

Avoiding Waiver

A Guide for Commercial Landlords

Step 1 – Check your Position

1. Check that the Lease contains a clause allowing you to re-enter the premises in certain circumstances, e.g. where there has been a breach of the Lease.
2. Check that the re-entry clause covers the tenant's act you are complaining about, e.g. a tenant's covenant not to assign the Lease without consent is not broken by a subletting.
3. Check whether the Lease specifies any pre-conditions for exercising the right to forfeit, e.g. a grace period for paying sums due under the Lease.

If you have confirmed that: (1) there is a re-entry clause in the Lease; (2) the re-entry clause covers the tenant's act; and (3) any pre-conditions in the Lease have been satisfied: **you have a right to forfeit the Lease.**

Step 2 – Avoid Waiver

If you want to look into the possibility of forfeiting the Lease and regaining possession of the premises, you should ensure that you do not waive the right to forfeit in the meantime. What is waiver?

No matter what your intention, you will waive the right to forfeit if you: (a) know of your tenant's breach; and (b) do something which unequivocally recognises the Lease as existing or continuing. In order for there to be waiver, your act which treats the Lease as if it is still in existence must also have been communicated to the tenant.

Always think: Will what I am about to do treat the Lease as if it still exists? Am I doing something which I am only allowed to do by virtue of the Lease?

Potential acts of waiver

- Demanding or accepting sums due under the Lease.
- Levying distress.
- Negotiating or granting consents required under the Lease.
- Serving notices under the Lease.
- Serving statutory notices.
- Seeking an injunction against a breach of covenant.
- Arranging to inspect the premises.
- Offering to accept or negotiating a surrender of the Lease.

For some breaches (which are called "continuing breaches"), it may not be a problem if you waive the right to forfeit because the right can arise again. However, it is generally better to take a cautious approach at first, until you have confirmed the nature of the breach.

Some of the common breaches of Lease, e.g. non-payment of rent, unauthorised assignment, unauthorised subletting and insolvency, are all regarded as "once and for all" breaches. This means that waiver in those cases would lose you the right to forfeit until there is any further breach by the tenant.

Step 3 – Actively Preserve the Right to Forfeit

- Only communicate with the tenant and/or its representatives on a without prejudice basis, if at all.
- Ensure that no sums due under the Lease are demanded or accepted, even on a without prejudice basis. Any letters to the tenant to chase arrears should be carefully worded, so that they do not waive the right to forfeit.
- Do not discuss the payment of future sums due under the Lease with the tenant and/or its representatives, even on a **without prejudice** basis.

Step 4 – Consider the possibility of forfeiting the Lease

This note is not intended to advise on the considerations that arise here and specific advice should be sought in individual cases. However, as a guide, the following factors should be borne in mind:

- Do you want to redevelop the premises?
- Is there a rent deposit?
- Is there a subtenant at the premises?
- Do you have a guarantor or any former tenants or former guarantors who are still liable?
- Are you confident that you can re-let the premises?
- Will the new rent payable by any new tenant be at least as much as the existing rent?