

Faiz and others v Burnley Borough Council [2021] EWCA Civ 55

The demand and acceptance of rent with knowledge of a breach of covenant will waive the right to forfeit if the rent accrued due after the breach but before the landlord had knowledge of the breach.

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Facts

The tenants (F) held a lease whose contractual term expired on 25 February 2020. They granted a sub-lease to a company wholly owned by one of them. The grant of the sub-lease was a breach of the absolute covenant against sub-letting contained in the lease. The sub-lease was granted in late September or early October 2019, but the landlord (BBC) did not become aware of it until 18 October 2019 (when F sent a copy to BBC). BBC served a section 146 notice on F on 30 October 2019 (relying on the grant of the sub-lease as the relevant breach giving rise to a right to forfeit) and purported to forfeit the lease by peaceable re-entry on 22 November 2019.

On 26 September 2019, BBC had demanded from F insurance rent due from 1 April 2019 to 25 February 2020. Under the lease, this sum became due on 2 October 2019. On 4 November 2019 (having become aware of the breach of the sub-letting covenant), BBC had sent to F a revised demand for the insurance rent covering the period up until 18 October 2019 (the date BBC became aware of the breach of covenant).

Issues

1. Did the original demand for insurance rent on 26 September waive BBC's right to forfeit F's lease?
2. Was the demand for insurance rent on 4 November 2019 a new demand for insurance rent accruing due after BBC had knowledge of the breach of covenant by F (meaning BBC had waived the right to forfeit F's lease)?

Decision

1. Waiver takes place where a landlord demands or accepts rent which accrued due after the date of a breach of covenant known to the landlord. Where the breach consists of an unlawful sub-letting, a 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.

In this case, since it was not clear exactly when the sub-lease had been granted, F had not discharged the burden of proof on them to show that the insurance rent had accrued due after the date of the breach (the insurance rent was due on 2 October 2019 and there was no clear evidence that the sub-lease had definitely been granted before then).

In any event, at the date when the insurance rent accrued due (2 October 2019), BBC could not have known that a breach had already taken place (the existence of the breach not being revealed to BBC until 18 October 2019). The original demand for insurance rent by BBC could not therefore have amounted to a waiver of the right to forfeit.

2. The 4 November invoice did not amount to a fresh demand for insurance rent. It demanded payment for only part of the period already covered by the earlier September invoice. It asserted that payment was due on the very day on which the invoice was sent which was inconsistent with what the lease said about a new demand (which provided that insurance rent became due within 7 days of demand). F could not have thought that BBC was requiring payment under both invoices; the second invoice, by implication, had to have superseded the first one. Accordingly, it did not amount to a waiver of the right to forfeit F's lease.

Points to note/consider

1. It has long been settled that the demand or acceptance of rent that accrued due before the date of a breach of covenant will not waive a landlord's right to forfeit a lease for that breach and that the demand or acceptance of rent that accrued due after the date on which a landlord has knowledge of a breach of covenant will waive a landlord's right to forfeit for that breach. What was not clear however was whether the demand and acceptance of rent with knowledge of a breach would waive a landlord's right to forfeit for that breach if the rent accrued after the breach, but before the landlord had knowledge of it. In this case, Lewison LJ decided that it would waive the right to forfeit for that breach.
2. Waiver occurs whenever a landlord, with knowledge of the tenant's once-and-for all breach of covenant (e.g. breach of an alienation covenant), acts in an unequivocal manner to recognise the continuation of the lease (e.g. demanding or accepting rent). Although a landlord can demand and accept rent that accrued due before the date of breach, this case is a reminder of the dangers for a landlord of demanding and accepting any rent that accrued due after the date of the breach.

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