

1. The High Court in *Faiz* considered the interrelationship between a landlord's knowledge and the date of accrual of a tenant's liability and their effect on waiver of forfeiture.
2. At present and in the near future, this case may see more use than the Court would have anticipated when handing it down in late February – a pre-Covid-19 world. Although the ban on possession persists, that does not mean that the issue is not at the forefront of both landlords and tenants' minds.
3. During this period forfeiture for breach of covenant has become the key-way in which landlord's may seek to take control of their properties. In the past, a landlord may have waived their right to forfeiture if a tenant breached a covenant because that tenant was a 'good payer'. Now this tenant may be not meeting their rent obligations and continuing to breach covenants. Of course, the landlord cannot forfeit for non-payment of rent, but s.82 of the Coronavirus Act 2020 does not prohibit non-rent forfeiture.
4. On the flip side, landlord's may be keen to recoup what rent they can or may not envisage how to fill the tenancy. It is with this background that it was felt pertinent to give an overview of waiver and analyse the recent case of *Faiz*.

Waiver of forfeiture: Overview

5. The basic statement is summarised by Parker J in *Matthews v Smallwood* 1910 1 Ch 777 786:

“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”

6. In terms of what breaches give rise to a waiver there are two kinds. A once and for all breach, waiver of which prevents a landlord from forfeiting for that breach e.g. granting a sublease. Continuing breach, which arises afresh each day and will survive an act of waiver e.g. repairing obligations.
7. When considering whether there has been a waiver, this is a question of law to be considered objectively without regard to the intentions or beliefs of the landlord (*Central Estates (Belgravia) v Woolgar (No.2)* [1972] 1W.L.R.1048). The right to forfeiture upholds landlords' property rights but if a landlord does not have their 'ducks in a row' then an unintentional waiver may occur.
8. The three main elements of waiver are knowledge of the breach, an unequivocal act and communication of the act to the tenant.

Knowledge

9. [*Metropolitan Properties Co Ltd v Cordery* \(1980\) 39 P&CR 10](#) exemplifies how knowledge is to be approached. It may be imputed to the landlord through its employee's acquired knowledge of the breach.
10. In *Cordery*, it was the porters who were under a duty to but failed to, inform the landlord of information that would have then led the landlord to knowledge of the subtenancy. Another important principle raised here is: if the landlord has reasonable grounds to suspect a breach of the lease, but does not take steps to discern the truth, it will be taken to have knowledge of the truth.
11. An important limitation on this is the landlord will not be held to have the knowledge if the employee or agent who gains it was not under a duty to report the breach of the covenant to the landlord.

12. It could be argued that the knowledge in *Cordery* is actually constructive but in reality, what label it is given does not matter.

Unequivocal act

13. The act must be consistent only with the continued existence of the lease. Naturally, in most cases this takes the shape of accepting some form of rent. This action is presumed to be unequivocal.

14. A demand for rent which fell due after the breach of the covenant will be deemed an election to treat a tenancy as continuing and so amounts to a waiver (*David Blackstone Ltd v Burnett (West End)* [1973] 1 W.L.R. 1487).

15. Conversely, if the landlord accepts rent which became due before the tenant committed the breach that has given rise to the right to forfeit, there will be no waiver ([Osibanjo v Seahive Investments Ltd \[2008\] EWCA Civ. 1282](#)). The focus of *Faiz* was on the intersection between this rule and the timing of the landlord's knowledge.

16. A landlord may not try to protect its position by accepting rent 'without prejudice' to the landlord's right to forfeit or other words to that effect. This will be deemed a waiver - actions speak louder than words (*Windmill Investments (London) Ltd v Milano Restaurants Ltd* [1962] 2 QB 373).

The facts

17. A father and daughter were seeking declaratory relief that they were entitled to the lease of a cafe premises in Lancashire. The Local Authority was the freehold owner.

18. The Defendant had sought to exclude s.24 to s.28 of Landlord and Tenant Act 1954. The lease contained covenants against assigning and subletting. The Defendant argued these had been breached by the Claimants when they granted a subtenancy

of the premises to a company (the third company) which had the daughter as the sole shareholder.

19. Relevant parts of the timeline:

- a. Two prior companies operating the café had gone into liquidation in October 2017.
- b. The subtenancy was backdated to 1st August 2017.
- c. In 2018, the Defendant became aware of the second company's liquidation and made the decision that it was not going to renew the lease.
- d. Fast forward to 18th October 2019 and the Claimants wrote to the Defendant stating that, as a subtenant, the third company was entitled to a "subsisting right to occupy the property upon expiry of the lease". At this point, the Defendant had knowledge of the breach.
- e. The Defendant then swiftly served notices on the Claimants under s.146 Law of Property Act 1925.
- f. They had previously invoiced the Claimants in respect of insurance rent ('rent'), in September 2019. This would have covered a period of time after the Defendant had acquired knowledge of the breach.
- g. This rent remained outstanding and so a revised invoice was sent which apportioned the amount owed to encompass only the period ending 18th October 2019. The Claimants paid this amount.
- h. The Defendant then tried to exercise its right to forfeiture in November by peaceable re-entry.

- i. The Claimants responded that by demanding and accepting rent after becoming aware that the third company was a subtenant, the Defendant had waived its right to forfeiture.

Decision

20. The Claimants sought to rely on *Cordery*. They proposed that by January 2018 the Defendant knew company three was in occupation and so they had knowledge of the sublease. The Court did not agree. After a reasonable enquiry in *Cordery*, the landlord would have found out that the individual in occupation was a subtenant.
21. On the evidence, the Claimants had failed to establish that if the Defendant had conducted a reasonable inquiry into company three, it would have revealed an entitlement to a subtenancy [71]. At that point all company three would have had was a license.
22. The alternative case put forward by the Claimants was based on the Defendant's invoice for insurance rent [74]. It only claimed insurance rent up until 18th October 2019 but did so after it had acquired knowledge of the breach of covenant. The Claimants submitted that both the requesting and receiving of monies waived the Defendant's right to forfeiture. They were also unsuccessful on this front.
23. The Court considered *Price v Worwood* (1859) 4 H & N 512, *Osibanjo* and a passage from *Woodfall: Landlord & Tenant Vol 1 Para 17.098* in reaching its decision.
24. These sources all drove at the same point: a landlord does not waive its right to re-entry by accepting rent due before it had the requisite knowledge. This proved fatal to the Claimants.

Analysis

25. The Court's decision in this case highlights a degree of confusion in doctrine of waiver. In reaching its decision, the Court at [76.4] commented upon the inconsistency of approach on the issue which the CoA exhibited in *Osibanjo*. The Court preferred Mummery LJ's reasoning at Para 14 from which it based its decision.
26. On the other side was Rix LJ at Para 32 who stated: "once there is necessary knowledge it should not matter whether the rent which is accepted has accrued due before or after the date of knowledge". Rix LJ's view fits the general thrust of waiver: if a landlord treats the lease as continuing with knowledge of breach then they have waived their right to forfeit.
27. There is then a degree of irony in the Court's proceeding analysis of the facts. It considered what a 'reasonable recipient' of the information the Claimants received would have thought. It is submitted that a reasonable recipient could consider the lease to still be continuing by virtue of paying rent.
28. Yet this is not what the learned judge took the law to be, which must be right. To penalise a landlord for demanding that to which they became legally entitled prior to acquiring knowledge in a situation which has only arisen by virtue of the tenant's breach would be unfair.
29. Another point of interest is that the Defendant made sure they did not claim insurance rent beyond the date of knowledge. The Court opined that this was probably an unnecessary precaution at [82]:
- "... a landlord does not generally waive its rights of re-entry by demanding and accepting rent in respect of a liability incurred before it has notice of the relevant breach regardless of whether the liability is in respect of future expenses."*

30. But is claiming this future expense worth the increased risk of your tenant using the courts to block your forfeiture of the lease? The tenant may not be likely to win on this point but that may not stop a determined tenant from litigating it.
31. A waiver of forfeiture cannot be undone, nor can it be protected against through words. Thinking practically, further engagement with a tenant post knowledge increases the chance of an inadvertent waiver. With this risk, it would be advisable to put a rent stop on a tenant's account. Commercial landlords would also be well advised to ensure that each individual in their organisation who may deal with a tenant understands the covenants of the lease. Due to imputed knowledge, it only takes one sum of rent to slip through the net.
32. *Faiz* has demonstrated that the law on timing of knowledge and accrual of liability is not settled and the Court noted at [76.4], that before *Osibanjo* there was limited directly relevant authority on the issue. The issue would certainly benefit from the CoA revisiting it. *Faiz* has upheld landlords' property rights but the door remains ajar for future waiver litigation. It remains to be seen how important this case will be in a post Covid-19 world.

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Whilst every effort has been taken to ensure these notes are as correct, they are intended to give a general overview of the law. Delegates are respectfully reminded that they are not intended to be a substitute for specific legal advice. No liability is accepted for an error or omission contained herein.