

Shopping Centre Leases

Second Edition



Editor-in-Chief
Harvey M. Haber, Q.C., LSM



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Landlord's Waiver of its Right to Forfeiture — A Practical Guide

*Randall M. Rothbart**

INTRODUCTION

This chapter deals with the doctrine of waiver, an evolving minefield for landlords, property managers, and their counsel. In most leases, the landlord will have included terms which will permit it to exercise various remedies against a defaulting tenant including the ultimate remedy of termination of the lease. However, a landlord by its conduct can unwittingly waive its right to terminate in response to a specific default.

Landlord Responses to Breach

Each lease varies but, generally speaking, there are several possible courses of action available to a landlord in the event of breach by a tenant, either pursuant to the terms of its lease or at common law. The following are the most common remedies utilized:

- (1) The delivery to the tenant of a Notice of Default, which declares that the tenant is in default, identifies the action or inaction which constitutes the breach, and may provide the tenant with a prescribed or reasonable period of time within which to remedy the breach.
- (2) The commencement of an action against the tenant for non-payment of rent or for damages occasioned by a non-monetary default.
- (3) The remedy of distress, in which the landlord seizes the goods of the tenant on the leased premises and uses the proceeds of their sale to pay the outstanding arrears of rent; the tenancy is recognized as continuing to exist.
- (4) To take no steps whatsoever, and continue to accept rent from the tenant.
- (5) Forfeiture, in which the landlord delivers a Notice of Termination and terminates the tenancy.

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The doctrine of waiver significantly affects the landlord's rights and any decision to proceed with forfeiture of the tenancy. The landlord's right to forfeiture can be jeopardized by certain conduct of the landlord after it becomes aware of, or arguably should have known of, a breach of lease by the tenant.

Test for Waiver

The test for waiver is succinctly set out in the key Ontario Court of Appeal decision of *Malva Enterprises Inc. v. Rosgate Holdings Ltd.*¹, as follows:

A landlord who has the right to forfeit a lease by reason of the tenant's default may waive the exercise of this right when, after the act or omission giving rise to the right of forfeiture has come to its knowledge, it does *any act whereby it recognizes the relationship of landlord and tenant as still continuing.*

The three elements necessary for waiver are:

- (1) default by tenant;
- (2) landlord has knowledge of tenant's default; and,
- (3) conduct of the landlord that affirms a continuing landlord and tenant relationship.

Essentially, the court found that the key to the doctrine of waiver is the obligation of the landlord to choose between mutually exclusive options for relief available to it pursuant to the lease. To permit the landlord to both affirm and repudiate the lease at the same time would be manifestly unfair. As the court set out in *Malva*:

The lessor has an option whether he will take advantage of a forfeiture or not, and if he elects not to do so the forfeiture is waived. This waiver of the right to forfeit the lease is properly regarded as an aspect of the wider doctrine of election. This type of waiver arises where a person is entitled to alternative rights which are inconsistent with one another and, with knowledge of the facts which give rise in law to these alternative rights, he acts in a manner which is consistent with his having chosen to rely on one of them. He is held in law to his choice even though he was not aware of the legal consequences of the choice. Such election may be either express or implied and it is implied when the lessor, after the cause of forfeiture has come to his knowledge, does any act whereby he recognizes the relation of landlord and tenant as still continuing.²

¹ (1993), 104 D.L.R. (4th) 167, 14 O.R. (3d) 481 at p. 487 (Ont. C.A.) ("*Malva*") [emphasis added].

² *Supra*, at p. 487.

