

Waiver of Forfeiture

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What is waiver of forfeiture?

“Waiver of a right of re-entry can only occur where the lessor, with **knowledge** of the facts upon which his right to re-enter arises, does some **unequivocal act** recognising the **continued existence of the lease**”.

-- *Matthews v Smallwood* [1910] 1 Ch. 777, 786, per Parker J.

“If the landlord by word or deed manifests to the tenant by **an unequivocal act** a concluded decision to elect in a particular manner, he will be bound by such an election. If he chooses to do something such as demanding or receiving rent which can **only be done consistently with the existence of a certain state of affairs, viz. the continued existence of the lease or tenancy in operation**, he cannot thereafter be heard to say that that state of affairs did not then exist”.

-- *Central Estates (Belgravia) v Woolgar (No. 2)* [1972] 1 W.L.R. 1048, 1054, per Buckley L.J.

Basic principles

- Doctrine of election.

“Waiver is a word which is sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right which he once possessed from raising a particular defence to a claim against him which would otherwise be available to him. This arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did.”

-- Kammins Ballrooms Co Ltd Zenith Investments (Torquay) Ltd [1971] AC 850

In practice:

- When faced with a breach of covenant giving rise to a right to forfeit a lease, a landlord has two options:
 - (1) Enforce right of forfeiture and treat lease as being at an end; or
 - (2) Treat the lease as continuing to exist.

Waiver of forfeiture vs waiver of breach of covenant

- Waiver of forfeiture is based on the landlord's election and bars only the remedy of forfeiture → right to damages for breach remains intact.
- Waiver of breach of covenant is based on the inference of the landlord's consent to the breach → bars all the landlord's remedies relating to the breach.
- Neither waiver bars landlord's remedies in respect of subsequent breaches.

Waiver: the three ingredients

- (1) Landlord's **knowledge** of the breach of covenant
- (2) The **unequivocal recognition** by the landlord of the continued existence of the lease
- (3) **Communication** of that recognition to the tenant.

(1) Landlord's knowledge

Knowledge of what?

- Knowledge of the right to elect
 - (i) Knowledge of the basic facts in law giving rise to the right to elect
 - (ii) Knowledge of the right to elect itself

Harvey v Oswold (1865): "True it is, when the condition is broken, the lessor hath election to continue the lease, or to avoid it; but without privity that such election was in him, he cannot make an election".

(1) Landlord's knowledge: arrears of rent

- Where a right to re-enter is exercisable in the case of non-payment of rent only after 14 or 21 days of the rent falling due, a landlord cannot waive a right to forfeit until that period expires – there is a ‘twilight period’ (see *Stemp v 6 Ladbroke Gardens Management Ltd* [2019] L&TR 10 at [75]).
- A landlord can waive their right of forfeiture (once it has arisen) prior to being in a position to exercise the right – it is possible to make an unequivocal choice between two inconsistent rights prior to being in a position immediately to exercise them (*Stemp v 6 Ladbroke Gardens Management Ltd* [2019] L&TR 10)

(right to forfeit arose when arrears of service charge reserved as rent unpaid for 21 days; section 81 of the Housing Act 1996 prevented re-entry until admission or determination that the sum was payable; landlord indicated an intention to treat the lease as ongoing prior to statutory procedures being worked through)

(1) Landlord's knowledge

Burden of proof of knowledge?

- Lies on the tenant

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

(1) Landlord's knowledge: imputed knowledge?

Personal knowledge of landlord not necessary. Knowledge acquired by an employee of the landlord imputed where employee under a duty to report the matter in question. -- *Metropolitan Properties Co v Cordery* (1980) 39 P. & C.R. 10.

- Porter in a block of flats knew of sub-letting (*Metropolitan Properties Co v Cordery*)
- Landlord's solicitor knew subletting had been completed (*David Blackstone v Burnetts*)

Where agent's authority is limited/no duty to report a breach of covenant to the landlord, knowledge will not be imputed to the landlord.

- Landlord too ill to attend to business and son collected rents (*Doe d. Nash v Birch* (1836) 1 M. & W. 402.)
- Tenant's insolvency reported in London Gazette (*Fryer v Ewart* [1902] A.C. 187)

(1) Landlord's knowledge: suspicion?

“If the landlord receives a representation from his tenant which, if true, means that there has been no breach and if the landlord, not being sufficiently confident of the untruth of what the tenant says, decides not to take proceedings but proceeds on the basis that what the tenant says is true, then ... it cannot later be said that he knew all the necessary facts to establish a breach”.

-- *Woodfall's Landlord and Tenant* at 17.094.3, approved in *Thomas v Ken Thomas* [2007] 01 E.G. 94, CA

e.g. no waiver where landlord suspected a breach but assured by tenant that no sub-letting had taken place (*Chrisdell v Johnson and Tickner* (1987) 54 P. & C.R. 257, CA.)

BUT: where landlord has reasonable grounds to suspect a breach, must take steps to establish the position or will be imputed with knowledge: *Van Haarlam v Kasner Charitable Trust* (1992) 64 P. & C.R. 214.

(1) Relevance of landlord's intention?

- Intention to waive is unnecessary. Landlord's act is construed objectively.
-- *Central Estates (Belgravia) v Woolgar (No.2)* [1972] 1 W.L.R. 1048.

- Acceptance of rent through clerical error = waiver
-- *David Blackstone v Burnetts (West End)* [1973] 1 W.L.R. 148

- Receipt of rent “without prejudice” or under protest = waiver.
-- *Windmill Investments (London) v Milano Restaurants* [1962] 2 Q.B. 373;
Central Estates (Belgravia) v Woolgar (No.2); *Croft v Lumley* (1858) 6 H.L. Cas. 672.

(2) Unequivocal recognition of existence of tenancy

- Positive act required - lying by and witnessing the breach is no waiver.
-- *Doe d. Sheppard v Allen* (1810) 3 Taunt. 78.
- Long acquiescence in repeated breaches of covenant will usually amount to a waiver.
-- *Kelsey v Dodd* (1881) 52 L.J. Ch. 34.

(3) Communication to tenant

- Act or statement not communicated to tenant is not an election to waive the right to forfeit.
- E.g.: assignee of the reversion of a lease who takes “subject to and with the benefit of the lease” and with knowledge of a breach of covenant by the lessee which would entitle the lessor to re-enter does not waive the right of re-entry.
 - *London & County (A. & D.) v. Wilfred Sportsman* [1971] Ch. 764
- Where the act of waiver relied on is the sending of a document, the waiver is not effective until the document is received.
 - *David Blackstone v. Burnetts (West End)* [1972] 1 W.L.R. 1487.

Acts of waiver: (1) Demand and acceptance of rent

- Acceptance of rent which fell due after the date on which the right to forfeit arose will waive the right to forfeit for any breach of which the landlord was aware on the date on which the rent fell due.
- Where notice to repair is served, acceptance of rent during currency of notice will not amount to waiver because the right to forfeit arises only once the notice has expired: *Doe d. Rankin v Brindley* (1832) 4 B. & Ad. 84.
- Where a s.146 notice is served, acceptance of rent during currency of notice will not amount to waiver because the right to forfeit arises only on expiry of the notice: *Greenwich LBC v Discreet Selling Estates* [1990] 2 E.G.L.R. 65.
- NOTE: Where the breach is an irremediable breach like unlawful subletting, it is arguable that the right to forfeit arises at the date of the service of the notice (*Woodfall* at 17.098.1 and *Stemp v 6 Ladbroke Gardens Management Ltd* at [71])
- NOTE: where rent is demanded but not received, position is less clear: see *Greenwood Reversions Ltd v World Environmental Foundation Ltd* [2009] L.& T.R. 2.

(1) Demand and Acceptance of rent: by agent

- To amount to waiver it is sufficient if the rent is accepted by the landlord's agent, even if the agent has been instructed not to receive it: *Central Estates (Belgravia) v Woolgar (No.2)*.
- If rent paid into bank account:
 - Where the bank is instructed not to receive it, acceptance amounts to waiver unless steps are taken to repay as soon as possible: *Pierson v Harvey* (1885) 1 T.L.R. 430.
 - If landlord repays as quickly as possible, may be no waiver (*John Lewis Properties Plc v Viscount Chelsea* (1994) 67 P & C R 120)
 - If tenant owes rent falling due before breach and after breach, no waiver to accept only the rent due before breach: *Seahive Investments Ltd v Osibanjo* [2008] EWCA Civ. 1282.
 - Acceptance of a cheque which is not presented for payment: arguably no waiver (*Woodfall* at 17.098.1)

Acts of waiver: (2) pleading

If the relief is “subsidiary” or “incidental” to the possession claim then there is unequivocal election to determine the lease.

“I think that it is now settled that under a proviso for re-entry, such as the one in the present case, a writ claiming possession simpliciter, and any further relief which is incidental to a claim for possession, would be equivalent to a re-entry, and if this writ is to be regarded as a writ of that nature, then there has been a sufficient re-entry within the meaning of the covenant, and the lease is terminated.”

– Per Younger J in *Moore v Ullcoats Mining Ltd* [1908] 1 Ch. 575, discussed by Buckley J in *Calabar Properties v Seagull Autos* [1969] 1 Ch. 451.

So: no waiver of forfeiture to issue a claim for possession and arrears of rent falling due between expiry of a s.146 notice and the issue of the claim: see also *Greenwich London Borough Council v. Discreet Selling Estates* [1990] 2 E.G.L.R. 65.

Acts of waiver: (2) pleading

If the relief is **not** “subsidiary” or “incidental” to a claim for possession, then the right to forfeit is waived.

“I think the real question that I have to consider is whether this writ is in such a form that it would not have been open to the plaintiffs thereafter, if they had considered that their most convenient course, to ask for relief on the footing of the lease being in existence, and to abandon their claim for possession. I think I am bound to come to the conclusion that this writ was equivocal, and that it is a writ to which the plaintiffs, had they been so minded, might have given a meaning contrary to that which they now contend is the only meaning which could be given to it”

– Per Younger J in *Moore v Ullcoats Mining Ltd* [1908] 1 Ch. 575, discussed by Buckley J in *Calabar Properties v Seagull Autos* [1969] 1 Ch. 451.

So, a claim for possession including injunctive relief based on covenants in the lease, such as allowing a landlord to enter to inspect property, will be so equivocal as to amount to a waiver.

Acts of waiver: (2) pleading

- BUT: where a claim is issued for possession and an injunction which would normally be inconsistent with exercising a right of forfeiture, there is no unequivocal election to waive the right to forfeit **provided the injunction is pleaded in the alternative**, on the basis that the claim for the injunction could be abandoned before trial: *Calabar Properties v Seagull Autos* [1969] 1 Ch. 451.
- A stand-alone claim for performance of a covenant will amount to a waiver of the right to forfeit for breach of that covenant: *Cardigan Properties v Consolidated Property Investments* [1991] 1 E.G.L.R. 64.
- BUT: a threat to issue a claim for injunctive relief will not amount to a waiver where no s.146 notice has been served, since a landlord can still choose between claiming an injunction based on the continued existence of the lease or to exercise its right of re-entry: *Billson v Residential Apartments* (1990) 60 P. & C.R. 392 (approved by the Court of Appeal; unaffected on this point by reversal by the House of Lords).

Acts of waiver: (3) other acts

- An offer to buy the tenant's interest recognises the continuing existence of the lease and amounts to a waiver: *Bader Properties v. Linley Property Investments (1968) 19 P. & C. R. 620*.
- Service of a notice to quit can amount to waiver of a right to forfeit, since it recognises that there is an interest to be terminated by that method: *Marche v Christodoulakis (1948) 64 T.L.R. 466*.
- Use of CRAR (Commercial Rent Arrears Recovery) recognises the existence of the lease and will be an act of waiver: *Brar v Thirunavukkrasu [2019] EWHCA Civ 2032*.

Once and for all vs continuing breaches

- Once and for all breach: waiver prevents landlord from forfeiting for that breach.
- Continuing breach: breach arises afresh each day and will survive an act of waiver.

Once and for all breaches

- Rent arrears
- Assignment and sub-letting
- Alterations
- Failing to do something by a specified date, e.g. to comply with a covenant to erect buildings by a certain date (*Stephens v. Junior Army and Navy Stores Ltd* [1914] 2 Ch. 516)
- Refusal to allow a landlord to inspect a property (*Iperion Investments Corporation v Broadwalk House Residents* [1992] 2 E.G.L.R. 235.)
 - Right to forfeit for that particular breach is waived for good

Continuing breaches

- Breach of repairing obligation
- Breach of insuring obligation
- Breach of a user covenant
 - Right to forfeit arises afresh each day.

Conclusions: practical tips

- As soon as landlord has knowledge of a breach, a rent-stop should be placed on a tenant's rent account to avoid inadvertent waiver.
- Ensure managing agents are familiar with the covenants in a lease and that no rent demands are sent in respect of rent falling due after any breach.
- If rent falling due after the landlord acquires knowledge of a breach makes its way into a bank account, it should be repaid as soon as possible.
- Never issue possession proceedings based on forfeiture coupled with a claim for an injunction, unless injunctive relief is very clearly pleaded in the alternative.
- It is fine to threaten injunctive relief prior to a s.146 notice being served.
- It is fine to accept payments of rent falling due before knowledge of a breach.

Thank you for listening
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