Reassessing Forfeiture for Commercial Rent Arrears

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Abstract

The current moratorium on forfeiture of commercial leases for non-payment of rent presents an opportunity to reassess the purpose and operation of forfeiture. It is evident that forfeiture has an uncertain foundation and that its operation presents opportunities for 'sharp practice'. It is suggested that forfeiture should be subject to increased oversight, and that the binding arbitration process proposed for rent arrears arising from the COVID-19 pandemic might be extended more broadly.

Introduction

Two recent developments illustrate the uncertainty and inconsistency which characterise the law governing forfeiture of commercial leases for non-payment of rent. In *Keshwala v Bhalsod*[1], Mr Keshwala had held leasehold commercial premises under a 20-year lease from 2008. Following an accidental underpayment in June 2018 of one rental payment by £500 (to which the landlord made no reference for several weeks), the landlord forfeited the lease by peaceable re-entry in September 2018. Mr Keshwala claimed relief from forfeiture in February 2019. The Court of Appeal acknowledged that the decision to forfeit in these circumstances was 'very harsh'[2], but, allowing the appeal against the High Court's decision, it upheld the County Court decision to dismiss the claim for relief.

The outcome would have differed had Mr Keshwala's underpayment occurred after 25th March 2020, when the Coronavirus Act 2020 ('CA') came into force. S 82(1) CA states that 'A right of re-entry or forfeiture, under a relevant business tenancy, for non-payment of rent may not be enforced … during the relevant period'. S 82(12) defines 'rent' as 'any sum a tenant is liable to pay under a relevant business tenancy'. A 'relevant tenancy' is any tenancy 'to which Part 2 Landlord and Tenant

[1] *Keshwala v Bhalsod* [2021] EWCA Civ 492
[2] *Keshwala* (n1) [21]

Act 1954 applies'[3]. The 'relevant period', which initially ended on 30th June 2020, was extended six times, the last extension being until 25th March 2022[4]. The suspension of the right of commercial landlords to forfeit for non-payment of rent until that date offers an unusual opportunity to assess not only the effect of that suspension but also to consider how forfeiture might be altered when that suspension ends.

Suspension of the right to forfeit has had two significant effects, one financial and the other procedural. The British Property Federation estimated that by 30th June 2021 the commercial rent arrears incurred since the CA and the Health Protection (Coronavirus, Business Closure)(England) Regulations 2020[5] came into force totalled more than £7.5 billion[6]. The second effect is abuse of the suspension. Many tenants, unable to trade, were unable to pay rent. Some, however, perhaps utilising the absence in s82 CA of any distinction between businesses which could or could not operate, or between businesses which could or could not afford to pay rent, appear to have been unwilling, rather than unable, to pay. *Bank of New York Mellon (International) Ltd v Cine-UK Ltd*[7] and *Commerz Real Investmentgesellschaft mbH v TFS Stores Ltd*[8] both concerned proceedings for non-payment of rent, a remedy which remains available. In both cases, the tenants, who traded variously as a sports retailer, cinema, bingo business, nightclub and perfumerie, were unable to trade. None claimed that they were unable to pay rent. In both cases, the landlords sought summary judgment, and in both cases the tenants employed several potentially plausible defences, including that they should be entitled to share the proceeds of the landlords' loss of rent insurance, and, in *Mellon*, that the leases had temporarily been frustrated, all of which were 'unhesitating[ly]' rejected[9].

The decisiveness with which Parliament acted to suspend forfeiture and with which the courts in *Mellon* and *Commerz* appear to have acted to prevent exploitation of that suspension can be contrasted with the hesitant progress of *Keshwala* through three courts to an unattractive outcome.

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[3] Coronavirus Act 2020 s 82(12)(a)
[4] Business Tenancies (Protection from Forfeiture: Relevant Period)(Coronavirus)(England)(No2) Regulations 2021 (SI 2021/732)
[5] Health Protection (Coronavirus, Business Closure)(England) Regulations 2020 (SI 2020/327)
[6] GOV.UK, Supporting businesses with commercial rent debts: policy statement https://www.gov.uk/government/publications/resolving-commercial-rent-arrears-accumulated-due-to-covid-19> accessed 17 September 2021, 4
[7] *Bank of New York Mellon (International) Ltd v Cine-UK Ltd and others* [2021] EWHC 1013 (QB)
[8] *Commerz Real Investmentgesellschaft mbH v TFS Stores Ltd* [2021] EWHC 863
[9] Guy Featherstonehaugh and Elizabeth Fitzgerald, 'Rent in the time of Covid' EG 1 May 2021 48, 49

It is suggested that that contrast is evidence of judicial and parliamentary uncertainty as to the proper function and operation of forfeiture, which can only partly be explained by the profound difference in circumstances between 2019 and 2021.

Difficulties with the nature and purpose of forfeiture

Examination of forfeiture reveals uncertainties as to its nature and purpose. Concise summaries tend to emphasise a direct connection between it and breach by the tenant of its covenants, but the explanation of that connection varies. Gray and Gray describe forfeiture as 'the most draconian weapon in the armoury of the landlord whose tenant has committed a breach of covenant'[10]. Supporting this view, the Law Commission described it as 'often the only means by which the landlord may respond to breaches of covenant by ending the tenancy and recovering possession'[11], portraying forfeiture as a 'response' (and in its view sometimes the only available response) to a tenant's breach.

The non-legal terminology of 'weapon' and 'respond' in these descriptions points to a certain hesitancy to categorise forfeiture in legal terms. Gray and Gray note that although forfeiture is 'colloquially a remedy'[12], it does not remedy any preceding breach but 'merely prevents its recurrence and affords relief to the landlord from being saddled with a defaulting tenant'[13]. Issue might also be taken with the Law Commission's reference to 'often', *Mellon* and *Commerz* being examples of occasions when proceedings to recover arrears offered a more direct 'remedy' to the landlord. Moreover, if forfeiture is regarded, even if only 'colloquially', as a remedy, it might be expected that it would attempt to 'cure' the breach, or to return the landlord to its position before the breach, neither of which it is suggested are achieved by depriving the tenant of its lease. Successful forfeiture returns a landlord to the circumstances prior to the creation of the lease, rather than to those preceding the breach, a change of position that can appear neither adequately related, nor proportionate to, the breach. The success of Mr Keshwala's landlord, presumably unwilling to allow his continued occupation, in depriving him of another 10 years of possession for a relatively

[10] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP, 2009) 469
[11] Law Commission *Termination of Tenancies for Tenant Default* (Law Com No 303, 2006) Executive Summary para 1.1
[12] Gray and Gray (n10) 469
[13] *Razzaq v Pala* [1997] 1 WLR 1336 at 1343E-F per Lightman J

minor breach would suggest that the direct connection which is conventionally perceived to exist between forfeiture and breach of covenant is perhaps less substantial than it appears.

Some descriptions of forfeiture portray it as intrinsic to the landlord and tenant relationship. It has been described as 'what gives value and substance to the … freehold reversion'[14], a description which in turn poses the question of whether the current suspension of the right to forfeit has similarly suspended that value and substance. Another view is that forfeiture is 'penal in nature'[15], which raises the issue of the extent, if any, to which provisions designed to punish a tenant, rather than to compensate, or to rectify the loss suffered by, the landlord should exist in a commercial contract.

Forfeiture has also been described in pragmatic or functional terms as 'provid[ing] the landlord with a realistic security for … the rent due'[16]. This view of forfeiture, not as a 'weapon' or a 'response,' but rather simply as a 'device' or 'mechanism' perhaps implies that only forfeiture performs this function. It might be argued that other mechanisms, such as Authorised Guarantee Agreements, personal guarantees, rent deposit deeds and, as rejection of the tenants' ingenious and initially attractive arguments in *Mellon* and *Commerz* ably demonstrated, simple proceedings, all of which remained available during the 'relevant period', are more direct, effective and realistic route to recovery of rent arrears than forfeiture of the lease. Furthermore, to be an effective 'security' for the rent due, forfeiture necessarily depends on the availability of a new tenant to whom the premises can be re-let, a limitation currently evident: Campbell argues that 'Landlords on the whole are unlikely to seek to forfeit leases *en masse* once the moratorium is lifted, particularly in retail and hospitality where there is little demand from new tenants'[17]. The depiction of forfeiture as a 'security' also carries with it the implication that it is a 'safety net' or final line of protection for landlords, and as such should be exercised only when other 'weapons' or 'responses' have been exhausted, an implication on which doubt is cast by the absence of any statutory or other requirement that landlords will pursue other avenues first.

[14] *Cowan v Dept of Health* [1992] Ch 286, 295
[15] *Shiloh Spinners Ltd v Harding* [1973] AC 691, 719
[16] *Re Lomax Leisure Ltd* [2000] Ch 502, 513
[17] Rebecca Campbell, 'Lifting the moratorium: no one size fits all', EG 17 April 2021 47

More detailed investigations into the precise nature of forfeiture, by reference to its component parts expose a degree of contradiction as to what it is, its purpose and how it is intended to achieve that purpose. Assertions that forfeiture is in some way intrinsic to business leases, or that it is what confers value and substance on the landlord's interest are accompanied by a reticence to recognise that status. Unlike, for example, a landlord's covenant for quiet enjoyment, a tenant's covenant to pay reasonable rent, or numerous statutory qualifications to the rights of parties (for example s19(1A) LTA 1927, prohibiting unreasonable refusal of consent to assignment or subletting), the right to forfeit is not automatically implied, but depends for its existence on the inclusion of a contractual provision.

The routine inclusion of forfeiture clauses (often conferring the right to forfeit on non-payment for 14 or 21 days) might be attributable to a general recognition of the importance of forfeiture to the landlord and tenant relationship. Equally, however, this inclusion might simply arise from professional practice and convention, and from a desire to avoid the creation of leases which are perceived to be substantially defective, with the professional negligence consequences that follow. It might also be argued that in sectors such as retail or hospitality where potential tenants are scarce, the routine inclusion of forfeiture clauses which are unlikely to be exercised, and where the recovery of rent arrears would be better achieved by other means, in fact diminishes any status intrinsic to the landlord and tenant relationship which forfeiture might have. To the extent that routine inclusion of forfeiture clauses, with limited consideration of whether they are necessary, desirable or proportionate is perceived to be problematic, that problematic inclusion is aggravated by the routine drafting of leases by landlords' advisers. Landlords of multiple properties will tend to favour leases with similar formats. Depending on the relative bargaining power of the parties, possibilities for substantial amendments to the draft lease may be limited or non-existent, and it is not unreasonable to suggest that in many instances forfeiture clauses are in essence imposed, rather than mutually agreed.

Two further aspects of forfeiture potentially create further uncertainty. The first is its categorisation as a 'right of entry', capable both of independent existence as a legal interest under s 1(2)(e) LPA 1925 and 'of being conveyed … at law'[18]. This essentially independent proprietary character appears inconsistent with a more conventional view of forfeiture as a response to non-payment of rent by

[18] Law of Property Act 1925 s 1(2)

the party to whom that rent is owed. It might be argued that uncertainty as to whether forfeiture should properly be categorised as a 'proprietary remedy'[19], or as an independent proprietary right, capable of exercise by a party who has not suffered a wrong, or whether it might be both, is an abstract problem, but it appears that such uncertainty can have adverse practical consequences: In *Kataria v Safeland plc*[20] a lease contained a conventional forfeiture clause, operable on non-payment of rent. In 1995, the former landlords (Standard Life Assurance Company Ltd) had assigned the reversion to Safeland. At that time, the tenant, Mr Kataria had already incurred arrears exceeding £10,000, and in the assignment, Standard Life retained the right to recover those rent arrears and 'all related rights of action'[21]. Two days after the assignment, and without notice (in conduct described as 'monstrous'[22]) the lease was forfeited, not by Standard Life, but by Safeland, to whom, as was acknowledged, no rent was yet owed.

Brooke LJ in the Court of Appeal held that, 'As the proprietary remedy of re-entry had unquestionably been assigned to the new landlords', and 'the conditions on which they were entitled to re-enter were fulfilled' (i.e. that there were arrears of rent, albeit not owed to Safeland) they were 'as a matter of law entitled to forfeit'[23]. Perhaps most significant to the issue of categorising forfeiture was his finding that although the right to receive the arrears and 'all rights of action in relation to the recovery of the arrears' remained with Standard Life, the right to re-enter belonged to Safeland, because it was 'not a right of action within the meaning of the provisions of that assignment'[24]. This raises the question of, what, if it was not a right of action, the right to forfeit was. It appears that, in this case at least, it was a 'self-standing' right, which enabled a landlord, against whom no breach of covenant had yet occurred, to dispossess an unwanted tenant.

A further uncertainty, and one that 'does little credit to the law'[25] is the precise effect of exercise of the right to forfeit on the continued existence or otherwise of the lease. Immediately following a breach of the covenant to pay rent, the position is legally clear, even if the landlord's conduct following that breach is not necessarily predictable. Assuming a forfeiture clause exists, non-

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[19] P F Smith, *The Law of Landlord and Tenant* (6th edn, 2003, Butterworths LexisNexis) 177
[20] *Kataria v Safeland plc* (1997) 75 P & CR D30 – D32, CA
[21] *Kataria* (n20) D31
[22] *Kataria* (n20) D31
[23] *Kataria* (n20) D31
[24] *Kataria* (n20) D31
[25] P F Smith (n19) 176

payment of rent renders the lease 'merely voidable at the option of the landlord'[26]. The tenant's breach makes available a series of steps which the landlord may choose or decline to take. The precise legal effect of re-entry, whether conducted peaceably or by proceedings, on the existence or otherwise of the lease, however, is less clear. In *Billson v Residential Apartments Ltd*[27], Lord Templeman was evidently of the view that once the landlord had re-entered, the lease was 'determined' and 'no longer exists'[28]. A variant on this view is that once a landlord commences possession proceedings, forfeiture is treated as having 'notionally'[29] occurred, subject to relief being granted, the lease being 'forfeited retrospectively'[30] from the date of service of the claim if relief is denied. An alternative view is that once the landlord commences possession proceedings, the lease continues, with rent accruing, until a court order for possession is granted[31]. A final view which vividly, if unhelpfully, encapsulates features of the others, is that between forfeiture being initiated and the result of any relief application being determined, the lease has a 'trance-like existence'[32].

It is perhaps to this lack of consensus on what forfeiture is and on how it operates that its capacity to operate harshly against a tenant, by depriving it of its lease, and of conferring an undeserved advantage of vacant possession on the landlord can be attributed, a capacity evident from the detailed and longstanding provision made by the courts and by Parliament for relief. Pawlowski, describing Equity's development since the 17th century, observed that, 'Undoubtedly, the greatest influence of equity has been in the development of English land law, in particular, the granting relief against forfeiture'[33]. Parliamentary recognition of the need for relief dates from the Conveyancing Act 1881 ss 14(1) and 14(2), which were reproduced in ss 146(1) and (2) LPA 1925. Lord Templeman in *Billson v Residential Apartments Ltd* attributed the recognition by Parliament in 1881 of the need for relief to an appreciation that 'the forfeiture of any lease, however, short, may unjustly enrich the landlord at the expense of the tenant'[34].

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[26] Bowser v Colby (1841) 1 Hare 109, 133
[27] *Billson v Residential Apartments Ltd* [1992] 1 AC 494
[28] *Billson v Residential Apartments Ltd* [1992] 1 AC 494, 535
[29] P F Smith (n19) 176
[30] P F Smith (n19) 176
[31] *Maryland Estates Ltd v Bar Joseph* [1998] L & TR 105, CA
[32] *Meadows v Clerical Medical and General Life Assurance Society* [1981] Ch 70, 75
[33] Mark Pawlowski, 'Equity's Jurisdiction to relieve against forfeiture of leases – An historical perspective' Denning Law Journal 2014 Vol 26 149, 150
[34] *Billson* (n27) 535

Although the right to forfeit is reliant on the contractual intentions of the parties for its existence, its exercise is 'heavily qualified by the court's discretion to grant relief'[35]. Relief appears to address the breadth of the landlord's power to forfeit, and the potentially harsh consequences which follow, by conferring similarly broad powers on tenants to seek and obtain it. In some instances, the requirement for relief is so immediate and compelling that the court's discretion is essentially removed, and relief is automatic. Under s138(1) and (2) County Courts Act 1984 an action to forfeit ceases, and the lease continues, if not less than 5 clear days before the return day the tenant pays into court or to the lessor all the rent in arrears and the costs of the action. Tenants may also seek relief at any time within 6 months after the landlord forfeits, in which case the court may 'if it thinks fit, grant to the lessee such relief, subject to such terms and conditions, as it thinks fit'[36]. It might be argued that the natural result of the ability of landlords to create, or impose, the right to forfeit and enjoy wide and unsupervised discretion as to its exercise, the discretion and oversight of the court becoming relevant only when relief is sought, is likely to be uncertainty, practical inefficiency and increased costs for the parties.

Judicial recognition of the opportunistic use of forfeiture and of relief

It might be argued that the capacity of forfeiture to have these potentially unjust consequences should be tolerated as an inescapable feature of commercial conduct, and that courts should confine their attentions to be whether parties to commercial contracts have correctly complied with the legal requirements applicable to their situation: Whether those parties have also behaved 'justly', in the sense of complying with additional requirements of propriety, is beyond courts' remit. This view does not, however, appear to be reflected in the clarity with which judges have condemned conduct by landlords and tenants enforcing and resisting forfeiture which can be perceived at best as commercially astute, and at worst as deceitful. In *Keshwala*, Nugee LJ identified that the Landlords had forfeited the lease, '*taking advantage* of a minor shortfall in the payment of rent for the June 2018 quarter'[37](emphasis added). At first instance HHJ Hampton had acknowledged the lawfulness of the forfeiture, but, noting that only a fraction of one rental payment had been unpaid, that the landlord had sent an invoice for the next quarter's rent without referring to the arrears, and had given no notice of its intention to forfeit, remarked that it was "harsh business practice, even sharp practice in a modern environment"[38] to behave as the landlord had done. What precisely she meant

[35] Gray and Gray (n10) 469
[36] County Courts Act 1984 s 238(9A)
[37] *Keshwala* (n1) [2]
[38] *Keshwala* (n1) [22]

by ‘a modern environment’ is unclear, but it is reasonable to assume that she envisaged a commercial environment which encourages probity and a social responsibility to an extent not previously seen. The parties in *Keshwala* were individuals, but she perhaps envisaged the duties on company directors under s172 (d) and (e) Companies Act 2006 to consider the impact of corporate operations on the community and the environment, and the desirability of a company maintaining ‘a reputation for high standards of business conduct’.

While the court’s disapproval of the landlord’s conduct appears to have been directed at the injustice it would cause, it demonstrated similar disapproval of Mr Keshwala’s behaviour, that disapproval resulting from his delay in applying for relief or ‘even effectively notifying the Landlords of [the] intent to do so’[39]. His application, in February 2019, was within 6 months of the forfeiture in September 2018, as permitted by s138 (9A) County Courts Act 1984, but the court evidently considered the delay excessive. It is suggested that what characterised the parties’ conduct and what attracted the court’s displeasure was the opportunities forfeiture allows for commercially unattractive and, most importantly, unpredictable, behaviour. In a typical case involving breach of the covenant to pay rent, neither party can easily ascertain whether and how the other will use the opportunities which forfeiture and relief appear to offer to behave ‘harshly’ or ‘monstrously’, or to engage in ‘sharp practice’, or to use the range of options open to it to conceal its intended actions from the other party, or simply to be dilatory or disorganised.

Reform Proposals

Weaknesses in the regulation of forfeiture have long been recognised. The Law Commission reported on forfeiture in 1985[40], and again in 2006[41]. It is suggested that the current moratorium presents another opportunity to review proposals for reform, adding to this consideration proposals to address the specific issue of rents unpaid during the moratorium, and the implications of these proposals more broadly.

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[39] *Keshwala* (n1) [2]
[40] Law Commission, *Codification of the Law of Landlord and Tenant: Forfeiture of Leases* (Law Com No 142, 1985)
[41] Law Commission *Termination of Tenancies for Tenant Default* (Law Com No 303, 2006)

In 2006, the Law Commission described the law of forfeiture as 'complex, lack[ing] coherence, and … lead[ing] to injustice'[42] and as 'excessively technical and unnecessarily complicated'[43]. It noted particularly the observation of the Committee of HM Circuit Judges that the current law failed to work consistently in a way which was seen to be 'efficient, proportionate and just'[44]. Its view was that 'these criteria are valuable, and that proportionality, in particular, should be a cornerstone of the court's discretion'[45].

Perhaps recognising the difficulty of accurately identifying the nature and purpose of forfeiture, and alert to the unfortunate practical consequences of categorising it as an independent right of entry, the Law Commission proposed its abolition, the removal of any requirement for a forfeiture clause in the lease, and the introduction of a statutory scheme for terminating tenancies on tenant default. It proposed the introduction of a principle of 'Tenant default' and a range of orders (including a 'termination order', a 'remedial order', and 'transfer' and 'new tenancy' orders), which could be sought by qualifying interest holders, including for example a tenants' management company. Perhaps most significant was the breadth of the discretion which it envisaged the court would have: The scheme would not limit the range of orders that the court could make, and the report stated explicitly that the court would be permitted to make 'such order as it thinks appropriate and proportionate in all the circumstances'[46]. The only constraint to which it envisaged the court would be subject was a requirement to take into account a number of broadly drafted considerations, including the conduct of the parties and of any qualifying interest holders, the extent to which the tenant had complied or was likely to comply with any remedial order, any other remedy available to the landlord in respect of the default, and perhaps most significantly 'any other matter which the court thinks relevant'[47].

The Commission's intention appears to have been to grant the court the widest possible discretion on whether or not a lease should be terminated, to remove discretion from the landlord, and to move the point at which the court can exercise discretion as to what will happen to the lease away from the point at which relief is sought and 'forward' to the point at which the right to terminate

[42] Law Commission (n41) para 1.3
[43] Law Commission *Termination of Tenancies for Tenant Default* (Law Com No 303, 2006) Executive Summary para 1.5
[44] Law Commission (n41) para 1.29
[45] Law Commission (n41) para 5.103
[46] Law Commission (n41) para 2.22
[47] Law Commission (n41) para 2.22

becomes available. It is suggested that *Kataria* would have been decided differently had these proposals applied at the time, and that perhaps by referring to other remedies available to the landlord, Mr Keshwala might have been able successfully to avoid forfeiture. Alert to landlords' concerns about tenants who had abandoned premises or who 'had no reasonable means of defending a termination claim'[48], the Law Commission proposed 'an expeditious means of termination', in the form of a 'summary termination procedure'[49] which would allow landlords to terminate leases without applying to the court.

A consideration of these proposals needs now to be made in the light of the CA and of the Government's Policy Statement[50] on rent arrears accrued between March 2020 and March 2022, the introduction to which states that 'The government will legislate to ringfence rent debt accrued during the pandemic by businesses affected by enforced closure and set out a process of binding arbitration to be undertaken between landlords and tenants'. Most significant to the question of forfeiture is that the Policy Statement strongly implies that in respect of rent arrears incurred between March 2020 and the end of restrictions for the relevant sector, the right to forfeit will not be revived. The effect appears to be that notwithstanding an express contractual provision, landlords do not currently have, and never will have, the right to forfeit for arrears incurred during that period.

When considered together, the criticisms of the current law, the Law Commission's most recent proposals for reform, the effect of the CA and the Government's associated objectives on rent arrears arising from business closure appear to offer several possibilities for reform. The current inconsistent treatment of covenants to pay rent and other covenants, and the level of rent arrears already accrued, are compelling arguments why permanent suspension of the right to forfeit is not feasible. The issue is what form forfeiture should take when it returns. One option, subject to specific provision being made for rents due between March 2020 and March 2022, is for it to return unchanged. This approach would recognise both the argument that forfeiture is intrinsic to the landlord and tenant relationship, and the practical consideration that, although imperfect, the

[48] Law Commission (n43) para 1.29
[49] Law Commission (n43) para 1.29
[50] GOV.UK, Supporting businesses with commercial rent debts: policy statement https://www.gov.uk/government/publications/resolving-commercial-rent-arrears-accumulated-due-to-covid-19> accessed 17 September 2021

operation of forfeiture is well understood by property professionals. A contrary view is that leaving forfeiture unchanged perhaps falsely equates its longevity with its efficacy, prioritises professional understanding of the procedure over its merits, and is insufficiently attentive to the existence or the severity of defects which the Law Commission has identified. It appears that in respect of rent arrears accrued between March 2020 and March 2022, the right to forfeit will never return, and to that extent a permanent change to the current regime has already been made. S82 CA is evidence of clear Parliamentary recognition that the availability of forfeiture is not appropriate in all circumstances. The issue may be to determine for the future those circumstances in which it is appropriate.

A solution might be total or partial implementation of the 2006 proposals, with aspects of the compulsory arbitration process added, with, in particular, a renewed emphasis on proportionality. Since forfeiture is finite (unless a means could be devised to terminate a lease early, rather than immediately), and depending on the unexpired period of the lease, potentially serious, consideration of proportionality can only realistically relate to the circumstances in which forfeiture is permitted. The Law Commission's recommendation that before ordering forfeiture, courts should have regard to any other remedies and any other matter which it thinks relevant, when seen against the background of 'proportionality', would suggest that it viewed forfeiture as appropriate only where it would be proportionate either to the breach, or to the wider circumstances of the parties.

It is difficult to envisage how proportionality could be built into the court's consideration sufficiently robustly without simultaneously limiting the court's discretion (on which the Law Commission placed particular emphasis). Provisions to the effect that forfeiture would only be proportionate only where, for example, the tenant's breach was incompatible with the continued existence of the lease, the tenant had no reasonable prospect of being able to pay the rent, or where the tenant had breached covenants fundamental to the landlord and tenant relationship might not only replace existing arguments with new arguments, but might also effectively confine forfeiture to the circumstances in which the Law Commission envisaged the summary procedure (in which the court would not be involved at all) would apply.

A different approach might be to make very precise but limited provisions specifying when forfeiture is, or is not, available. An appropriate model might be ss 166 and 167 Commonhold and Leasehold

Reform Act 2002, applicable to long leases of dwellings, under which the tenant is not liable to make a rent payment (and cannot therefore be in arrears) unless the landlord has served a notice requiring it, and the landlord cannot forfeit unless the amount unpaid exceeds a statutory prescribed sum (currently £350) or has been unpaid for a prescribed period (currently 3 years). Such provisions, while necessarily limited in their scope, have the benefit of certainty.

A final option might be to extend the provisions for binding arbitration of rent arears accrued after 2020 to forfeiture for rent arrears incurred at any time. Without detail of the Government's proposals, such a proposition can only be speculative. There are already objections to the proposed mandatory arbitration scheme for arrears arising from the pandemic, and it is not unreasonable to suppose that similar objections would be raised to its extension to forfeiture for non-payment of rent generally. These objections appear to focus firstly on the potential interference of such a scheme with the ability of parties to contract as they wish, and secondly on the uncertainty which it is envisaged such a scheme would create. In relation to the first objection, and commenting on the specific issue of arrears incurred since March 2020, Humphreys' view is that this arbitration process will 'really work as a third party re-negotiation of the original lease'[51], and that 'such interference with contractual arrangements agreed between commercial parties would be a fundamental change'[52] and that it could undermine the recent High Court decisions in *Commerz* and *New York Mellon*.

Two observations may be made. Firstly, the emphasis in 'contractual arrangements agreed' perhaps presupposes incorrectly that the contractual arrangements are agreed willingly. Given the elevated status that forfeiture has historically enjoyed, its widespread support from landlords and the consequent routine inclusion of, and refusal to remove, forfeiture clauses in those leases, 'imposed' might be more realistic than 'agreed'. Secondly, 'Interference with contractual arrangements', both by the courts and by Parliament is not unprecedented: S29(1A) Landlord and Tenant Act 1927, a landlord's covenant for implied covenant for quiet enjoyment, and the entirety of Part 2 Landlord and Tenant Act 1954 conferring security of tenure on business tenants might all reasonably be considered examples of this.

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[51] Emma Humphreys, 'Commercial rent arrears – the burden of the pandemic remains with landlords' <https://blog.charlesrussellspeechlys.com/post/102h0rg> accessed 5 July 2021

[52] Humphreys (n51)

The second objection to mandatory arbitration, that it will lead to uncertainty appears to be based on the presumption that reliance on, and enforcement by courts of, contractual provisions is the route to certainty, that certainty is what commercial parties seek, and that interference with those provisions is therefore to be discouraged. The basis for the objection is readily identifiable from *Mellon*, in which Master Dagnall stated that:

"In times of uncertainty the law must provide a solid practical and predictable foundation for the resolution of disputes and the confidence necessary for an eventual recovery…Contractual rights are to be evaluated by applying settled principles to the contract in question. Legal certainty remains paramount and gives the surest basis for the resolution."[53]

His subsequent observation that 'anything else would be a matter for Parliament'[54], implies that, in his view, 'anything else' would be something other than the determination by reference to settled principles. While his previous observation might be motivated simply by a disinclination to see decision making transferred from judges to arbitrators, it is suggested that it may create unrealistic expectations of what the current law can and does provide. An assertion that legal certainty 'remains' paramount implies that the current forfeiture regime already confers that. It is submitted that the difficulties that characterise forfeiture, and the scope for opportunistic and unpredictable behaviour which these allow, render this assertion is, at best, questionable. The principles determining the operation of forfeiture do not appear to be adequately 'settled', and the erratic transit of *Keshwala* through three courts, and the court's simultaneous acceptance and disapproval of the landlord's behaviour in *Kataria* would indicate that certainty and predictability are not necessarily dominant features of the current regime.

Furthermore, since the principles governing mandatory arbitration are currently unknown, it might be asked whether there is any reason to believe that they would not be 'settled'. The Arbitration Act 1996 already makes detailed provision for the mechanics of arbitration generally. Commercial leases frequently include provisions whereby the parties, attracted by the relative speed and finality of arbitration, and by the ability to choose an arbitrator with relevant expertise, agree when the lease is granted that they will use it to settle disputes on service charges, rent suspension, lease renewals and particularly rent reviews. This would suggest that parties and their advisers consider arbitration to be an effective and sufficiently certain dispute resolution mechanism in these areas. In addition, detailed, well established and frequently revised guidance specific to the type of

[53] *Bank of New York Mellon (International) Ltd* (n7) [251]
[54] *Bank of New York Mellon (International) Ltd* (n7) [252]

dispute[55] already exists to supplement the Arbitration Act, and it is suggested that a similar level of detail might characterise equivalent guidance for arbitrators on forfeiture for rent arrears.

Other models for an arbitration scheme might follow the Law Commission's recommendations from 2006 for replacement of forfeiture with a statutory procedure, or otherwise adopt principles from existing statute, for example the statutory limit on arrears below which forfeiture is unavailable in CLRA 2002. Even if the principles governing mandatory arbitration were wholly new, and hence untested, it does not follow that they would not be 'settled' in the sense of being clear, unambiguous and straightforward to apply. Even if, as is possible, they did not adequately meet these criteria, there is no reason to suppose that uncertainty would be any more a feature of mandatory arbitration than it is of the current regime. It is suggested that an extension of whatever scheme is proposed for arrears resulting from COVID-19 to arrears of rent more broadly would reduce the opportunities for landlords and tenants unilaterally, and without oversight, to exploit the defects in the current regime for commercial reasons, and that this is a sufficient reason for such an extension to be considered further.

[55] For example, RICS, 'Professional Guidance, England and Wales, Surveyors acting as arbitrators in commercial property rent reviews', 9th edn, 2013