Landmark CHAMBERS

Waiver: the test and basic elements, timing, acts of waiver, types of breach

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STRUCTURE OF TALK

- PART I: What is waiver?
- PART II: Issues

What is waiver?

- In the context of forfeiture: where the landlord waives their right to forfeit the lease, usually by their conduct

What is waiver?

- Where a tenant's default gives rise to a right of re-entry which, if it is exercised, will determine the lease, the landlord is presented with a choice to **elect** between sets of inconsistent rights:
  1) L can choose to re-enter the property, recover possession and treat the lease as at an end (i.e. forfeit the lease)
  2) L can continue to require compliance by the tenant with the terms of the lease.

- L must choose once and for all between these options; cannot alter his choice (but note the exception in ***Mount Cook***)

Election: a fork in the road

Waiver in the context of forfeiture

- THEREFORE, once a landlord has done any act which is consistent only with the continuing existence of the lease, he is considered to have made his irrevocable choice not to terminate the lease. **In this situation he is held to have 'waived' his right to forfeit the lease.**

What is waiver *not* in the context of forfeiture?

- Waiver in this context is only in relation to the (particular) right to forfeit
- Does not affect landlord's other remedies for the breach in question
- Where the breach is a 'continuing breach', it re-occurs every day, and therefore landlord will be able to forfeit the next day
- Does not affect landlord's rights in respect of future breaches (include, where relevant, the right to forfeit in respect of future breaches)

Waiver: the classic statement

- The classic statement of the nature of waiver of a right of re-entry is by Parker J in ***Matthews v. Smallwood*** [1910] 1 Ch 777:

  – *"Waiver of a right of re-entry can only occur where the lessor, with knowledge of facts upon which his right to re-enter arises, does some unequivocal act recognising the continued existence of the lease. It is not enough that he should do the act which recognises, or appears to recognise, the continued existence of the lease, unless at the time when the act is done, he has knowledge of the facts under which, or from which, his right of entry arose."*

- As approved by Lord Diplock in ***Kammins Ballrooms v Zenith Investments*** [1971] A.C. 850 at 853.

Requirements to show waiver of right to forfeit lease

- Parker J's formulation is incomplete, because waiver must also be **communicated** to the tenant. In relation to the breach of a covenant preventing subletting, the requirements to show waiver were described as follows by Aldous LJ in ***Cornillie v Saha*** (1996) 72 P&CR 147:
  1) *Does the alleged act of waiver unequivocally recognise the subsistence of the lease?*
  2) *Did the landlord have knowledge of the breach of covenant from which the right of re-entry arose at the time of the alleged act of waiver?*
  3) *Was the act of recognition communicated to the tenant?*

Act of waiver is considered objectively

- The effect of an act relied on as **waiver** of **forfeiture** must therefore be considered **objectively** without regard to the subjective states of minds and motives of either party: ***Central Estates (Belgravia) Ltd v Woolgar (No. 2)*** [1972] 1 WLR 1048 at 1052 per Lord Denning.
- Whether the landlord intended to waive, or whether the tenant understood that the landlord has done so are both irrelevant

PART II: Forfeiture issues

(1) The Landlord's knowledge
(2) Timing
(3) Waiver by demand and acceptance of rent
(4) Other acts of waiver
(5) Communication to the tenant
(6) Effect of waiver

(1) THE LANDLORD'S KNOWLEDGE

- What does the landlord need to have knowledge of, the facts giving rise to the right to forfeit, or the existence of the right to forfeit?
- Swanwick J held in ***David Blackstone Ltd v Burnetts (West End) Ltd*** [1973] 1 WLR 1487 that it was only the former; at p.1501F:
  - *'the knowledge required to put a landlord to his election is knowledge of the basic facts which in law constitute a breach of covenant entitling him to forfeit the lease. Once he or his agent knows those facts an appropriate act by himself or any agent will in law effect a waiver or a forfeiture. His knowledge or ignorance of the law is, in my judgment, irrelevant. If it were not so, a vast gap would be opened in the administration of the law of landlord and tenant and a facile escape route for landlords would be provided. Indeed, if this were the position unscrupulous landlords could hardly have failed in the past to take advantage of it long before now.'*
- Approved by Aldous LJ in ***Cornillie v Saha***

(1) THE LANDLORD'S KNOWLEDGE

- Therefore….
  - Once a landlord has knowledge of circumstances which might suggest a *possible* breach of convent, the landlord must inquire further as to the precise nature of the breach, or he risks waiving the breach by his subsequent acts.
  - Landlord cannot say that he did not know enough to be put to his election if something he knew should have indicated to him that he should inquire further.
  - However, where landlord (i) suspects a breach of covenant (ii) receives a representation denying the same and (iii) is "not sufficiently confident of the untruth" of the representation: the landlord is not obliged to enquire further into his suspicions and cannot be said to have waived the breach: ***Metropolitan Properties Co Ltd v Cordery*** (1980) 39 P&CR 10

(1) THE LANDLORD'S KNOWLEDGE

- The knowledge of the landlord's agents (including solicitors) is imputed to the landlord; e.g. porters - ***Metropolitan Properties Co. Ltd. v Cordery****;*
- Official notification of tenant's compulsory winding-up given by an advertisement in the London Gazette was not sufficient to fix a landlord with constructive notice of the same: ***Official Custodian for Charities v. Parway*** [1985] Ch 151
- Where an unlawful sub-tenant openly occupied a flat in a block of flats to the knowledge of porters employed by the landlord, the landlord, by continuing to accept rent from the tenant, was deemed to have accepted the subtenant's occupation and to have waived any breach: ***Metropolitan Properties Co Ltd v Cordery***

Van Haarlam v Kasner (1992) 64 P. & C.R. 214

- Breach of the covenant not to use the flat for illegal purposes.

Van Haarlam v Kasner (1992) 64 P. & C.R. 214

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- T was arrested and charged with (and subsequently convicted of) doing acts preparatory to the committal of offences under the Official Secrets Act 1911:
  - The preparatory acts were residing in the United Kingdom, having in his possession equipment for the receipt of secret information, materials for communication of secret information to others and a list of places where secret information could be left or collected and receiving secret radio transmissions from Czechoslavakia.
- Court held that demand and acceptance of rent in the knowledge that T had been arrested, charged with offences under the Official Secrets Act 1920 and remanded in custody amounted to a waiver

(2) TIMING

- An election cannot be made until the landlord's right of re-entry has arisen. Until that point, the landlord does not have inconsistent rights, since he does not yet have any right to forfeit the lease.
- Once an election is made *either way* it is final.
- BUT NB: a forfeiture by the service of proceedings is not always final: where the tenant defends the claim by denying that the landlord had the right to forfeit at all, the landlord can discontinue his claim, accepting that defence, and thereby undo the forfeiture: ***Mount Cook Land Ltd v Media Business Centre Ltd*** [2004] 2 P & CR 25.

(2) TIMING: When does the right of re-entry arise?

- For example, most leases provide that the right of entry for non-payment of rent arises after some 'grace period' e.g.:
- *"If the rents hereby reserved, or any party thereof, shall be unpaid for a period of 21 days after becoming payable (whether demanded or not) then….*
- But rent is payable as of rent day; L may sue for it as a debt immediately
- But does right of entry arise:
  - As soon as rent is 'unpaid'?
  - 21 days after rent is first unpaid?
  - At some other point??

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(2) TIMING

- It follows that:
  1) L CANNOT WAIVE a right to forfeit before it arises. Where L does some act consistent only with the continued existence of the lease (e.g. issues proceedings claiming an injunction requiring the tenant to comply with the lease's user covenant), although that act would be capable of amounting to waiver of the right to forfeit after the grace period, it does not do so during the grace period.
  2) By the time the right to re-entry does arise at the end of the grace period, tenant already owes the landlord the rent; therefore, landlord may demand those arrears during *and after* the grace period without waiving the right to forfeit the lease in reliance on that breach because they arose **prior** to right to forfeit: ***Debtors v Joyner*** [1995] 1 WLR 1127

(3) WAIVER BY THE DEMAND AND ACCEPTANCE OF RENT

- the acceptance of rent which has fallen due after the landlord became aware of the relevant breach is a waiver of the right to forfeit

- Where a tenant asserts that his landlord has waived the right to forfeit by accepting rent they will, therefore, have to prove:
  - that the money was *"accepted"* by the landlord;
  - that it was accepted *"as rent"*; and
  - that the rent in question fell due after the landlord had acquired knowledge of the breach of covenant which gave rise to the right to re-enter

(3) WAIVER BY THE DEMAND AND ACCEPTANCE OF RENT

- courts have historically treated acts of waiver relating to the acceptance and demand of rent as being in a category of its own

- Unlike other potential acts, this is true regardless of any other surrounding circumstances which might render equivocal the behaviour of the landlord. It is said that there is *"no room for inquiry into the facts under the doctrine – no question of what must have been the common intention of the parties":* ***Greenwich v. Discreet Selling Estates*** (1991) 61 P. & C.R. 405 per Slaughton LJ at 409

(3) WAIVER BY THE DEMAND AND ACCEPTANCE OF RENT

- Acceptance by agents with full authority, even when accepted by their clerk in error against the landlord's instructions, counts as acceptance by the landlord: ***Central Estates v. Woolgar (no. 2)***

- Where rent is paid directly into a landlord's bank account, and the landlord rejects the transfer (if that is possible) or repays the money as soon as reasonably practicable, the landlord will not have "*accepted*" the rent.

- ***Seahive Investments Ltd v. Osibanjo*** [2008] EWCA Civ 1282: cheque part-payment of both pre- and post-right to forfeit rents

(4) WAIVER BY ACTS OTHER THAN THE DEMAND/ACCEPTANCE OF RENT

- An act other than the demand and acceptance of rent which occurs at a time when the landlord has the relevant knowledge of a right to re-enter will amount to a waiver only if it is *"so unequivocal that when considered objectively it could only be consistent with regarding the lease as continuing*": ***Yorkshire Metropolitan Properties v Cooperative Retail Services*** [2001] 2 L&TR 298 per Neuberger J

- Bringing of a claim which asserts the continuing existence of the lease; e.g.
  - Seeking injunction to enforce use covenants;
  - commencing proceedings seeking access to flat on the basis of a provision in the lease: ***Cornillie v Saha***

(4) WAIVER BY ACTS OTHER THAN THE DEMAND/ACCEPTANCE OF RENT

- Historically levying of distress considered a waiver of all known breaches for which a right of re-entry had arisen at the date of the levying of the distress (right to distrain incident of the continued existence of the tenancy)
- Distress abolished on 6 April 2004 upon the coming into effect of Chapter 2 of the *Tribunals, Courts and Enforcement Act 2007:* replaced by statutory procedure - Commercial Rent Arrears Recovery (CRAR)– exercisable, in certain circumstances, after the end of a lease but not where the lease has been forfeited: s.79(4)(a) 2007 Act
- Strong argument same logic applies to CRAR procedure? Its use appears, to the same extent, an unambiguous assertion that the lease is not being forfeited.

(4) WAIVER BY ACTS OTHER THAN THE DEMAND/ACCEPTANCE OF RENT

- **KEY QUESTION: Has there been a sufficiently unambiguous acknowledgement of the lease at a time when the right of re-entry for the relevant breach had arisen?**
  - Service of a s. 146 notice in respect of the relevant breach: obviously not an unequivocal affirmation of the existence of the lease because it is a necessary preliminary step to the termination of the lease by re-entry
  - service of a s. 146 notice asserting later beaches does not waive the right of re-entry that had arisen from earlier failures to pay the rent when it fell due: ***Church Commissioners v. Nodjoumi*** (1986) 51 P&CR 155
  - The service of a notice which presupposes the continued existence of the lease or tenancy, such as a notice to quit, is an act of waiver: ***Marche v Christodoulakis*** (1948) 64 TLR 466

(5) COMMUNICATION TO THE TENANT

- Negotiations which are genuinely protected by the 'without prejudice' privilege applicable to attempts to settle litigation are unlikely to give rise to an effective waiver in practice, since the tenant is prevented from pleading the alleged act of waiver: ***Re National Jazz Centre*** [1988] 2 EGLR 57; the fact of entering into without prejudice negotiations does not indicate waiver;
- For other negotiations, normal test applies; e.g. a *'subject to contract'* offer for the purchase of the tenant's interest has been held to amount to an act of a waiver, since it unambiguously recognised that the lease still existed: ***Bader Properties v Linley Property Investments*** (1968) 19 P&CR 620
- a "without prejudice demand" for rent is still a waiver: ***Segal Securities v. Thoseby*** [1963] 1 QB 887

(5) COMMUNICATION TO THE TENANT

- Note issues of timing of communication:
  - Service, not issue, of proceedings;
  - if landlord's agent posts a demand for rent but the landlord manages to peacefully re-enter before it is delivered, the landlord would not have waived his right to re-enter and the re-entry will have been effective (the purported 'waiver' would have occurred after election to forfeit, therefore ineffectual)
  - BUT – NB – question of recognition of the continued existence of the lease might be assessed at a different time; e.g. at the time the demand for rent is *made;* a letter from a landlord unambiguously recognising the tenant which is despatched before the landlord has knowledge of his entitlement to re-enter does not constitute a waiver (even where the tenant receives the letter after the landlord has acquired sufficient knowledge: ***David Blackstone Ltd v. Burnetts (West End) Ltd*** [1973] 1 WLR 1487

(6) EFFECT OF WAIVER

- Where the breach is a **'once and for all breach'** – i.e. consisting of a single, rather than recurring, breach of covenant:
  - E.g. breaches of covenant to pay rent, not to assign, etc.
  - waiver results in the loss of L's right to forfeit in reliance upon T's act/omission;

(6) EFFECT OF WAIVER

- Where the breach is a continuing breach;
  - E.g. covenant to keep premises in repair/insured;
  - Each day on which premises is not in repair/uninsured represents a *fresh breach;*
  - Therefore, if L waives, but state of affairs continues… L's right of re-entry arises again the next day
  - In such situations – repercussions of waiver much less significant
- Where L serves a s.146 notice in respect of a continuing breach; and then waives; and state of affairs continues - there is no need to serve *another* s.146 notice before exercising right of re-entry, provided substantially same state of affairs is still continuing: ***Greenwich LBC v Discreet Selling Estates*** (1991) 61 P&CR 405

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Thank you

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