

Commercial Landlord and Tenant: Without Prejudice Discussions & Waiving the Right to Forfeit

The Case of *Re. National Jazz Centre* [1988] 2 EGLR 57

The Facts

On 4 September 1984, the Landlord granted a lease to National Jazz Centre Ltd ('the Tenant') in respect of 9 and 10 Floral Street, Covent Garden, London ('the Property') for a term of 75 years ('the Lease').

The Lease provided for the payment of substantial sums of rent to be paid in advance on the usual quarter days. The Lease also provided for forfeiture if the rent was unpaid for 21 days after becoming due.

On 21 November 1986, Lloyds Bank appointed Price Waterhouse & Co as its receiver ('the Receiver').

There were negotiations by the Receiver with the Landlord in an attempt to realise some financial benefit for the Bank from the disposal of the Property.

On 21 January 1987, the Tenant was wound up and a liquidator was appointed ('the Liquidator').

In March 1987, the Landlord brought an action against the Tenant for forfeiture of the Lease and a Possession Order. However, the Landlord had not obtained the Companies Court's consent to bring the action and so it made a post-issue application for permission to continue its action against the Tenant.

The Landlord's application was listed for a hearing on 30 June 1987. At the hearing, the Judge proposed to make a '*Blue Jeans Order*' requiring the Liquidator to give immediate possession of the Property taking into consideration the Tenant was over two years in arrears with the rent. The Landlord agreed and the Liquidator did not object. In the circumstances, the Judge granted the Order.

However, the Receiver was aggrieved that an order had been made that was different from the one sought by the Landlord in its application to the Court and without the Receiver having an opportunity to object to the Order.

In the circumstances, the Receiver applied to the Court for the Order to be discharged on the ground that there was an arguable defence to the Landlord's claim, namely, the Landlord had waived its right to forfeit the Lease when it entered into without prejudice negotiations with the Receiver.

The High Court's Judgment

Mr Justice Gibson handed down the High Court's Judgment on 13 October 1987.

The Court referred to the case of *Jones v Foxall* (1852) 15 Beav 388 in which it was said that without prejudice letters could never be admitted in evidence for the purpose of fixing the person sending them with any admissions contained in such letters.

The Court went on to state that, where a question of waiver is in issue, one must be able to spell out of the negotiations an admission that a tenancy existed; but the mere fact that negotiations have taken place between a landlord and a tenant does not tell anything about what the landlord was in fact conceding, if anything.

The Court held that it was impossible to reach a conclusion that there had been an unequivocal acceptance of the existence of the Lease by entering into negotiations without looking at what actually occurred in the without prejudice negotiations themselves and it was clear that was something the Court could not do.

In the circumstances, the High Court dismissed the Receiver's application and upheld the '*Blue Jeans Order*'.

Richard Moss Solicitors

14 December 2014