Landmark Chambers

Forfeiture and waiver

Richard Clarke

Introduction – nature of forfeiture

- Exercise of a contractual right to determine a lease upon the happening of a specified event;
- No forfeiture clause = no right to forfeit;
- A right not an obligation – landlord is put to an election.

Restrictions on forfeiture

- For breaches other than non-payment of rent – service of a s146 notice required;
- Chance for tenant to remedy those breaches capable of remedy and avoid forfeiture;
- Most breaches can be remedied (see Neuberger LJ in Akici v LR Butlin [2006] 1 WLR 201) :
  - Whether or not a breach is capable of remedy is a practical question, not a technical one;
  - Majority of breaches are capable of remedy – can the mischief be put right;
  - For now, assignment, subletting and illegal/immoral user irremediable.

Restrictions on forfeiture

- Significant restrictions on ability to forfeit long residential leases;
- Current moratorium on forfeiture for non-payment of rent of commercial premises (s82 Coronavirus Act 2020):

> (1) A right of re-entry or forfeiture, under a relevant business tenancy, for nonpayment of rent may not be enforced, by action or otherwise, during the relevant period.

- Relevant period due to end 30 June 2021 (s82(12)(b).

Waiver

- Waiver of breach of covenant vs waiver of right to forfeit;
- Right to forfeit will be waived where the landlord:
  - Has **knowledge** of the tenant's breach;
  - Performs an **unequivocal act** recognising the lease as continuing to exist;
  - **Communicates** that act to the tenant.

- Once the election is made, landlord irrevocably bound by it: (Central Estates (Belgravia) Ltd v Woolgar (No 2) [1972] 1 WLR 1048.

Coronavirus Act 2020

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- Section 82(2):

“(2) During the relevant period, no conduct by or on behalf of a landlord, other than giving an express waiver in writing, is to be regarded as waiving a right of reentry or forfeiture, under a relevant business tenancy, for non-payment of rent.”

Knowledge

- Test for the LL's knowledge of the breach is objective;
- The LL must have knowledge *"of at least the basic facts which constitute the relevant breach"*; (Faiz v Burnley BC [2021] EWCA Civ 55 at [15]);
- Can impute knowledge to LL:
  - Acquired by an employee (Metropolitan Properties v Cordery (1980) 39 P & CR 10 (knowledge of porters with a duty to report matters to LL imputed to LL after a reasonable time);
  - Acquired by an agent (Central Estates) (estate agent managing property);
    - But not where agent's authority limited and no duty to report breach (Doe d. Nash v Birch (1836) 150 ER 490) (son acting for ill father);

Knowledge

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- Mere suspicion is not enough;
- If a landlord, who suspects there might be a breach of covenant, receives a representation from the tenant which if true means there has been no breach and he is not sufficiently confident of the untruth of what he says, then it cannot be said that the landlord knew all the facts nor that he has waived the breach (Chrisdell v Johnson and Tickner (1987) 19 HLR 406 – tenant asserted sub-tenant was a housekeeper or caretaker);
- Burden of proof is in the tenant to show LL had knowledge of the breach at the time the election was made (Matthews v Smallwood [1910] 1 Ch 777).

Act recognising continuation of the tenancy

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- LL must performs an **unequivocal act** recognising the lease as continuing to exist;
- Judged objectively:

"…because the act is unequivocal: it can only be explained on the basis that he has exercised his right to elect. The motive or intention of the landlord, on the one hand, and the understanding of the tenant, on the other, are equally irrelevant to the quality of the act" (Central Estates)

- Cannot act 'without prejudice' to right to forfeit (Matthews).

Act recognising continuation of the tenancy

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- Acceptance of rent which accrued after the breach, with knowledge of breach;
- Expert Clothing Service & Sales Ltd. v Hillgate House Ltd [1986] Ch 340:

"…cases where there has been an acceptance of rent fall into a special category. In such cases the established legal effect of such acceptance is so clear that, whatever the particular circumstances of the case, it is probably not open to the landlord to submit that he has not waived the relevant breach. In the present case, where no acceptance of rent (or demand for rent) is involved, the court is, I think, free to look at all the circumstances of the case to consider whether the act of the plaintiffs' solicitors relied on…was so unequivocal that, when considered objectively, it could only be regarded as having been done consistently with the continued existence of a tenancy…"

Acts which do not waive right to forfeit

- Demand or acceptance of rent which accrued prior to the breach;
- Service of a s146 notice;
- Mere fact of entering without prejudice negotiations (Re National Jazz Centre [1988] 38 EG 142);

Other acts

- Exercising commercial rent arrears recovery – right can only be exercised during a subsisting L&T relationship, or after end of a lease provided did not end by forfeiture (Brar v Thirunavukkrasu [2020] Ch 567);
- Generally, seeking to exercise a contractual right that is premised upon the continued existence of the lease is a waiver;
- Dependent on circumstances:
  - Do not waive by continuing to address communications to “leaseholders”; consulting with lessees about proposed repairs; relying on covenants regarding fire safety arrangements and allowing entry (Stemp v 6 Ladbroke Gardens Management Ltd [2018] ULUT 375 (LC) (5/12/18);
  - BUT – is possible to waive forfeiture during period when s81 Housing Act 1996 prevented right to forfeit being exercised – waived by demanding rent after knowledge of breach.

Communicated to the tenant

- If the LL does not communicate the act recognising the lease as continuing to the tenant, there will be no waiver;
- The understanding or belief of the tenant is irrelevant (Central Estates).

Once and for all vs continuous breaches

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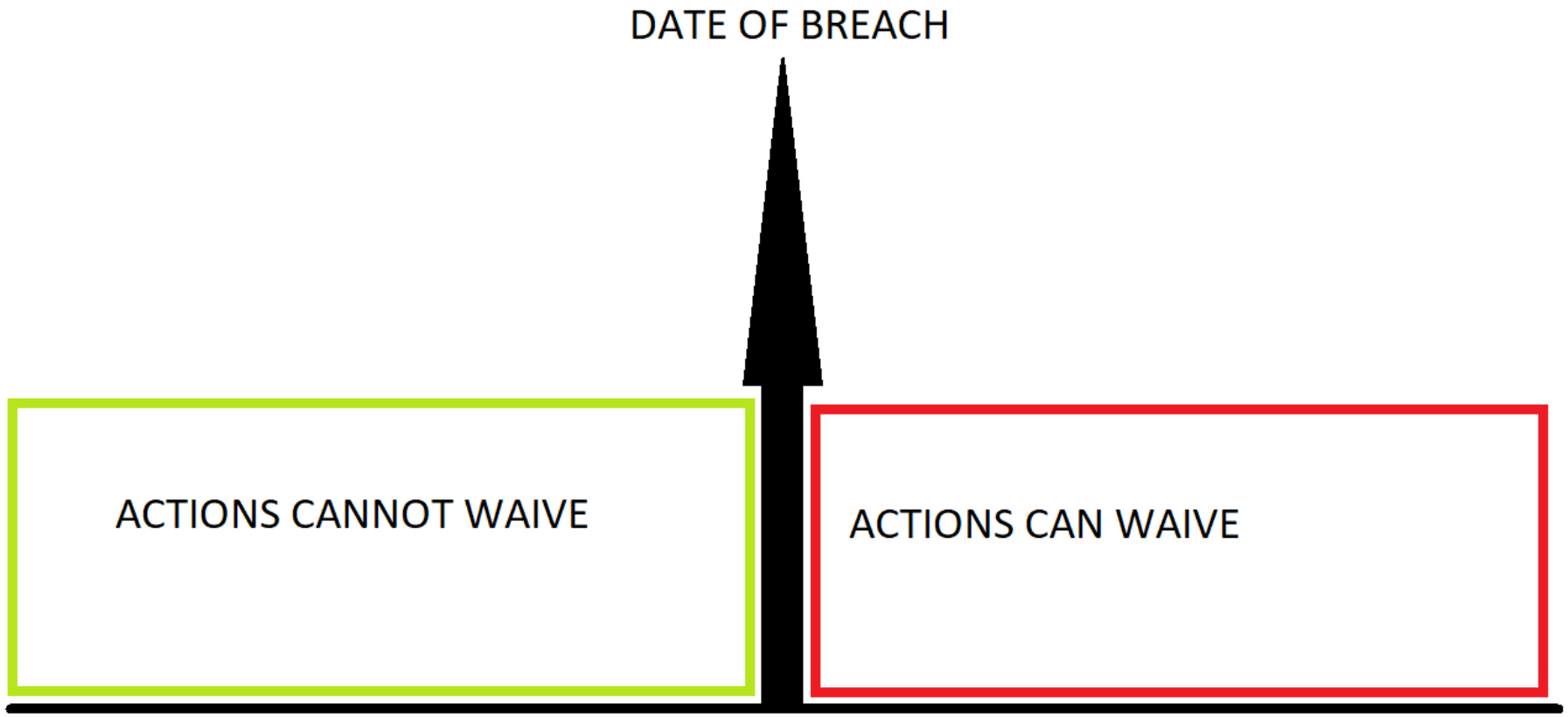
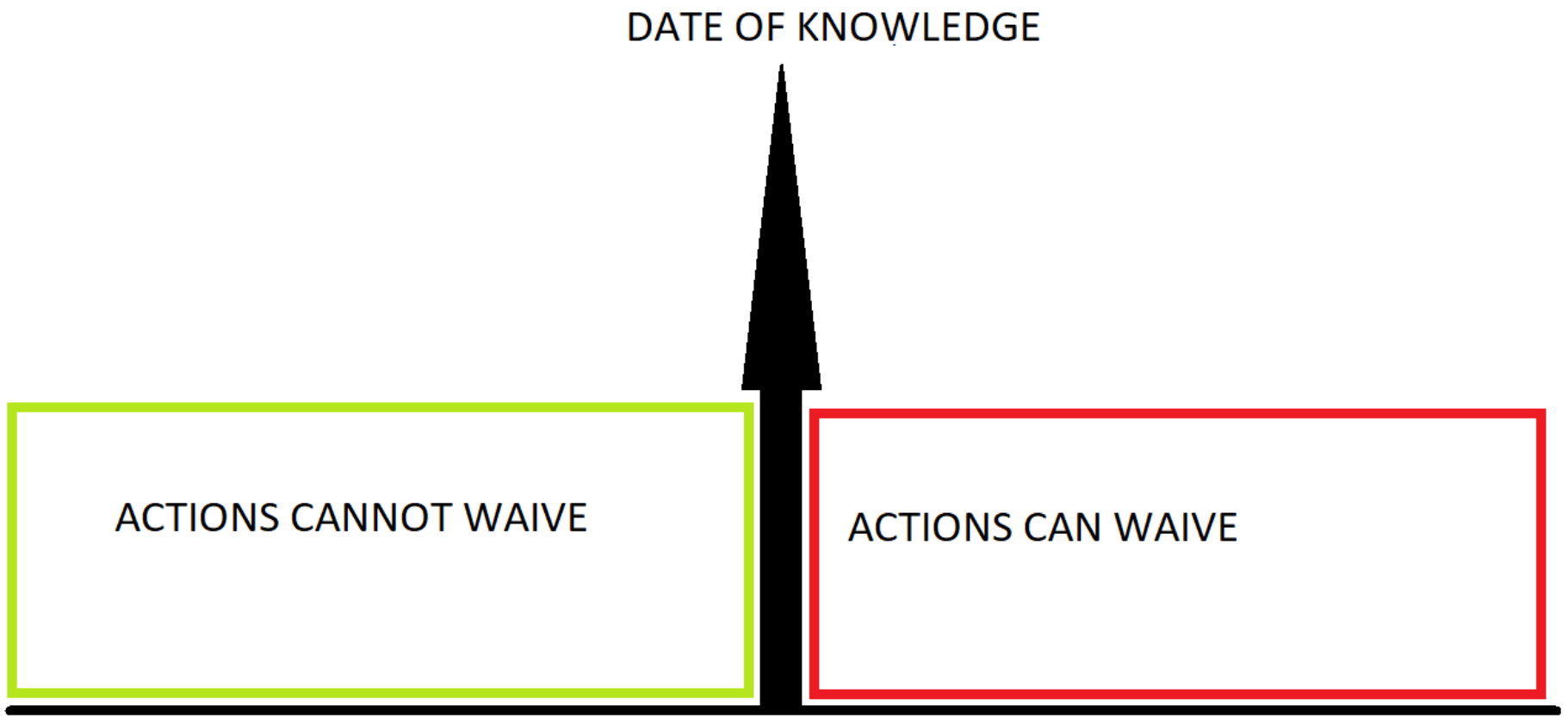
- Once and for all breaches:
  - Breach of covenant to carry out repairs by a specified date;
  - Breach of covenant to pay rent;
  - Breach of covenant against assigning or subletting;
  - Breach of covenant not to make alterations.
- Continuing breaches:
  - Breach of covenant to keep in repair;
  - Breach of a user covenant;
  - Breach of a covenant to insure.

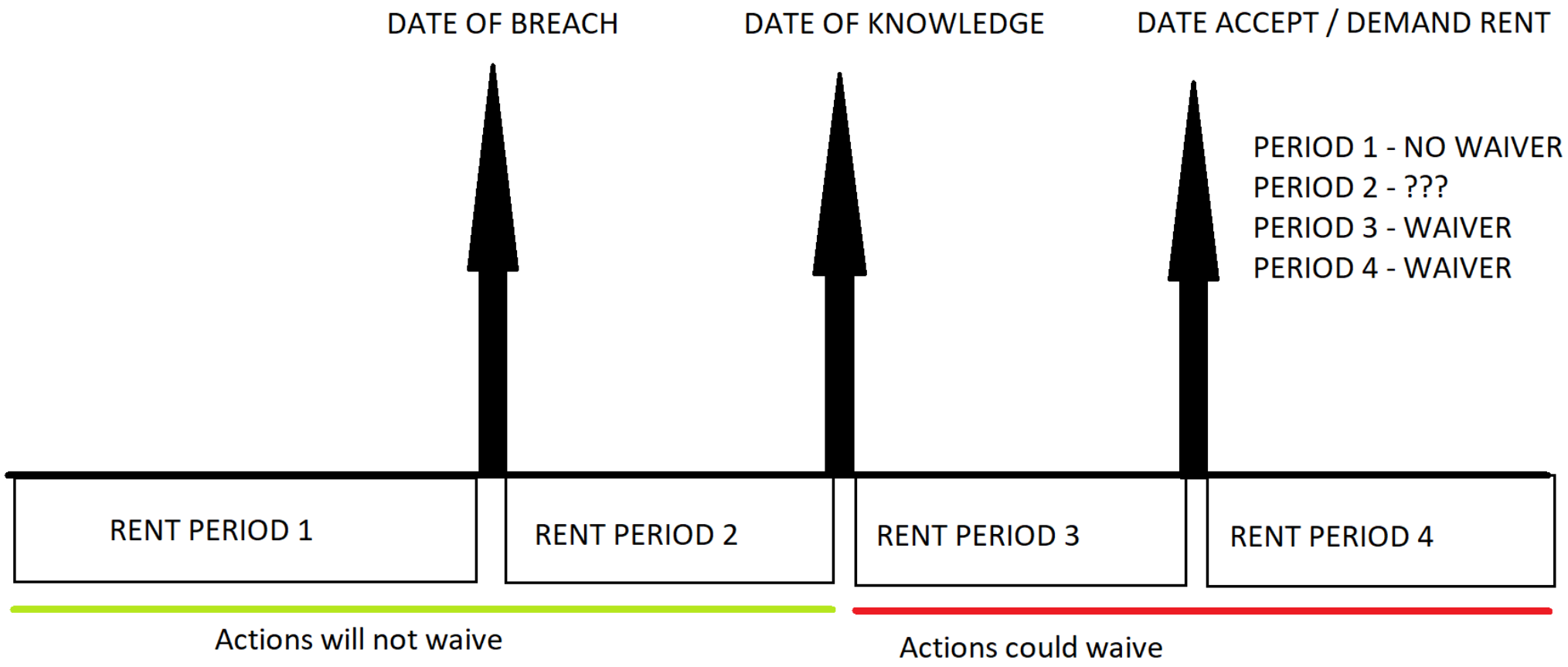
Date of breach



Date of knowledge



Waiver by demanding or accepting rent



Accept rent with knowledge, for period pre-knowledge: Faiz v Burnley BC [2021] EWCA Civ 55

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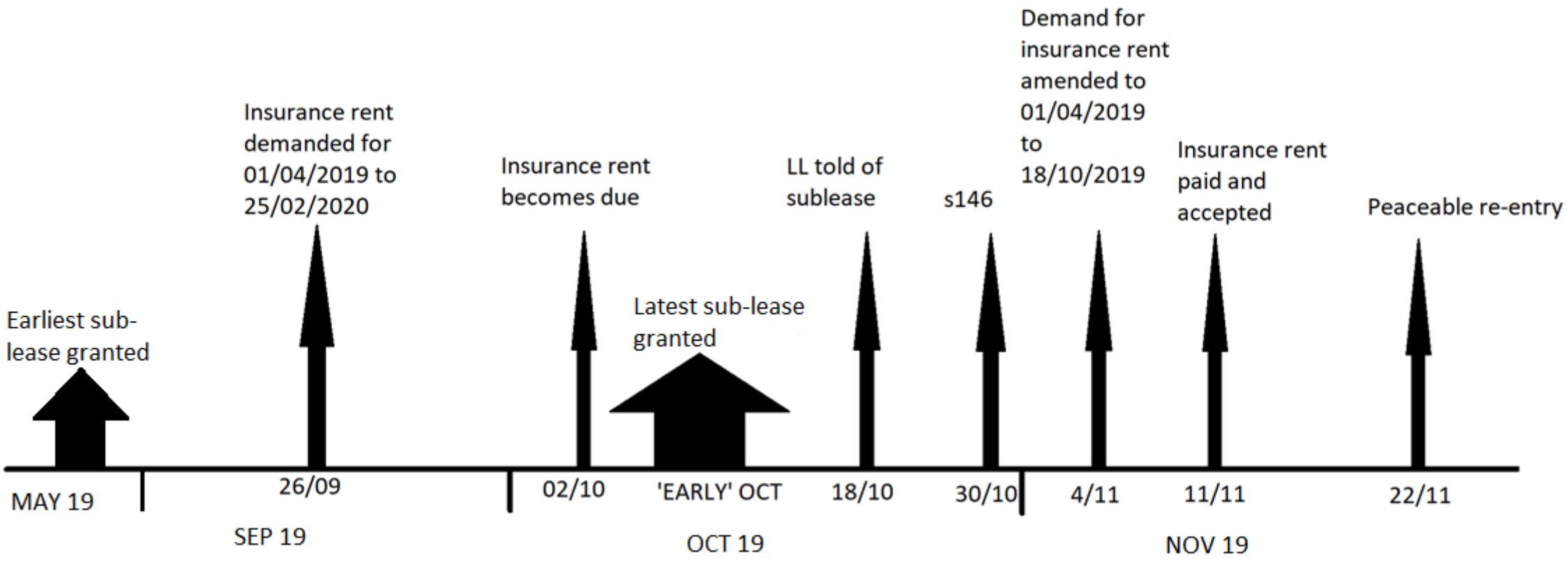

Faiz v Burnley BC

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- Lewison LJ identified the issue as *"whether the demand and acceptance of rent with knowledge of the breach amounts to a waiver if the rent accrued due after the breach, but before the landlord has knowledge of it"*
- Starting point was that previous cases and academic commentary did not speak with one voice;
- Question had to be considered as one of principle.

Forfeiture, first principles

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- “What entitles the landlord to forfeit the lease is a breach of covenant, whether or not he knows that the breach has been committed.” If a landlord forfeits a lease, “it is the breach that he relies on; not the date when he became aware of the breach.” [26]
- “It does not matter whether the rent accrued due before or after the date of the landlord’s *knowledge*, but whether it accrued due before or after the date of the *breach* of which the landlord (now) has knowledge. [28]
- The critical question is “whether the date on which the rent fell due preceded or post-dated the breach, rather than the date of the landlord’s knowledge, provided that, when he demanded or accepted the rent, the landlord knew that the breach had been committed.” [34]
- True principle is that “waiver takes places where a landlord demands or accepts rent which accrued due after the date of a breach known to the landlord”

Faiz v Burnley BC: demand of 26/09

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- On the facts:
  - Invoice sent 26/09;
  - Rent accrued due 02/10;
  - Breach in ‘early’ October – tenant failed to prove breach pre-dated rent accruing;
  - And, LL only had knowledge on 18/10, not when rent demanded.

Faiz v Burnley BC: demand of 04/11

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- Not a fresh demand for rent, amendment of earlier demand and superseded it as:
  - Demand for a part of the period previously demanded;
  - Stated to be payable on 04/11, not 7 days after demand – by implication superseded first demand – indication a lower sum would be accepted;
  - Did not amount to a waiver of forfeiture.

Faiz v Burnley BC: accept rent on 11/11

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- When rent accepted:
  - LL knew breach had taken place;
  - Did not know when, other than that it was before 18/10;
  - “If, as I consider, the November invoice was an indication by the Council that it would accept only part of the sum that had accrued due on 2 October, then it follows that the Council did not know that it was accepting rent accrued before the date of the breach. The acceptance of the payment did not, therefore, amount to a waiver of forfeiture.” [43]

Thank you for listening

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