1. Upon breach, a landlord must elect whether to treat the lease as being at an end or to continue with it, despite the breach. The latter is the waiver of the right to forfeit, which has three essential components: (1) with knowledge of the breach, (2) the landlord communicates to the tenant, (3) an unequivocal recognition of the subsistence of the lease.

2. For the landlord's conduct to amount to a waiver, it must be "so unequivocal that, when considered objectively, it could only be regarded as having been done consistently with the continued existence of a tenancy": per Slade LJ in ***Expert Clothing Service Sales Ltd v. Hillgate House Ltd***. [1986] 1 Ch 340.

3. The acceptance of rent falls into a special category, if it is accepted for a period after a breach, with knowledge of that breach, it will automatically amount to a waiver. The strict application of this principle has its roots in the feudal system of land ownership and there is no sign of it changing.

4. What about demanding rent with knowledge of a breach?

    (1) In ***Expert Clothing Service Sales Ltd v. Hillgate House Ltd***. [1986] 1 Ch 340, David Neuberger submitted a demand for rent operates as a waiver. Slade LJ was content to assume that was correct, without deciding the point.

    (2) In ***Yorkshire Metropolitan Properties Ltd. v Co-Operative Retail Services Ltd.*** [2001] L. & T.R. 26, Neuberger J. was prepared to proceed on the assumption that a demand for rent operated as a waiver.

    (3) In ***Thomas v Ken Thomas Ltd.*** [2007] L. & T.R. 21, Neuberger LJ considered, albeit obiter, that a demand for rent is a classic way in which a landlord can waive the right to forfeit.

5. I may be unfairly singling out Lord Neuberger, as he now is. There are first instance decisions dating back nearly 200 years that a demand for rent is as good as acceptance of rent; and there are Court of Appeal cases where it has been prepared to assume that was correct without deciding the point.

6. Part of the problem is that the arguments put forward in support of a demand for rent operating as a waiver can be traced back to the obiter comments of Parke B.

in ***Doe d. Nash v Birch*** 150 E.R. 490, in 1836, a case which did not turn on the demand for rent. It is not the strongest foundation for such a strict rule.

7. Going back to Neuberger J., in ***Yorkshire Metropolitan Properties***, he was not prepared to accept the demands for service charge and insurance, although recoverable in the same manner as rent (not as rent), would waive the right to forfeit, commenting, "However, in relation to something like an insurance premium, particularly in the context of a substantial landlord with many properties…a demand bears the hallmarks of a routine administrative act".

8. Is not the demand of ground rent under a long, residential lease more routine than a considered demand for a contribution to the service charge expenditure? Even in the context of commercial rents, the demands are invariably computer generated.

9. It is the acceptance of rent which waives, not its payment: payments may be, and usually are, nowadays, made electronically, without the landlord's knowledge. It does not amount to the acceptance of rent until, objectively, the landlord has knowledge of the payment and has retained it. A situation which is quite different to a computer-generated demand.

10. Finally, the consequences of accepting rent not amounting to a waiver can be far more inequitable than demanding it. If a landlord, with knowledge of a breach, accepts the quarter rent in advance, on 25th March, and peaceably re-enters the following day on the grounds of the antecedent breach, absent an apportionment provision in the lease, the tenant will have been put out of possession and lost that quarter's rent. No such injustice arises with a mere demand for rent.

11. That is not to say that a demand for rent should not be a factor which a court takes into account when considering whether the totality of the landlord's conduct amounts to an unequivocal recognition of the subsistence of the lease. However, to elevate a demand for rent to the same status as an acceptance of rent, with its strict consequences, is wrong in principle.

12. However, until such time as the Court of Appeal or Supreme Court says otherwise, the County Court, which predominantly deals with landlord and tenant cases, is bound by the High Court decisions (e.g. ***Segal Securities Ltd. v Thoseby*** [1963] 1 Q.B. 887).