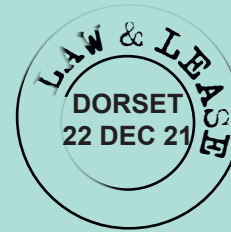




Mr Faiz and his daughter were the lessees of a café. Rent was payable to the landlord, Burnley Borough Council, within 7 days of a demand. On a date between 20 May 2019 and 18 October 2019, in breach of one of the covenants of their lease, the Faizes sub-let the café.

On 26 September 2019, the Council demanded insurance rent for the period 01 April 2019 to 25 February 2020, to be paid by 02 October 2019.



On 18 October 2019, the Faizes' solicitors sent a copy of the sublease to the Council. On 30 October 2018, the Council gave the Faizes a s.146 forfeiture notice. On 04 November 2019, the Council issued a "Recharge of buildings insurance" demand, this time covering only the period to 18 October 2019. The demand stated that it was due for payment on the same day. The Faizes paid it on 11 November 2021.

On 22 November 2019, the Council forfeited the lease.

In *Faiz v Burnley Borough Council* [2021] EWCA Civ 55, the Court of Appeal was asked whether the Council had waived, ie lost, the right to forfeit by accepting payment of the 04 November 2019 demand. The Court held that it had not. Lewison LJ considered the law of waiver:

Where a tenant commits a breach of covenant which gives rise to the right to forfeit the lease, the landlord is put to his election. Either he may forfeit the lease; or he may affirm its continuation. In order for the landlord to be put in that position he must have knowledge of at least the basic facts which constitute the relevant breach.

Subject to statutory restrictions, he may forfeit the lease either by the issue and service of a claim form claiming possession; or by peaceable re-entry. He may affirm the continuation of the lease either expressly or by means of an act or statement (communicated to the tenant) which is consistent only with the continuation of the lease. The affirmation of the lease is normally referred to as a waiver of forfeiture. Once the landlord has made his election, he cannot retract it...

It would ... be inconsistent for [a] landlord to maintain the position that he could both rely on a breach committed in January and yet ([knowing] that a breach had taken place in January) accept rent due in March and June...

The critical question is whether the date on which the rent fell due preceded or post-dated the breach, rather than the date of the landlord's knowledge; provided that, when he demanded or accepted the rent, the landlord knew that the breach had been committed....

...waiver takes place where the landlord demands or accepts rent which accrued due after the date of a breach known to the landlord.