# FortyTwo Talks:

## Forfeiture Miniseries – Episode 4

## Waiving goodbye to Forfeiture

**James Hoile:** Hello and welcome to *FortyTwo Talks* and our latest episode in our miniseries covering topics relating to forfeiture.

I'm James Hoile, a Business and Property specialist at 42BR. I'm joined by my much-esteemed colleague and actually previous pupil supervisor, Michael Grant.

Michael, it's always a pleasure to drag you into Chambers, can you explain what we're here for today?

**Michael Grant:** Thank you, James, I don't feel dragged in, its a pleasure to join you as well. And we're talking about forfeiture, particularly on the topic of waiver.

We'll try and make this as interesting and jolly as possible, we appreciate it could be a bit of a dry topic, but we'll try and jazz it up as much as possible to engage you as a listener.

Now, as I'm sure most listening to this podcast will know, the starting point for considering whether a landlord has the right to forfeit is always the lease, would you agree James?

**James Hoile:** Of course.

**Michael Grant:** In most leases, whether commercial or long residential, there will be a forfeiture clause usually so often described as a right of re-entry. Most landlords consider forfeiture for one of two main reasons, its either usually non-payment of rent or a

breach of some other covenant in the lease. There are obviously other reasons such as insolvency, entering through a CVA or IVA etc, but we're not really touching upon that in this podcast, but the two main areas are non-payment of rent and breach of covenant.

A standard forfeiture clause might read something like this, and if you're listening very intently, we're not going to test you at the end, especially because it's a podcast but also I might ask James at the end of this to see if he has come across any variations on the theme or whether he agrees that this may be a standard clause. So here it goes:

*'If at any time the rent or any part of it shall remain unpaid for 21 days after becoming due, whether formally demanded or not, or if any covenant or condition on the tenants part contained in this lease is not performed or observed, then it shall be lawful or the landlord anytime thereafter to re-enter the property, or any part of it in the name of the whole, and immediately upon such re-entry this lease shall determine that without prejudice to any right of action or remedy of the landlord in respect to any previous breach of any covenant or condition'.*

What would you say? Would you say that's kind of what you hear most of the time? What do you see?

**James Hoile:** Yes Michael, I would agree that is the standard forfeiture clause that one would see.

So, I've come across circumstances where there isn't a forfeiture clause is it still possible to forfeit or to exercise the right to forfeiture if there's no clause like this?

**Michael Grant:** Usually no, the starting position is and usually the ending, the final position is if it's not in the lease then there is no right to forfeit. I think there have been some instances in the absence of a forfeiture clause where it has been debated but we shan't get into that

in too much depth in this podcast. But the general position is, no, it has to be a fundamental contractual provision before you can forfeit.

So, once a forfeiting event occurs, whether that's rent remaining unpaid beyond the grace period or a breach of covenant the landlord is put to what's called an election. Now, this is really important because this podcast centres on the election. They can either enforce the right of forfeiture and treat the leases at an end or they could just treat the lease as continuing. It's one or the other, that's why it's an election. A landlord can however waive their right to forfeit if they carry out an act which affirms the continued existence of the lease. So, in other words, an act that is inconsistent with treating the lease as having come to an end. The question of waiver therefore focuses on what the landlord does after the right to forfeit has arisen, but not before.

So, in a rent case, if the clause bites after 21 days of non-payment, it's the landlord's conduct from the 22nd day onwards that will be scrutinised on the question of waiver.

**James Hoile:** Perfect. Thank you for that brief summary, Michael. In terms of the meet of this podcast we're going to address what's often known as the three ingredients of waiver. Generally speaking, these are the ingredients that give rise to the right to forfeit being waived by a landlord. These are firstly knowledge, secondly an unequivocal recognition of the continued existence of the lease and thirdly the communication of this act to the tenants.

Now, rather than leave you there with a brief summary me and Michael are now going to address each of these ingredients in more detail.

**Michael Grant:** Thanks James. So, let's deal with the first ingredient which is knowledge. On the topic of knowledge, I'll be splitting this into three short sections.

So, there's knowledge generally, imputed knowledge and suspicion. Don't worry, I'm not going to lose you with splitting already a podcast into three sections, into another three sections. It's just to deal with knowledge. So, this is all about knowledge.

So generally, you can't waive what you don't know you have, or to put it another way, there's no election until the landlord knows both the facts of the breach and that those facts give rise to the right to forfeit.

I'll give an example, imagine a long lease of a flat, which contains a tenant's covenant not to keep pets in the dwelling. The lease also contains a standard forfeiture clause that allows for say re-entry upon the tenant's breach of any covenant in the lease. So, imagine the tenant quietly gets a cat but the landlord never visits and doesn't know and he doesn't hear about it from the managing agents and then he just carries on receiving the standard order in.

So, it could be argued in that situation that the landlord doesn't know the facts giving rise to any right to forfeit and therefore hasn't appreciated that they have a right to elect between ending the lease and just letting it continue despite the breach. So, there's no informed election and therefore no waiver. But once the landlord knows at least the basic, and even sometimes the precise facts that amount in law to a breach, they can be treated as having knowledge of the breach even if the tenant disputes it. So, from that point on any act by the landlord which affirms the continuation of the lease may well amount to waiver.

**James Hoile:** So of course that's a pretty straight forward I guess, the most obvious way, that you have knowledge. What about imputed knowledge, Michael?

**Michael Grant:** Yes, so that's the second part, I'm splitting this short section into three different aspects so 'imputed knowledge'.

Knowledge doesn't have to sit in the landlord's own head for instance, if someone whose job includes noticing or reporting breaches like a managing agent, porter or even a solicitor who might be acting on behalf of the landlord, if they know about the breach their knowledge is imputed to the landlord, so the landlord is treated as knowing of the breach.

Another example, if a building manager employed by the landlord becomes aware of an unlawful subletting or an unauthorised alteration and part of their role is to report those matters up the chain, their knowledge is imputed to the landlord. So, the landlord is treated as knowing of the breach whether or not the information is actually passed on directly to the landlord.

Conversely, however, if the person's role is too limited, with no duty or authority to deal with breaches or to pass on that kind of information, then their knowledge is not automatically imputed to the landlord and it won't start the clock running on waiver.

To give an example, if a cleaner is employed by the landlord to clean the common parts of a block of flats and they happen to see builders inside one of the flats carrying out structural alterations, that cleaner wouldn't usually have any duty to report covenant breaches so their knowledge of the builders inside that flat, their knowledge is not imputed to the landlord and the landlord may still be treated as not knowing of the breach at all.

So that would be dealing with imputed knowledge it all depends on what's the extent of the person who's receiving information, what's the extent of their duties in respect of the landlord.

The third part that I'm splitting this aspect of knowledge into is 'suspicion'. If a landlord suspects a breach but is reassured by the tenant of the contrary and then genuinely proceeds on the basis that there is no breach, the landlord cannot be said to have knowledge of the breach. So, any affirmation thereafter of the continued existence of the lease simply can't amount to waiver.

**James Hoile:** On that Michael, I know that you have a Court of Appeal case that you absolutely love on this point, do you mind giving us a little bit of an explanation on this case?

**Michael Grant:** Thanks James, I don't think I absolutely love an authority, but I will certainly mention it. This is as far as I recall ChrisDell Limited v Johnson and Tickner.

Lord Justice Glidewell in the Court of Appeal, he said *'if the landlord receives a representation from his tenant which, if true, means that there has been no breach and if the landlord not being sufficiently confident of the untruth of what the tenant says decides not to take proceedings but instead proceeds on the basis that what the tenant says is true, then it cannot later be said that he knew all the necessary facts to establish a breach but equally, if the landlord has a reasonable suspicion of breach and then deliberately does nothing to check, whether that suspicion is true or false, that level of suspicion can amount to sufficient knowledge and any subsequent affirmation of the lease's continuation may then naturally operate as a waiver'*.

Yes James, you've got something you want to ask me.

**James Hoile:** No, no. I would say that was outspoken with passion, Michael. So, you know, it's to know, that members of Chambers can recite from heart.

**Michael Grant:** I'm glad, yes, thank you.

Am I making this podcast sound less dry than it ought to?

**James Hoile:** No, no, not at all. I think that deals with knowledge doesn't it, Michael?

**Michael Grant:** Well, it does. Over to you James. I think you'll be talking about the unequivocal recognition of the continued existence of the lease.

**James Hoile:** Yes, Michael. So, this moves us onto the second ingredient - that being an unequivocal act that recognises the continued existence of the lease.

Now, this has to be a positive act and mere in action is not normally sufficient, that being said a continued prolonged acquiescence in the face of repeated breaches will normally amount to waiver as it demonstrates the consistent recognition that the tenancy is continuing despite the breaches.

I would also add that service of a notice under Section 146 of Law Property Act does not normally amount to waiver as this is simply a preliminary step towards seeking forfeiture, it doesn't treat the lease as continuing but prepares the grounds for bringing a lease to an end. Conversely, a notice to quit can amount to waiver as a forfeiture and the service of a notice to quit are distinct methods of bringing a tenancy to an end, serving of a notice to quit essentially treats the tenancy as still existing and therefore capable of termination by the notice to quit.

So, beyond that, what can amount to an unequivocal act?

The most obvious one is the continued demand and acceptance of rents. It's important to note for the purposes of waiver and today that demanding rent is treated almost the same as accepting rents. That is,

if there's a demand for or acceptance of rents, that accrued after that right to forfeiture has arisen, then it's clearly an act that continues to hold the lease in existence and therefore a forfeiture in that instance is waived.

**Michael Grant:** Also, this leads me onto my next question actually, James, because I'm often asked by clients what if there is a forfeiture clause for instance that allows for re-entry in the event rents unpaid for say 21 days and a demand is raised on the 20th day, I think what you we're saying there, what's the position? If demand is raised from the 20th day, so one day before the triggered date, would that give right to waiver?

**James Hoile:** Well, I expect you know the answer to this, Michael, but I think it's good to have a discussion like this, in those circumstances it wouldn't amount to waiver as the trigger date, when the right to forfeit arises is on the 21st, so let's say the demand was on the 22nd that would count as waiving the right to forfeit but the fact it was on the 20th as you've described you're completely fine.

Also, just important to note that if you're trying to get around this general rule accepting rent without prejudice to your rights to forfeit unfortunately does not protect you as a landlord as this will still amount to waiver and as does accepting rent under protest.

Now moving on from that, for waiver to occur the sum demanded has to be rent properly so called where quite often you'll have insurance premiums which are not expressly reserved as rent but a provider to be recoverable in the same way as rent, those sums don't amount to rent for the purposes of waiver in the way that we've just discussed.

**Michael Grant:** I wanted to ask, what if a tenant just makes, for instance, a unilateral payment into the landlord's bank account? So, without having received a demand or without providing the landlord with any notification or indication that they were going to make payment nor telling the landlord after they've made payment that they've made payment, what if they just make it for instance by some kind of standing order, what happens in this situation? Would the landlord be deemed to have accepted the rent and hence waived their right to forfeit?

**James Hoile:** Well, let's make this a little bit more specific, are we talking about in the 21-day scenario where we had that forfeiture clause, is the money being paid unilaterally on the 22nd?

**Michael Grant:** Yes, if the money is paid.

**James Hoile:** After the right to forfeiture arising?

**Michael Grant:** After the right to forfeiture arising.

**James Hoile:** Okay, well my experience is that if monies are paid unilaterally into a bank account, so the landlords bank account, let's say they somehow have the bank account details and they've made that payment without any demand for it, there's an onus on the landlord to promptly reject and to send the money back. It will be factually specific terms of whether waiver arises or has been affected or not, but generally speaking a landlord that acts promptly to reject payment or send it back will not be deemed to have waived the right to forfeit.

I'm now going to move onto a slight distinction between a continuing breach on one hand and a once and for all breach on the other.

So, let's say a breach is continuing for example disrepair to a property. Demand or acceptance of rent that has accrued during the notice

period for them to make good those repairs would not normally amount to waiver should the works not end up be completed in the end and therefore the right to forfeiture arising, whereas if you have a remedial breach, let's say one that I love and Michael shares my enthusiasm for the use of a property in an immoral way.

**Michael Grant:** I don't share enthusiasm for using a property in an immoral way, James.

**James Hoile:** What sorts of immoral ways have you in your experience seen properties used?

**Michael Grant:** Well, I've come across certain cases where properties have been used for something like a brothel or some kind of immoral purpose in that way, have you come across cases like that James?

**James Hoile:** No, I haven't Michael, but I do greatly enjoy your war stories about regaling.

So, let's take a remedial breach the property has been used in an immoral way, in those circumstances the acceptance of rent that has accrued after the service of a Section 146 notice would likely see the right waived.

**Michael Grant:** I have a question now, what if for instance, an agent accepts rent or even demands rent on behalf of the landlord, can the landlord say for instance that's not a waiver it wasn't me?

**James Hoile:** I'm going to try and answer this as concisely as possible Michael, I think the general rule is that an agent acting on behalf of the landlord or even on behalf of a tenant is deemed to have carried out those acts that would amount to waiver in those circumstances.

**Michael Grant:** I feel sorry for the landlord but if that's the way it is.

**James Hoile:** Very briefly, we've taken out some time on the second ingredient, I'm just going to end with what else can amount to an unequivocal act.

The second I'd say most common way is relying on a covenant of the lease after the right to forfeiture has arisen, so let's say as a landlord you sent a notice pursuant to a term of the lease to enter the property as a landlord and enter the property and carry out works that you're due to carry out, that would amount to waiver.

In a similar way if a landlord takes a tenant to court for the breach of an obligation under a lease, let's say seeking injunction to a restrain unlawful alterations, or the landlord issues procured after the rights to forfeit has arisen, both of those situations would see waiver take place and therefore you would not be able to forfeit the lease.

That generally speaking covers the second ingredient I'm going to pass the baton back onto Michael who's going to talk about the communication of that recognition.

**Michael Grant:** Thanks James. So, this is the third ingredient, its whistlestop tour it's not going to be long, communication of the recognitions.

So now we've had an in depth look at unequivocal recognition of the continued existence of the lease. What about communication of that recognition?

Waiver only happens where the landlord, knowing the facts that give rise to a right of re-entry, does something unequivocal that recognises the lease as still alive and that recognition is communicated to the tenant, but anything said or done that's not communicated to the tenant cannot affect them.

So, for instance an assignee of a reversion of a lease who takes his conveyance *'subject to and with benefit of the lease'* and with knowledge of the breach of covenant by the lessee which would entitle the lessor to re-enter does not amount to recognition of the existence of the lease so as to waive the right to forfeit.

I suppose another example could be where the landlord is a company and at a board meeting for instance the directors collectively decide to treat the lease as continuing despite knowledge of both the breach itself and the right to elect forfeiture. If there's been no communication of that decision to the lessee it simply cannot be waiver, there needs to be communication.

**James Hoile:** So, let me pose to you a quick question Michael.

**Michael Grant:** Sure, I think I've lost you.

**James Hoile:** It's my turn to put you under the cosh. What about a set of circumstances where a landlord essentially sends a letter by post communicating his continued acceptance of the lease. Let's say he posts it but by sheer happenstance there's a postal strike, now the next day full of regret after a stern talking to by their partner the landlord marches down to the post office and intercepts the letter, so it's been sent but it hasn't been received.

**Michael Grant:** So, when you say it's been sent do you mean it arrived at the post office?

**James Hoile:** Well, it's kind of half been sent but it hasn't been received.

**Michael Grant:** You mean it's posted you mean?

**James Hoile:** Yes.

**Michael Grant:** Okay, but it's not been delivered.

**James Hoile:** He's intercepted, Michael.

**Michael Grant:** Interesting.

**James Hoile:** In those circumstances I suspect that doesn't amount to communication.

**Michael Grant:** It wouldn't do, if the tenant hasn't received it, it wouldn't amount to proper communication. There was a Court of Appeal decision by the name of London and County (A. & D.) Ltd v Wilfred Sportsman Ltd in 1970.

**James Hoile:** That's excellent knowledge there, Michael, another County Court.

**Michel Grant:** Not that I'm reading this out or anything James.

So, it's stressed that waiver is about election and that a landlords act which is neither communicated to the tenant nor capable of having any impact on them is not treated as a waiver at all and it's what's known as the legal maxim *Res inter alios acta.*

**James Hoile:** Now Michael, can I ask what this means for any of our non-Latin scholars?

**Michael Grant:** Aren't you a Latin scholar?

**James Hoile:** Well, I suspect that my Latins not that good to stretch to knowledge of that.

**Michael Grant:** I'm going to be honest, neither's mine. In that concept, what it means is 'a thing done between others' so in this context it would mean an act done with individuals outside of the strict landlord and tenant relationship, in other words, it has to be a communication between landlord and tenant, anything said between just members of the landlord company can't amount to a waiver nor could there be for instance anything that's been said between a staff member of a landlord and the one in charge of making a decision that cant amount to waiver as well it has to be communicated to the tenant.

**James Hoile:** On that technical and passionate final point, Michael, I think that's just about all we have time for so I just wanted to thank everyone listening for tuning into this episode of *FortyTwo Talks,* we really hope you've enjoyed it and the next episode of the series which

should be coming out in a week or so is going to be hosted by my dear friend Michael again but also with another colleague in Chambers, Anne Hogarth.

To listen to all our podcasts, you can find us on Apple Podcasts, Spotify, our Chambers website or wherever else you get your podcasts. Thank you very much for listening.

**Michael Grant:** Thanks for listening.