Real Estate
Real Estate Update
Rosling King LLP

The Facts

The long lease in question was granted on 10 July 1948 for a term of 900 years. It reserved a rent of £2 per annum payable by equal half yearly instalments. The lease contained a forfeiture clause which entitled the landlord to re-enter if the rent was "*in arrear for the space of two years after the same shall have become due (whether any formal or legal demand thereof shall have been made or not)"*. Mr Calce (the "**Tenant**") acquired the lease in 1997. Cheerupmate2 Limited (the "**Landlord**") was registered as proprietor of the reversion on 4 March 2015. Thereafter, the Landlord sent the Tenant a letter in which it informed him of the same. Further, enclosed with that letter was a notice on a printed form intended to take effect as a notice under section 166 of the Commonhold and Leasehold Reform Act 2002 (the "**2002 Act**"). The notice required the Tenant to pay a specified outstanding rent and stated that it was payable in respect of a specific period of time. The printed form contained a number of notes which were in accordance with that prescribed under the Landlord and Tenant (Notice of Rent) (England) Regulations 2004 as originally made. However, by a correction slip issued by the Queen's printer, an amendment had been made to one of the notes which changed the prescribed form. It followed that, when the notice was served, it was not in the form then prescribed

Following service of that notice the Landlord purported to re-enter peaceably the day after the outstanding rent was due. On the same day, the Landlord applied to close the leasehold title at HM Land Registry. The Tenant brought an action against the Landlord in the First-tier Tribunal ("**FTT**"). The FTT held that: (i) the notice was not valid as it was not in the prescribed form; (ii) that the effect of section 166 of the 2002 Act was to start time running again for the lapse of two years required by the forfeiture clause before a valid re-entry could take place in accordance with the terms of the lease. It followed that the purported forfeiture was premature; and (iii) section 167 of the 2002 Act (which provided that a landlord under a long lease of a dwelling may not exercise a right of re-entry or forfeiture for failure by a tenant to pay an amount (i.e. rent) unless it exceeds £350 or consists of, or includes, an amount which has been payable for more than 3 years) precluded the Landlord from forfeiting for a period of three years from the date of a valid section 166 notice. The Landlord appealed to the Upper Tribunal (Tax and Chancery Chamber) (the "**UT**"), who upheld the FTT's decision but with slightly different reasoning as to the invalidity of the section 166 notice.

The Landlord appealed to the Court of Appeal. The issue for the Court's determination was whether the Landlord had validly forfeited a long lease held by the Tenant by peaceable re-entry.

Judgment of the Court of Appeal

The Court of Appeal held that there was no doubt that both the FTT and UT were right in saying that the notice given by the Landlord was not in the prescribed form. However, that was not the end of the enquiry. The courts have had to consider the validity of notices which fail to comply with legislative requirements on a number of occasions. The Court of Appeal noted the principles derived from two key cases, namely *Natt v Osman* [2014] EWCA Civ 1520 and *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89 (see paras 14-17 of the judgment).

In this case, the discrepancy between the notice as served and the prescribed form lay not in the information provided but in the clarity of the information. The notice as served contained all the information required by the 2002 Act. The form of the notice was governed by a statutory instrument, and not by the 2002 Act. The form of the note in the notice as served was part of a prescribed form that was in force between 2004 and 2011. Therefore, it had to have been regarded by Parliament at that time as sufficient to comply with the statutory requirement. The change in the wording of the note was made, not by an amending set of regulations, but by a "correction slip" which would only have been used if the change was regarded as not altering the substance of the note. The explanatory notes were plainly subordinate to the purpose of the notice which is to inform the leaseholder that there are arrears of rent which had to be paid by the date specified in the notice. The explanatory note described the context in which the notice was served. The combination of those features led to the conclusion that Parliament was unlikely to have intended that the minor discrepancy between the notice in fact served and the prescribed form was of sufficient importance to invalidate the notice. Therefore, both the FTT and UT were wrong in holding that the notice was invalid.

Despite the Court of Appeal's holding that the notice was valid, the forfeiture clause only allowed the Landlord to forfeit when the rent was in arrears for two years after it shall have become due. As to when it became due, pursuant to section 166(1), a tenant under a long lease of a dwelling was not liable to make a payment of rent under the lease unless the landlord has given him a notice relating to the payment and the date on which he is liable to make the payment is that specified in the notice. Therefore, the Landlord was required to wait for two years after the date specified for payment in the notice before the right to forfeit became exercisable. It followed that the purported re-entry was unlawful.

Commentary

This case provides welcome guidance on the principles that will be applied by a court when considering a minor discrepancy in the validity of a notice. Further, it signifies the importance of the protection afforded to long leaseholders.

The Court of Appeal in its postscript questioned the procedure of the Land Registry in that it will close a leasehold title on being satisfied by evidence that a peaceable re-entry has been effected; and that even the existence of an application by the tenant for relief against forfeiture is not a sufficient objection to closure of the title.

For further information, please contact Ann Ebberson or the Partner with whom you usually deal.