Neutral Citation Number: [2021] EWCA Civ 55

Case No: A3/2020/0839 & 0881

IN THE COURT OF APPEAL (CIVIL DIVISION)
THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS
IN MANCHESTER PROPERTY TRUSTS AND PROBATE LIST
HIS HONOUR JUDGE HALLIWELL
PT-2019-MAN-000119

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd January 2021

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
LORD JUSTICE ARNOLD

- -

Between :

(1) MOHAMMED MAJEED FAIZ **(2) SHAKEELA FAIZ** **(3) SASSF LIMITED**	**Appellants**
- and -	
BURNLEY BOROUGH COUNCIL	**Respondent**

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- -

MR PHILIP BYRNE (instructed by **Betesh Middleton Law**) for the **Appellants**
MR DAVID BERKLEY QC (instructed by **Legal Department, Burnley Borough Council**) for the **Respondent**

Hearing date : 14th January 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Friday 22nd January 2021.

Lord Justice Lewison:

1. The issue on this appeal relates to the waiver of forfeiture.

2. The trial judge (HHJ Halliwell) had to resolve a number of issues of fact which do not arise on this appeal. Those which are relevant may be shortly stated.

3. Burnley Borough Council granted a lease of a café at Towneley Hall, a historic country house in Lancashire, for a term expiring on 25 March 2020. The lease was "contracted out" of security of tenure under Part II of the Landlord and Tenant Act 1954. The lease became vested in Mr Faiz and his daughter in 2003.

4. The lease contained provision for the payment of rent and insurance rent. The rent was an index-linked amount quantified in the lease payable on 1 January, 1 April, 1 July and 1 October in each year. The insurance rent was calculated by reference to the cost to the Council of insuring the premises under its covenant to do so. That rent was payable "within 7 days of demand". The lease contained an absolute prohibition on sub-letting; and a forfeiture clause in the event of breach of covenant.

5. At some point before 18 October 2019 Mr Faiz and his daughter granted a sub-lease of the café to a company abbreviated to SASSF. The sub-lease was not "contracted out" of security of tenure under Part II of the Landlord and Tenant Act 1954. The grant of the sub-lease was a breach of the absolute covenant against sub-letting contained in the lease. The Council did not know about that at the time of the grant. The judge considered a number of possible dates at which the sub-lease might have been created. He was clear that it was executed between 20 May 2019 and 18 October 2019; and back-dated to 1 August 2017. His ultimate conclusion was that in "all likelihood it was executed prior to late September or early [October 2019]" (the judgment as handed down gives the latter date as "early October 2017" but in the overall context of the judge's findings, "2017" must be a typographical error for "2019," as counsel agreed).

6. On 26 September 2019 the Council made a demand for insurance rent for the period from 1 April 2019 to the expiry of the lease on 25 February 2020. The amount demanded was £2,845.20. Since under the terms of the lease the insurance rent became due within 7 days after demand, the invoiced sum became due on 2 October 2019. That amount remained unpaid.

7. On 18 October 2019 the tenants' solicitors wrote to the Council, enclosing a copy of the sub-lease. Thus the Council became aware of the existence of the sub-lease, and thus of the breach of the absolute covenant.

8. On 30 October 2019 the Council gave the tenants notice under section 146 of the Law of Property Act 1925, relying on the grant of the sub-lease as the relevant breach of covenant; and asserting that it was incapable of remedy.

9. On 4 November 2019 the Council sent a demand for insurance rent amounting to £1,826.87. That figure was a revised figure which had been recalculated so as to encompass only the period ending on 18 October 2019. The invoice making the demand described itself as "Recharge of buildings insurance" for the reduced period. It went on to say that "This invoice is due on 4 November 2019" (i.e. the day it was sent).

10. The amount of that invoice was paid to the Council on 11 November 2019. On 22 November 2019 the Council purported to forfeit the lease by peaceable re-entry.

11. The judge decided that, on these facts, the Council had not waived the forfeiture. His judgment is at [2020] EWCH 407 (Ch).

12. The appeal raises two issues. First, does the acceptance of rent after a breach of covenant with knowledge of that breach waive the right to forfeit, where:

    i) the rent in question had accrued due and been demanded before the landlord had knowledge of the breach; but

    ii) the rent had accrued due and was demanded after the breach itself; and

    iii) the landlord accepted the rent after becoming aware of the breach?

13. Second, was the demand for insurance rent made on 4 November 2019 a new demand for rent accruing due after the landlord had acquired knowledge of the breach?

14. The law relating to waiver of forfeiture is of ancient origin. It was developed by the common law at a time when courts of common law had no power to grant relief against forfeiture; and courts of equity had only very limited jurisdiction to do so. That explains why the principles of waiver of forfeiture are strict. Although proposals have been made for its abolition, it remains the law.

15. The basic principle is not in doubt. 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. Either he may forfeit the lease; or he may affirm its continuation. In order for the landlord to be put in that position he must have knowledge of at least the basic facts which constitute the relevant breach. Subject to statutory restrictions, he may forfeit the lease either by the issue and service of a claim form claiming possession; or by peaceable re-entry. He may affirm the continuation of the lease either expressly or by means of an act or statement (communicated to the tenant) which is consistent only with the continuation of the lease. The affirmation of the lease is normally referred to as a waiver of forfeiture. Once the landlord has made his election, he cannot retract it.

16. It is well-settled, for example, that distraining for rent with knowledge of a breach amounts to a waiver of forfeiture down to the date of the distress. That is because the right to distrain is a right which (until recent statutory changes) can be exercised only during a subsisting landlord/tenant relationship. It is also well-settled that the acceptance of rent which accrued due after the date on which the landlord had knowledge of the breach also amounts to a waiver. Where the alleged act of waiver is the acceptance of rent, and possibly where it is no more than a demand for rent, that is all that counts. Where the alleged act of waiver is something else, the court may look at all the circumstances of the case: *Expert Clothing Service & Sales Ltd v Hillgate House Ltd* [1986] Ch 340.

17. What is less clear is 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 had knowledge of it.

18. In *Price v Worwood* (1859) 4 H & N 512 the tenant was in breach of a covenant to insure. Rent under the tenancy seems to have been payable quarterly in arrear on the usual quarter days. On 23 December 1858 the landlord accepted payment from sub-tenants of the rent due from the tenant on 29 September 1858. On 24 December 1858 the landlord began proceedings in ejectment against the tenant. The question for the court was whether the acceptance of payment from the sub-tenants had waived the forfeiture. The main argument for the tenant was that the acceptance of payment from the sub-tenants was equivalent to distress, but the Court of Exchequer rejected that. Although Pollock CB did not say so in terms, it seems to me that the premise underlying his decision was that, at best, the acceptance of rent due on 29 September could only have waived breaches accruing up to that date; and that since the breach was a continuing breach, the landlord remained entitled to forfeit thereafter. Martin B was more explicit. He said:

> "A receipt of rent, to operate as a waiver of a forfeiture, must be a receipt of rent *due on a day after the forfeiture was incurred*. The mere receipt of the money, the rent having become due previously, is of no consequence, and for the very plain reason that the entry for a condition broken does not at all affect the right to receive payment of a pre-existing debt." (Emphasis added)

19. But he also held that the continuation of the breach between 23 and 24 December gave the landlord sufficient right to forfeit.

20. Channell B did not find it necessary to confront the question. He said:

> "Now, on the 23rd December, the day before the action was brought, the plaintiff obtained from the undertenants payment of the rent due from them to their landlord, the present defendant, up to the preceding Michaelmas. Without entering into the question whether that is to place the plaintiff in a worse situation than if he had received it from his tenant; in other words, whether it is only evidence of a waiver of the forfeiture before the Michaelmas up to which rent was paid, or whether it brings the waiver down to the 23rd December; still, if I and the rest of the Court are right in our conclusion, there was evidence of a continuing breach between the 23rd, when the payment was made, and the time when the action was brought on the 24th."

21. The only other case which we were shown in which the question was considered was *Osibanjo v Seahive Investments Ltd* [2008] EWCA Civ 1282, [2009] 2 P & CR 2. In that case the landlord demanded rent from 25 March 2004 to 29 September 2005. The rent remained unpaid; and on 5 January 2006 he presented a bankruptcy petition. In June 2006 the landlord became aware of breaches of the covenants against alienation and alterations. On 24 October 2006 the tenant sent the landlord a cheque expressed to be in part to discharge the bankruptcy debt and in part as payment for arrears of rent. The landlord presented the cheque but returned that part of the amount tendered as exceeded the bankruptcy debt. On 4 April 2007 the landlord issued forfeiture proceedings. This court held that the landlord had not waived the forfeiture by accepting payment of the bankruptcy debt.

22. Mummery LJ said at [3]:

> "There is no substantial dispute about the relevant law. Forfeiture may be waived by the receipt of rent. The rent *must have accrued due since the landlord had notice of the cause for forfeiture* and it must have been tendered and accepted by the landlord as rent. In those circumstances the landlord has elected not to take advantage of the forfeiture." (Emphasis added)

23. Rix LJ was less certain. He said:

> "[31] My only purpose in writing a separate judgment is to say that I am not sure that a landlord cannot waive the right to forfeit by accepting rent with knowledge of the breach where that rent had accrued due before knowledge of the breach: provided of course that the rent had accrued due after the breach. Thus I am concerned that acceptance of rent which accrues due after the breach on which forfeiture is based may always be a waiver of the right to forfeit for that breach provided of course that at the time of acceptance the landlord has the requisite knowledge of the breach. It is true that in *Oak Property Co Ltd v Chapman* [1947] 1 KB 886 at 898 Somervell LJ said (in a judgment of the court of appeal prepared by Evershed LJ) that "acceptance of any rent accrued due after the landlord's knowledge of the tenant's breach was regarded necessarily as inconsistent with an election to avoid the lease". However, at 899 Somervell LJ restated the principle more broadly as follows:
>
> "From long usage the acceptance of rent by a landlord after knowledge of circumstances giving rise to a claim for possession has come to be regarded by landlords and tenants alike as evidence of an intention to affirm the tenancy."
>
> [32] The former statement is true, even if it is not necessary for the rent to accrue due after knowledge of the breach. On principle, I would be inclined to think that knowledge is what is necessary to found the waiver, since one cannot waive without knowledge, but that once there is the necessary knowledge it should not matter whether the rent which is accepted has accrued due before or after the date of knowledge."

24. Smith LJ simply agreed. *Price v Worwood* does not appear to have been cited.

25. So far as the textbooks are concerned, Woodfall on Landlord and Tenant (loose-leaf edition para 17.098) takes the view that acceptance of rent is not a waiver of a breach committed or of which the landlord became aware after the date on which the rent fell due but before acceptance of the payment. Hill and Redman on Landlord and Tenant (para 4826) states that a landlord waives a forfeiture by "accepting rent (including sums reserved as rent) which has accrued due after the landlord had notice that the right to forfeit had arisen". Halsbury's Laws of England (vol 62 para 507), on the other hand, states that a demand made by the landlord or his agent with knowledge of the breach

for rent due after the cause of forfeiture operates as a waiver. Likewise, Megarry and Wade on Real Property (9th ed para 17-022) states that a "waiver will be implied when a landlord, with knowledge of the tenant's breach, accepts, sues for, or even merely demands, rent falling due after the breach. A waiver will also be implied where the landlord levies distress, even in respect of rent due before the breach."

26. None of the statements by these distinguished judges binds us, as none is part of the ratio of the case. Nor do the textbooks speak with one voice. It seems to me, therefore, that we must consider the question as one of principle. What entitles the landlord to forfeit the lease is a breach of covenant, whether or not he knows that the breach has been committed. Of course, unless he knows of the breach, he will not in practice forfeit the lease. But if he does forfeit the lease it is the breach that he relies on; not the date when he became aware of the breach. Thus in order to plead a claim to forfeit the landlord needs to allege:

    i) The existence of the lease and the terms of the relevant covenant;

    ii) The existence and terms of the forfeiture clause; and

    iii) The fact of the breach.

    iv) It is good practice, though not essential, to plead service of notice under section 146 of the Law of Property Act 1925 (where applicable) and the tenant's failure to remedy the breach (if remediable) or the fact that the breach is irremediable.

27. Any allegation of waiver by the landlord is then pleaded by the tenant by way of defence.

28. In principle, therefore, it seems to me that the view expressed by Rix LJ is the right one. 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. The point can be tested this way. The tenant commits a once-and-for-all breach of covenant in, say, January. The rent is payable on the usual quarter days, but remains unpaid. The landlord discovers the breach in, say, July when the rent is still unpaid. Is it consistent for the landlord to say: on the one hand I am entitled to forfeit the lease because you committed a breach of covenant in January; but, on the other hand, I am entitled to demand and be paid the rent that fell due on 25 March and 24 June? The tenant's liability to pay rent arises only because he is the tenant. By demanding and accepting rent from the tenant the landlord is surely accepting that the lease continues at least until the dates on which those instalments of rent accrued due. In this example both rent days post-date the breach. It would, in my judgment, be inconsistent for the landlord to maintain the position that he could both rely on a breach committed in January and yet (with knowledge that a breach had taken place in January) accept rent due in March and June.

29. As Rattee J put it in *re a Debtor (No 13A-IO-1995)* [1995] 1 WLR 1127:

> "… a demand for or acceptance of rent accrued due after a breach of covenant by the tenant is inconsistent with, and therefore waives, the landlord's right to forfeit the lease for that breach because such demand or acceptance is a recognition that the

> lease has continued after the breach…. However, in my judgment, the same reasoning cannot apply to a demand for or acceptance of rent accrued due on or before the relevant breach. As is recognised by the terms of the right of re-entry itself in this case, there is nothing inconsistent between forfeiting the lease and demanding or accepting rent accrued due before the right to forfeiture arose."

30. This view is, I think, supported by earlier authority. In *Croft v Lumley* (1858) 6 HL Cas 672 the House of Lords put a number of questions to the judges, of which the fourth was whether certain breaches of covenant had been waived. Watson B said at 697:

> "It is well established by authorities, ancient and modern, that receipt of rent accrued *due after a breach of covenant known to the lessor at the time of such receipt of rent* is a waiver of such forfeiture; for this reason, that the landlord affirms the continuance of the lease, and thereby determines the option of taking advantage of the forfeiture for condition broken." (Emphasis added)

31. Martin B said at 720:

> "I think the receipt of the rent was a waiver of all breaches of condition which *had happened before the rent became due*, and which were known to the Plaintiff, but was not in respect of any breach of condition not known to him." (Emphasis added)

32. He added:

> "In my opinion this is the true principle; and if a landlord receives *rent which falls due after a condition broken*, of which he had notice, the right of entry is waived or barred, and his intention or desire not to waive it is immaterial." (Emphasis added)

33. Wightman J said at 729:

> "Acceptance by a landlord of rent accruing due from a tenant, after knowledge by the landlord of a breach of covenant by the tenant, which gives the landlord a right of re-entry on the ground of a condition broken, amounts to a waiver of the right to re-enter, as it is in effect an admission that *the tenant held rightfully as such at the time the rent accrued*." (Emphasis added)

34. Some of the other judges who gave their opinions in the case expressed themselves in more equivocal terms; but in my judgment the extracts I have quoted encapsulate the true principle. 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. On the view that the House took of the facts of that case, the fourth question did not arise for decision.

35. In *Expert Clothing*, Slade LJ said at 359:

> "One typical act of waiver, illustrated by a number of reported cases, is the acceptance of rent. It is well settled that this will constitute a waiver of a landlord's right to forfeit on account of any breaches of the tenant's covenants of which he is aware at the date of the acceptance."

36. I ought to say something about the extent of the knowledge that the landlord must have. In *Matthews v Smallwood* [1910] 1 Ch 777 Parker J put it this way (in a passage that has been frequently approved):

> "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 recognizing the continued existence of the lease. It is not enough that he should do the act which recognizes, or appears to recognize, the continued existence of the lease, unless, at the time when the act is done, he has knowledge of the facts under which, or from which, his right of entry arose. Therefore we get the principle that, though an act of waiver operates with regard to all known breaches, it does not operate with regard to breaches which were unknown to the lessor at the time when the act took place."

37. Thus the principle is that waiver takes place where the landlord demands or accepts rent which accrued due after the date of a breach known to the landlord. Where the breach consists of an unlawful sub-letting (as in this case), I consider that the landlord must know not only that the sub-letting has taken place, but also that the rent demanded or accepted accrued due after the date of the breach.

38. In the present case the first invoice was sent on 26 September 2019 and the insurance premium became due on 2 October. The judge's finding that the sub-lease was granted (and hence the breach took place) "prior to late September or early [October 2019]" does not, in my judgment, allow us to reach the conclusion that the breach took place before the insurance rent became due, since "early October 2019" would, in my view, encompass a date *after* 2 October. Thus the insurance rent could, on the judge's findings, have become due before the date of the breach, if the breach did not occur until, say, 5 or 6 October. Since the burden of proof in establishing waiver lies on the tenants, I would hold that they have not discharged that burden.

39. In addition, at the date when the insurance rent accrued due the Council could not have known that the breach had already taken place, since the existence of the breach (whenever it took place) was not revealed until 18 October. That demand for the insurance rent could not, therefore, have amounted to a waiver of the forfeiture.

40. The second issue that arises is whether the demand for insurance rent made on 4 November 2019 was a fresh demand for rent which accrued due after the date of the breach of covenant, which the Council demanded with knowledge that the breach had occurred. The tenants' argument runs thus. Insurance rent is due 7 days after demand. The Council made a demand on 4 November. The insurance rent thus became due and was paid on 11 November. But the Council knew of the breach both at the date of the

demand and at the date when the payment was made. The judge rejected that argument on the ground that a reasonable recipient of the 4 November invoice would have understood that it was no more than an amended version of the original demand which had been made on 26 September. Mr Byrne says that that was wrong: the 4 November invoice was for a different amount in respect of a different period. It can only be treated as a fresh demand; or, if not, it is insufficiently clear to be treated as no more than a revised version of the original demand.

41. In my judgment the 4 November invoice did not amount to a fresh demand for insurance rent due under the lease. First, it demanded payment for only part of the period already covered by the September invoice. Second, it asserted that payment was due on the very day on which the invoice was sent, which is inconsistent with the contractual machinery for a fresh demand. Although, as Mr Byrne submitted, insurance rent due under the lease becomes due 7 days after the demand, this invoice said in terms that the amount demanded was due on 4 November. Third, the tenants cannot have thought that the Council was requiring payment under both invoices; so the second invoice must, by necessary implication, have superseded the first one.

42. Because the November invoice asserted that it was payable on the date of the invoice itself, it cannot have been a demand for an amount due under the lease. It could only have been an indication by the Council that it was willing to accept a lower sum than that which had been previously demanded under the September invoice. Accordingly, in agreement with the judge, I would hold that the November invoice did not amount to a waiver of the forfeiture.

43. In this case the landlord was paid (and accepted the payment) on 11 November 2019. The Council's state of knowledge on 11 November was that a breach had taken place. But it did not know when that breach had taken place (except that that it must have been on or before 18 October). 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 that accrued due before the date of the breach. The acceptance of the payment did not, therefore, amount to a waiver of the forfeiture.

44. I would dismiss the appeal.

Lady Justice Asplin:

45. I agree.

Lord Justice Arnold:

46. I also agree.