



PROPERTY LAW
NUTS & BOLTS
SEMINAR SERIES

「Landmark
Chambers」

Welcome to Landmark Chambers’ ‘Property Law Nuts & Bolts, Part 2: Understanding Forfeiture’ seminar

The recording can be accessed [here](#).

Your speakers today are...



Simon Allison (Chair)



Evie Barden

Topic:
Waiver of
forfeiture



Peter Sibley

Topic:
Relief from
Forfeiture



Rebecca Sage

Topic:
The Right to
Forfeit

The Right to Forfeit



Rebecca Sage

What we will cover

- What is forfeiture?
- Peaceable re-entry vs forfeiture proceedings
- Breach of covenant
- Non-payment of rent
- Restrictions on the use of forfeiture

The law of forfeiture



*“it is complex, it lacks
coherence, and it can lead to
injustice”*

Law Commission
‘Termination of Tenancies for
Tenant Default : A Consultation
Paper’ (2003)

What is forfeiture?

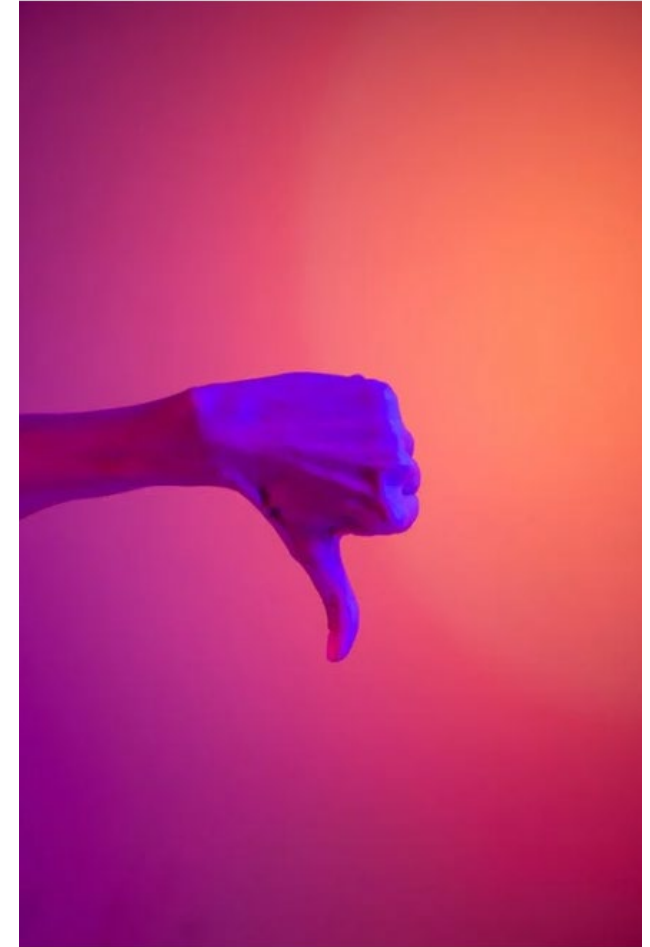
“the ultimate affirmation of the landlord’s proprietary power”
Inntrepreneur Pub Co (CPC) Ltd v Langton [2000] 1 E.G.L.R. 34
 (Arden J at [38])

- Right to terminate tenancy (aka a “right of re-entry”):
 - Before the end of the term
 - Due to the tenant’s default
 - Arises under the terms of the lease
- Landlord must elect between forfeiting and treating lease as continuing
- Tenant (or subtenant/mortgagee) can apply for relief
- If relief not applied for/unsuccessful, lease and derivative interests terminate

Breach

- Breach of covenant
 - Agreement by T to do, or not to do, certain things
 - (e.g.) alienation, use, alteration
 - L cannot forfeit unless lease contains express provision allowing forfeiture (aka right of re-entry)

- Breach of condition
 - Tenancy is terminable on the occurrence of a particular event – “on the condition that”/“provided always that”
 - (e.g.) “*stipulated and conditioned that the lessee does not underlet*” (*Doe d. Henniker v Watt* (1828) 8 B. & C. 308)
 - No need for right of re-entry



Forfeiture clause/proviso for re-entry

*The Landlord may **re-enter** the Property (or any part of the Property in the name of the whole) at any time after any of the following occurs:*

- (1) Any **rent** is unpaid 14 days after becoming payable **whether it has been demanded or not**;*
- (2) Any **breach of any condition, or tenant covenant**, in this lease.*

*If the Landlord re-enters the Property (or any part of the Property in the name of the whole) pursuant to this clause, **this lease shall immediately end**, but without prejudice to any right or remedy of the Landlord in respect of any breach of covenant by the Tenant or any guarantor.*

Peaceable/physical re-entry



a “*dubious and dangerous method*”

Billson v Residential Apartments Ltd [1992] 1
A.C. 494 (Lord Templeman at [536]).

- Physically entering onto the property – need unequivocal act/words (e.g.) changing locks
- Restrictions
 - Criminal offence if violence used/threatened (Criminal Law Act 1977, s.6)
 - Unlawful if let as a dwelling and someone lawfully residing (Protection from Eviction Act 1977, s.2) = criminal liability (PEA 1977 s.1) and damages (Housing Act 1988, ss.27-28).

Forfeiture by proceedings

- CPR Part 55
- Service = treating lease as forfeited
- But the lease does not terminate until claim is determined
- “Twilight period”
 - T technically a trespasser
 - L cannot enforce covenants
 - T liable to pay mesne profits (usually equal to rent)
- If claim fails, lease is retrospectively reinstated



Forfeiture for breach of covenant (1): Notice

Section 146 Law of Property Act 1925

*(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the **lessor serves on the lessee a notice—***

*(a) specifying the **particular breach** complained of; and*

*(b) if the breach is **capable of remedy**, requiring the lessee to remedy the **breach**; and*

*(c) in any case, requiring the lessee to **make compensation in money** for the breach;*

*and the lessee **fails, within a reasonable time thereafter**, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.*

Forfeiture for breach of covenant (2): Remediable and irremediable breaches



- Irremediable
 - Not to assign/sublet without consent (*Scala House & District Property Co Ltd v Forbes* [1974] Q.B. 575).
 - Potentially illegal/immoral user
- Remediable – question of fact
 - Positive covenants: can T rectify the failure to act? Usually yes.
 - Negative covenants: can the breach be undone?

Forfeiture for breach of covenant (3): Time for compliance

- Always a question of fact
- Some examples from case law
 - Repair = up to a year (Cardigan Properties Ltd v Consolidated Property Investments Ltd [1991] 1 E.G.L.R. 64)
 - Subtenant causing a nuisance in breach of covenant = four working days insufficient (Courtney Lodge Management Ltd v Blake [2004] EWCA Civ 975)
- Even if breach cannot be remedied, need to give sufficient notice to enable T to consider its position – 2 days not enough (Horsey Estate Ltd v Steiger [1899] 2 Q.B. 79), but 14 days sufficient (House & District Property Co Ltd v Forbes [1974] Q.B. 575)

Forfeiture for non-payment of rent

- Formal demand for rent
 - “*the exact sum due on the day when it falls due at such convenient hour before sunset as will give time to count out the money, the demand being made upon the demised premises and continuing until sunset*” (Duppa v Mayo (1669) 1 Saund. 275)
 - Statutory limits on need for notice: s.139(1)County Courts Act 1984 and Common Law Procedure Act 1852 s/139(1)
 - Hence the wording of the forfeiture clause!
- No requirement for s.146 notice, but don't forget PD55A if residential

Restrictions on forfeiture

- Long lease of a dwelling –
Commonhold and Leasehold
Reform Act 2002, ss.167/168
- Non-payment of
service/administration charge –
Housing Act 1996, s.81(1)
- Disrepair - counter-notice under
Leasehold Property (Repairs) Act
1938



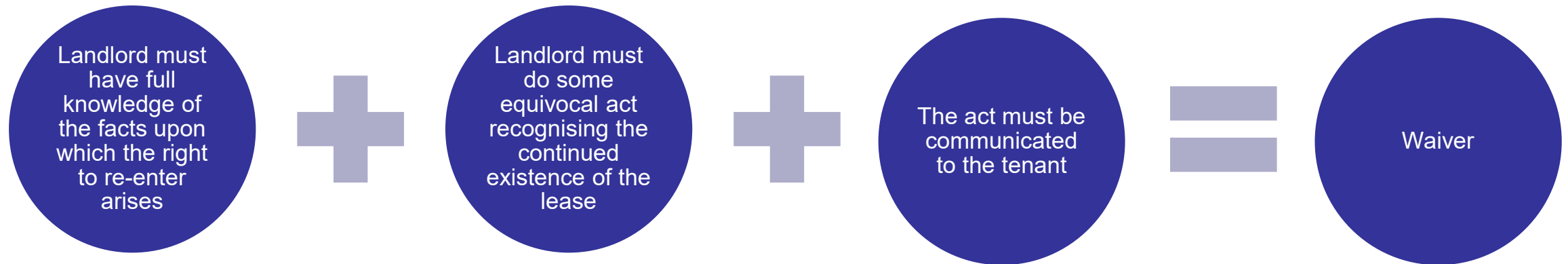
Waiver of forfeiture



Evie Barden



What is the recipe for waiver?



Knowledge

- Knowledge can be imputed.
- What about information in the public domain? *Official Custodian for Charities v Parway Estates Developments Ltd (in liquidation)* [1985] Ch. 151.
- What about suspicions? *Van Haarlam v Kasner* (1992) 64 P & C R 214.
- Burden of proof = tenant.

Act



The act must be so unequivocal that, when considered objectively, it could only be regarded as having been done consistently with the continued existence of the tenancy: *Stemp v 6 Ladbroke Gardens Management Ltd* [2019] L & T R 10.

But: long acquiescence may be sufficient!

Demands for and acceptance of rent



- Commercial Rent Arrears Recovery (“CRAR”) can normally only be used while the lease continues.
- So, the use of CRAR will recognize the continuance of the lease and equal a waiver: *Brar v Thurnavukkrasu* [2019] EWCA Civ 2032.

Pleading

- Be careful which claims you bring!
 - Will be a waiver:
 - Claim for injunction and possession but statement that willing to grant a lease: *Evans v Davies* (1878) 10 Ch. D. 747.
 - Claim for injunction against a breach of covenant: *Wheeler v Keeble (1914) Ltd* [1920] 1 Ch. 57.
 - Claim for production of an insurance policy under a tenant's insurance covenant: *Cardigan Properties v Consolidated Property Investments* [1991] 1 EGLR 64.
 - Claim for rent UNLESS it is coupled with a claim for possession: *Greenwich London Borough Council v Discreet Selling Estates* [1990] 2 EGLR 65.

Communication



Contracting out?

- “No act of waiver will debar a forfeiture”.
- “Any act of waiver will not be effective unless it is in writing”.

Effect

Once and for
all

Waiver
forever

Continuing
breaches

Can forfeit for
subsequent
breach

Statutory bars on forfeiture and waiver

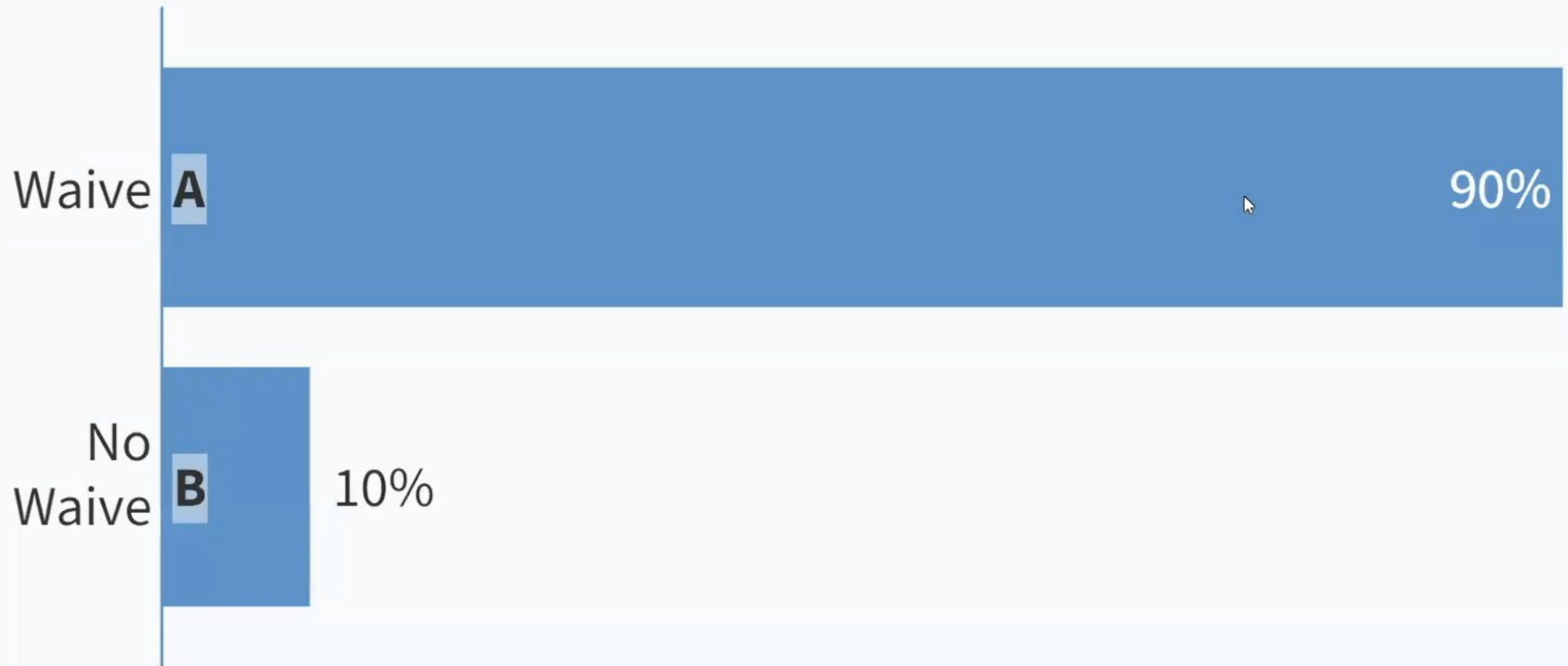
“There are various statutory fetters upon a landlord’s right immediately to forfeit a lease for breach of covenant [...] In each case the landlord knows of facts upon which a right to re-enter arises and in each case the landlord is not yet in a position to exercise that right because the statutory procedures have not yet been worked through. Where the breach of covenant is irremediable it is not the law that a landlord is unable to waive a right to re-enter because a s.146 notice has not yet been served or has not yet expired. By parity of reasoning I reject the submission that a landlord is unable to waive a right to re-enter because some other fetter upon exercising a right of re-entry, for an irremediable breach, has not yet been worked through.”

Stemp v 6 Ladbroke Gardens Management Ltd [2019] L & T R 10 at [71].

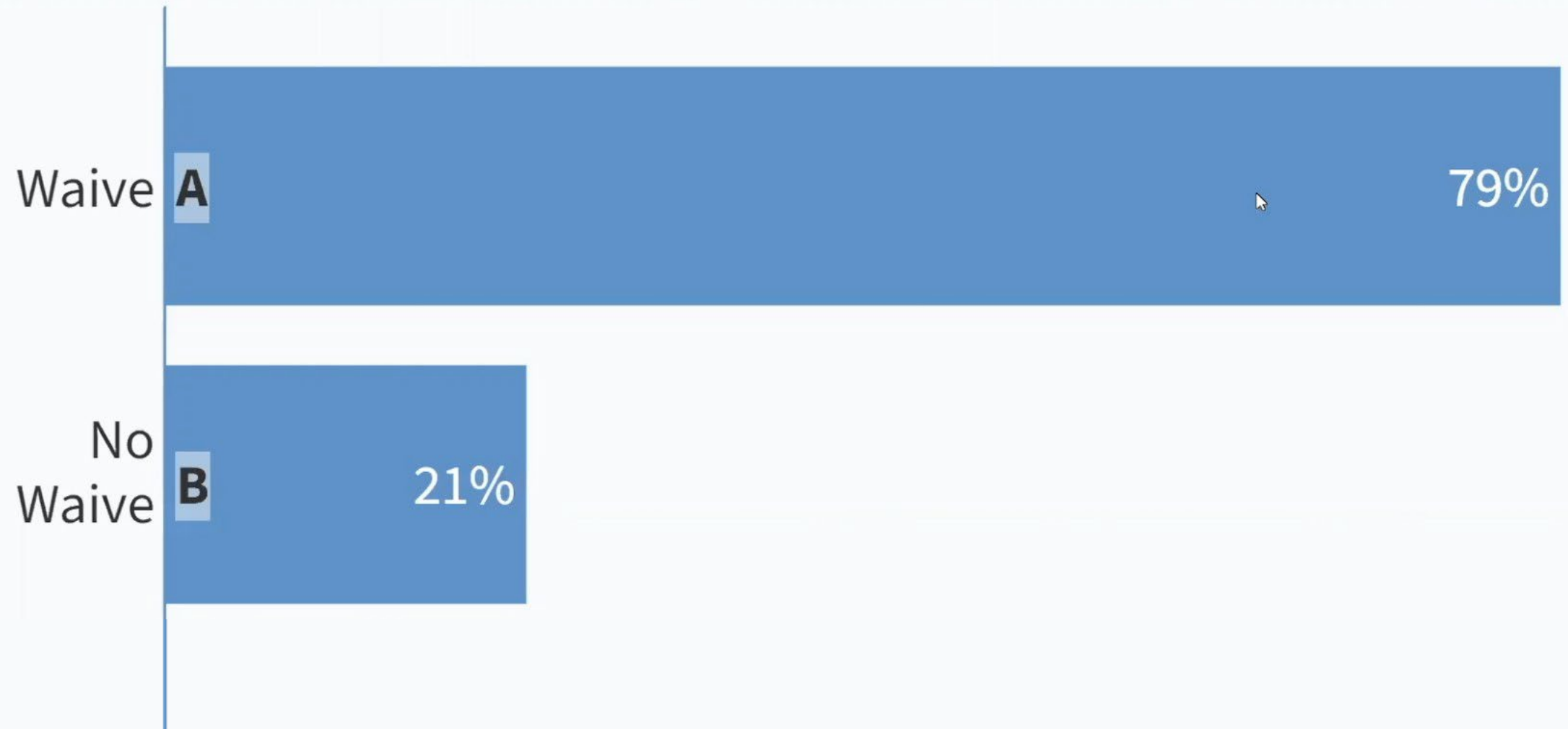


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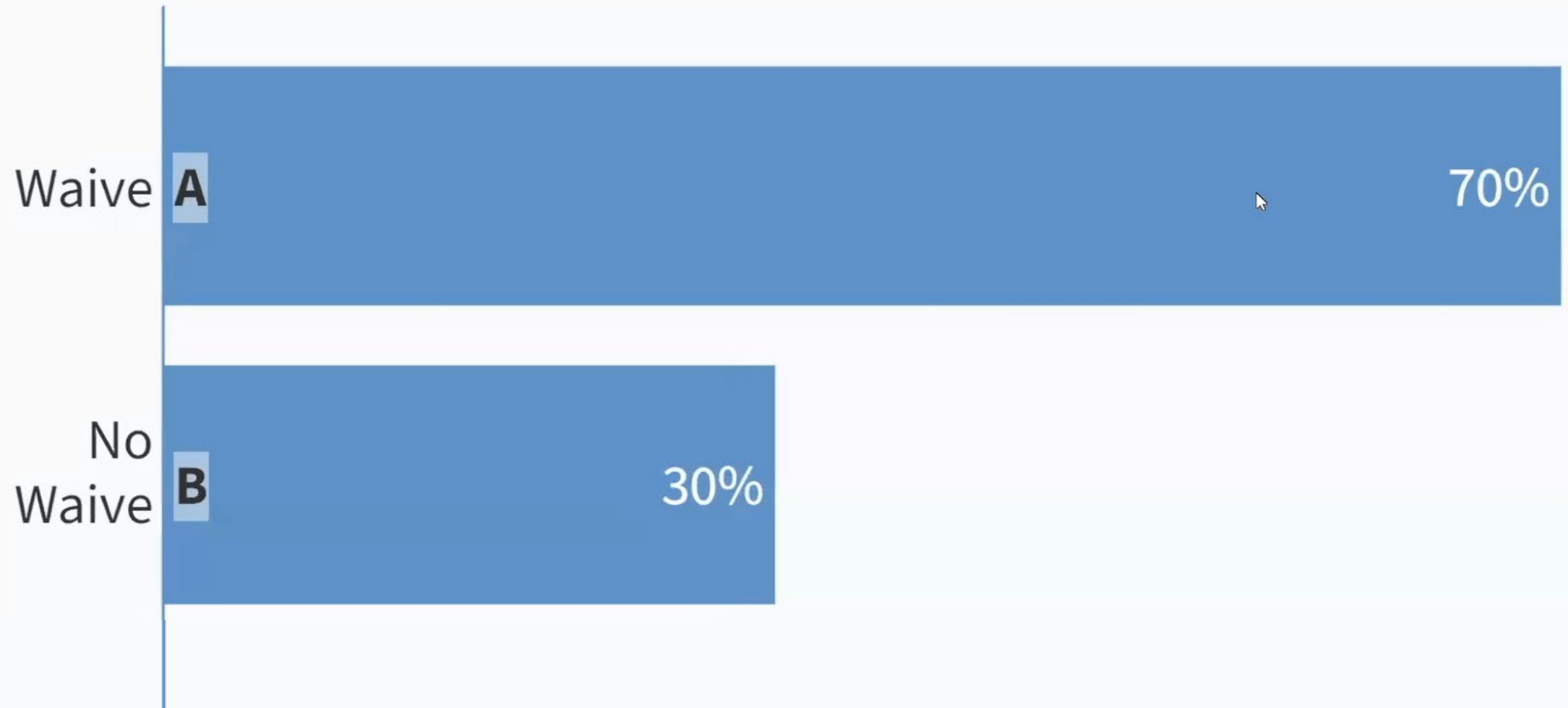
Landlord's offer to buy a tenant's interest, subject to contract



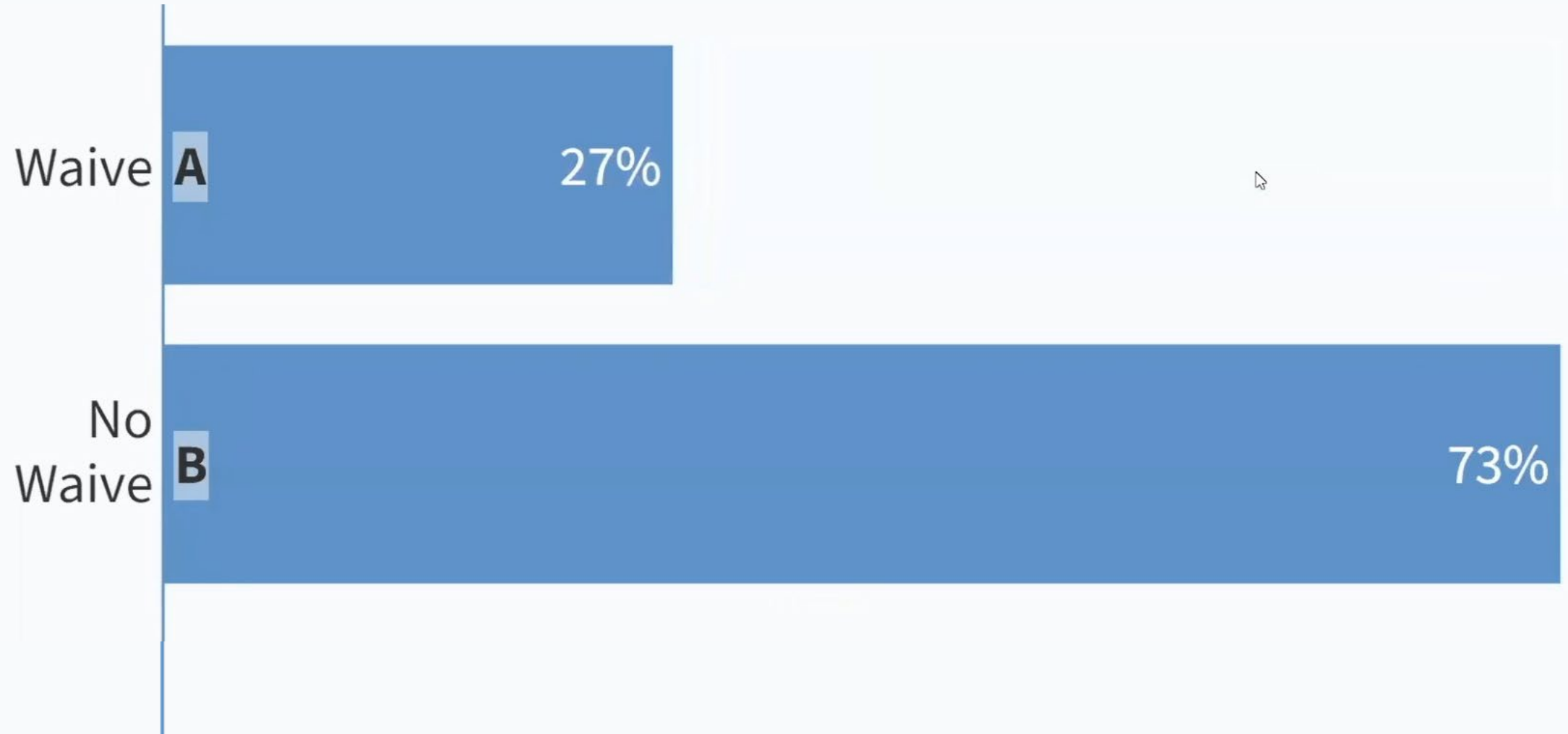
Landlord relying on covenant to enter demised premises



Landlord allows the tenant to spend money on works



Landlord engages in without prejudice discussions with tenant



Acceptance of rent due pending a notice to repair, which is then not complied with



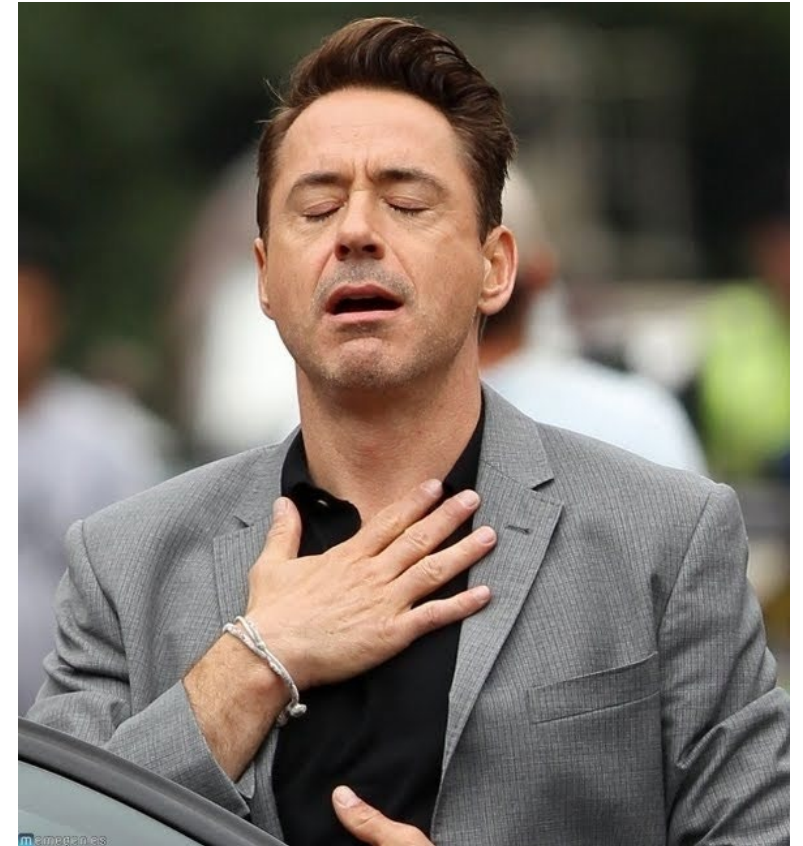
Relief from Forfeiture



Peter Sibley

What is relief from forfeiture?

- *Dendy v Evans* [1910] 1 K.B. 263
- *Shiloh Spinners Ltd. v Harding* [1973] A.C. 691
- Non-payment of rent or other breach?



Other breach: s.146(2)

“(2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.”

Other breach: s.146(2)

- *Pakwood Transport Ltd. v. 15 Beauchamp Place Ltd.* (1978) 36 P. & C.R. 112
- *Billson v. Residential Apartments* [1992] 1 A.C. 494

Other breach: s.146(2) – exercise of discretion

- *Magnic Limited v Mahmood UL-Hassan, Nasim Akhtar Malik* [2015] EWCA Civ 224
- *Freifeld v West Kensington Court Ltd* [2015] EWCA Civ 806
- *Hoffman v Fineberg* [1949] Ch. 245
- *Egerton v Jones* [1939] 2 K.B. 702

Other breach: s.146(3) – Costs

- “(3) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under the provisions of this Act.”
- *Patel v K&J Restaurants Ltd* [2010] EWCA Civ 1211

Non-payment of rent



Non-payment of rent – County Court – forfeiture by proceedings

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- S.138 of the County Courts Act 1984
- Before trial or hearing – (2) and (6)
- At trial or hearing – (3), Form N27
- After trial or hearing but before possession recovered – (4), (5), (7), (8), (9)
- After landlord recovers possession (9A)

Order for possession on forfeiture (for rent arrears)

In the Claim No.

Claimant

Defendant(s)

On 20 ,

sitting at

heard

SEAL

and the court orders that

1. The defendant give the claimant possession of on or before 20 , and £ per day from 20 until possession is given to the claimant or payment is made under paragraph 5 below.
2. The defendant pay the claimant's costs of £ [The defendant pay the claimant's costs, within 14 days after they are assessed [and in the meantime pay the claimant £ on account of those costs]
3. The defendant pay the total of the sums mentioned above to the claimant [on or before 20 .] [by instalments of £ per , the first instalment to be paid to the claimant on or before 20 .]
4. If the defendant pays the claimant the sums mentioned above on or before 20 this order shall have no effect and the lease will continue.

To the defendant

The court has ordered you to leave the property by the date stated in paragraph 1 above. However that order will not take effect if you pay the arrears of rent, any use and occupation charge, and costs by the date stated above. Payment should be made to the claimant, not to the court. If you need more information about making payment, you should contact the claimant.

If you do not make the payment or leave the property, the claimant can ask the court, without a further hearing, to authorise a bailiff or Sheriff to evict you. In that case, you can apply to the court to stay the eviction; a judge will decide if there are grounds for doing so.

(If detailed assessment of costs is ordered)

The claimant will send you a copy of the bill of costs with a notice telling you what to do if you object to the amount. If you do object, the claimant will ask the court to fix a hearing to assess the amount.

(If there is an order to pay money, made in a county court)

If you do not pay the money owed when it is due and the claimant takes steps to enforce payment, the order will be registered in the Register of County Court Judgments. This may make it difficult for you to get credit. Further information about registration is available in a leaflet which you can get from any county court office

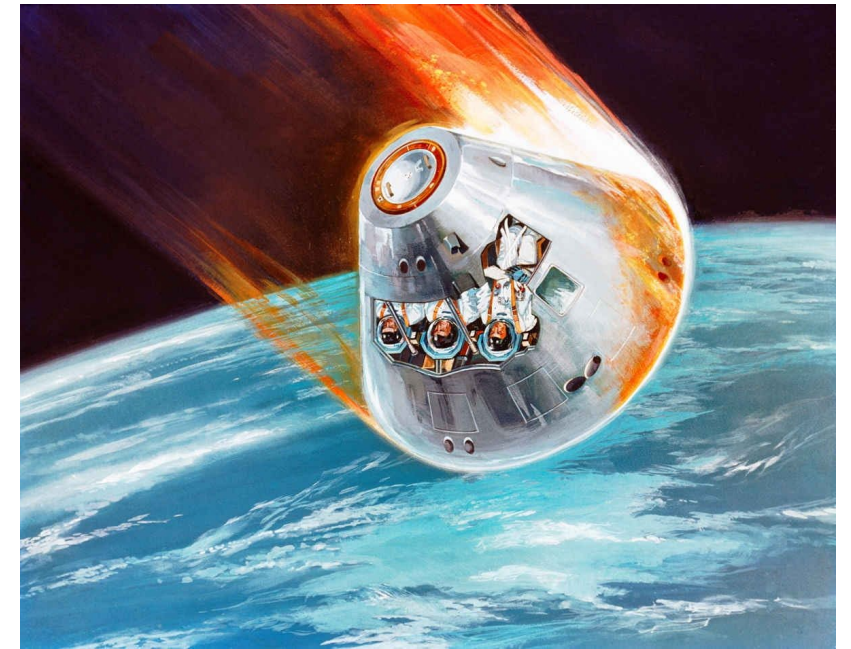
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N27 Order for possession on forfeiture (for rent arrears) (January 2002) Crown Copyright. Reproduced by Sweet & Maxwell Ltd

Non-payment of rent – County Court – forfeiture by peaceable re-entry

S.139(2) of the County Courts Act 1984

“Where a lessor has enforced against a lessee, by re-entry without action, a right of re-entry or forfeiture as respects any land for non-payment of rent, the lessee may at any time within six months from the date on which the lessor re-entered apply to the county court for relief, and on any such application the court may, if it thinks fit, grant to the lessee such relief as the High Court could have granted.”



Non-payment of rent – High Court – forfeiture by proceedings

- S.38(1) of the Senior Courts Act 1981 provides:
“(1) In any action in the High Court for the forfeiture of a lease for non-payment of rent, the court shall have power to grant relief against forfeiture in a summary manner, and may do so subject to the same terms and conditions as to the payment of rent, costs or otherwise as could have been imposed by it in such an action immediately before the commencement of this Act.”
- *Inntreprenneur Pub Company Ltd v Langton*
[2000] 1 E.G.L.R 34



Non-payment of rent – High Court – forfeiture by proceedings

- Common Law Procedure Act 1852
- S.212 – similar to s.138(2)
- S.210 – 6 months from recovery of possession

Non-payment of rent – High Court – forfeiture by peaceable re-entry

- Inherent equitable jurisdiction
- *Keshwala v Bhalsod* [2021] EWCA Civ 492
- *Pineport Ltd v Grangeeglen Ltd* [2016] EWHC 1318 (Ch)



Thank you for listening

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London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Contact us

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

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