Section 146: a modern interpretation

Charles Auld & Kate Harrington trace the introduction, construction & interpretation of s 146 notices

IN BRIEF

- The Victorians considered that a landlord should not re-enter without a warning notice being given to the tenant.
- A section 146 notice served before the landlord's right to re-enter has arisen is of no effect.

In Victorian times a landlord could forfeit a lease for failure to repair without giving the tenant any warning that he was going to do so. Of course, there was no reason why the parties to a lease could not agree provisions that required the landlord to give due warning before re-entering the premises and terminating the lease. However, it seems that few did so. Accordingly, Parliament intervened and enacted s 14 of the Conveyancing Act 1881, the relevant parts of which provided that 'a right of re-entry or forfeiture shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and the lessee fails, within a reasonable time thereafter, to remedy the breach'. Section 146 of the Law of Property Act 1925 re-enacted s 14 of the 1881 Act in identical words.

The initial approach of the courts

Initially the courts refused to let such a notice become a technical document; treating it rather as a written warning that any competent landlord could draft without consulting lawyers. In *Fox v Jolly* [1916] 1 AC 1 the notice indicated under general headings repairs which were required to be done by the tenant, and, in some instances, it simply required the lessee to 'examine and repair' particular items. The tenant appealed to the House of Lords contending that the notice was too vague, but her appeal was dismissed. Lord Atkinson said: 'In my view that contention is based on a wholly erroneous and mistaken view of the aim, object, and requirements of this section' and Lord Sumner added that the requirement to give notice before re-entering 'confers a great boon on the tenant, but it ought not to be turned into a trap for the landlord. To hold this notice to be in law no compliance with the section would, in my opinion, arm the tenant with a quibble, where only a shield against oppression was intended'.

So the section was given a purposive rather than a literal construction with the courts effectively looking at the date when the landlord forfeited (either by physically re-entering or by issuing proceedings) and asking if, at that date, the tenant had been given sufficient warning of the relevant lack of repair. As Lord Justice Collins remarked in *Penton v Barnett* [1898] 1QB 276: 'The common sense of the matter is that the tenant is to have full notice of what he is required to do. He has had notice, and has failed to act on it.' And in *Pigott v Middlesex County Council* [1909] 1 Ch 134 Mr Justice Eve said: '…it was never intended by the Legislature to deprive the lessor of his right of re-entry if there had in fact been a substantial breach of the covenant, and if he had in fact given to the lessee an opportunity of remedying that breach.'

Modern approach

In the last 40 years, however, the purposive construction of s 146 has given way to a literal construction and notices served under that section have acquired such a technical status that only the most incautious of landlords would now draft the notice themselves. Possibly the start of this development can be traced to *Pakwood Transport Ltd v 15 Beauchamp Place Ltd* [1977] 36 P&CR 112 where the Court of Appeal decided that the service of a s 146 notice was not merely a preliminary step taken before forfeiture, but was actually the start of the forfeiture process such that the tenant could, on receipt of the notice, immediately apply to the court for relief from forfeiture.

Akici v Butlin [2006] 2 All ER 872 has continued this process. Mr Akici was a tenant under a lease which prohibited the tenant from assigning, sub-letting, sharing or parting with possession of the premises. Mr Akici was also involved with a company called Deka Limited and, soon after he became the tenant, that company started to trade from the premises. Butlin knew nothing of this until solicitors acting for Mr Akici complained about nuisance from building works that Butlin was carrying on next door and, in correspondence, stated that they acted for both Mr Akici and Deka. Getting no satisfactory answer about the status of Deka, Butlin's solicitors served a s 146 notice complaining that, in breach of the lease, Mr Akici had 'assigned, sublet or parted with possession to Deka Limited'. The trial judge decided that Butlin could rely on the s 146 notice, but the Court of Appeal allowed the tenant's appeal holding that since that notice had not expressly specified 'sharing possession' it was of no effect. As Lord Justice Neuberger somewhat delphically explained: 'I think it impossible to say that no lessee would have been in any doubt but that the lessors were not contending that he was sharing possession of the premises.'

In *Toms v Ruberry* [2019] 2 WLR 975 cl 3.6 and 3.7 of the lease required the tenant to keep the interior of the premises in repair. If the tenant failed to do so, by cl 4.1.7, the landlord was entitled to serve a 'Default Notice' and if this was not complied with within 14 days the landlord could forfeit. On 25 February 2015 a default notice and a s 146 notice were served simultaneously on the tenant, Mrs Ruberry. Both notices had attached to them the same schedule of dilapidations and the only significant difference between them was that while the default notice required the repairs to be done within 14 days, the s 146 notice required them to be carried out within seven weeks. The trial judge found that Mrs Ruberry was in breach of her obligations under cll 3.6 and 3.7 at the time both notices were served and also when they expired. However, he dismissed Mr Toms's application for possession holding that, since the s 146 notice had been served before the 14 days set out in the default notice had expired, it was premature and therefore invalid. Mr Toms's appeals to the High Court and subsequently to the Court of Appeal failed. Lord Justice David Richards, who gave the only reasoned judgment of the Court of Appeal, decided that 'a section 146 notice can be served only after the contractual right of re-entry has become enforceable'.

If a literal interpretation of s 146 is appropriate, then it is hard to fault either *Akici* or *Toms*. Furthermore, the judgment in *Toms* has the great merit, often lacking in modern appellate decisions, of being brief and clear: a s 146 notice served before the landlord's right to re-enter has arisen is of no effect. What, however, the modern decisions seem to have lost sight of is that a s 146 notice was not intended to be a trigger notice or a notice to quit, but simply a fair warning to the tenant so that he could not

complain, if the landlord re-entered, that he had been taken by surprise. Suppose a lease of a factory includes a duty to paint the outside of the building before 25 December in the fifth year of the term. In mid-December in the fifth year the landlord drives past the premises and sees that no redecoration has been carried out, no scaffolding has been erected and no painters are busily at work. The landlord goes home and prepares a s 146 notice, but, concerned that it might get lost in the Christmas post, hand-delivers it to the tenant's receptionist at lunchtime on 24 December. On the basis of *Toms* such a notice is invalid as the failure to repaint does not arise until midnight on 25 December. On the other hand, if the landlord had put the same notice in the post and it had duly arrived in early January the following year it would have been valid.

> *"The judgment in Toms has the great merit, often lacking in modern appellate decisions, of being brief & clear"*

David Richards LJ accepted that s 146 itself does not 'in terms spell out the time at which a section 146 notice should be given', but concluded that it was 'clear from the subsection as a whole' that a valid notice can only be served 'after the breach of the covenant or condition triggering the right of re-entry has occurred.' If a s 146 notice was intended to be a trigger notice that conclusion is unimpeachable, but if the purpose of the legislature was to give the tenant a 'shield against oppression and not a quibble', it is more difficult to see why the hand-delivered notice in the above example should be a nullity. After all it sets out precisely what the tenant has to do to avoid his lease being forfeited. If the landlord subsequently physically re-enters or issues proceedings for forfeiture, why does it matter that the tenant received the warning notice a few days early?

An unexpected consequence?

Section 146 merely requires that the tenant has 'a reasonable time' in which to comply with the notice. In his s 146 notice Mr Toms specified seven weeks for the work to be completed as that was what his surveyor considered appropriate. However, in his Default Notice Mr Toms, to comply with clause 4.1.7 under which it was given, specified 14 days. In coming to his decision in *Toms* David Richards LJ decided that the breach which should have been stated in the s 146 notice was not the failure by Mrs Ruberry to comply with the repairing covenants, but her failure to remedy them in accordance with the default notice. He said: 'It is the failure to remedy the antecedent breaches of cl 3.6 and 3.7 within the period of 14 days from the receipt of the default notice which is the relevant 'breach of any covenant or condition in the lease' referred to in the opening part of section 146(1)'.

If that be right, then landlords might be advised to include a similar 14 day 'Default Notice' provision in every lease as it could enable them significantly to shorten the amount of time they would otherwise have to allow when serving a s 146 notice. Suppose leased premises are in disrepair and a reasonable time for doing the repairs is six months, then that would be the period of time which a landlord would have to allow after service of his s 146 notice, before re-entering. On the other hand, if the lease contains a 14-day default notice clause and it is a failure to comply with that clause which gives rise to the right to re-enter, the landlord can serve a s 146 notice on the fifteenth day and re-enter soon thereafter. If the tenant protests that the repairs will take six months and that 14 days is too short, he arguably only has himself to blame for taking a lease containing a 14-day default provision and the landlord could argue that, as between the parties, it is a reasonable period. After all in *Penton v Barnett* the lease provided that the tenant had three months to comply with any notice to do repairs and accordingly this was the time which the landlord specified in his notice. In his judgment in *Penton* Lord Justice Rigby commented that: 'It cannot be doubted that the time indicated by the notice was a reasonable time, for it is the time specified' in the lease.

Full circle?

So have we, perhaps, come almost full circle? The Victorians considered that a landlord should not re-enter without a warning notice being given to the tenant, but the courts emphasised that a common sense construction must be given to that warning notice and that it must not be allowed to become a trap for the landlord. Arguably the modern literal construction of s 146 has made it a trap for the landlord; but the same literal construction has potentially enabled landlords, by including a default provision, to forfeit the lease with little warning. **NLJ**

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