
- (2) *Safin (Fursecroft) Limited v Badrig***
13. In *Safin*, the landlord forfeited a lease of a valuable flat, in London W1, on the grounds of non-payment of service charges and breaches of the alterations covenant. The tenant's claim for relief was compromised on the terms of a consent order signed on the eve of trial.

14. The consent order provided that relief would be granted if the tenant remedied the breaches within a set timetable. Importantly, the consent order contained a ‘guillotine’ provision which stated that time was of the essence of the various steps in the timetable and that, in default of compliance, the relief application would stand struck out without further order. The consent order was therefore in “last chance” form.
15. The tenant failed to pay the arrears within the time specified within the consent order but, shortly before the expiry of the deadline, applied for an order extending time under the consent order. By the time that application was heard, the tenant had complied the various conditions in the consent order, albeit late.
16. The landlord argued that the fact that the terms of relief were embodied in a consent order, containing a compromise of litigation, was significant and that recourse must therefore be had to the jurisprudence dealing with the question of whether and, if so, in what circumstances a Court can interfere with a compromise.
17. Under the RSC, the position was that the Court had no jurisdiction to vary a consent order containing a contract of compromise (as distinct from a mere case management order).¹ In the first two decisions under the CPR, at High Court level, it was held that the Court did now have a jurisdiction to interfere with a compromise, but that that jurisdiction should be exercised only in unusual or exceptional circumstances.² In *Pannone LLP v Aardvark Digital Ltd* [2011] EWCA Civ 803, the Court of Appeal considered the authorities on this issue, albeit on an *obiter* basis (being there concerned with a *case management* consent order), and expressed the view that the presence of unusual or exceptional circumstances was not a prerequisite to extending time under compromise consent order: the fact that the order contained a compromise “will have very great and perhaps ordinarily decisive weight”, but did not otherwise impose any limit on the Court’s ability to intervene.
18. The issue of exceptional circumstances was significant in *Safin* because there was plainly nothing exceptional about the tenant’s reasons for not complying with the original timetable: the problems encountered by him in obtaining the required funds

¹ *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185

² *Ropac Ltd v Intreprenneur Pub Co (CPC) Ltd* [2001] L&TR 10; *Fivecourt Limited v JR Leisure Development Co Ltd* [2001] L&TR 5.

and taking the other steps were of a kind that were readily apparent at the time the consent order was entered into.

19. HHJ Mitchell, who heard the tenant's application concluded, relying on *Pannone*, that exceptional circumstances were not required and he duly extended time. In doing so, he relied heavily in the 'no windfall' principle derived from the relief from forfeiture cases and his view that the landlord had "...got what it wanted [out of the litigation], albeit after something of a struggle".
20. The landlord appealed (with leap-frogged permission of the Judge) and contended that the *obiter dicta* in *Pannone* should not be followed; that exceptional circumstances (in the sense of something new having occurred that would not have been contemplated at the time of the original consent order) should be required before disturbing a compromise and that where, as here, the parties have specifically provided that the timetable should final, the Court should respect the parties' bargain and decline to interfere.
21. However, the Court of Appeal disagreed. It held that, although *obiter*, the views expressed in *Pannone* about the Court's jurisdiction to interfere with a substantive compromise were the product of a careful analysis of the authorities and should be followed. Exceptional circumstances were not therefore a prerequisite. Although not expressly dealt with in the judgment, it is clear that the Court of Appeal rejected the landlord's submission that the Court could not intervene in a case where the consent order expressly provides that the timetable is final and not susceptible to being extended by the Court.
22. The Court of Appeal also held that the Judge had rightly had regard to the 'no windfall' principle, in the relief from forfeiture jurisprudence, when exercising his discretion to extend time under the compromise. The fact that the tenant was seeking to obtain relief for a second time, by varying the timetable for compliance with the original conditions, did not reduce the force of that principle. The Court of Appeal in any event concluded that the Judge's decision to extend time was one that he had been reasonably entitled to reach.

(3) *Freifeld v West Kensington Court Limited*

23. In *Freifeld*, the landlord successfully forfeited a valuable lease of restaurant premises, in London W14, on the grounds that the tenants had breached the alienation covenant by the grant of a sub-lease.
24. Importantly, the trial Judge (HHJ Gerald) found that the tenants had taken a “conscious and deliberate decision” to grant the sub-lease in breach of the alienation covenant and that that they had, for some time, been operating the restaurant in a manner that constituted a breach of the ‘anti-nuisance’ covenant in the lease. Those factors (particularly the first) led the trial Judge to conclude that the tenants now faced “a vertiginous climb” to persuade the Court to grant relief and, having concluded that they had scarcely embarked upon that ascent, he dismissed the application for relief.
25. Following the handing down of judgment, the tenants rapidly procured the surrender of the offending sub-lease and made then made a further application for relief from forfeiture. This time the tenants invited the Court to grant relief on terms that they be given six months to sell the lease to a third party failing which it would simply be surrendered.³ The tenant supported its position by reference to the ‘no windfall’ principle and that fact that the subject lease was worth somewhere between £1 – £2 million.
26. But the trial Judge was unmoved. He held that the ‘no windfall’ principle did not operate in favour of a tenant who had wilfully breached the lease – the tenants here were “simply reaping what they had sown” – and that there was in any event no real windfall to the landlord: the tenants’ lease was now of little, if any, value because all that remained in their hands was there mere “hope that relief from forfeiture would be granted”.
27. The Court of Appeal held that the trial Judge had misdirected himself on both counts. On the question of wilfulness, the Arden LJ (who gave the leading judgment) noted the warning shot fired in *Magnic*, and said this:

³ Relief had been granted on similar terms in *Khar v Delbounty Limited* (1998) 75 PC & R 232.

“Therefore the judge was clearly right to make findings about the wilfulness of the breach and to take his findings into account in deciding whether to grant relief from forfeiture. The judge was amply justified in his conclusion. When the lessees have concealed important breaches from the lessor and acted in continuous disregard of their obligations, it would not without some security that the future would be different be fair to grant relief and restore the parties to their previous contractual relationship.”

28. But, importantly, the Court of Appeal did not agree that a finding of wilfulness deprived the tenant of the ability to have recourse to the ‘no windfall’ principle. Moreover, the trial Judge had been wrong to regard the value of the tenants’ lease as having been reduced to nil: the lease would be restored to full value if relief was granted which, of course, was what the tenants were now asking the Court to do.
29. The trial Judge should, in the Court of Appeal’s view, have appreciated that there was “a way of squaring the circle” by granting relief on terms that the lease be sold to a new tenant, with prior approval of the landlord, within six months, in default of which the claim for relief would be dismissed. In the exercise of its fresh discretion, that is what the Court of Appeal resolved to do.

So where does our trio of decisions leave us?

30. Although the decisions have not effected any seismic shift in the approach to applications for relief from forfeiture, they have yielded a number of useful principles.
31. First, the principle that a proviso for re-entry is merely security for the tenant’s performance of the tenant’s covenants and is not intended to confer a windfall on the landlord falls to be applied in all cases. It applies in favour of:
 - (i) A tenant who is applying for a second or even third grant of relief in respect of the same breach (*Magnic* and *Safin*);
 - (ii) A tenant who, with his eyes open and the benefit of legal advice, had consented to the original terms of relief (as distinct from having them imposed) and it even seemingly applies in circumstances where the consent order expressly provides that there should be no extensions (*Safin*).
 - (iii) A tenant whose original breach was the product of a conscious and cynical decision, rather than inadvertence or *force majeure* (*Freifeld*).

32. Secondly, not only does the ‘no windfall’ principle fall to be applied, with equal vigour, in such cases, it is, as our trio of decisions demonstrate, likely to be dispositive of the application in the tenant’s favour – even in cases where the tenant has behaved badly.
33. But, thirdly, where the tenant’s breach is wilful and longstanding, relief should not be granted “without some security that the future would be different” so as to “restore the parties to their previous contractual relationship” (*Freifeld*). Orders for relief on terms that the tenant then sells the lease to a (hopefully better behaved) tenant may now become more common in such cases.
34. Fourthly, even relief on terms is not guaranteed. Both *Safin* and *Freifeld* contain warnings that the Court’s decision to rescue the particular tenant under consideration “should not be misinterpreted as conferring *carte blanche* on tenants to disregard their covenants, wherever there is value in their leasehold interest that will be lost by an unrelieved forfeiture” (*Freifeld*, per Briggs LJ).

Are we where we should be?

35. Our trio of cases will make gloomy reading for landlords. They have long known that, in the ‘plain vanilla’ case, the tenant gets relief provided he remedies his breach in reasonably short order. But equally the authorities from *Chandless-Chandless v Nicholson*⁴ in 1942 to *Freifeld* in 2015 are replete with tantalising warnings that the Court will not ride to the rescue of a tenant who has been slack or casual about the performance of the covenants in the lease or the conditions of the original grant of relief.
36. But that threat, although commonly issued, is scarcely ever carried out. All three of our trio of cases involved applications made by tenants who, to varying degrees, had been guilty of slackness in the performance of the covenants in the lease and/or the conditions of their first grant of relief. But all three were nevertheless indulged by the Court.

⁴ [1942] 2 KB 321: “Lessees must not think for one moment that they are entitled to be slack or casual about the performance of terms. If they are so and then endeavour to get further indulgence from the court, the court will know how to deal with them...” per Greene MR.

37. If one limits the scope of the enquiry to the merits of the particular case, most would regard the result in *Magnic* and *Freifeld* as being ‘right’ and, although perhaps more likely to divide opinions, the decision in *Safin* is at the very least defensible.
38. But what about the bigger picture? The landlord’s forfeiture claim in *Magnic* took seven years to conclude. The forfeiture claim in *Safin* is four and a half years and, in relation to certain ancillary costs matters, it is still ongoing. The *Safin* claim has generated some six substantive hearings, listed for a day or more of Court time, together with the usual array of shorter interlocutory hearings.
39. The burden of a fully-contested forfeiture claim on the parties themselves and, perhaps more importantly, on finite judicial resources is really quite considerable. “This is the Court of perpetual litigation...” – lamented HHJ Mitchell in *Safin* at the start of his judgment – “...Cases are tried, judgments given or consent orders made. The public may be foolish enough to think that that dispute resolution, subject to appeal, is complete. But, no, the ingenuity of those who appear in this court in seeking to reopen issues knows no bounds and the onus on this court is as burdensome in most cases as it is unnecessary.” Ten minutes later, the Judge granted an extension of time under a consent order that stated, in terms, that its timetable was strict.
40. It is not, I suggest, just the ingenuity of tenants and their advisors that breeds perpetual forfeiture litigation: kind-hearted judges also play their part. The trouble with giving a tenant, in an individual case, as many lives as the proverbial cat is that other tenants (and their legal advisers) come to expect that they will be afforded the same degree of judicial latitude. If there were to be a stiffening of judicial resolve and a correspondingly reduction in the opportunities afforded to the tenant to remedy his default, would there then be flurry of cases in which valuable leasehold interests were lost or would tenants, faced with this harsher environment, just get their house in order that much quicker? The latter, I suggest, is rather more likely.
41. The problem that a Judge, who would otherwise be minded to take a firmer approach, faces is that there is venerable line of authority which is to the effect that a forfeiture clause is intended to do no more than provide the landlord with “security for the performance of the tenant’s covenants”⁵ such that equity “leans against

⁵ *Sir Harry Peachy v The Duke of Somerset* 93 E.R. 626; (1720) 1 Str. 447.

forfeiture”⁶. The net result of applying those principles is that, whereas in other related property contexts (eg. development contracts and contracts for the sale of land) termination clauses ‘do exactly what they say on the tin’, a forfeiture clause is not what it seems: it is a contractual sheep in wolf’s clothing.

42. It is appropriate, in this context, to remind ourselves that the principles with which we are now concerned were forged at a time when the legal landscape looked very different to the one in which forfeiture claims are fought out today. Statements of these principles can found in reported cases from the 16th century⁷, but their roots plainly extend even further back than that.
43. Prior to the enactment of the Conveyancing Act 1881, which contained the precursor to the modern-day section 146 of the Law of Property Act 1925, there was no requirement for the landlord to serve a preliminary notice before effective re-entry: a right of re-entry, once acquired, could be exercised peaceably (ie without a court order) and without further warning to the tenant. In those circumstances, one can well understand why equity developed principles designed to protect tenants from a swiftly administered coup de grâce by their landlord.
44. Even by the time those principles were restated in the early 20th century cases⁸, to which modern Judges still refer, the only limit on the landlord’s ability to exercise a right of re-entry was the requirement, under the Conveyancing Act 1881, to serve a warning notice prior to forfeiting for something other than non-payment of rent.
45. But, if we fast forward to the modern day, we find that the obstacles in the way of an effective forfeiture of a lease have multiplied in both number and severity. So, for example, if a landlord wishes to forfeit a residential long lease for breach of a user covenant, he will need to:
 - (i) serve a (Pre-Action Protocol compliant) letter before action and await the tenant’s response;
 - (ii) issue proceedings, in the First-tier Tribunal, to obtain a determination, under section 168 of the Commonhold and Leasehold Reform Act 2002, that the breach has occurred;

⁶ *Goodwright D Walter Davids* (1778) Cowp 803.

⁷ See the authorities referred to in the preceding two footnotes.

⁸ Eg. *Hyman v Rose* [1912] AC 623 (referred to in *Freifeld*) and *Dendy v Evans* [1910] 1 KB 263.

- (iii) wait a further five weeks and then serve a section 146 notice⁹;
 - (iv) allow a reasonable time for the tenant to comply with the section 146 notice to elapse;
 - (v) issue and prosecute court proceedings to obtain an order for possession;
 - (vi) resist any application for relief made before he actually recovers possession;
 - (vii) resist one or more fresh applications to extend time or otherwise vary the terms of the previous orders for relief.
46. Even before one gets to step (vii), that process will, in most cases, have taken literally years to navigate. At each stage, the tenant will, *ex hypothesi*, have received a clear warning that he must remedy his breach, on pain of losing his lease, and then failed to heed it.
47. If equity were to look, *with fresh eyes*, on a 21st century tenant who has arrived at step (vi) without having remedied his breach and/or failed to comply timeously with the conditions attached to a first order for relief so as to reach step (vii), one wonders whether she would adopt such a benevolent approach? Equity's desire to achieve fairness between the parties would surely need to take into account that the distance that the battle-weary landlord must now travel before achieving a forfeiture. If a tenant has repeatedly failed to heed the warnings which must now be given to him, equity might decently decide to harden her heart. There is no maxim that 'equity does not suffer fools lightly', but perhaps there should be.
48. One possible distinction which is not currently, but might yet be, drawn is as between residential tenants on the one hand and commercial tenants on the other. Whilst a degree of mollicoddling may still be appropriate where one is concerned to ensure that Mrs Bloggins is not deprived of her home, it is perhaps harder to see why a plc tenant should not expect to lose its lease if it does not abide by its terms.
49. A distinction could also be drawn between first time applicants for relief on the one hand and tenants who come to Court, cap in hand, for a second time. As a matter of principle, rather than authority, there would seem to be real force in the proposition that whereas, at the first time of asking, the 'no windfall' principle operates almost

⁹ That being the combined effect of sections 168(3) and 169(2) of the 2002 Act.

irresistibly in favour of the tenant, the second application for relief should be fought out on a more equal footing.

50. In all three of our cases, the landlord sought skip around the ‘no windfall’ principle, by having recourse to the acknowledged, but elusive, exceptions to it (viz. the slack or wilful tenant). But, at least to my knowledge, no-one taken aim at the principle itself. A brave landlord might yet invite the Court to reconsider whether a principle drawn from legal antiquity continues to have a proper place in the modern legal landscape. As I have endeavoured to demonstrate, there are reasons, of both practice and principle, why a brave judge might take up that invitation.
51. The Government may yet beat us to the punch. The Law Commission presented its report “Termination of Tenancies for Tenant Default”¹⁰ – in which it advocated the abolition of the law of forfeiture in favour of a new statutory scheme – as long ago as 2006. Very little has happened since then. But, the Government has recently promised to respond to the Law Commission’s recommendations “as soon as practicable in 2015”.¹¹ But a similar promise was made, but not fulfilled, last year. At any rate, it is safe to assume that the law of forfeiture will remain with us for a little time yet. There is still time to knock it into shape before we usher it out the door.

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¹⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272363/6946.pdf

¹¹ Paragraph 104 of the 2015 Report on the implementation of Law Commission Proposals: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/410228/report-on-implementation-of-law-commission-proposals.pdf