Landmark Chambers

Welcome to Landmark Chambers' 'Issues Around Lease Termination' webinar

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Myriam Stacey QC (Chair)

Topic:
Break Clauses and Vacant Possession

Nic Taggart

Topic:
"Whose Risk Is It Anyway?" - We all know that frustration of leases is possible, but why does it never happen?

Richard Clarke

Topic:
Forfeiture and waiver

Tom Morris

Topic:
Recovering Possession of Residential Premises

Break Clauses and Vacant Possession

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Myriam Stacey QC

Break clause conditions

- Strict compliance required

- **Mannai Investment v Eagle Star Life** [1997], per Lord Hoffman:

> *"If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease."*

- **Siemens Hearing Instruments Ltd v Friends Life Ltd** [2014], per Lewison LJ:

> "*The clear moral is: if you want to avoid expensive litigation, and the possible loss of a valuable right to break, you must pay close attention to all the requirements of the clause, including the formal requirements, and follow them* ***precisely****."*

What does ‘Vacant Possession’ mean?

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NYK Logistics (UK) Ltd v Ibrend Estates BV [2011] 2 P & CR 9, Rimer LJ :

> *“The concept of “vacant possession” … is not complicated. …. It means that at the moment that “vacant possession” is required to be given, the property is* ***empty of people*** *and that the purchaser is* ***able to assume and enjoy immediate and exclusive possession, occupation and control****. It must also be* ***empty of chattels,*** *[which]* ***substantially prevent or interfere*** *with the enjoyment of the right of possession of a substantial part of the property.”*

- “*Ordinary meaning*” = premises to be returned free of “*trilogy of people, chattels and interests”:* **Goldman Sachs International v Procession House Trustee** [2018] EWHC 1523, Nugee J.

(1) Vacant possession of what: the "demised premises"?

- Chattels are not always loose items: *Riverside Park v NHS Property Services* [2016] EWHC 1313

- Fixtures:

  *"... **the premises will include anything which in law have become part of the premises by annexation**. A fixture installed by the tenant for the purposes of his trade becomes part of the premises as soon as it is installed, although the tenant retains a right to sever the fixture on termination of the tenancy. Whether something is a fixture depends on the degree and purpose of annexation; in each case looked at objectively. **If something has become part of the premises by annexation then it is part of a thing of which vacant possession has to be given. Its presence does not amount to an impediment to vacant possession itself**."*

  – *L&G Ltd v Expeditors* [2006] EWHC 1008, per Lewison J.

- How does the lease treat tenant's fixtures?
- Alterations additions or improvements?

(2) Inter-relation with reinstatement?

Goldman Sachs International v Procession House Trustee Ltd [2018] EWHC 1523:

- Clause 23.1: *break option "subject to the Tenant being able to yield up the Premises with vacant possession **as provided in Clause 23.2**."*
- Clause 23.2: "*On expiration of such notice, the Term shall cease and determine (and the Tenant shall yield up the Premises in accordance with clause 11 **and** with full vacant possession) without prejudice to the rights of the parties in respect of any antecedent claim or breach of covenant."*
- Clause 11: "*remove any alterations or additions made to the Premises (and make good any damage caused by that removal **to the reasonable satisfaction of the Landlord**) and reinstate the Premises to their original layout and to no less a condition than as described in the Works Specification."*

(3) How much / little to remove?

- Nothing that substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property

- **Secretary of State for Communities v South Essex College** [2016] 7 WLUK 780:
  - Removing too little

- **Capitol Park Leeds plc v Global Radio Services Ltd** [2020] EGLR 38:
  - Removing too much
  - *"An empty shell of a building which was dysfunctional and unoccupiable"*
  - Appeal pending …!

“Whose Risk Is It Anyway?” - We all know that frustration of leases is possible, but why does it never happen?

Nic Taggart

To view Nic’s paper, please click here.

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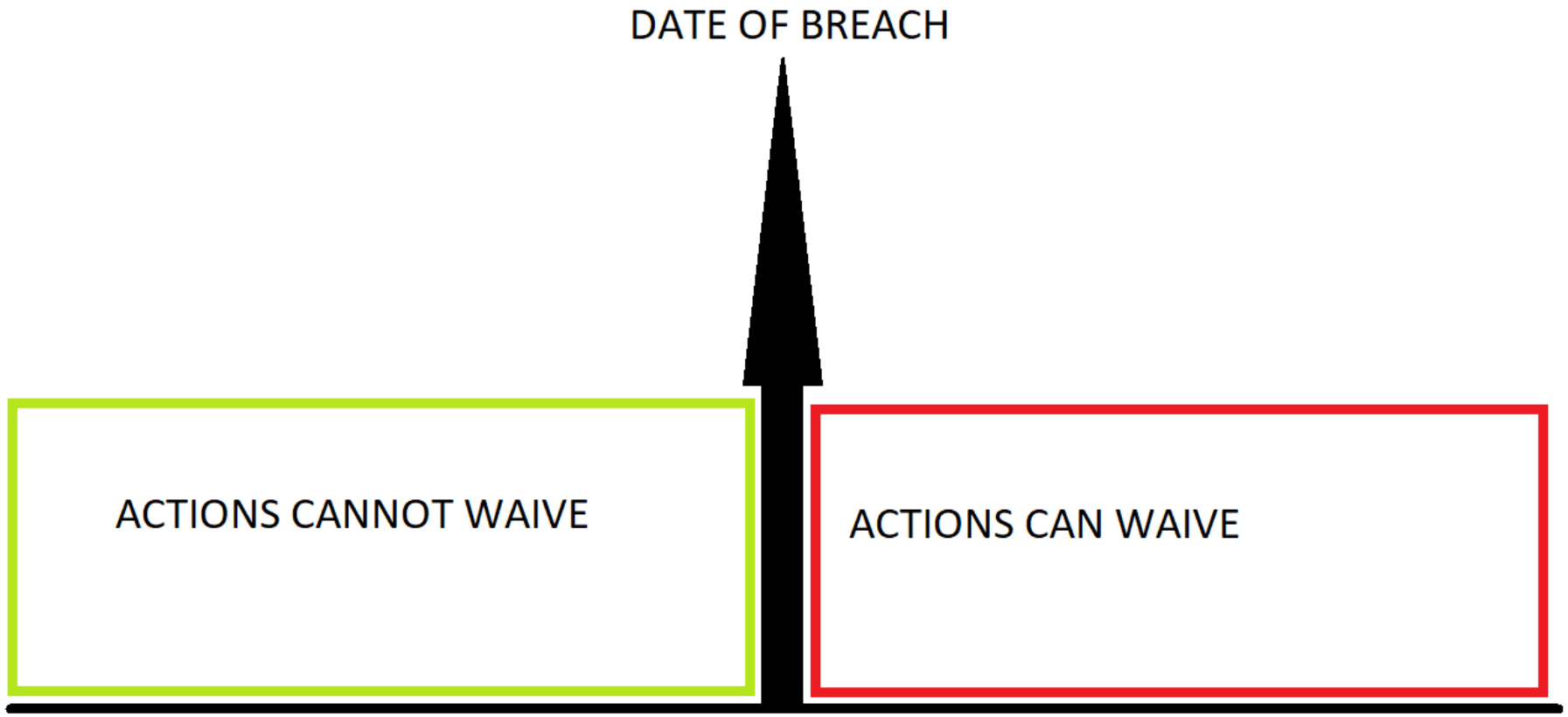
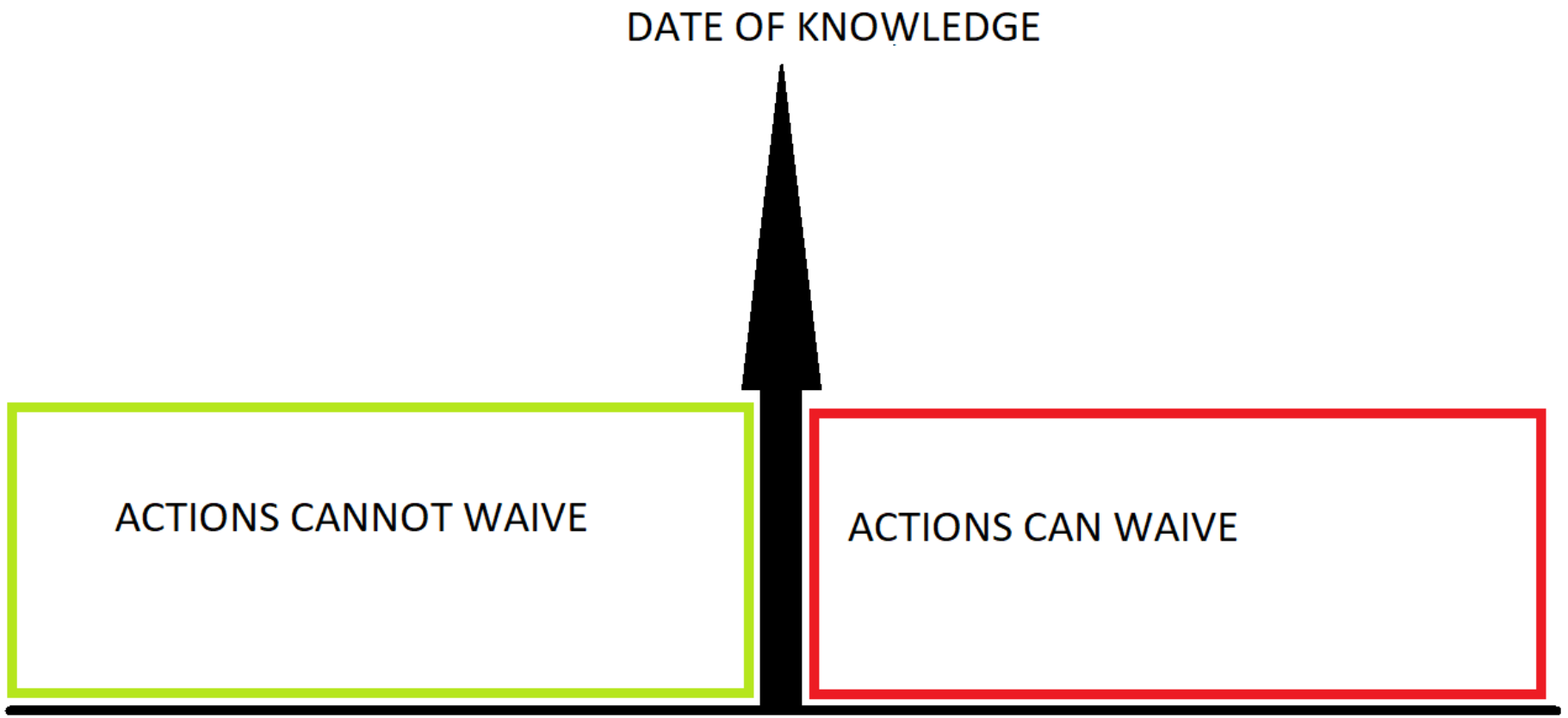
- Once and for all breaches:
  - Breach of covenant to carry out repairs by a specified date;
  - Breach of covenant to pay rent;
  - Breach of covenant against assigning or subletting;
  - Breach of covenant not to make alterations.
- Continuing breaches:
  - Breach of covenant to keep in repair;
 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

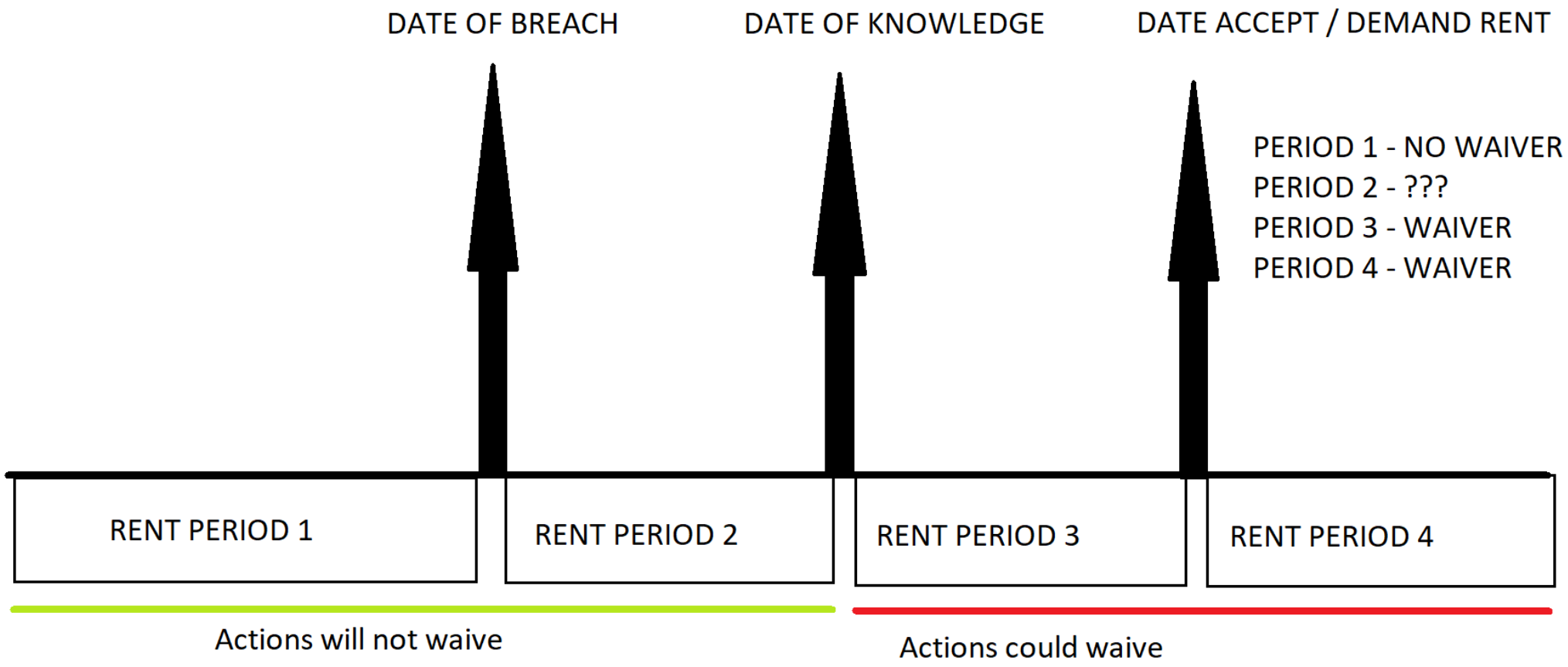
Date of breach



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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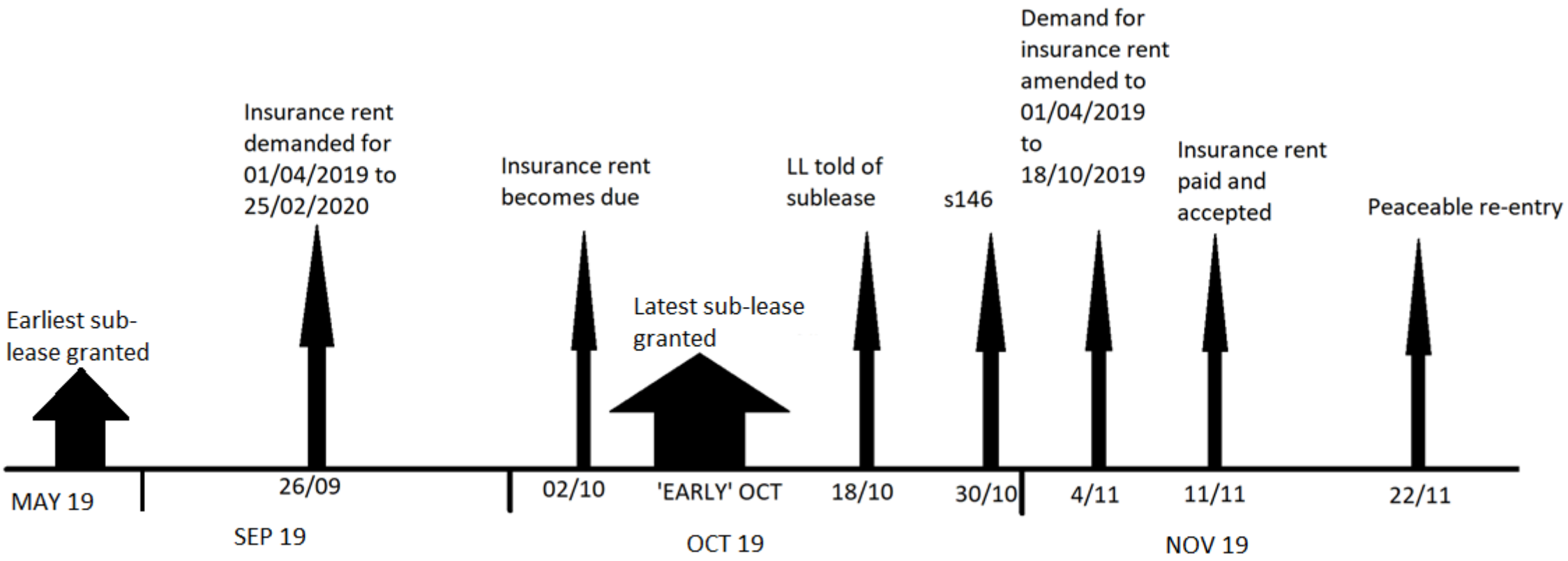

Faiz v Burnley BC

- 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]

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Recovering Possession of Residential Premises

Tom Morris

Eviction ban: where are we?

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- Public Health (Coronavirus) (Protection from Eviction) (England) Regulations 2021
  - Prevented any person attending at a dwelling house for executing a writ or warrant of possession or delivering a notice of eviction.
  - Expired on 21st February 2021.
- Public Heath (Coronavirus) (Protection from Eviction) (England) (No. 2) Regulations
  - Expired on 31st March 2021.
- Public Health (Coronavirus) (Protection from Eviction) (England) (No. 2) (Amendment) Regulations
  - Amended expiry date to 31st May 2021.

Notice periods: where are we?

https://www.gov.uk/government/publications/covid-19-and-renting-guidance-for-landlords-tenants-and-local-authorities/technical-guidance-on-eviction-notices

- Ground 8 and 11 (since 29th August 2020):
  - 4 weeks where arrears are at least 6 months
  - 6 months where arrears are less than 6 months
- Ground 7a – serious antisocial behaviour:
  - 4 weeks for a periodic tenancy
  - 1 month for a fixed-term tenancy
- Section 21:
  - For notices between 26 March 2020 and 28 August 2020: at least 3 months
  - After 29 August 2020, at least 6 months

Where are we going?

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→ Coronavirus (COVID-19) | Rules, guidance and support

Home > Housing, local and community > Housing > Rented housing sector

Press release

Support for renters continues with longer notice periods

Renters will continue to be supported as national COVID-19 restrictions ease.

From: Ministry of Housing, Communities & Local Government and The Rt Hon Christopher Pincher MP

Published 12 May 2021

In summary:

- Four-month notice periods for most tenants until at least the end of September.
- “Move will ensure renters are protected as we continue through the Roadmap.”
- “Subject to the public health advice and progress with the Roadmap, notice periods will return to pre-pandemic levels from 1 October.”
- NOTE: “Bailiffs have been asked not to carry out an eviction if anyone living in the property has Covid-19 symptoms or is self-isolating”.

New Regulations!

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- Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) (No. 2) Regulations 2021 – from 31st May 2021
- Amends Schedule 29 to the Coronavirus Act 2020 to achieve 4-month notice period aim.
- Section 8(4BA)(a)(ii) of the Housing Act 1988 will be amended:
  - The six months' rent arrears threshold for giving only four weeks' notice will be lowered to a four months' rent arrears threshold.
  - From 21st August 2021, it will be lowered to two months.
- Section 8(4BA)(c) of the Housing Act 1988 will be unamended by the new regulations – therefore where there are more than four months' rent arrears, only four weeks' notice will be required.

More New Regulations!

- Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment) and Suspension (Coronavirus) Regulations 2021
  - From 1st June 2021
- Insert new prescribed forms into the relevant prescribed forms regulations:
  - Form 3 (section 21)
  - Form 6A (section 8)
- Any section 21 notice or section 8 notice sent before 1st June that will be deemed served after 1st June should be in one of these forms.

Procedure: Practice Direction 55C

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- Practice Direction 55C.
- After stay lifted, reactivation notice required.
- Where no reactivation notice filed by 4pm on 30th April 2021, claim automatically re-stayed
  - not a sanction, but application needed to lift the stay.
- For new claims brought after 3rd August 2020, Claimant must:
  - bring to the hearing two copies of a notice setting out what knowledge the party has as to the effect of the Coronavirus pandemic on the Defendant
  - serve that on the Defendant not less than 14 days before hearing.

Procedure: the Overall Arrangements

https://www.judiciary.uk/wp-content/uploads/2020/09/Possession-Proceedings-Overall-Arrangements-Version-1.0-17.09.20.pdf

- Review date
  - Claimant to provide court with electronic bundle
  - Defendant has chance to take free legal advice.
  - Short review appointment listed by the court – 5 minute document review by the judge.
  - If documents in order and no settlement, matter will proceed to substantive hearing.

Overall Arrangents

- Substantive hearing: parties to attend.
- Court decides the claim or gives direction.

- Key concepts:

(1) Prioritisation

(2) Covid-19 Case Marking

Prioritisation

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- The following cases warrant listing with priority:
  - Antisocial behaviour
  - Extreme alleged rent arrears – 12 months' rent or 9 months' rent where it amounts to more than 25% of a private landlord's total annual income from any source.
  - Squatters
  - Domestic violence
  - Fraud or deception
  - Unlawful subletting
  - Abandonment
  - Claims issued before the stay.

Covid-19 Case Marking

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- Draws attention to cases where claimant may be in a particular difficulty as a result of the pandemic, and assists with listing and case management.
- Any defendant or private claimant entitled to request the case be Covid-19 case marked at any stage and by any means.
- Must provide specified information and inform other parties.
- If no objection, the request will result in case marking.
- If a party objects, the court will decide on the documents.

Tips

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- Check and double-check the notice period
- Make sure you are using the correct prescribed form for notices
- Check the level of the rent arrears to see if you can plead “extreme rent arrears” for prioritisation purposes
- Consider applying for Covid-19 Case Marking on basis of affect of pandemic on landlord

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Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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