Neutral Citation Number: [2013] EWHC 2676 (QB)

Claim No: XXXQB/2013/0213XXX

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 23 July 2013

BEFORE:

MR JUSTICE JAY

- - - - - -

BETWEEN:

MISS ISABELLA ANDERS

Appellant

- and -

(1) MR ANDREW HARALAMBOUS
(2) MRS CONSTANTIA HARALAMBOUS

Respondent

- - - - - -

MR ROMIE TAGER QC (instructed by Messrs Setfords) appeared on behalf of the Appellant

MR JOHN DE WAAL QC (instructed by Messrs SLS Solicitors) appeared on behalf of the Respondent

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Approved Judgment

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No of Folios: 104
No of Words: 7,461

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J U D G M E N T

MR JUSTICE JAY:

1. This is an appeal, with the permission of Collins J, against a decision of His Honour Judge Dight sitting at the Central London County Court on 27 March 2013. The judge declared that the defendants' lease is forfeit, with a question of possession and any relief from forfeiture to be determined at a subsequent hearing.

2. The factual background to this appeal is as follows. The subject premises are at 85A Wandsworth Bridge Road, London SW6. The respondents, Mr and Mrs Haralambous, own the freehold. Since 2 July 2010 the appellant, Miss Isabella Anders, owns the leasehold. The third schedule to the lease contains relevant covenants. This is page 14 of bundle A. First of all, covenant (k):

> "Not to use the premises or permit the same to be used for any purpose whatsoever other than as a self-contained private dwelling for residential purposes only."

3. Then covenant (m):

> "Not to assign, underlet or part with or share possession or occupation of part only of the premises."

4. Mr Romie Tager QC in opening this case to me helpfully took me to the relevant documents, only some of which I will cover in my judgment. On 15 March 2011 (this is page 57 of bundle A) solicitors acting for the landlords wrote to the tenant stating that the tenant was in breach of a number of covenants by subletting the premises on the basis that the premises were then apparently occupied by 15 persons. On 18 April 2011 (at page 59) solicitors wrote again mentioning an e-mail which had been sent to them and referring to the fact that breaches of covenants were constituted by what they called a situation of multiple occupancy. On 8 June 2011 (this is page 60) the tenant was invited to remove what were described as the subtenants.

5. On 15 July 2011 the landlords brought proceedings under section 168 of the Commonhold and Leasehold Reform Act 2002, relying on multiple occupation and the absence of a licence, referring to the letters which I have just mentioned and stating that the tenant was in breach by virtue of her subletting. On 12 August 2011 Miss Anders filed the first of her five witness statements in these proceedings (this is page 61 of the bundle.) This was in opposition to the claim for a declaration. I have been told that, although Miss Anders has been acting at various times through barristers instructed on the Direct Access scheme, her witness statements were, as it were, homemade and prepared without the benefit of legal advice. It is, however, clear (and I infer this from the various witness statements) that Miss Anders is, if I may say so, an educated woman with some understanding of the law. She says in paragraph 9 of this witness statement (at page 62) that the students who are or have been placed in the premises are tenants. Then in paragraph 15 she says "prior to letting the property" (those were her words) she believed that a licence may be required. This addressed the multiple occupation point.

6. Miss Anders' second witness statement quibbled over the numbers. She was always

making it clear that the reference to 15 students was always a great exaggeration; there were never more than four.

7. Her third witness statement was filed on 12 May 2012. It is at page 99 of the bundle. This time Miss Anders used slightly different language: for example, in paragraph 8 she refers to the existence of student guests in the property, not tenants, and she made it clear that as at that date, or indeed at any stage, she had not had more than two student guests at the property. I think that was the position as at May 2012. The maximum number which she ever accepted was four. In the same witness statement there is a flat denial of any breach of covenant (m) or indeed any breach of covenant (k).

8. The matter came before District Judge Hart for summary determination of the section 168 issue on 15 August 2012. As I have said, this was an application for summary judgment. Unfortunately the appellant before me today was neither present nor represented. There was evidence that her partner in Poland had died suddenly and in tragic circumstances very shortly before the hearing. The district judge was made aware of that fact, or at least that contention, but, given that she felt that there was no possible defence to this claim, she did not grant an adjournment. The finding of the district judge under covenant (k) is set out in paragraph 8 of her judgment. I quote:

> "In relation to the covenants as to occupation [this is user covenant (k)] my conclusion is that the covenant at paragraph (k) of the third schedule requires Miss Anders not to use the premises for any purpose whatsoever other than as a self-contained private dwelling for residential purposes only. To my mind it is clear from her own evidence that she has used it on a commercial basis for lodging students from the language school with which she is associated. That is not use as a private dwelling. I therefore find that there has been a breach of the covenant at (k)." [Quotation unchecked.]

9. Pausing there, District Judge Hart made no reference to subletting or indeed to any tenancy. She refers more parsimoniously, perhaps more neutrally, to the lodging of students and to the almost irresistible inference that this was done on a commercial basis. In my view, District Judge Hart's finding on the covenant (k) point was unimpeachable. In any event it cannot be impeached before me today since her judgment is not the subject of any appeal.

10. As for covenant (m) of schedule 3, District Judge Hart addressed this at paragraph 9 of her judgment. She pointed out what the covenant required and then said:

> "It is clear from Miss Anders' own evidence that she had had lodgers in residence in various of the bedrooms in the property. This amounts to parting with or sharing possession of part of the premises. I therefore find there has been a breach of paragraph (m)." [Quotation unchecked.]

11. I make the same point as I made in relation to paragraph (k), no finding of subtenancy, under-tenancy or any form of tenancy. Instead, a precise finding that there was parting with or sharing possession of part of the premises. Of course covenant (m) does not prohibit parting with or sharing possession of the whole of the premises. It is only part of the premises which is in issue. There are other covenants which deal with assignment of the whole of the premises with which I am not concerned today.

12. There was an application made by the appellant to set aside the judgment and order of District Judge Hart (that is page 168 of bundle A.) At page 169 of the bundle, it is clear from the evidence submitted in support of that application that Miss Anders had no idea which part of covenant (m) was in play, namely what the basis of District Judge Hart's finding was. Because, as Mr Tager has pointed out, covenant (m) is in fact a wrapped up covenant which contains a series of obligations, all of which are, as it were, in the alternative to each other and one needs to specify which is in play or in operation in any given case.

13. What happened after the ruling of District Judge Hart is that the landlords, as they were entitled to do, and indeed as they had to do if they wanted to obtain possession, served a notice under section 146 of the Law of Property Act 1925 (see page 141 of the bundle). This notice was in fairly standard form and referred in terms to the relevant covenants, which for these purposes of course are covenants (k) and (m). Paragraph 2 of the notice reads:

> "The above mentioned covenants have been broken and you have sublet the premises to students and received payments therefrom, thus operating the premises as a business as opposed to residential purposes only, as determined by the court on 15 August 2012." [Quotation unchecked.]

14. I observe, although I will be addressing this in more detail later, that this apparently gave Miss Anders an intimation for the first time of what District Judge Hart's finding was since there was express reference to the court's determination on 15 August 2012. Yet paragraph 2 of the section 146 notice does not refer to sharing of possession, it refers to subletting.

15. On 19 September 2012 Miss Anders acknowledged receipt of the section 146 notice (that is page 188 of the bundle.) She accepted that there was an order of the court dated 15 August 2012 that found her in breach of clauses (k) and (m) of the lease; indeed she had been provided with a copy of the order, yet she pointed out, as indeed was the case, that she was not present in court when the order was made. She had made an application to set aside the order and, I would add, it is clear from the terms of that letter that she did not know precisely on what basis the court had found against her. I should say that there is a dispute as to whether this letter is in fact contemporaneous with 19 September 2012 or whether it has come into existence at some later point, which is the respondents' position. But for today's purposes I am prepared to assume, without deciding the point, that the letter is what it purports to be. In my judgment, it does not avail the respondents' case.

16. On 27 November 2012 proceedings for possession were commenced (that is page 134 of bundle A) and the pleaded case relied on the forfeiture notice. There was then an application for relief from forfeiture (page 181 of the bundle) and on 6 February 2013 Miss Anders filed her fourth witness statement (that is page 183 of the bundle.) This witness statement was filed in support of her application that she be relieved from forfeiture of the lease. That is important in the context of Mr Tager's ground 2. The point was made in paragraph 7, repeating what had been said earlier, that there had been no assignment or underletting of any part of the property. Miss Anders' position was that she retained legal possession and occupation of the whole of the property. As I have already pointed out, by 19 September 2012 Miss Anders was apparently able to confirm,

and there is correspondence to this effect, that there were no longer any students at the property at all. So in effect, had there been an earlier breach of the covenants, which Miss Anders clearly was not admitting, she was effectively saying that those breaches had been remedied.

17. In terms of what happened next, on 14 March 2013 we have another witness statement from Miss Anders, which I believe is her fifth and last witness statement. Paragraph 8 of that statement (which is at page 222 of the bundle) points out that she is not the owner of the school: the school in fact is owned by a company, and that the relevant contracts are between the students and the company. She did not have a contract with the students, whether in relation to tutoring or accommodation. Then she says:

> "As the owner of that property I was perfectly entitled to allow people to stay at the property and I have freely admitted that I did so. The fact that the people who stayed at the property were students of the school and that I have a connection with the school is neither here nor there. There was no evidence put before the judge that I was paid by the students or the company for the students staying at the property. The judge was quite wrong to describe the people staying at the property as lodgers. That implied that I was in a contractual relationship with the students or the company in relation to their accommodation, or I was paid for the students staying at the property, which is not the case. I have always used the property as a private dwelling for residential purposes only." [Quotation unchecked.]

18. I think it is fairly obvious, indeed I have been invited to proceed on this basis, that shortly before 14 March 2013 the appellant must have seen a transcript of District Judge Hart's reasons. That point is put beyond doubt by paragraph 35 of this witness statement, a matter which Mr Tager accepted. Finally in terms of the chronology, there is an e-mail which indicates that Miss Anders had an intention to sublet the whole of the premises on or shortly after July 2012.

19. I now turn to the hearing before His Honour Judge Dight on 27 March 2013. There were a number of matters and applications before the court, including the appellant's application to set aside the order of District Judge Hart, but more particularly for today's purposes there was the respondents' application for a declaration that the lease had been forfeited. It is important to note what was conceded by counsel then appearing for Miss Anders during the course of argument. There is a transcript of the entirety of the proceedings. Counsel then acting for Miss Anders said this, at page 45 of bundle A:

> "Miss Anders, subject to any further appeal, is therefore fixed with those findings [that is to say the findings of the district judge]. Therefore no defence to the claim for forfeiture has been filed. It is an application for relief from forfeiture. That is what we have. In those circumstances it is the evidence of Miss Anders that primarily, in my submission, she goes first in the sense that it is her application for relief." [Quotation unchecked.]

20. The issue before the judge was whether the section 146 notice was valid. The appellant took the point that the notice, which we have seen at page 141 of bundle B, alleged that she had sublet the premises, whereas District Judge Hart's finding was much more limited, namely a parting with possession or occupation of part of the premises. The

judge referred to the decision of the Court of Appeal in Akici v LR Butlin Limited [2006] 1 WLR 201, an authority to which I will come. He directed himself on the basis that he should consider the relevant factual matrix, including the correspondence to which I have referred, as well as the appellant's witness statements. At paragraph 41 of his judgment, at page 116 of bundle A, I quote:

> "The question is whether in the context of the other material the notice would have been sufficiently clear to the reasonable recipient of it." [Quotation unchecked.]

21. That question can be gleaned, as it were, from a number of authorities, namely Fox v Jolly [1916] AC 1, Akici, which I have already mentioned, and Mannai Investment v Eagle Star [1997] AC 749. Then at paragraphs 44 and 45 of his judgment, His Honour Judge Dight said this:

> "Further, it seems to me that the defendant in her evidence makes it plain that she knew what was really the issue between the parties, namely that she had allowed the students to occupy the property. If one looks at her witness statement of 12 August 2011, the one in which she describes herself as the principal of the school, she sets out that it was her intention to allow students to lodge at the school. She states in paragraph 8 that she is preparing the property for letting. In paragraph 9 she admits that she had placed students in the property up to a maximum of four students, whom she described as tenants. She subsequently refers to a request to move the subtenants from the property.
>
> "Looking then back at the notice giving particulars of the alleged breaches of the provisions of the lease and the documents that I have just referred to, it seems to me that when in paragraph 2 of the notice reference is made to a breach of the covenant by subletting to students, that was perfectly understandable to someone in the defendant's position. The fact that there was then a reference to receipt of payment for such occupation is, in my judgment, something that can be ignored. It does not add to the original statement of the breach of covenant, namely the subletting to the students, a matter which, as I have already said, the defendant appears to admit in a passage in her witness statement which I have referred to. It is consistent with the judgment of District Judge Hart (although the defendant was not aware of it that there had been a parting or sharing of possession of part of the premises) and therefore in my judgment a reasonable recipient of the notice, in the light of that knowledge that the defendant would have enjoyed, would have been well aware that what she was required to do as a result of receiving this notice was to remove the student occupiers from her property and to cease sharing or parting with possession." [Quotation unchecked.]

22. This addressed the breach of covenant (m). As for covenant (k), His Honour Judge Dight said this at paragraphs 46 and 47 of his judgment:

> "So far as the second part of the paragraph is concerned and the reference to use of the premises, District Judge Hart came to the conclusion that there was commercial use. It seems to me, as I mentioned earlier, that it is plain from the evidence of the defendant that whether or not there was receipt of rent by her,

and one does not need to determine that issue, the first, the occupation of the premises by the students, was attributable to the school's undertaking to house them, and secondly, that the defendant was using the property as a result of her interest in that language school business. That was sufficient to amount, in my judgment, to a breach of covenant (k) in schedule 3.

"The fact that the particular wording of clause 2 of the notice refers to operating the premises as a business is a different way of describing the same breach. In any event it would, in my judgment, have put a reasonable recipient sufficiently on notice as to what she was required to do to remedy the breach, namely to stop using the premises as a place to house students who are attending the language school. The defendant or the reasonable recipient of the notice in her position and with her knowledge cannot, in my judgment, have been in any doubt about its true meaning." [Quotation unchecked.]

23. The appellant is now on to her third barrister, Mr Romie Tager QC. As I have pointed out, the appellant's witness statements were prepared without the benefit of legal advice, although I have inferred that she had some knowledge of the law and I have already referred to her level of education.

24. Ground 1 in the notice of appeal, for which permission was, in my judgment, granted by Collins J, alleges that the section 146 notice failed to identify the breach or breaches of covenant determined by District Judge Hart on 15 August 2012. Whereas the district judge found, as we have seen, that the appellant had breached covenant (k) by using the premises on a commercial basis for lodging students from the language school with which she was associated, which was not used as a private dwelling, the section 146 notice effectively alleged that the breach was constituted by the subletting for reward. The point is said to be even stronger in relation to covenant (m). In oral argument, Mr Tager did not press with any particular force the point which appealed to Collins J, namely that the notice referred to the whole premises, whereas the breaches found related to part only. In my judgment, he was quite right not to press it.

25. Mr Tager places particular reliance on the decision of the Court of Appeal in Akici v LR Butlin Limited. In that case Neuberger LJ (as he then was) gave the lead judgment. He held that the section 146 notice there was inapt to cover a case of sharing of possession. It could not be construed so as to comprehend sharing of possession as a breach. The following citations from the judgment of Neuberger LJ are relevant. Paragraph 52, first of all, at page 212:

"If one confines oneself to the contents of the notice it is very difficult to see how it can fairly be construed as specifying the sharing of possession as a breach of covenant complained of. The notice quotes clause 4.18, which includes covenants not to assign, not to sublet, not to part with possession and not to share possession, and then goes on to allege the breaches complained of, which is the assigning, subletting or parting with possession. On any rational approach it seems to me that a reasonable recipient of the notice would have understood that sharing of possession was not being complained of. Though included in the clause of the lease which was quoted, it was excluded from the list of breaches complained of. To put it another way, clause 4.18 of the lease quite clearly distinguishes between parting with possession and sharing

possession and the relevant breach of covenant alleged in the notice was parting with possession and no mention was made of sharing possession." [Quotation unchecked.]

26. Neuberger LJ then addressed the point that the objection which was being made to the section 146 notice in that case appeared to be unduly technical and reference was made in that context to the decision of the House of Lords in Mannai Investment Company v Eagle Star Life Assurance (*loc cit*). But then Neuberger LJ in addressing that submission said this at paragraph 54:

> "I accept the submission that the approach of the majority of the House of Lords in Mannai to contractual notices will apply to section 146 notices despite Mr Butler's submission to the contrary. However, I have nonetheless come to the conclusion that Mr Lloyd's defence to the notice cannot stand. Even applying the Mannai case, the notice has to comply with the requirements of section 146(1) of the 1925 Act and if, as appears pretty plainly to be the case, it does not specify the right breach, then nothing in the Mannai case can save it." [Quotation unchecked.]

27. Mr Tager quite understandably placed particular reliance on that paragraph. Neuberger LJ continued at paragraph 55:

> "Quite apart from this, if on its true construction the section 146 notice did not specify a sharing of possession as a breach complained of, it can be said with considerable force that it neither informed the recipient of the breach complained of nor indicated to him whether, and if so how, he must remedy any breach. On the basis that there was a sharing of possession, a reasonable recipient of the section 146 notice would have been entitled to take the view that he need do nothing because the lessors were only complaining about the presence of the company if there was a parting with possession ..." [Quotation unchecked.]

28. Then finally, paragraph 56:

> "Accordingly, a reasonable recipient in this case ... could, to put it at its lowest, reasonably have taken the view that the lessors were not objecting to any sharing of possession but consequently that no steps need to be taken, either with a view to remedying a breach or with a view to improving the prospects of obtaining release from forfeiture." [Quotation unchecked.]

29. Reference was also made in this context, but more particularly by Mr de Waal QC acting for the respondents rather than Mr Tager, to the decision of the House of Lords in Fox v Jolly [1916] AC 1. At this stage particular reference needs to be made to what fell from Lord Parmoor at page 23:

> "I think that the notice should be construed as a whole in a commonsense way and that no lessee could have any reasonable doubt as to the particular breaches which are specified." [Quotation unchecked.]

30. The issue for determination here is whether any reasonable recipient of the notice in the

instant case could have been in any reasonable doubt as to the particular breaches which are specified. Mr Tager stresses that this is not of technical or academic import: whereas a finding of subletting would be an irremediable breach, a parting with or sharing of possession or occupation would not.

31. It is convenient to take first the appellant's case under covenant (m). The allegation was that the appellant had sublet premises to students and received payments therefrom (this aspect can be blue pencilled out in my judgment) as determined by the district judge on 15 August 2012. This, and as I have pointed out more than once now, is not what the court determined. To the extent that the judge based himself on the appellant's own evidence, in particular reference to subletting, in my judgment that was wrong. It did not reflect the fact that the appellant's case had changed through her various witness statements and that it was clearly arguable that she was not using the term "subletting" in any technical legal sense. There was no evidence that the appellant knew of the district judge's findings, as opposed to the upshot of those findings, until shortly before 14 March 2013, which was outside the reasonable time after the commencement of proceedings.

32. What is critical on Mr Tager's submissions is that subletting is incapable of remedy, whereas the lesser finding of parting with or sharing of possession could have been remedied and, of course, it was the appellant's case that it had been remedied. Paragraphs 55 and 56 of Neuberger LJ's judgment are, on Mr Tager's submissions, directly in point.

33. Mr de Waal QC submitted to me that his clients have been hampered throughout by not knowing precisely what the appellant has done at all material times in relation to the lodging of students at her premises, and I use here as neutral a term as I can, whether she has received payment for that endeavour, and indeed the precise basis of any legal relationship, if any, between her and her students. The point which is now being taken, Mr de Waal submits, is entirely artificial. Furthermore, when one considers the reference to the premises in the section 146 notice, that must include part of the premises, and I have already indicated that I fully accept that submission. Mr de Waal placed particular reference on the decision of the House of Lords in Mannai Investments. There the House of Lords by a majority considered the construction of section 146 notices and the relevant approach. My attention was drawn to *dicta* from Lord Steyn and Lord Clyde. What Lord Steyn said, and this starts at page 767 at letter G:

> "The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene."

34. Then I read on from Lord Steyn, but now I am at the top of page 768:

> "First, in respect of contracts and contractual notices the contextual scene is always relevant. Secondly, what is admissible as a matter of the rules of evidence under this heading is what is arguably relevant. But admissibility is not the decisive matter. The real question is what evidence of surrounding circumstances may ultimately be allowed to influence the question of

> interpretation. That depends on what meanings the language read against the objective contextual scene will let in. Thirdly, the enquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind. It follows that one cannot ignore that a reasonable recipient of the notices would have had in the forefront of his mind the terms of the leases."

35. Then Lord Clyde, at 782, just above B, cited Slade LJ, in a case called Delta Vale Properties Limited v Mills who observed at page 454:

> "'In my judgment, notices to complete served under condition 23, if they are to be valid, must be sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate.'

Lord Clyde continued:

> "The standard of reference is that of a reasonable man exercising his common sense in the context and in the circumstances of the particular case. It is not an absolute clarity or an absolute absence of any possible ambiguity which is desiderated. To demand a perfect position in matters which are not within the formal requirements of the relevant power would in my view impose an unduly high standard in the framing of notices such as those in issue here. While careless drafting is certainly to be discouraged the evident intention of a notice should not in matters of this kind be rejected in preference for a technical precision."

36. Mr de Waal submits that there was no covenant against subletting as such. By contrast with the facts of Akici, the section 146 notice here did not reflect a covenant or part of a covenant in the lease. Accordingly, approaching this matter in line with the guidance offered by the majority of the House of Lords in Mannai, Mr de Waal submits that I should read the section 146 notice in a commonsense way as including a reference to sharing of possession.

37. I have considered the competing submissions very carefully, but at the end of the day have concluded that Mr Tager's submissions on this point are to be preferred. What is critical here, for the purposes of covenant (m), is the reference in the section 146 notice (at page 141 of the bundle) to the fact that the tenant had allegedly sublet the premises to students, missing out irrelevant words:

> "Thus operating the premises as a business as opposed to residential purposes only, as determined by the court on 15 August 2012." [Quotation unchecked.]

38. So there was a clear reference to the court's findings on that date and, as I have already pointed out, that reference was incorrect. Mr de Waal's submission that the word "subletting" should be read loosely and without any legal interpretation is, in my judgment, incorrect. Covenant (m) does refer to, amongst other things, underletting part of the premises and, as the Court of Appeal pointed out in Akici (this is Neuberger LJ at paragraph 67):

> "There is no material difference for these purposes between subletting and

underletting." [Quotation unchecked.]

39. What the landlords had to do, in my judgment, was to rely more precisely on what the exact findings and conclusions, made by District Judge Hart on 15 August 2012 were. As I have stated, those findings were expressed more parsimoniously on the basis not that there had been a subletting but rather there had been a parting with or sharing of possession. It is true that the present case is not quite as strong as Akici to this extent. Whereas in Akici the covenant in question did expressly refer to sharing possession of the whole or part of the premises, and therefore that was an option, as it were, which the landlord was deemed specifically not to rely on, the present case did not refer expressly to subletting. However, as I have made clear, underletting and subletting can be read interchangeably and I consider that any reasonable recipient of the notice would have believed that the finding of the court on 15 August 2012 was that there had been a breach of covenant (m) by dint of subletting alone.

40. The point is not an academic or technical one to this important extent. In line with the reasoning of the Court of Appeal in Akici, what is important is that the tenant has to understand what he or she needs to do in response to the notice. Paragraph 3 of this notice required the tenant to remedy the aforesaid breaches insofar as the same are capable of remedy. Yet there is clear authority in support of the proposition that subletting is a breach which is incapable of remedy. So really by parity of reasoning with the conclusion of Neuberger LJ, in particular at paragraph 56 of his judgment in Akici, there was nothing that this appellant could reasonably and properly have done to remedy the breach and it may have been for that reason that she applied for relief against forfeiture rather than seek to take any other or additional point. It follows that I find favour with the appellant's case in relation to covenant (m).

41. I turn now to deal with the case in relation to covenant (k). This case is, in my view, more difficult because in one sense it is clear that, whatever the appellant had done, she was in breach of that covenant. Further, it has been pointed out to me that a partially incorrect notice is not invalid. Mr de Waal submitted in this context that covenant (k) is a user covenant, and of course that is correct, and that, to use my language, it is possible to decouple the subletting allegation from "operating the premises as a business as opposed to residential purposes". He also submits that it would have been sufficient for the section 146 notice to have said simply that the breach consisted in the commercial use, in other words, the reference to subletting was a reference which can effectively be ignored for the purposes of the case under covenant (k). I have considered Mr de Waal's submission on that point, but at the end of the day I have reached the conclusion that the same argument that, whatever the appellant had done, she was in breach of covenant, could equally have been raised in relation to covenant (m).

42. On any fair reading of paragraph 2 of the section 146 notice the position was clear. It was being alleged that the premises, and I would include here part of the premises, were being sublet to students, thus operating them as a business. It was that which was said to be the breach of covenant (k) and that allegation was inextricably linked with the facts relied on, namely the sublettings which, as I pointed out on several occasions now, are not the correct facts. It follows that the appellant did not know what she needed to do to rectify the matter. Indeed the correct analysis on this premise is that these matters were incapable of rectification.

43. In relation to the further point which Mr de Waal developed, that it was not necessary to do more than specify that there had been a commercial use in breach of the covenant which was for residential purposes only, Mr Tager in his reply took me to various passages in Fox v Jolly, in particular Lord Buckmaster, Lord Chancellor, at pages 8, 11, 12 and 15, Lord Atkinson at pages 17 to 18, and he took me back to Neuberger LJ in Akici at paragraph 55. I am not going to set out all those passages because they are broadly to similar effect. The issue is the degree of particularity or specificity which needs to be given in order to comply with the terminology of section 146 or, in the instance of Fox v Jolly, the antecedent legislative provision which was in like terms. Quoting from page 15 of the report in Fox v Jolly and the speech of Lord Buckmaster, we see this:

> "The last case is that of Purnell v City of London Brewery Company where it was decided that a notice which specified two breaches and something else that was not a breach was nonetheless good since the breach complained of had been specified, together with the addition of something which was material. I regard this view as the correct interpretation of the section. The notice must state with sufficient particularity the breach of which the landlord complains and that breach the tenant must satisfy within a reasonable time. If he does satisfy it, it would not be open to the landlord to allege that there was another breach of another covenant which had been referred to in the notice but had not been sufficiently specified which had not been remedied." [Quotation unchecked.]

Then Lord Buckmaster pointed out that on the facts of the incident case the notice did sufficiently specify the landlord's complaints because it gave the tenant adequate notice of what he was required to do.

44. In the present case I do not think it would have been sufficient, indeed I rule that it would not have been sufficient, merely to have stated that the tenant, in breach of covenant (k), was using the premises other than for residential purposes. More had to be stated. Indeed that appears to have been the premise on which paragraph 2 of the section 146 notice was drafted since more was stated, but the difficulty is that the more which *was* stated did not reflect the true position, and I have already set out my conclusions about that. So it follows that I reject Mr de Waal's submissions in relation to covenant (k). It follows that I must allow the appeal on ground 1. I say that I have reached that conclusion not with any particular enthusiasm because at the end of the day the matter has turned on the way in which a particular notice has been drafted and it is quite clear that, had it been drafted slightly, albeit materially differently, the outcome would have been different. But at the end of the day of course I have to apply the law as I understand it to be and in this area of the law one does, I am afraid, have to be precise.

45. The upshot of my conclusion in relation to allowing the appeal on ground 1 is that the order of His Honour Judge Dight given on 27 March of this year must be set aside. I think, although I will give Mr de Waal the chance to come back to this when I have dealt with the second ground, it must also follow that the particulars of claim must be struck out since there is no basis on which the claim can proceed.

46. I do deal with ground 2 out of an abundance of caution since I have heard detailed submissions from Mr Tager upon it, although I did not invite Mr de Waal to address me in reply. Mr Tager's point in essence is that the way the matter proceeded before the

judge was on the basis of a concession by counsel which was wrongly made. Given the evidence which was then available, in particular the appellant's case that she had remedied the relevant breaches in the sense that there were no longer any students occupying the property on any basis at all, it should not have been conceded that these breaches were incapable of remedy. Indeed this was a point which if necessary the landlords' counsel should have taken and it was certainly, although not pressed in any way before him, a point which on Mr Tager's argument the judge could have taken of his own motion in the face of the concession which was made before him. So Mr Tager submits in effect that his client should be allowed to resile from this concession at this appeal. There has been no injustice. Since all the relevant evidence is before this court, it is not a question of having to go away and obtain further evidence.

47. Mr Tager places particular reliance on his client's Convention rights, whether they be under article 1, protocol 1 of the Convention or article 8. It amounts to this: the judge when exercising his jurisdiction under CPR part 55 should conduct a more proactive role in the proceedings that would ordinarily be the case in civil litigation. One pointer to this is that when one looks at CPR part 55.7, an acknowledgement of service is not required in circumstances where the defendant does not file a defence, which was after all the case here: the defendant may take any part in any hearing but the court may take his failure to do so into account when deciding what order to make about costs. So that is really saying that the court is obliged to satisfy itself fully that the grounds for possession are made out, in other words, that all the requirements of section 146 of the Law of Property Act are satisfied, including the requirement that the breaches of covenant accurately specified have not been remedied within a reasonable time or at all.

48. Finally, Mr Tager submits that if it is plain that something has gone wrong, this court has power under part 52.11(3) to correct the injustice on the basis of a serious procedural or other irregularity in the proceedings below. In my judgment, there is no merit, I regret to say, in Mr Tager's second ground. I see there as being a distinction between a pure point of law on the one hand and on the other hand questions of fact and/or of mixed fact and law. If the court below proceeds on the basis of a pure error of law, say an error which has been contributed to by concessions wrongly made by counsel, then it seems to me that this court would in the appropriate circumstances have jurisdiction to correct the matter. We are not concerned here, in my judgment, with a pure point of law, we are concerned here with a more open textured judgmental question.

49. It is true that the available evidence was there to base a submission, if a submission was going to be made, that the breaches were capable of remedy and had been remedied, but at the end of the day, notwithstanding the amplitude of His Honour Judge Dight's jurisdiction under part 55, he, the judge, was quite entitled to proceed on the basis of the cases presented to him by counsel. If counsel did not want to take the point, then I do not believe that the judge can be criticised for failing to take it of his own motion. It is for the parties to decide how they wish to proceed. After all, even on the available evidence, had the matter been tried out, that is not to say that the appellant might not have lost the point at the end of the day and that forensically might have placed her in a worse position when she came to her application for relief against the consequences of forfeiture. These are all forensic decisions. I am not saying that it was the forensic decision made in the present case, but it is the sort of forensic decision which does not cry out for immediate correction. As I have said, the position is entirely different when we are looking at a matter of pure law.

50. So, contrary to Mr Tager's forceful submissions on his second ground, I reject his case on that ground. I allow the appeal on the first ground alone.