How will the judicial approach to forfeiture change once the temporary Coronavirus moratorium measure is lifted?

Where will the challenges come from?

I have been asked to consider with you how the judicial approach to forfeiture may change once the temporary Coronavirus moratorium is lifted.

In substance, that largely means the judicial approach to relief from forfeiture.

I shall look into my crystal ball and say something about that a little later.

But perhaps unusually, there has been some recent clarification of the law in another area of possible relevance to this question: the subject of waiver of the right to forfeit. This clarification has resolved a long-standing area of uncertainty, and may have a bearing on what happens immediately after the moratorium expires, so I propose to start with an update.

To keep things focussed, everything that I have to say today relates only to business tenancies falling within Part 2 of the Landlord and Tenant Act 1954.

Waiver of the right to forfeit by accepting rent

The update concerns the recent decision of the Court of Appeal in Faiz v Burnley Borough Council [2021] EWCA Civ 55, handed down on 22 January 2021, which deals with the topic waiver of the right to forfeit by accepting rent.

The basic principles will be familiar, and were explained by Lewison LJ at [15]:

> "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."

Whenever the tenant commits a breach of covenant, this gives rise to a risk for the landlord that it will waive the right to forfeit without intending to. The greatest risk is where the landlord knows about a breach when rent falls due. If the landlord accepts payment of that rent, that will waive the right to forfeit, save in exceptional circumstances[1]. The same is probably true if the landlord simply demands payment of the rent.

I can illustrate this situation with a simple timeline:

The reasoning that underpins this is that the landlord is choosing to treat the lease as continuing when the rent falls due, despite the breach, rather than to exercise its right to forfeit for the breach. A claim for later rent is consistent only with the continuation of the lease. Other actions by the landlord may also lead to a waiver (including accepting payments of things which are not rent), but in those other situations, the court will consider all the circumstances before deciding whether what has been done counts as an unequivocal recognition of the tenancy by the landlord.

The position is different if the breach happens after the rent falls due:

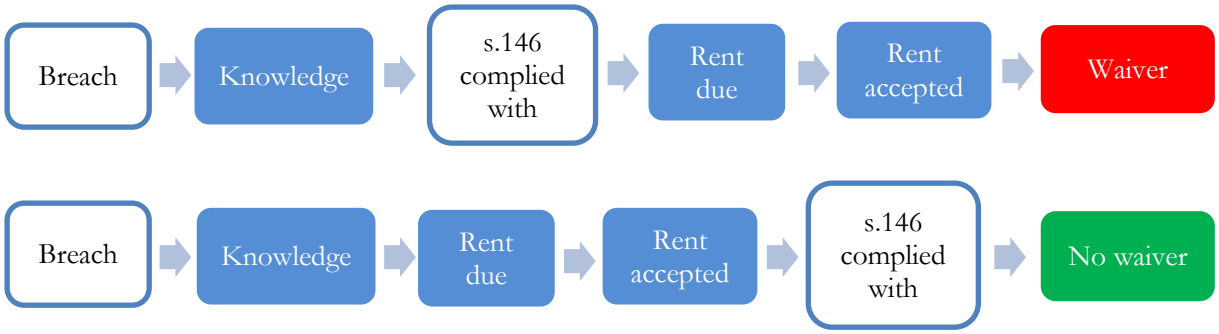
The reason for this is that, even if the landlord knows about the breach, accepting that rent does no more than to recognise that the lease was on foot when the rent fell due: i.e. before the breach too place. That does not make any difference to the right to forfeit for that later breach.

But those simple timelines mask a number of complications. I want to mention just two.

The first concerns statutory barriers to forfeiture: most obviously, here, the effect of LPA 1925 s.146, if it applies. As you will know, this provides that a right to forfeit "shall not be enforceable" until its requirements have been satisfied.

[1] One possibility may be where the tenant pays the rent directly into the landlord's bank account, and the landlord returns the payment as soon as it can.

There is strong textbook support for saying that there can be no waiver until the requirements of s.146 have been satisfied[2]. If that is right, then then the timelines above would look different, perhaps like this (in the case of a once-and-for-all breach[3]):



You will see from those timelines that, if this is right, rent can be accepted without risk if a s.146 notice has not yet been served (second timeline); and if the breach is a remediable one, rent can be accepted without risk until expiry of the time given in the s.146 notice to remedy that breach.

Despite that textbook support, there is no definitive decision on this[4], and another recent case has reopened the debate.

The core question is: Can the landlord make an election as soon as the right to forfeit has arisen under the lease, or only after it has jumped over the statutory hurdles placed in its way before the right can be enforced?

That recent case is Stemp v 6 Ladbroke Gardens Management Ltd [2018] UKUT 375 (LC)[5]. This concerned to a long residential lease. The Upper Tribunal decided that a landlord can elect – and so can waive a right to forfeit for non-payment of rent - even before complying with the statutory requirements for forfeiture, and suggested that the position would be the same in relation to s.146 (with the exception, it was suggested, of remediable breaches, in which case the s.146 notice must first expire). If this case is right, then my original timelines are the right ones for an irremediable breach.

The point did not arise for decision in Faiz (although Lewison LJ illustrated his decision by giving an example at [28] which took no account of the timing of a s.146 notice).

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[2] Woodfall para.17.098.1 (but see the next footnote); Hill and Redman para.A[4832].
[3] The landlord will be in a stronger position still if the breach is a continuing one.
[4] Both Woodfall and Hill & Redman arguably draw too much from the disrepair cases which they cite.
[5] See, especially, [71]-[73]. This has led to an inconsistency in Woodfall between paras.17.098.1 (above) and 17.092 (where Stemp is cited as good law, including in relation to s.146). The decision is criticised in Hill & Redman at para.A[4832].

The second complication I want to consider can be seen from the facts in Faiz itself, which are not complicated.

The tenant was obliged to pay insurance rent within 7 days of demand. In breach of covenant, the tenant sub-let the café. The timeline was as follows:

Insurance rent demand:	26 September 2019	(for the period from 1 April 2019 to expiry of the tenancy on 25 February 2020)
Insurance rent due:	2 October 2019	
Sub-tenancy:	c. early October 2019	
Council told of sub-tenancy:	18 October 2019	
Council served s.146 notice:	30 October 2019	(relying on the unlawful sub-letting)
Revised insurance demand:	4 November 2019	(for 1 April to 18 October 2019; stating it was due on that date)
Insurance rent paid:	11 November 2019	(for the reduced amount demanded)
Peaceable re-entry:	22 November 2019	

The tenant argued that the Council knew about the unlawful sub-letting on 18 October, and so when it demanded insurance rent on 4 November, or when it received payment of it on 11 November, it the Council waived its right to forfeit for that breach.

This is far from a unique case: I have come across this situation quite a few times over the last 25 years or so, and differing views were expressed on the issue in the Court of Appeal in 2008 (Osibanjo v Seahive Investments Ltd [2008] EWCA Civ 1282).

Putting the facts into a simple timeline, they look like this:

The landlord does not know about the breach when the rent fell due, but it does know about it when it accepts the rent. Does the landlord waive its right to forfeit for the breach by accepting the rent?

Court of Appeal: Yes.

Lewison LJ decided that, in principle, while the landlord cannot waive its right to forfeit for a breach until it knows about it, once it does know about it, what matters is whether the rent in question fell due before or after the breach.

While this now settles this issue at Court of Appeal level, it could be a real trap for an unwary landlord. A prudent landlord's processes must now ensure that as soon as a breach comes to its attention, there a stop is placed on both demands for rent and the acceptance of rent until the date of the breach has been checked against the date when the rent fell due; and this needs to cover the situation where arrears have been building up over time, and a landlord becomes aware of a breach that happened some time ago.

On the more positive side for landlords, the court went on to consider what knowledge a landlord needs to have about the timing of the breach.

There are plenty of cases in which the landlord will not be sure when a breach was committed, and Lewison LJ has now clarified 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."

Because the burden of establishing waiver lies on the tenant, the burden is on the tenant to prove that the breach took place before the rent in question fell due.

On the facts of Faiz, this helped the Council to escape waiver, because the evidence about when the breach happened was unclear. It could have happened after 2 October 2019: i.e. after the insurance rent became due. You might be thinking the Council was rather lucky. You would be right.

Waiver and the moratorium

So much for my update. What about the future?

Let me issue a few words of caution first of all about waivers and the expiry of the moratorium.

Under s.82(2) of the Coronavirus Act 2020, "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 re-entry or forfeiture, under a relevant business tenancy, for non-payment of rent".

Here, "rent" includes any sum a tenant is liable to pay under a relevant business tenancy (s.82(12)).

So, while the moratorium is in place, landlords will not inadvertently waive the right to forfeit for non-payment of those sums covered by the moratorium. Waiver can still take place of the right to forfeit for other breaches; and once the moratorium has come to an end, waiver of the right to forfeit will rear its head again in relation to non-payment by tenants during the moratorium period.

This means that landlords will need to think ahead, and potentially prepare their systems, particularly if they wish to take steps to forfeit for arrears that arose during the moratorium. As soon as the moratorium comes to an end, any acceptance of rent or other sums due under a lease may amount to a waiver of the right to forfeit for breaches committed during the moratorium, as may a demand for it. Other actions taken which depend on the lease still being on foot may also have the same effect. Payment arrangements during the moratorium may add a further layer of complication.

On the other side, well-advised tenants may seek to do two things, relying on the case of Thomas v Ken Thomas Ltd [2007] 1 EGLR 31.

First, they may seek to engineer a waiver by paying the first sum due by way of rent after the moratorium, making sure that they appropriate their payment to that rent .liability (thereby avoiding the landlord accepting it towards any arrears). That is what happened in the Ken Thomas case.

If that is achieved, then a second consequence may follow. Even if the tenant fails to pay rent due subsequently, the moratorium arrears may not have to be paid as a condition of obtaining relief from forfeiture for that subsequent non-payment: Ken Thomas (*obiter*). I suspect that this part of Neuberger LJ's judgment is not well known, but it may take on greater significance in the next couple of years.

Future judicial approach to forfeiture?

So what about the future judicial approach to forfeiture?

The first question is whether we are going to see new legislation which makes a difference to what are otherwise long-settled principles.

That could be coming. The recent controversies concerning CVAs have already brought the law relating to commercial property and insolvency into the political arena. We know that residential property law reform is on the cards. A Government looking to transform and kickstart the economy might be willing to consider more fundamental reform of the law affecting commercial property.

At the end of last year (9 December 2020), the Government announced a review of what it described as the "outdated" commercial landlord and tenant legislation, "to address concerns that the current framework does not reflect the current economic conditions". This will apparently consider "how to enable better collaboration between commercial landlords and tenants and also how to improve the leasing process to ensure our high streets and town centres thrive as we recover from the pandemic and beyond."

The review "will consider a broad range of issues including the Landlord & Tenant Act 1954 Part II, different models of rent payment, and the impact of Coronavirus on the market."

The review was due to start this month: March 2021. As of today, 9 March, there has been no announcement. It is far from clear how wide-ranging this will be, or whether forfeiture will be included.

A Law Commission working party first suggested reform as long ago as 1968. The most recent attempt was in a Law Commission Report in 2006. That recommended a new statutory regime for dealing with the termination of tenancies following tenant default. In the Ministry of Justice's annual Reports on the Implementation of Law Commission Proposals, the Government has repeatedly promised to reach a conclusion on these proposals, along with several other property law proposals. Progress on some – but not forfeiture – in 2015 and 2016 was overtaken by Brexit. Might those proposals be looked at again?

Apparently, we should also expect further guidance soon which will "sit alongside the government's Code of Practice" published in June 2020[6], "to encourage all parties to work together to protect viable businesses and ensure a swift economic recovery."

Without fresh legislation, there is little scope for judicial development of the principles, so what can we expect from the courts in the meantime?

[6] Code of Practice for Commercial Property Relationships During the COVID-19 Pandemic.

I expect judges to continue to try to strike a fair balance between ensuring that landlords are paid what they are due, and allowing tenants a realistic chance of paying their arrears. The same applies to other duties owed by tenants. What the pandemic may have changed, though, at least for a while, is how and where judges decide to strike that balance. They do not apply the law in a vacuum, and are very well aware of the impact of the pandemic on both tenants and landlords alike.

Here are a few tentative suggestions:

1. There may be a greater focus on what arrears have to be paid as a condition of granting relief from forfeiture. Tenants may turn for assistance to Neuberger LJ's judgment in the Ken Thomas case, aiming to reduce the arrears that they have to pay as a condition of relief. Landlords may yet seek to challenge that decision.

2. Tenants in a precarious financial position may be allowed more of an opportunity to show that they can pay than they might previously have been given.

3. Judges may be more willing to allow tenants longer to pay, perhaps requiring them in return to pay in instalments over a fixed period. Relief is not complete until all conditions have been complied with, so this could lead to longer periods of uncertainty about tenants' true status, but that is a price that many tenants will be willing to pay in return for more time.

4. Procedural delays are likely to be with us for some time, and although they may give tenants further breathing space to sort out their finances, courts are likely to expect them tenants use that time wisely. We might yet see the courts use their procedural powers to try to help parties to resolve their differences while they wait in the queue for a hearing date.

5. We may find judges considering the finances of both landlords and tenants, in order to determine the fair terms to impose on the tenant.

6. The June 2020 Code of Practice, and other Government guidance, might finally have some practical significance, if judges look to this as setting a standard against which to assess the conduct of both landlords and tenants when deciding on what is a fair outcome.

7. Depending on how the economy performs, we may find tenants asking more often for extensions of time, in both rent and non-rent cases, and judges more willing to grant this.

8. We may also see some innovation in the conditions for relief, and in the structure of orders granting relief from forfeiture.

Andrew Walker QC
9 March 2021