

**Waiver after *Tropical Zoo v*  
*Hounslow London Borough*  
*Council* [2024]**

**Julian Greenhill KC**  
**Wilberforce Chambers**

# Waiver of the right to forfeit – a reminder

- Unequivocal act done with knowledge of tenant's breach and communicated to tenant = waiver
- Acceptance of rent due after the breach = classic act of waiver
- Objective test
- *Central Estates (Belgravia) v Woolgar* [1972] 1 WLR 1048
- Acceptance of rent by mistake is still a waiver: "strict principle ... in a special category", acceptance is "all that counts"

# *The Tropical Zoo Ltd v London Borough of Hounslow* [2024] EWHC 1240 (Ch)

- 6 January 2021 – once-and-for all breach by tenant
- 16 February – landlord’s section 146 notice
- Landlord’s instruction to agent not to accept rent
- No communication with tenant
- 18 March – tenant pays rent falling due after 6 January
- 19 March – agent “returns” that rent to the wrong bank account
- 9 November – rent returned to tenant

# Three key issues on waiver from *Tropical Zoo*

1. Waiver by agent's mistaken acceptance of rent
  - a. What authority must the agent have in order to waive?
  - b. Nature and application of the objective test
2. Can you waive during the currency of a s146 notice?
3. Contracting out of waiver

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# (1)(a) Waiver by mistaken acceptance of rent – agent’s authority

- Actual authority and ostensible authority
- Authority to waive or authority merely to accept rent?
- Judge’s decision on agent’s authority:
  - agent with “authority to make decisions as to the continuation of the lease” vs agent with “authority to collect rent but no wider authority”

# (1)(a) Waiver by mistaken acceptance of rent – agent’s authority (continued)

- Confines waiver by acceptance of rent to narrow range of circumstances
- Corporate landlords and waiver
- *Mardorf Peach v Attica* [1977] AC 850 and *John Lewis v Viscount Chelsea* [1993] 2 EGLR 77
- “Acceptance” of rent vs receipt of rent

# (1)(b) Waiver by mistaken acceptance of rent – the objective test

- Nature of the objective test – *Mardorf Peach v Attica* [1977]
- Application to *Tropical Zoo* – was the agent's rejection of the rent within the scope of the objective test?
- Judge's decision: the agent's acts "unambiguously rejected the payment"
- "Omniscient" objectivity vs viewpoint of a reasonable tenant

## (2) Waiver during currency of a s146 notice?

- Orthodox position - yes, you can waive whilst notice is running
- Difficult for landlords
- *Central Estates Belgravia v Woolgar* [1972]
- *First Penthouse v Channel Hotels* [2003] EWHC 2713 (Ch)

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## (2) Waiver during currency of a s146 notice? (continued)

- Rejection of the orthodox position in New Zealand:  
*McDrury v Luporini* [2000] 1 NZLR 652
- *Tropical Zoo Ltd v Hounslow* [2024]: in England answer is still “yes”, you can waive during currency of a s146 notice
- But seems ripe for review by the CA or SC
- Implications of a change inc. estoppel



## (3) Contracting out of waiver

- The clause in *Tropical Zoo* – “the Landlord may (even if the Landlord has waived any previous right of re-entry) re-enter the Premises” – not apt to exclude waiver
- A wider principle against contracting out?
- *R v Paulson* [1921] 1 AC 271
- *Owendale Pty v Anthony* (1967) 117 CLR 539 (Australia)

Thank you