Faiz v Burnley BC [2021] EWCA Civ 55

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***Faiz v Burnley BC* [2021] EWCA Civ 55**

The Court of Appeal has handed down its judgment in the case of *Faiz v Burnley Borough Council* (2021) EWCA Civ 55, dismissing the appeal. Judgment was given by Lewison LJ; with whom Arnold and Asplin LLJs agreed.

The Court considered two questions:

1. Does acceptance of rent after breach of covenant, with knowledge of that breach, waive the right to forfeit where:

    (i) the rent accrued due and was demanded before the landlord had knowledge of the breach; but

    (ii) the rent accrued due and was demanded after the breach itself; and

    (iii) the landlord accepted the rent after it had knowledge of the breach.

2. Was the demand for insurance rent on 4th November 2019 a new demand after the landlord had acquired knowledge of the breach?

The facts

The respondent landlord (L) had let a café to commercial tenants (T), the first and second appellants. The lease provided for the payment of insurance rent within 7 days of demand. The lease contained an absolute prohibition on sub-letting and a forfeiture clause in the event of breach of covenant.

On 26 September 2019, L demanded insurance rent for the period between 1 April 2019 and 25 March 2020, when the lease was due to expire. The invoiced sum became due on 2 October; but went unpaid. The Judge below found that around early October 2019, T sublet the premises in breach of covenant to S, the third appellant. The Judge below also found that L became aware of the sub-letting on 18 October 2019. On 30 October 2019, L served a s 146 notice. On 4 November 2019 L sent another demand for payment of the insurance rent by an invoice that required immediate payment, but the figure demanded had been recalculated for 1 April -18 October 2019. The insurance rent was subsequently paid on 11 November 2019. On 22 November 2019 L peacefully re-entered the premises.

The issue before the Court of Appeal was whether L's demand and subsequent acceptance of the insurance rent had waived its right to forfeit the lease, so that the re-entry had been unlawful.

Decision

In dismissing the appeal, the Court of Appeal held that where the breach consisted of an

unlawful sub-letting, the landlord had to know not only that the sub-letting had taken place, but also that the rent demanded or accepted had accrued due after the date of the breach.

The leading judgment of Lewison LJ provides a useful review of the complex minefield that surrounds waiver. Shortly put, the Court explained that waiver occurs where a landlord demands or accepts rent which accrues due after the date of a breach that is known to the landlord.

Where, as here, a tenant commits a breach of covenant which gives rise to the right to forfeit the lease, a landlord is put to its election and may either forfeit the lease or waive forfeiture. However, a landlord must have *knowledge* of the breach.

Lewison LJ put it succinctly:

> "*It does not matter whether the rent accrued due before or after the date of the landlord's knowledge, but whether it accrued before or after the date of the breach of which the landlord (now) has knowledge*." [para 28]

> *"Thus the principle is that waiver takes place where the landlord the demands or accepts rent which accrued due after the date of a breach known to the landlord. where the breach consists of an unlawful sub-letting (as in this case), I consider that the landlord must know not only that the sub-letting has taken place, but also that the rent demanded all accepted accrued after the date of the breach*" [para. 37]

Forfeiture is dependent on the breach of covenant, not the date the landlord becomes aware of the breach. It matters not whether the rent accrued due before or after the date of the landlord's knowledge, but whether it accrues due before or after the date of the breach of which the landlord subsequently had knowledge. This was because waiver takes place where the landlord demands or accepts rent which accrues due after the date of a breach known to the landlord.

It followed that in this case, an unlawful sub-letting, the landlord had to have knowledge of (1) that the sub-letting had taken place; and (2) that the rent demanded or accepted had accrued due after the date of the breach.

In the present case, to establish a waiver T would have had to demonstrate that the insurance rent demanded had fallen due *before* the breach giving raise to the right to forfeit; it was unable to do so.

The court below had found that the subletting had occurred in early October, so around when the insurance rent fell due. As such, there was no evidence that the insurance rent could have become due before the date of breach. Further, as the date the insurance rent accrued was due 2 October 2019, L did not have known of the breach (the Judge made a finding that L did not become aware until 18 October 2019). It followed that the 26 September 2019 demand for the insurance rent could therefore not have amounted to a waiver. Further, the abated 4 November 2019 demand was not a fresh demand, but served as a revised demand of the sum already due on 2 October 2019, so did not amount to a

waiver. Finally, the payment made and accepted on 11 November 2019 also did not amount to waiver as L did not know that is accepted rent for a period that accrued due before the date of breach. The acceptance of the payment did not, therefore, amount to a waiver of forfeiture.

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