Waiving goodbye to the breach: repairing obligations and waiver of breach
Practical implications and tactical considerations following the Court of Appeal decision in *Forkner v Zas Ventures Ltd* [2016] EWCA Civ 1062; [2017] 1 P. & C.R. DG7

Introduction

1. Repairing obligations are almost universally incorporated in commercial and residential leases and licences. In the general sense an obligation to repair is to carry out such repairs and maintenance as might be required from time to time (although much can depend upon the precise wording of the covenant/obligation). Where there is a breach by a tenant or licensee, the covenant is broken everyday the property is out of repair: the breach, therefore, is of a continuing nature.

2. *Forkner* provides an interesting illustration of waiver of breach of an obligation to repair and the issues that arise are considered in different contexts, such as forfeiture and renewal of business tenancies, and the potential tactical considerations for a tenant or licensee who is alleging waiver of past breaches.

Background

3. A terraced house was passed to two of three siblings, Brian and Pamela, on their mother's death in 1985. The house was occupied at the time by the older sibling, Lillian. Lillian had lived in the property for her entire life and suffered from various mental health difficulties. After the mother's death the siblings met at the house and it was agreed that Lillian could live in the house as long as she wanted so long as she repaired it and kept it insured. Nothing was put in writing. 23 years later in 2008 the house was sold with Lillian in occupation to a company, Landmark, and in doing so Brian and Pamela made Statutory Declarations setting out the agreement: in effect Lillian could live in the house for life provided she repair it and keep it insured. The Declarations also stated that Lillian had not repaired the house over the past 23 years and they, Brain and Pamela, had "*accepted the situation and had not require [Lillian] to carry out any repairs*". The house, as a consequence, was in a very poor condition: among other things, there was a large crack in an exterior wall, no workable heating system and damp throughout. Landmark unsuccessfully attempted to sell the house at auction stating

in the particulars of sale that it was "*subject to a tenancy for life at nil rent*", there was "*no maintenance agreement*" with the occupier and "*the buyer was to insure*". There was however no evidence available as to the reasoning behind the particulars of sale. The house was eventually sold to an individual, Mr Chaudhry, in 2011 on the basis of the Statutory Declarations. Then, in 2013, the house was assigned to the Respondent company, of which Mr Chaudhry's son was the director and owner. The Respondent demanded that Lillian put the house into repair (i.e. to put right 26 years of neglect); when Lillian failed to do so, the Respondent stated that it had accepted her repudiatory breach of the licence and sought possession.

4. In her Defence, *inter alia*, it was alleged by the Appellant that the historic breaches had been waived. The Court of Appeal held that past breaches had been waived, however, the obligation to repair continued and, as no repairs had been done by the Appellant at all and some deterioration was evident, the obligation was breached. Possession was granted.

Waiver

5. A waiver of breach of an obligation to repair (or indeed any continuing obligation, including the payment of rent) can occur when, *inter alia*, there is a clear representation, either by words or conduct, that the landlord or licensee would not insist on performance of the obligation[1].

6. Where past breaches are waived (without release from the covenant or obligation itself) it merely suspends the obligation, which can later be revived. A classic illustration is in *Central London Property Trust v. High Trees House* [1947] K.B. 136 where the obligation to pay rent was suspended during the war but nonetheless continued and was revivable in relation to future rent payments once the war ended. A repairing obligation creates a similar continuing obligation.

7. The concept of "lifting the waiver" or "reviving" the obligation is how the obligation is brought back to life, but only in relation to future compliance or breach. A waiver of a continuing contractual obligation (such as to repair or to pay rent) may be lifted upon reasonable notice unless circumstances have changed so as to make compliance with the original obligation impossible or inequitable (See Chitty on Contracts 22-042).

8. In *Forkner* Moore-Bick LJ held:

> 20. The debate about the extent of the deterioration between September [2011] and October 2015 arose out of a submission by [the Appellant] that Miss Forkner could not be held responsible for all the defects that had accumulated since 1985. I think that is right. Whether the obligation to maintain should be construed in all respects as if it were a standard form of repairing covenant in a lease or not, it did in my view require her to carry out such repairs and maintenance as might be required from time to time and to that extent was of a continuing nature. However, Brian and Pamela's failure (and subsequently that of Landmark) to require her to carry out any repairs over the course of 26 years, despite the fact that they were aware that the property was in a poor state of repair, and their failure, as far as one can tell, to enquire at any stage whether she

[1] This article does not intend to address the elements of the various types of waiver and the conditions required (see specialist text, for example, Chitty on Contracts 22-040)

> had insured it, amounted in my view to a clear representation that they would not insist on performance of her obligations, at least without giving her reasonable notice of their intention to do so, and then only in respect of subsequent deterioration.

9. It was accepted Miss Forkner did no repairs whatsoever; therefore the issue of breach fell to expert evidence of subsequent deterioration. The situation could however be far more complex if the occupier did some repairs but not to the extent that satisfied owner. The Court would then be left with the task of identifying what precisely remains within the obligation to repair.

Practical implications: a crack in a wall

10. Take a scenario where a crack in a wall of a house developed as a result of years of neglect. The occupier of the property is responsible for repairs as the need arose; the owner however stands by and allows the occupier to breach the obligation and the property deteriorates. The crack gets bigger. 26 years later the owner wants the cracked wall repaired.

11. The problem for the owner is that, over the many years he stood by and allowed the property to deteriorate, he lost the right to require the occupier to put right the effect of the past failure to repair. He could still enforce the repairing obligation: the obligation was now, however, an obligation to keep in repair a tumbledown house with a large crack in a wall. Furthermore, the occupier cannot be required to *repair* the crack as to do so would be to put right past failure to repair (or would otherwise be tantamount to an improvement not a repair).

12. Numerous questions then arise: what is then required of the occupier to comply with the obligation to repair in relation to the cracked wall? Could any meaningful repairs be done without, first, the crack being repaired? If the crack is not repaired first, is the occupier is merely required to paper over it?

Tactical considerations for a tenant or licensee

13. The waiver of an obligation to repair, be it in a residential or commercial lease or a licence, is not that unusual; what *Forkner* presented was an extreme example of a not uncommon problem. As per Moore-Bick LJ (above), the obligation to repair could be revived on reasonable notice but only in relation to subsequent deterioration.

14. The problem for Miss Forkner in relation to the waiver argument was that, despite succeeding in relation to past breaches, the obligation continued and no repairs were done after the waiver had been lifted. The expert evidence, whilst wanting in many regards, provided a sufficient basis for establishing subsequent deterioration.

15. In a commercial lease situation under the Landlord and Tenant Act 1954 (or indeed any common law residential or commercial lease), where a tenant is willing to comply with the obligation going forward but alleges past breaches were waived, some practical issues and tactical considerations are illuminated by *Forkner*:-

(i) **Landlord wanting all repairs done by tenant**: when a demand is made to carry out repairs after the obligation appears to have been previously waived, as in *Forkner*, the owner is likely to demand more than just the repair of "subsequent deterioration". In such circumstances, before proceedings are issued, the tenant should require the landlord to set out specifically what repair they say the tenant is responsible for. A general schedule of works, with some current and some historic defects, should be interrogated and issue taken where a defect, on the tenant's case, appears to have been caught by the waiver. This will assists in relation to setting the context for any fight if the landlord attempts to forfeit the lease and in relation to costs.

(ii) **Forfeiture**: the requirement for reasonable notice before the lifting of the waiver may be of crucial importance if there is a forfeiture or a re-taking of possession. If there was not "reasonable notice", the covenant was, arguably, not operative at the time of the forfeiture.

(iii) **Section 146 Notices**: a s.146 Notice served in relation to an alleged breach of a repairing obligation must particularise the failing and the defects. It also must give reasonable notice to undertake the work. If the defects are caught by the waiver then the work is not required to avoid the forfeiture and, as above, if the covenant was not operative at the time there can be no breach at the date of service.

(iv) **Opposition to a new lease**: Proceedings for a new lease can be opposed on grounds of failure to repair or comply with the covenants of the lease. If the breaches have been waived they cannot form the basis of an opposition to a new lease.

(v) **Expert evidence**: this is critical in litigation concerning alleged failure to repair so as to prove or disprove breach of an obligation. Where there is an alleged waiver of past breaches and some, but not all, repairs were done by the tenant, it will be essential to have clear expert evidence to say what is caught by the waiver and how these defects may feed into a general deterioration.

A final thought

16. In the cracked wall scenario above there could be scope to argue (with expert evidence to support the contention and a tenant willing to perform the future obligation) that, for the waiver to be lifted, the only equitable way[2] is for there to be mutuality or shared responsibility for the crack - to the effect that the owner repairs the crack first and the occupier then keeps the wall in repair. This mutuality resonates with a similar consideration where specific performance is sought. A potential future development, maybe.

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[2] See commentary in Chitty on Contracts 22-042

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