

Don't let waiver Faiz you!

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The case of *Faiz & Ors v Burnley Borough Council* is a reminder to landlords to remain vigilant as to who is in occupation of premises and from whom they are demanding and accepting rental payments. It also provides useful commentary on waiver in the context of forfeiture.

The tenant and purported sub tenant of a café sought a declaration from the Court that the Council landlord (who had forfeited the lease on the grounds of the tenant's grant of an unlawful sub-tenancy) had waived the right to forfeit the lease by demanding and accepting rent with the knowledge of the breach. If the Court found in their favour, the sub-tenant might be able to remain in occupation with the benefit of security of tenure as the sub-lease (unlike the lease) had not been contracted out of the Landlord and Tenant Act 1954. This was an outcome the Council was keen to avoid as it would severely impede its flexibility in relation to the operation of the café which formed part of Towneley Hall, an historic country house in Lancashire.

Forfeiture is a powerful tool in the landlord's armory. However, it is a long-established principle that the right to forfeit can be waived by a landlord. This occurs when, with full knowledge of the facts upon which its rights have arisen, the landlord acts in a way which is consistent only with the continuation of the lease. This action must be communicated to the tenant. The most common example of an act that can constitute waiver is a demand for rent or other sums under the lease.

Facts

In 2010 the Council had granted Mr Faiz and his daughter a ten year lease of the cafe which expired in February 2020. Over the years, three companies (including the purported sub-tenant), all of which the tenant was closely connected, were involved in the operation of the business and made rental payments to the Council which were accepted without question. A separate arm of the Council also prosecuted one of the companies, as opposed to the tenant, for food hygiene breaches in connection with the running of the cafe. The chain of events made for a confused position as to who was in occupation, the basis of such occupation and the extent of the Council's knowledge (or deemed knowledge) of the occupation.

Demand for Rent

The issue of waiver turned primarily on a demand for insurance rent that the Council raised in September 2019 for sums up to and including lease expiry in February 2020. After raising the demand in September ('the first demand'), solicitors for the tenant and sub tenant (SASSAF Limited ("SASSAF")) wrote to the Council on 18 October 2019 asserting that SASSAF was in occupation of the premises with the benefit of security of tenure. This was the first time that the Council was expressly made aware of the sublease, albeit it had accepted around 4 payments of rent from SASSAF between May 2019 and October 2019. Upon receipt of this correspondence, the Council duly served notices pursuant to Section 146 of the Law of Property Act 1925. It subsequently issued a revised invoice ("the revised demand") in respect of the insurance rent apportioning it up to 18 October 2019 and went on to accept payment of the revised amount. On 22 November 2019, the Council forfeited the lease by peaceable re-entry.

Issue

The first demand was raised prior to the Council's knowledge of the tenant's breach. The revised demand, although raised after knowledge of the breach, was for sums that fell due prior to having such knowledge. The tenant argued that by issuing the revised demand (which it claimed constituted a fresh demand) and accepting payment, the Council had waived the right to forfeit.

Finding

Finding for the Council, the judge held that the tenant's liability to make payment of the insurance rent arose upon the issue of the first demand. Further, relying on existing authorities he said that acceptance of the rent with knowledge of the breach did not amount to waiver as the rent fell due for payment before the landlord had such knowledge. It was also noted that whilst different departments of the Council (food hygiene and property) had involvement with the property, for the purposes of waiver, only the knowledge obtained by the officers, servants and agents on behalf of the Council as a property owner, was relevant. Despite the numerous payments of rent it had knowingly accepted from SASSAF, on the facts of this case the judge did not consider that this necessarily meant that the Council had knowledge of SASSAF's occupation as sub-tenant.

Conclusion

Waiver is a real risk for landlords and there are technical traps for the unwary. Advice should be sought to ensure the right to forfeit is preserved.

