

# WAIVING BREACHES OF LEASE COVENANTS – WHEN, WHY AND WHAT ARE THE CONSEQUENCES?

# (INADVERTENT WAIVER OF A TENANT'S BREACH)

## **Terminology:**

The term waiver is best avoided:

*'...because it covers a wide range of different situations. These include variation of a contract and promissory estoppel. But waiver may also be used to describe, for example, where a party has chosen to affirm a contract rather than terminating it for breach...'*

***'Restatement of the English Law of Contract' (2016)***

# Types of Waiver

- *1. Waiver of Forfeiture*
- *2. Waiver of Breach*
- *3. Waiver of Covenant*

## a. Waiver of the Right to Forfeit

- It only bars the remedy of forfeiture, not the right to claim damages for the breach or the right to take other action based on the breach;
- It does not depend on consent;
- It will not prevent L relying on the covenant in respect of subsequent breaches;
- It will not prevent a subsequent forfeiture for (the same) breach where the breach is a continuing, as opposed to a once and for all, breach.

*‘...If he chooses to do something such as demanding rent which can only be done consistently with the existence of a certain state of affairs, viz the continued existence of the lease....he cannot thereafter be heard to say the state of affairs did not exist...’*

# Anti – waiver clauses

eg:

- *‘no act of waiver will debar a forfeiture....’*

The election doctrine stipulates that *‘waiver is a question that the law decides’ (Kammins v Zenith Investments [1971])*

(contrast the position in other jurisdictions)

# Three ingredients of this type of waiver

- Landlord's **knowledge**
- Unequivocal **recognition** of Lease's continued existence
- **Communication** of that **recognition**

# Element 2 – unequivocal recognition

## ***ACCEPTANCE OF RENT***

- 1. Acceptance of rent ‘without prejudice’*
- 2. Acceptance of rent due after right to forfeit has arisen where L was aware of breach on date rent fell due*
- 3. Acceptance where breach committed (or came to L’s attention) after the date rent fell due, but before acceptance of rent?*
- 4. Demand for rent?*

- *5. Acceptance during currency of a s.146(1) notice*
- *6. Rent accepted after re-entry has occurred*
- *7. Acceptance of sums other than rent (e.g. insurance premiums not reserved as rent)*

# Two distinguishing features

- Rent – a ‘special category’
- Prolonged delay alone in enforcement of a relevant covenant in the face of repeated breaches may amount to the waiver of the right to forfeit

# Inadvertent Waiver

- 1. Rent accepted by an agent
- 2. Rent paid into the landlord's bank account
- 3. 'Composite' payments of rent
- (Receipt of sums other than rent need not lead to waiver, if returned)

# Practical steps

- Expressly limiting an agent's authority to receive rent;
- Instructions to ensure express rejection of the payment and its re-payment as soon as it is received;
- Beware the appropriation of payments by the tenant.

## **b. Waiver of Breach**

*Faidi and Faidi v Elliot Corporation* [2012] HLR 27

## c. Waiver of Entire Covenant

- *Attorney General for Hong Kong v Fairfax* [1997] 1 WLR 149
- *Gibson v Doeg* (1859)

Thank you