

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

Where will the challenges come from?

Faiz v Burnley Borough Council [2021] EWCA Civ 55

Breach = choice:

- **Forfeit**

or

- **Affirm (i.e. waive right to forfeit)**

Requires knowledge of basic facts constituting breach.

Accepting rent, knowing about a prior breach = affirmation/waiver.

Breach before rent due



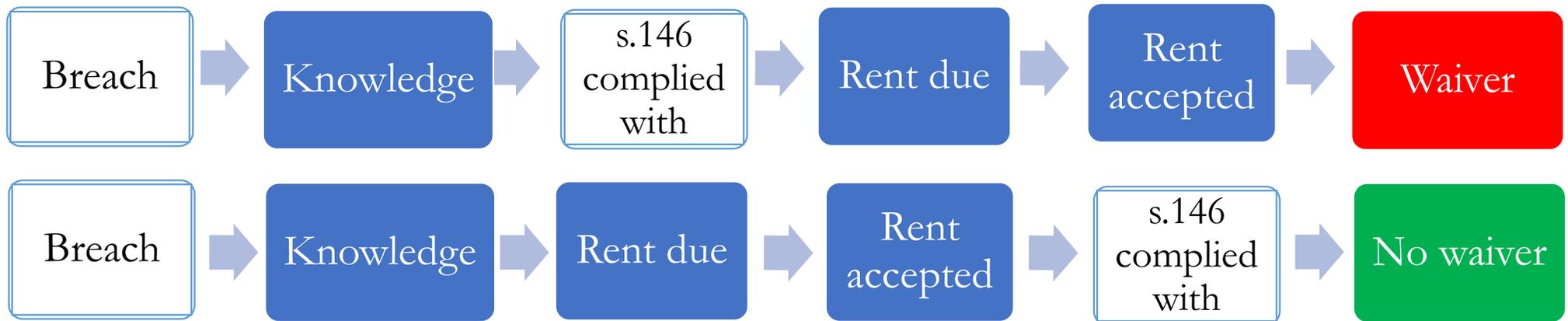
Breach after rent due



Complications

Statutory restrictions, e.g. LPA 1925 s.146 : no waiver until overcome?

Textbooks:



Wrong? Stemp v 6 Ladbroke Gardens Management Ltd [2018] UKUT 375 (LC)

Breach before rent due; delayed knowledge

Faiz v Burnley Borough Council [2021] EWCA Civ 55

| | | |
|------------------------------|-----------------------|---------------------------------------|
| Insurance rent demand: | 26 September 2019 | (for 1 April 2019-25 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 2019-18 October 2019) |
| Insurance rent paid: | 11 November 2019 | (for the reduced amount demanded) |
| Peaceable re-entry: | 22 November 2019 | |

Breach before rent due; delayed knowledge



- Landlord cannot waive until it knows about the breach.
- But once it knows about it, what matters is whether the rent in question fell due before or after the breach.
- Landlord must also know that the breach came first.

Coronavirus Act 2020

s.82(2):

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.

s.82(12)

“Rent” includes any sum a tenant is liable to pay under a relevant business tenancy.

Landlord actions?

Think ahead:

- Can I forfeit for moratorium arrears?
- Do I want to?
- Am I ready to avoid waiver?

Tenant response?

Thomas v Ken Thomas Ltd [2007] 1 EGLR 31

- Engineer waiver by paying first post-moratorium rent, and appropriating payment to that rent?
- Relief from forfeiture for non-payment, without having to pay earlier arrears for which right to forfeit has been waived?

UK Government's review of commercial L&T legislation, March 2021

“to address concerns that the current framework does not reflect the current economic conditions”

“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”

“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”

Law Commission Report: Termination of Tenancies for Tenant Default (2006)

'Code of Practice for Commercial Property Relationships During the COVID-19 Pandemic' (June 2020)

Post-moratorium?

- More focus on what arrears have to be paid as condition of relief (Ken Thomas)?
- More opportunity for tenants in precarious financial position?
- Longer to pay? Instalments?
- Procedural delays and orders?
- Consider finances of both landlord and tenant?
- Code of Practice is relevant? Conduct of each party?
- More extensions of time?
- Innovative conditions and forms of order?