Effecting Forfeiture by Peaceable Re-Entry: a critical analysis of recent developments and proposals for law reform

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Abstract: Once an act of forfeiture has been committed by a commercial tenant, a landlord may validly terminate a lease by effecting re-entry, by either issuing proceedings for ejectment or, alternatively, through self-help by physically re-entering the premises. Physical re-entry must be peaceable to be effective and there have been a series of recent High Court decisions where the limits of the permissible force allowed have been discussed. A judicial consensus is developing that a landlord effecting a re-entry may not break the lock on the premises to do so, even if this lock is immediately replaced. This article offers a critical analysis of these judgments in light of previous authority, as well as critiquing proposals from the Law Reform Commission to abolish the ability to terminate a lease without a court order. I suggest that judges and policymakers should be cautious in seeking to limit or abolish this self-help for both principled and practical reasons, that judges should be wary of applying landlord and tenant law mutatis mutandis to receiverships, as well as highlighting the fact that an aggrieved commercial tenant already has numerous post-factum remedies to vindicate their rights where an entry has been made unlawfully.

Keywords: Commercial landlord and tenant law, forfeiture, peaceable re-entry, receiverships.

Introduction

In contrast to the law relating to residential tenancies — which has been put on a modern footing by the Residential Tenancies Acts 2004-2025[1] — the procedure for terminating commercial tenancies for breach of covenant is still based on law that might justifiably be called arcane.[2] The Irish Law Reform Commission ("the

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[1] See Una Cassidy and Jennifer Ring, *Landlord and Tenant Law: The Residential Sector* (2nd edn, Round Hall 2020).

[2] Law Reform Commission, *Consultation Paper on General Law of Landlord and Tenant* (LRC CP 28-2003), [14.01]. The best recent survey of the development of law in this area is provided by J.C. Wylie, *Irish Landlord and Tenant Law* (4th edn, Bloomsbury Professional 2022), ch. 24.

LRC"), in its 2003 Consultation Paper on General Law of Landlord and Tenant described the area as in need of radical reform, being 'fraught with complexity and uncertainty'.[3] To achieve this much needed reform, the LRC produced the heads of the Landlord and Tenant Law Reform Bill 2011,[4] although this measure remains unenacted and there is no indication at the time of writing that there are any plans to progress it to legislation.

Forfeiture was abolished as a remedy available to landlords for residential tenancies by the Residential Tenancies Act 2004, and replaced with a self-contained statutory procedure to terminate tenancies for breach of covenant.[5] Nonetheless, forfeiture is still very much part of the law in relation to commercial tenancies, and it is not controversial to state that, in Ireland, a landlord may effect physical re-entry of a tenancy as a means of forfeiting the lease, provided that entry is peaceable.[6]

In this regard, the degree of force which the landlord may use in effecting this physical re-entry, which by definition is without reference to any form of court procedure or court order, is often contested in cases that come before the courts. In this article, I first consider the law relating to forfeiture and re-entry in Ireland, before engaging in critical analyses of the recent judicial and academic debate on the issue of whether a landlord or receiver may break the locks when effecting peaceable re-entry. I also offer a brief critique of the proposal of the LRC to abolish the procedure.

[3] ibid 165.

[4] Law Reform Commission, *Report: The Law of Landlord and Tenant* (LRC 85-2007), 9-227.

[5] Residential Tenancies Act 2004 (as amended) s 58(1). See consolidated statute prepared by the LRC, available at: <https://revisedacts.lawreform.ie/eli/2004/act/27/section/58/revised/en/html> accessed 28 June 2025. Although a tenant is, under the 2004 Act, entitled to be notified of the breach of covenant complained of, and given an opportunity to remedy it before a valid notice of terminations can issue (Residential Tenancies Act 2004, s 34) in a manner similar to the forfeiture procedure, there is understandably no provision to take possession otherwise than pursuant to a court order.

[6] *Sweeney Ltd v Powerscourt Shopping Centre Ltd* [1984] IR 501; *Billson v Residential Apartments ltd* [1992] 1 All ER 141. For right of a mortgagee to enter peaceably: see *First National Building Society v Gale* [1985] IR 609.

The Law of Forfeiture and Re-Entry in Ireland[7]

Procedural Requirements

Tenants' obligations in a lease are normally in the form of covenants, but a breach of covenant *simpliciter* by a tenant does not effect a forfeiture or entitle a landlord to re-enter.[8] Modern commercial leases normally have a 'forfeiture clause' which expressly grants to the landlord a right to re-enter on the breach of a covenant contemplated by the clause. Nonetheless, the right to forfeit is subject to many restrictions.

The procedure adopted depends on whether the breach of covenant complained of is for the non-payment of rent as opposed to where it is a breach of any other covenant in the lease. For the latter, and subject to certain exceptions, a forfeiture notice must be served under section 14 of the Conveyancing Act 1881 ("the 1881 Act"), the contents of which must grant an opportunity to the tenant to remedy the breach before physical re-entry is permissible.[9] The policy of the requirement appears to be to allow the tenant an opportunity for relief in circumstances where the breach can be remedied, compensation awarded for any loss which the landlord has suffered from it and furthermore that an undertaking can be given that it will not recur in the future.[10] Failure to serve a notice may lead the tenant to believe that the breach has been waived, and would serve to deprive the tenant of her right to apply for relief.[11]

In the case of non-payment of rent, which is excluded from the requirements of section 14 of the 1881 Act, no notice need be served, but a demand for the rent must be made unless the lease specifically excludes this. Where it is excluded, the

[7] There has been lively academic discussion of this issue in recent years; see: Martin Canny, 'Forfeiture by Peaceable Re-Entry: Barely Legal Bullying or an Essential Remedy for Landlords?' (2007) 12(4) *Conveyancing and Property Law Journal* 94; Ruth Cannon, 'Forfeiture for Breach of Covenant by a Tenant—the Need for Reform' (2007) 12(1) *Conveyancing and Property Law Journal* 5; J.C. Wylie, *Irish Landlord and Tenant Law* (4th edn, Bloomsbury Professional 2022) [24.18]; Mema Byrne, *Landlord and Tenant Law: the Commercial Sector* (2nd edn, Round Hall 2024) ch. 28.

[8] The LRC has recommended making a right to re-enter automatic on a breach of covenant, removing the need for a forfeiture clause in a lease: Law Reform Commission, 'Landlord and Tenant Law Reform Bill 2011' s 68(1).

[9] Conveyancing Act 1881 s 14.

[10] See the comments of Andrews LJ in *Walsh v Wightman* [1927] NI 1, 9.

[11] ibid.

landlord may then effect re-entry in circumstances where no notice has been served and no demand for the rent made, effectively abrogating the tenant's opportunity to remedy the breach.

Relief Against Forfeiture

Once a valid re-entry has been effected either by peaceable physical re-entry or through the issuance of court proceedings, it is also of note that the tenant may seek relief against forfeiture whereby the tenant remedies the breach complained of and the court grants relief to prevent the termination of the lease.[12] Where the landlord has effected peaceable re-entry, the tenant can still apply for relief against forfeiture, and if successful, will be restored to the property.[13] The equitable jurisdiction to grant relief developed to avoid a situation where the tenant could lose a valuable asset (such as a long lease at low rent) through an inadvertent and trivial breach that was easily remedied.[14] Where the right to forfeit exists to secure the payment of money, equity will grant relief where payment is made with interest, and usually costs as well.[15]

Courts lean in favour of granting relief from forfeiture in cases where the breach can be remedied, and the breach of the landlord's rights was not wilful or continuous and the damage is trivial compared to the value of the property.[16] In cases where the landlord has effected peaceable re-entry, there is no time limit as to when the tenant can apply for relief, although *laches* has been an effective defence to a claim that was not made until five months after the landlord had re-entered the property.[17]

Re-Entry

By far the safest course of action for the landlord who wishes to effect re-entry is to bring ejectment proceedings on the title seeking possession on foot of an act

[12] Martin Canny, 'The Second Chance Saloon: The Unusual Jurisdiction to Grant Relief Against Forfeiture of Deposits and Forfeiture of Leases' (2008) 13(4) Conveyancing and Property Law Journal 89.
[13] *Billson v Residential Properties* [1992] 1 AC 494, 536-538 (Templeman L.J.).
[14] ibid.
[15] *Shiloh Spinners v Harding* [1973] AC 691, 722 (Lord Wilberforce LJ).
[16] ibid 723-725 (Lord Wilberforce LJ).
[17] *Keshwala v Bhalsod* [2021] EWCA Civ 492.

of forfeiture. Less risk-averse landlords may opt for the self-help remedy and seek to physically re-enter the property.

Venturing onto the property is not, of itself, sufficient to effect re-entry. In *Bank of Ireland v Lady Lisa Ireland Ltd,*[18] O'Hanlon J cited Collins MR in *Serjeant v Nash, Field and Company*[19] who noted that an act of re-entry occurs when 'there is a final determination of a tenancy under a lease when the lessor, by some final and positive act which cannot be retracted, treats a breach of covenant by the lessee as constituting a forfeiture'.[20] The issuance of possession proceedings on foot of an act of forfeiture is one such unequivocal act, as is physically re-entering and taking possession of the premises with the intention of determining the tenancy.

This latter point came to the fore in the recent case of *Verbenagrove Limited v Evans*[21] where the landlord had entered the building which was the subject of the lease in a manner that was found not to be peaceable, and tried to avoid this difficulty by claiming that entering the garden at the front of the building through an unlocked gate had effected the forfeiture after which the lease was terminated. By this logic, as the lease was no longer in existence, the landlord would then have been free to do any damage he wished to the property. O'Donnell J described the argument as 'weak', characterising it as:

> …an artificial and atomistic approach to the overall circumstances. Entry through an unlocked gate or garden – even where it forms part of the overall demise – is unlikely to demonstrate the requisite intention to forfeit the lease. This is particularly so where the main element in the demised premises is a building, and a landlord enters the building…[22]

In this case, the landlord argued that lawful entry over any part of the premises in the name of the whole is sufficient to constitute re-entry, if it demonstrates an intention to take possession of the whole,[23] but this is ultimately a factual

[18] [1992] 1 IR 404.
[19] [1903] 2 KB 304.
[20] (n 18) at 408.
[21] [2025] IEHC 151.
[22] [2025] IEHC 151 [39].
[23] ibid. See Thomas Harrison, *Ejectments in Ireland* (Dublin 1903; Reprint 1981), 385-390. A number of English cases are authority for the broader proposition that peaceable re-entry can include the use of reasonable force: *Jones v Foley* [1891] 1 QB 730; *Hemmings v Stokes Pages Golf Club* [1920]

question, and other textbook writers are of the view that entry over part of the premises is only sufficient if the lease so provides.[24] In any event, the entry into the unlocked garden that occurred in *Verbenagrove* could hardly be described as unequivocal evidence of an intention to re-enter the whole of the premises, as there are many possible explanations for this that postmen, charity-hawkers and electioneering politicians could testify to.

Judicial Attitudes Towards Physical Re-entry

The strongest modern argument in favour of the continued availability of the self-help remedy of physical re-entry is to prevent an impecunious tenant from taking advantage of the delays in bringing a case to court, in order to continue in the occupation of the premises without paying rent. This is particularly so in circumstances where the landlord will only stand a very small chance of recovering any arrears *post factum*. The *locus classicus* of this approach are the comments of Carroll J in *FG Sweeney Ltd v Powerscourt Shopping Centre Ltd*,[25] where the landlord effected re-entry by using a master key to the premises and re-entering on a Sunday, when there was nobody in occupation of the shop which was closed at the time. The Court upheld the validity of the re-entry and noted that no violence had been used in retaking possession. Carroll J observed that:

> At the present time the amount of rent payable for prime city locations is very high and the arrears owed here are very large. The commercial viability of a shopping centre may well depend on all the tenants paying their rents and service charges promptly … Why should a lessee have a free ride as far as rent and services charges are concerned for as long as it takes a lessor to bring an action in the Circuit Court and then wait for an appeal to the High Court? The undertaking concerning damages that has been given by the plaintiffs is meaningless as the damages will be the equivalent to the rent and service charges for which liability already exists.

1 KB 720.; *Billson* (n 13). This line of authority is, however, unlikely to be followed in Ireland: see the comments of Cannon (n 7) 7-8.

[24] John Furber and Joanne Moss (eds), *Hill and Redman's Law of Landlord and Tenant* (LexisNexis, 2025) [8989].

[25] *Sweeney v Powerscourt Shopping Centre* [1984] IR 501 (HC) 504.

The Court affirmed that a lessor is not obliged to go to court and may re-enter peaceably under a valid re-entry clause or after the service of a valid notice under section 14 of the 1881 Act, in cases where the default is otherwise than in the payment of rent. Carroll J also noted that 'the lessee's rights are fully protected by being able to apply for relief against forfeiture under section 14(2) of the Act of 1881'.[26]

It was of particular importance in this case, that the lessee had not applied for such relief. From this failure, the judge inferred that the tenant wished to avoid the court enquiring about when arrears of rent and service charges might be paid. When applying for relief against forfeiture, a tenant may seek an interlocutory injunction to have their possession restored pending the outcome of the proceedings, enabling possession to be resumed almost immediately and frustrating the landlord's attempts to quickly terminate the lease without recourse to the courts.[27]

There are further reliefs available to a tenant after a physical re-entry has been effected. A right to compensation (for instance by a trespass to goods claim if the tenant's property has been damaged) survives the re-entry and can be pursued as an independent damages claim in the Circuit Court or High Court depending on the amounts involved.[28] If a tenant is not allowed back into possession pending the determination of a relief against forfeiture claim that is ultimately successful, an account can be taken of the loss to the tenant from being dispossessed for this time, and that amount deducted from any sums owing to the landlord.[29]

Thus, it can be seen that a tenant is far from being deprived of effective remedies where the landlord has made physical re-entry, particularly in circumstances where the breach complained is remediable. *Sweeney v Powerscourt*, one of the leading modern Irish authorities on this issue, obscures this fact, as there the

[26] ibid.
[27] Although, a dispossessed tenant would be wise to seek such a remedy promptly; see *Pineport v Grangeglen* [2016] EWHC 1318 (Ch).
[28] *Rainey Brothers v Kearney* [1990] NI 18. See also Cannon (n 7) 8.
[29] *Monument Creameries v Carysfort Estates* [1967] IR 462 (HC) 464-465.

tenant took the unusual step of challenging the re-entry without seeking relief against forfeiture.

Indeed, *Sweeney v Powerscourt* represents the high watermark of the modern jurisprudence in favour of the self-help remedy. In contrast, the comments of McKechnie J in the High Court in *Harrisrange Ltd v Duncan*[30] which might be read as impliedly hostile to the self-help remedy, given the various court procedures available to a landlord in these circumstances. He noted:

> No re-entry is to take place unless it, and the method used, is lawful and in accordance with law. The procedures available are quite adequate to vindicate any person's rights and access to the courts for that purpose. Those who refuse to avail of such rights and such access can only intend to steal a march on the rule of law. This should not be allowed to happen.[31]

It is true that judges tend to scrutinise a purported peaceable re-entry closely, given that a landlord who has effected re-entry in this way has bypassed the courts system, and the procedural protections contained therein for a tenant. As such, choosing to proceed in this manner is attendant with risk and not just for a landlord themselves. As Canny notes "[i]t is with some trepidation that lawyers advise a client to invoke a self-help remedy".[32]

Physical re-entry is risky as it creates a possibility that it will lead to a physical altercation with an aggrieved tenant (which exposes the landlord to a trespass to the person claim or the risk of injury), or damage to the tenant's property (actionable as trespass to goods). It is also commonly stated that infringing forceable entry legislation runs the risk of both civil and criminal proceedings.[33] Nevertheless, the most recent forceable entry act — the Prohibition of Forcible

[30] [2003] 4 IR 1.
[31] ibid [35]. In *Harrisrange*, the conduct complained of (the claim by the tenant in respect of which was ultimately found to be statute-barred by McKechnie J) was a series of attempted re-entries by changing the locks, with the tenant each time regaining possession, and then claiming assault and battery against the landlord. Such unseemly back-and-forth is clearly to be disapproved of, but is of a materially different nature than taking possession of an empty building at a time when there is no one expected to be on the property, as occurred in *Sweeney v Powerscourt*.
[32] Canny (n 7) 94.
[33] Wylie, *Irish Land Law* (6th edn, Bloomsbury 2021) 973.

Entry and Occupation Act 1971 — only applies where the offender is not the owner of the land, and does not apply to landlords who have an interest in the property.[34] There is also a panoply of earlier measures, some very ancient, relating to forcible entry, but in an impressive review of these statutes Collins concludes that only an Act of 1381 is still in force and relevant.[35] This measure provides that:

> None from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in (peaceable) and easy manner.

While there would clearly be practical difficulties with seeking to invoke an Act from the 14th century, this statement has been influential on the law's subsequent development, and underlines the principle that the lawfulness of the re-entry is not a defence to entering too forcefully onto property. In relation to this statute, Archbold notes that '[a]n entry by breaking the doors or windows … especially if it is a dwelling house, is a forcible entry'.[36]

Force or a show of force calculated to prevent resistance is forbidden, but interestingly, Archbold further notes that entry through a 'trick or artifice', or an entry effected by threats, such as to property and that are not threats of personal violence, would not support an indictment. And, as occurred in *Sweeney v Powerscourt*, an entry with a key is acceptable.[37]

Physical Re-Entry and 'Minimal Damage'

Clearly, the antiquity of the 1381 Act presents interpretative difficulties for a commercial landlord in deciding whether or not a lock can be broken in effecting a lawful and peaceable re-entry.[38] In recent times, a number of academic writers have suggested that a re-entry in which "minimal damage" was caused would be

[34] Owners of the land are excluded from the operation of the Act and the definition of owner encompasses *inter alia*: 'any person having an estate or interest in land' Prohibition of Forcible Entry and Occupation Act 1971 ss 1 and 2.
[35] Seamus Collins, 'To Break the Lock or Not?' (2021) 26(4) *Bar Review* 127, 129-130.
[36] Theobald Butler, *Archbold: Pleading, Evidence and Practise in Criminal Cases* (36th ed, W Gaunt & Sons 1966) 1306.
[37] ibid.
[38] Collins (n 35) 130.

an acceptable re-entry.[39] However, in the recent case of *ILG Ltd v Aprilane Ltd* [40] Allen J was doubtful of this position. He noted that the proposition for minimal damage being acceptable in effecting peaceable re-entry is derived from the first edition of Wylie's *Landlord and Tenant Law*,[41] and observed as follows:

> Without finally deciding the point, I am extremely sceptical of the argument that whether an entry is forcible might turn on the degree of force used, or the extent of damage done to the property – whether by drilling, forcing or cutting of locks or whatever.[42]

Allen J noted that the proposition that no more than minimal damage may occur in re-entry 'appears… to be unsupported by any judicial authority.'[43] To this point I will return below. Of interest here, is the seemingly inconsistent judgment of Keane J (delivered almost contemporaneously to *Aprilane*) in *Hafeez v CPM Consulting*,[44] where a lock was forced during re-entry. The Court noted that while the:

> …re-entry may have been forcible, but it is difficult to see how it was not peaceable… There is no evidence before me of anything more than minimal damage to the restaurant premises by, at most, breaking - and, presumably, immediately afterwards repairing - a lock.[45]

When one more closely examines these two seemingly contradictory authorities, the danger of making *obiter* statements, albeit in a qualified and provisional way, in the absence of a real factual dispute on the point that is before the court becomes apparent.

Aprilane was not directly concerned with the lawfulness of any physical re-entry that had been effected by the landlord. Rather, it was an attempt by the plaintiff to avoid the costs implications of issuing a notice of discontinuance, in circumstances where the main purpose of issuing the proceedings had been

[39] See Wylie, (n 7) 565-567; Cannon, (n 7) 7-8; Canny (n 7) 94-97; Byrne (n 7) 426-427.
[40] [2020] IEHC 420.
[41] John Wylie, *Irish Landlord and Tenant Law* (Butterworths 1990).
[42] [2020] IEHC 420 [26]-[27].
[43] ibid [26].
[44] [2020] IEHC 536.
[45] ibid [36].

achieved by it obtaining an interlocutory injunction restraining the defendant landlord from effecting physical re-entry of the property.[46]

In issue was the allegation that the landlord had threatened physical re-entry in circumstances where it would have been clearly unlawful, irrespective of whether locks would have been broken or not. First, re-entry was threatened in circumstances where the breach of covenant alleged was for reasons other than non-payment of rent (alienation of the interest without the landlord's consent), and no forfeiture notice had been served, as required by section 14 of the 1881 Act.[47] Secondly, the threat to re-enter was at a time when the premises (a gym) was open for business and the landlord was aware that a private security firm had been engaged to protect it, indicating a clear intention by the tenant to resist re-entry, which is not acceptable in Ireland.[48]

Contrast this with the facts in *Hafeez* where Keane J considered, in deciding whether to grant relief against forfeiture, the broader conduct of the tenant and refused relief due to the persistent failure of the tenant to pay the rent as it fell due.[49] The prospects of future commercial relations between the parties and the tenant's difficulties with both the Revenue Commissioners and the Director of Corporate Enforcement were further factors justifying the refusal of relief.[50] In declining to invalidate the re-entry because of the necessary inference that the lock had been forced (as the defendant did not have a key), the Court was able to avoid an outcome where a tenant, of opaque solvency and in persistent default in respect of his obligations under the lease, would be enabled to use litigation as a means of frustrating and delaying the landlord's right to forfeit the lease. This was in circumstances where there was also considerable doubt whether the tenant would be in a position to clear any arrears of rent owing, or to discharge any costs orders that may be made against him subsequently.

Were the requirement to avoid even 'minimal damage' in effecting re-entry, as espoused in *Aprilane* and the cases that follow it discussed below, applied strictly and in a manner removed from other contextual factors in the case, the result

[46] [2020] IEHC 420 [1], [7], [34].
[47] ibid [24].
[48] ibid at [24]. *Revok Properties v Dixon* (1973) 25 P & CR 1. Cannon (n 7).
[49] [2020] IEHC 536 [121].
[50] ibid [122].

would have been very different. This was precisely the evil warned against by Carroll J when she wondered why impecunious tenants should be allowed 'a free ride' as far as rent is concerned for as long as a case takes to conclude.

Indeed, Wylie in the most recent edition of his Landlord and Tenant Law text,[51] notes the comments of Allen J in *Aprilane* regarding 'minimal damage', but restates his view that physical re-entry is only unacceptable if the

> …tenant resists physical re-entry by the landlord, or if such a re-entry would cause more than minimal damage to the property the landlord should refrain as an attempt to use force is likely to be a criminal offence.[52]

In considering Allen J's criticism, Wylie further notes that there is no authority for the proposition that minimal damage is acceptable, referencing the above-cited article by Canny, of which he states that there is therein cited 'considerable authority supporting the proposition'. [53] Indeed, the English jurisprudence provides support for a much broader dictum that the use of force does not negate a forfeiture, and that peaceable re-entry using reasonable force such as the breaking into a locked premises, and even including the use of excess force, does not negate the forfeiture. The tenant who is affected would still be able to pursue remedies after the fact by civil or criminal means, but the forfeiture would be valid.[54]

There is authority to suggest that using reasonable force can include removing a roof,[55] and carrying the tenant's wife over the threshold of the premises while she was seated in her armchair.[56] Indeed, the English authorities go much further than this. Where re-entry is validly effected over part of the premises with the intention to re-enter the whole,[57]the lease is forfeited and the tenant is automatically a trespasser from that moment on. As such, in this line of thought, the landlord

[51] Wylie, (n 7) 565-567.
[52] ibid 566.
[53] Wylie also cites the decision of Keane J *Hafeez* on this point with approval; ibid 566 fn 139. Canny (n 7) fn 133; The authorities referred to are as follows: Hill and Redman (n 24); Harrison (n 25), 385; *Hemmings v Stoke Pages Golf Club* [1920] 1 KB 720; *Kavanagh v Gudge* (1844) 7 Man. & G. 316; *Jones v Foley* [1891] 1 QB 730; *Billson* (n 13) [1992] 1 AC 494, 524-525 (Nicholls LJ).
[54] Hill and Redman (n 24) [9001].
[55] *Jones v Foley* [1891] 1 QB 730.
[56] *Hemmings v Stoke Pages Golf Club* [1920] 1 KB 720.
[57] See *Verbenagrove Limited v Evans* [2025] IEHC 151, [39]-[40].

would be justified in using reasonable force to turn the tenant out.[58] However, as Cannon notes, this statement of the law is unlikely to be applied in Ireland, and where a tenant offers resistance, physical re-entry would be an unacceptable means of securing possession, a position this author concurs with.[59]

Recent Jurisprudence: Receiverships

Notwithstanding the academic and judicial support for the position of Keane J in *Hafeez*, the comments of Allen J in *Aprilane* have had more influence on the subsequent jurisprudence in the High Court. Although this debate has commenced in the context of commercial landlord and tenant law, it has now been applied to the law relating to receivers obtaining possession of property pursuant to a debenture.

Receivers, of course, seek possession on a different legal basis to landlords, normally entering pursuant to the terms of a charge where a borrower has defaulted on the terms of the loan, and the right to possession has become exercisable. The receiver normally acts as the agent of the mortgagor on the basis of statute and, often, a provision to this effect in the mortgage.[60] For instance, section 108 of the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act") indicates that a receiver appointed pursuant to this provision 'is the agent of the mortgagor, who is solely responsible for the receiver's acts or defaults, unless the mortgage provides otherwise.'[61] Invariably, commercial lenders insert terms to similar effect in deeds of mortgage and charge.

Furthermore, a receiver has a broader right to possession than a landlord who must effect a valid re-entry in order to bring the tenancy to an end. In contrast, a receiver's right to possession exists prior to the attempt to retake possession – once an event of default has occurred in respect of the mortgage that renders the power exercisable. Indeed, for mortgages by conveyance that may have been entered into prior to the commencement of the 2009 Act, the receiver may be the owner of the fee simple in the property, and thus entitled to possession only

[58] Hill and Redman (n 24) [9001].
[59] Cannon (n 7) 8.
[60] *McGuiness v AIB and Others* [2025] IEHC 180 [9] which set out the relevant portion of the debenture in that case that deemed the receiver to be the agent of the borrower.
[61] LCLRA 2009 s 108(2).

restricted by the terms of the mortgage so long as the borrower complies with its terms.[62]

This quite different legal basis for a receiver's right to possession has not been considered in any significant detail by a number of recent High Court decisions, where the law on re-entry for forfeiture of a commercial lease has been applied *mutatis mutandis* to receiverships. Additionally, these cases concern applications for interlocutory relief where no final factual determination has been made by the court, and their precedential value should be weighed accordingly.

In *Charleton v Hassett*,[63] the plaintiff had appointed a receiver as agent of the mortgagee (a rarer occurrence than the receiver being the agent of the mortgagor) over the mortgaged property pursuant to a charge, and sought injunctions restraining the defendant from interfering with the receiver exercising his powers so that the property could be sold.[64] What followed then was, as described by Allen J, a 'protracted game of cat and mouse' where the receiver initially changed the locks, and the defendant then retook possession by changing the new locks, and the process was repeated over the course of fourteen months.[65] Although there were many elements to the case, ultimately it was the bank's possession that was being interfered with, and while the plaintiff receiver had been appointed as agent of the bank with regard to securing the property and selling it, he had no authority to litigate on its behalf to vindicate its right to possession.[66]

There was some controversy as to whether the property was the defendant's family home, but it was unquestionably residential property. It was also clear that there was an express term in the Deed of Mortgage entitling the bank to take possession without notice, once default had been made by the borrower. In this regard, the Court noted Hogan J's comments in *Irish Life & Permanent plc v Duff*,[67] that the constitutional protection of the inviolability of the dwelling cast serious

[62] *Gale v First National Building Society* [1985] IR 609, Costello J; but cf the comments of Hogan J in *Irish Life & Permanent v Duff* [2013] 4 IR 96.
[63] [2021] IEHC 746.
[64] ibid [1]-[2].
[65] ibid[19], [22], [45].
[66] ibid [88].
[67] [2013] IEHC 43; cf *Gale v. First National Building Society* [1985] IR 609.

doubt on the entitlement of a bank to take possession of *residential* property in the absence of a court order.[68] Allen J restated his comments in *Aprilane* and doubted whether breaking locks could ever amount to peaceable re-entry,[69] but as noted above, *Aprilane* concerned re-entry pursuant to forfeiture of a commercial lease.

The subsequent case of *Wallace & O'Connor v Davey*[70] bears a superficial similarity to *Charleton v Hasset* in that the plaintiff receivers were seeking possession of the property, as well as related injunctions restraining interference with the joint receivers in the discharge of their functions, with a view to the plaintiffs selling the property. Stack J noted of the plaintiffs' assertion of a right of re-entry pursuant to the mortgage deed, and further that:

> …[the] right is a right to enter, and therefore must be either asserted on foot of a court order or exercised peaceably: see *Charleton v. Hasset* [2021] IEHC 746, where it was held the breaking of locks does not constitute peaceable re-entry.[71]

This perhaps overstates the finding of Allen J in *Charleton* where he merely recited his obiter comments in *Aprilane* that he 'doubted' if the breaking of locks could ever constitute peaceable re-entry. Such a distinction is not mere pedantry, as a general finding that locks in commercial receiverships may not be changed is fraught with difficulty, not least because it runs counter to commercial practice in this area of many years' standing.

Furthermore, there is a crucial distinction between the *Wallace* case and *Charleton* in that in the latter the receiver was an agent of the mortgagee, whereas in the former, the joint receivers were the agent of the borrower (the more common position).[72] As the agent of the mortgagor, the receiver would have been at law

[68] [2021] IEHC 746 [63].
[69] ibid [64].
[70] [2022] IEHC 120.
[71] ibid [96].
[72] This was because the implied statutory powers to appoint a receiver contained in ss 19 and 24 of the Conveyancing Act 1881 were implied into the mortgage deed, thus the receiver would have been the agent of the mortgagor pursuant to s 24(a). [2022] IEHC 120 [19]-[21].

deemed to be breaking the locks on behalf of the borrower, weakening the argument that this would not constitute peaceable entry.

In addition, the property the subject matter of the receivership in *Charleton* was residential (and there was a claim that it was a family home), whereas in *Wallace* it was a commercial premises. Hogan J's judgment in *Irish Life and Permanent v Duff*[73] was cited with approval by Allen J in the former case.[74] *Duff* was concerned with the inviolability of the dwelling and the Court noted in that case that:

> [t]he assurance of security and protection inherent in the guarantee of "inviolability" would be fundamentally compromised if peaceable possession could be taken at any time other than by means of a court order without express notice to the borrower … merely because the borrower was in default.[75]

The Court further held that the inviolability of the dwelling protected by Article 40.5 of the Constitution 'complements and re-enforces other constitutional guarantees and values, such as … dignity of the individual (as per the Preamble to the Constitution), the protection of the person (Article 40.3.2), the protection of family life (Article 41) and the education and protection of children (Article 42).'[76]

While this statement is certainly true for dwellings, it is of note that none of the rights mentioned are engaged with regard to entry onto commercial premises, which is usually a dispute about conflicting property rights. If a re-entry involves trespass to the person or goods (though not to land if a right to re-entry exists), there are established remedies available *post factum* to vindicate any infringement of these rights such as damages claims in torts, and the right to set-off any such damages against any arrears of rent claimed in the forfeiture

[73] [2013] IEHC 43.
[74] [2021] IEHC 746 [63].
[75] [2013] IEHC 43 [48]. In *Emerald Sky 2 DAC and Others v Victoria Homes Ltd and Others* [2023] IEHC 446, Egan J noted that *Charleton v. Hasset* concerned residential property, but nonetheless, indicated on an obiter basis that the removing and changing of locks did not represent obtaining peaceable possession in a partially completed and unoccupied block of apartments that did not yet constitute residential property.
[76] *DPP v. O'Brien* [2012] IECCA 68 [17] (Hardiman J); cited with approval in *Irish Life and Permanent v Duff* [2013] IEHC 43 [46] (Hogan J).

proceedings. This distinction is not only apparent from the constitution but also the differing statutory regimes pertaining to residential and commercial property.[77] Thus, applying the same procedural protections as are available for residential property to commercial property disputes cannot be justified on the basis of the same panoply of rights being engaged by both.

All of these authorities were considered by Nolan J in *Coulston and Others v Elliot & Elliot*,[78] a case involving the powers of a receiver to take possession on foot of a debenture. In this case, the relevant mortgage deed expressly indicated that the bank or its agent, being the receiver, could enter the premises any time after a demand was made and take possession of it. The receiver had entered the premises causing minor damage while changing the locks. Nolan J observed that the lock belonged to the defendants formed part of their property, and then expressly preferred the argument put forward originally by Allen J that any breaking of the lock constituted non-peaceable entry.[79]

Nonetheless, the effect of the finding that the entry was forcible was slight, going to the matter of costs, and the Court was influenced by the fact that the trespass took place in the middle of the night, lasting for a mere two hours with the premises being handed back at 6.00am. He noted as follows:

> …whilst I find that there has been a trespass, it seems to me that it could only be described as technical in nature and that it would be practically impossible to put a compensation value on that trespass and that justice will be done between the parties by an appropriate order for costs.[80]

It was also apparent in *Coulston and Others v Elliot & Elliot* that section 19 of the 1881 Act was implied into the deeds of charge and, as such, it would appear that the receivers, pursuant to that section, would have been acting as agents of the

[77] For example, s 96(3) of the Land and Conveyancing Law Reform Act 2009 indicates that the provisions affording procedural protections to defaulting borrowers on foot of a mortgage may not be contracted out of in regard to housing loan mortgages. Furthermore, the Residential Tenancies Act 2004, as amended, is a self-contained statutory regime for private residential tenancies that provides extensive procedural protection to tenants where the landlord wishes to terminate their tenancy.
[78] [2024] IEHC 697.
[79] ibid [103]-[105].
[80] ibid [106].

borrowers when changing the locks.[81] Although the point was not argued in the proceedings, the receiver was breaking locks that belonged to the borrowers on their behalf and with their authority as their agents.

In any event, this developing *ratio* that the breaking of locks will never be acceptable for a receiver retaking possession in a receivership has further embedded itself in this area of law by the recent decision of Dignam J in *McGuinness v AIB and Others*[82] where he found that the removal and changing of locks 'leads to the conclusion that there is a strong case that possession was not taken peaceably',[83] and this provisional finding (this was another interlocutory application) was one of the grounds on which injunctive relief was refused.

Reform

The LRC has produced a consultation paper,[84] and a subsequent report with a Draft Bill,[85] on the subject of commercial landlord and tenant law, of which, at the time of writing at least, there is no indication that its passage is imminent or a political priority for the Government. Nonetheless, the chapter concerned with forfeiture is sensitive to the need to simplify the procedure, as well as the potential injustice which may result from a defaulting tenant taking advantage of court delays when defending an indefensible claim.[86]

There is a further issue with property that has been abandoned by the tenant and the asset is at risk pending the retaking of possession by the former landlord. Of course, the current law which allows physical re-entry to complete a forfeiture avoids many of these problems and at one point the Law Commission of England and Wales had recommended retention of the self-help remedy as an 'effective

[81] ibid [85].
[82] [2025] IEHC 180.
[83] ibid [102].
[84] Law Reform Commission (n 2).
[85] Law Reform Commission (n 4).
[86] Law Reform Commission (n 4) 172-175.

management tool' for landlords with regard to commercial property,[87] although this appears to have been supplanted by more recent recommendations.[88]

The Draft Bill produced by the LRC contains a nuanced proposal for a statutory scheme to introduce a simplified and summary procedure in place of forfeiture, where entry without a court order is, for the most part, abolished.[89] This is subject to an *ex parte* procedure where the court can grant an order of possession if there are reasonable grounds for believing the property is to be abandoned.[90] In exceptional circumstances, possession can be retaken in an 'emergency action' application if the premises are at risk of 'substantial damage',[91] but this does not have the effect of terminating the tenancy, and the landlord has to apply to the court to retain possession, and bring an end to the tenancy.[92]

This is a well-drafted proposal, but one does have to wonder at the mischief it seeks to address. The reasons cited by the LRC itself (tenant had insufficient time to remedy the breach, trespass to goods or damage to tenant property, tenant subsequently applies for relief against forfeiture),[93] either have established remedies available after the fact, or raise the possibility that the tenant may claim a remedy after the fact (the reason why this creates a problem is questionable). The stated goal of 'simplification' of forfeiture hardly justifies abolishing the simplest remedy of all: self-help. Furthermore, there is nothing to suggest there is any difficulty with existing *post factum* remedies. In such circumstances, the legislature might be mindful of law reform that will lead to a notable increase in litigation in this area, unless clear policy reasons can be identified for this change.[94]

[87] Law Commission, *Termination of Tenancies by Physical Re-entry* (1998) [1.6]-[1.9]
[88] Law Commission, *Termination of Tenancies for Tenant Default* (2006-Law Comm-303), <https://assets.publishing.service.gov.uk/media/5a7c30a4ed915d7d70d1d2ac/6946.pdf> accessed 24 July 2025.
[89] Law Reform Commission (n 4) Landlord and Tenant Bill 2011, Ch 5 and 6.
[90] ibid s 76.
[91] ibid s 77.
[92] ibid s 71.
[93] Law Reform Commission (n 2) [14.16].
[94] See the comments of Professor Mee regarding law reform creating incentives to litigate in relation to the reform of the law of prescription in: John Mee, 'Prescriptive Easements and Profits: Another Cliff Edge?' (2021) *Conveyancing and Property Law Journal* 11.

Conclusion

Although it is unquestionably the law that a commercial landlord may effect physical re-entry on foot of an act of forfeiture, judges are understandably wary of endorsing such a remedy given it bypasses the courts and the procedural protections they provide, and also because of the potential illegality that may result through an unseemly altercation with the tenant or damage to the tenant's property. Nonetheless, there are many established remedies that an aggrieved tenant may have recourse to after such a re-entry has occurred, including having possession restored and remedying the breach complained of so that relief against forfeiture can be sought.

Where a tenant is in persistent default of its obligations under a lease, or where property is abandoned by the tenant, such a right of re-entry enables a landlord to avoid an impecunious tenant exploiting the time involved court proceedings in bad faith in order to extend the tenancy and in circumstances where it is unlikely that any outstanding rent or service charges will be recoverable. Of course, re-entry must be peaceable but this is ultimately a factual question and courts should be wary of adopting rigid rules, such as that locks may *never* be broken, that may tie a judge's hands in examining all of the circumstances and contextual factors to determine the issue. I would contend that the decision of Keane J in *Hafeez* was correct in all of the circumstances of the case, and that an injustice would have resulted had he been compelled to find otherwise on the single fact of the locks having being changed when re-entering the property.

There is also an argument that the recent line of jurisprudence which rejects the proposition that a landlord may cause 'minimal damage' when entering the property has been decided *per incuriam*, as it fails to consider earlier authorities, and also in applying the requirement *mutatis mutandis* to the law of receiverships without a consideration of their differing legal basis. If earlier authority is to be departed from, it is better that it is done so consciously after considering the earlier law and distinguishing it or identifying a specific deficiency. One wonders if there is a certain conflation of the strict procedural requirements for taking possession of residential property with that pertaining to commercial property in the judicial mind, in circumstances where the latter does not engage the same range of personal rights of the former.

The Law Reform Commission's proposals to reform the area are a considered attempt to weigh the differing policy considerations at play in such commercial disputes, but in circumstances where there are established and powerful remedies already available to an aggrieved tenant, one wonders what evil they would seek to address.