

Practitioner Page

Waiver of Forfeiture - Non-payment of Rent

Mark Pawlowski

General Editor

To what extent will a landlord waive a right of forfeiture for non-payment of rent by demanding subsequent instalments of rent falling due after the breach? Will the landlord's claim seeking possession based on rent arrears fall to be characterised as "equivocal" if it claims later instalments of rent in the prayer? What is the effect of claiming rent on other breaches of covenant (e.g., failure to repair or subletting without consent)?

Although such questions frequently arise in practice, it is surprising how little guidance is to be found in the relevant case law. As a general principle, it seems that no distinction is to be made between a waiver of forfeiture for non-payment of rent and any other breach of covenant: *London & County (A.D.) v Wilfred Sportsman Ltd* [1971] Ch. 764. Thus, an unambiguous demand for rent accruing due after the breach of covenant will constitute a waiver of forfeiture. Needless to say, the bringing of an action for rent accruing due after the breach will also amount to a waiver: *Dendy v Nicholl* (1858) 4 CB (NS) 376. But does the rent action also waive any prior claims for the rent itself? This depends primarily on when the rent accrued due.

Rent due before or after cause of forfeiture?

The point was addressed in *Re Debtors Nos 13A10 and 14A10 of 1994* [1995] 41 E.G. 142, a case involving a lease of commercial premises. The rent for the quarterly periods commencing 1 September and 1 December 1994 were not paid. The landlords issued proceedings for the arrears of rent on 5 January 1995. On 10 February 1995, they entered judgment in default of defence for £5,081.52 against the tenant in respect of the arrears and (on 13 February 1995) peaceably re-entered the premises under the proviso for re-entry contained in the lease. The tenant subsequently argued that the landlords' re-entry was ineffective to forfeit the lease because they had waived their right of forfeiture in relation to the tenant's failure to pay the instalments due on 1 September and 1 December 1994 by bringing the action claiming rent. Rattee J., upholding the trial judge's view, held that the landlords' action for arrears of rent due on 1 December was inconsistent with forfeiting the lease for non-payment of the rent due on 1 September because, by claiming the later instalment of rent, the landlords indicated their acceptance of the continued acceptance of the lease on 1 December 1995.

On this reasoning, assuming two quarters' rent is unpaid, if the landlord claims the second quarter's rent, it will waive the forfeiture for non-payment of rent for the previous quarter because it thereby recognises that the lease continues to the second quarter. But what is the position regarding the second outstanding quarter? In the *Debtors* case, the trial judge concluded that to claim the rent due on 1 December (even after the right to re-enter had arisen

14 days after that date under the forfeiture clause) was not inconsistent with an exercise of the right to forfeit which arose once that instalment of rent had been unpaid for 14 days. The reason for this was that the right of re-entry reserved by the lease was (in the usual way) expressed to be "without prejudice to the lessor's right of action in respect of any antecedent breach of covenant by the lessee". Thus, a re-entry for non-payment of that instalment of rent (after the requisite 14-day period had elapsed) did not affect the landlords' additional right to recover that rent. The right to forfeit for the rent due on 1 December would only be lost by a subsequent claim for rent due on the next quarter (i.e., March 1995). This would then have the effect of waiving the forfeiture for both the September and December quarters, but not the March quarter.

The point here is that a demand for rent accrued due *on or before* the relevant breach will not constitute a waiver. In the *Debtors* case, the instalment of rent for the December quarter fell due on 1 December, but the right to forfeit the lease for non-payment of that instalment did not arise until 14 days thereafter. A claim for rent, to operate as a waiver, must be a claim for rent due on a day *after* the cause of forfeiture has arisen. Put simply, the right of forfeiture is unaffected by the claim (or demand) of a pre-existing debt: *Price v Worwood* (1859) 4 H. & N. 512. A demand for rent already due prior to the date when the cause of forfeiture has arisen merely acknowledges the continued existence of the lease before that date. It does not operate as an acknowledgment of the future existence of the lease because the demand is for a past (as opposed to future) rent debt. Although the demand itself may have been made after the date when the cause of forfeiture arose, because it relates to a past debt, no waiver occurs. The date of the demand is not crucial. The relevant enquiry is: what is being demanded? Is it rent accrued due before or after the cause of forfeiture has arisen?

Landlord's knowledge of breach

In *Faiz v Burnley Borough Council* [2021] Ch 303, the Court of Appeal (comprising Lewison, Asplin and Arnold LJ) set out the following principles governing waiver of forfeiture of a lease for non-payment of rent:

1. Where a tenant commits a breach of covenant which gives rise to the right to forfeit the lease, the landlord is put to his election and can either forfeit the lease or waive forfeiture.
2. To be put in that position, the landlord must have knowledge of the basic facts constituting the breach. The acceptance of rent which accrued due after the landlord knew of the breach amounts to a waiver.
3. It is less clear whether the demand and acceptance of rent with knowledge of the breach amounts to waiver if the rent accrued due after the breach, but before the landlord had knowledge of the breach.
4. When a landlord seeks to forfeit a lease, it relies on the breach of covenant, not the date it became aware of the breach. It matters not, therefore, 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 subsequently had knowledge.

5. Waiver takes place where the landlord demands or accepts rent which accrued due after the date of a breach known to the landlord.

In *Faiz*, the breach consisted of an unlawful sub-letting. Accordingly, the landlord had to know not only that the sub-letting had taken place, but also that the rent demanded or accepted had accrued due after the date of the breach: see further, M. Pawlowski, "Landlord's Knowledge of Breach - Waiver of Forfeiture?", (2021) 25 L. & T. Rev. 124.

Rent in advance or in arrears?

Does it make any difference if the rent is payable in advance or in arrears? In other words, if the rent is payable in advance (as in most leases), is it correct to say that a demand for rent in advance is a recognition that the lease will continue for the period covered by the rent? On this point, Rattee J. in the *Debtors* case concluded that, since the lease made the rent for the December quarter payable in full on 1 December, the landlords' proceedings claiming recovery of that rent recognised only that the lease subsisted on that date (i.e., 1 December) and not thereafter. Thus, the claim for the December quarter's rent did not operate to waive the occasion of forfeiture that arose 14 days after 1 December because any such claim could not be taken as recognition of the continued existence of the lease on any date later than 1 December: see also, *London & County (A.D.) v Wilfred Sportsman*, *ibid.*, at 784-785, per Russell L.J.

According to Rattee J., there was nothing inconsistent between re-entry by a landlord for breach of a covenant to pay a quarter's rent in advance within a stated period and a claim by the landlord for the full amount of that unpaid rent, notwithstanding that the re-entry takes place within the relevant quarter: see also, *Ellis v Rowbotham* [1900] 1 Q.B. 740, where the Court of Appeal held that the Apportionment Act 1870 had no application to make the quarter's rent apportionable between the period prior to and that after the forfeiture of the lease.

"Continuing" and "once and for all" breaches of covenant

The effect of a waiver will also depend on the nature of the breach giving rise to the landlord's election to forfeit. Thus, if the breach is of a continuing nature, there is a continually recurring cause of forfeiture and the waiver operates only in relation to past breaches (i.e., breaches committed in the period prior to the act which constitutes the waiver). What is the position, therefore, if the landlord seeks to forfeit for a continuing breach of covenant (e.g., disrepair) and includes a claim for arrears of rent accrued due after the breach in his claim? Will the claim for the arrears in the prayer constitute a waiver of forfeiture for that breach? Does the inclusion of the rent claim render the proceedings equivocal?

In *Penton v Barnett* [1898] 1 Q.B. 276, the premises were in disrepair and the landlord served a s.146 notice requiring the tenant to remedy the breach within three months. Three days after the expiration of the notice, a quarter's rent became due. No repairs were done and the

landlord brought an action seeking forfeiture of the lease and also claimed the quarter's rent due in the same proceedings. The Court of Appeal held that the breach, being a continuing one, did not affect the right to possession in respect of non-repair after the date when the rent fell due. In other words, the claim for rent in the landlord's action only waived the forfeiture for disrepair up to that date. Thereafter, a fresh right of forfeiture arose by virtue of the fact that the particular breach was a recurring one (i.e., accruing day by day). It is also noteworthy in this context that the court held that no new s.146 notice was required in respect of the non-repair after the expiration of the time specified in the notice: see also, *Greenwich London Borough Council v Discreet Selling Estates Ltd* [1990] 48 E.G. 113. A further notice under s.146 will, however, be necessary if there has been a material change in the condition of the premises since the date of the service of the notice: *New River Company v Crumpton* [1917] 1 K.B. 762.

Where the breach is classified, not as continuing, but as a once-and-for-all breach, the right to forfeit for that breach will be lost upon waiver. Significantly, a covenant to pay rent falls within this category. If, therefore, the landlord's action for forfeiture for non-payment of rent includes a claim for arrears of rent, this will waive the right to forfeit for non-payment of rent but only, as we have seen, in respect of instalments which fell due prior to the last relevant breach. Applying the *Debtors* case, there would be nothing inconsistent between the landlord re-entering and also claiming the last instalment of rent remaining unpaid in the period allowed by the lease for payment. The right of forfeiture for this last instalment will have arisen as soon as that rent was unpaid within the specified period and by virtue of that non-payment. Moreover, it will not be waived by any subsequent demand or acceptance of rent after re-entry has occurred: *Evans v Enevers* [1920] 2 K.B. 315.

Conclusion

The foregoing analysis indicates that the inclusion of a claim for arrears of rent in proceedings for possession based upon forfeiture for breach of covenant will waive the forfeiture in respect of:

- Continuing breaches, but only up to the date upon which the rent fell due; and
- Once and for all breaches but, in relation to non-payment of rent, only up to the date upon which the last instalment of rent fell due.

How then should the landlord proceed if it wishes to forfeit in respect of say, both a breach of a covenant against assignment and non-payment of rent, and also claim the outstanding rent by means of court action? The difficulty, of course, is that if the landlord includes the claim for arrears of rent in his claim, this will waive the forfeiture in respect of the unlawful assignment for all time (being a once-and-for-all breach) and also waive the right to forfeit for non-payment of rent down to the date when the last instalment of rent became due. (In the case of a continuing breach, the inclusion of a claim for rent arrears is not, as we have seen, as critical because the claim for rent in the proceedings will only waive the forfeiture up to the date when the rent fell due.)

One solution is to rely on the principle that, once the landlord has signified his intention to forfeit (by physical re-entry or service of notice of proceedings for possession), the right of

re-entry ceases to be capable of waiver. Because the landlord is entitled after re-entry to make a claim for rent arrears accrued due prior to the service of the proceedings, the suggested course of action is to bring possession proceedings based upon forfeiture for the breach of covenant and non-payment of rent, but omit any claim for the arrears. The landlord should wait until the proceedings are served on the tenant and then claim the outstanding rent up to the date of forfeiture in a separate action against the tenant. This second action can then be consolidated with the forfeiture proceedings so that both are heard together at the same hearing. Although such an approach is cumbersome procedurally, it does meet the difficulties associated with a combined claim for forfeiture and outstanding rent.

The law is stated as at 4 October 2023.