Neutral Citation Number: [2023] EWHC 804 (Ch)

Case No: CH-2022-000145

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 05/04/2023

Before :

MR JUSTICE ADAM JOHNSON

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Between :

(1) MR RAGMOHAN SINGH CHUG **(2) THE ESSENTIALS HOMEWARES LIMITED**	**Appellants/ Claimants**
- and –	
(1) MR MOHINDERPAL SINGH DHALIWAL **(2) MRS BHAJAN KAUR DHALIWAL**	**Respondents/ Defendants**

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Mr Niraj Modha (instructed by **Radius Law**) for the **Appellants/Claimants**
Mr Evan Price (instructed by **MT UK Solicitors**) for the **Respondents/Defendants**

Hearing dates: 28 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 5 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE ADAM JOHNSON

Mr Justice Adam Johnson:

Introduction and Background

1. This is an Appeal in a landlord and tenant case, from a Judgment of HHJ Saggerson in the Central London County Court dated 5 July 2022.

2. I will start with some facts, as found by the Judge in his Judgment. There is no appeal against any of the Judge's factual findings.

3. Mr and Mrs Dhaliwal are freeholders of a property in Hounslow. It is at 358-360 Bath Road, Hounslow. It is used as a shop.

4. On 17 July 2005, they entered into a twenty-year lease with Mr Ragmohan Singh Chug ("*the Lease*") at a rent of £57,000 pa. Mr Chug wanted to use the property as a "*homeware*" shop.

5. As usual, the Lease contained a number of covenants, including a covenant against alienation. This was at cl. 3(13)(a) of the Lease. Under it, Mr Chug agreed not to do a number of things. Among them he promised not to part with possession of the demised property ("*the Property*") or to suffer any other person to occupy the whole or part of it.

6. By late 2016, Mr Chug was looking to sell his business. He had discussions with a Mr Dhawan. These included discussions about transferring the leasehold interest in the Property. To begin with, Mr Chug looked to assign the Lease, but in the end nothing came of this and no licence to assign was ever granted. Mr Chug and Mr Dhawan went ahead anyway. Mr Dhawan agreed to pay Mr Chug £175,000 for his business, of which he eventually paid about £150,000. Meanwhile, Mr Dhawan entered into occupation of the Property. He paid to Mr Chug each month a sum of money corresponding to the rent due from Mr Chug, and Mr Chug paid it on to Mr Dhaliwal, so that as far as Mr Dhaliwal was concerned there was no change. This secret pass-through arrangement continued for about two years.

7. Although the Judge found that from 2018, Mr Dhawan had carried on his business at the Property via his company, The Essential Homewares Limited, he nonetheless considered that the arrangement between Mr Chug and Mr Dhawan was only ever a personal one between the two of them. The Judge described it as follows (at para. [31]):

> "*In the light of my findings, [Mr Dhawan] was, in my judgment, a tenant at will or licensee of [Mr Chug]*."

8. Things changed in January 2019. Mr Dhaliwal applied for a loan from Barclays bank. This was to be secured on the Property, and so a surveyor was sent round. The surveyor raised some questions about what was going on at the Property. Mr Dhaliwal realised that Mr Chug had stepped aside and that someone else was in occupation.

9. As it happened, in December 2018 there had been – for the first time – a shortfall in rent, in the sum of £3,222.25. There was also another issue, which was that part of the Property had been partitioned off, for use as a mobile phone shop. This gave rise to a

question whether there had been a breach of another clause in the lease, cl. 3(10) which prohibited the making of certain alterations to the Property.

10. Notwithstanding his knowledge of the above matters, Mr Dhaliwal continued to accept rent during the period January-April 2019. To be precise, there were four payments during this period, on 30 January (£3,000), 25 February (£6,322.25), 25 March (£6,322.25) and 23 April (£6,232.25).

11. On 1 May 2019, however, Mr Dhaliwal served on Mr Chug a Notice under s.146 of the Law of Property Act 1925. This drew attention to the perceived breaches of both the alterations clause (cl 3(10)) and the alienation clause (cl. 3(13)(a)), and to the December shortfall in rent. It said that if there was failure to comply with the Notice within 28 days, then the Landlord (Mr Dhaliwal) reserved the right to re-enter the premises.

12. There was no response to the s. 146 Notice. The 28-day period expired and nothing further happened, although there was another payment of rent on 25 May. There was then yet a further payment of rent after expiry of the 28-day period, on 24 June.

13. On 5 July 2019, however, Mr Dhaliwal took action. He instructed bailiffs and re-entered the premises. Mr Dhawan was excluded.

14. What happened next is important. On 9 July 2019 Mr Chug sent a letter. It had an apologetic tone. It said he understood his responsibility to put the Property " *… into a state as it was at the time of the [L]ease*". It said he had settled the rent arrears that day. As regards the occupation by another party, although Mr Chug remained coy about who the other party was, the letter said the position would be regularised:

> " *… the people running the business are known to our client and the process of assignment to them is in progress. Our client will soon be applying for Landlord's consent to the assignment*."

15. Discussions followed in the period 9 to 20 July 2019. At trial, Mr Dhaliwal gave written evidence about this. He said that Mr Dhawan had pleaded with him to sort things out. He also had discussions with Mr Chug. Mr Dhaliwal summarised the position reached as follows:

> *"[Mr Chug] informed me that he accepted the forfeiture and negotiated that I do not serve a Schedule of Dilapidations on him. I agreed, and instructed the bailiffs to allow … re-entry*."

16. The Judge plainly accepted this evidence. His summary of the position reached is in his Judgment at [59]-[60]. At [59], he set out his findings in relation to Mr Chug:

> *"[Mr Chug], I find, had lost interest by then. He had his agreement for £175,000 with [Mr Dhawan], £150,000 of which had been paid, and he was focusing on his business as an estate agent. He had moved on. I find that [Mr Chug] orally agreed on or shortly after 5/7/19 and before 20/7/19 that he would set aside any further claims in respect of the Property on [the Dhaliwals] agreeing not to pursue him for any dilapidations that*

> *might otherwise have arisen. This is consistent with [Mr Chug] effectively washing his hands of the Property."*

17. As to the position between Mr Dhaliwal and Mr Dhawan, the Judge found there was an agreement between them as well. He said at [60] of his Judgment that when the keys to the Property were made available to Mr Dhawan again on 20 July, this was " *... on the express agreement that he or [The Essential Homewares Limited] would be allowed back onto the Property to clear the stock but continue trading pending negotiations about a new lease*." The Judge described Mr Dhawan as a "*licensee of [the Dhaliwals] during this period*".

18. Negotiations with Mr Dhawan then continued. These were not negotiations for an assignment of the old Lease, as originally suggested in the letter from Mr Chug's solicitors of 9 July 2019. Instead, they were negotiations for a *new* lease.

19. As the Judge also held in his Judgment at [60], Mr Chug during this period "*... was prepared to engage sufficiently to do whatever might be necessary to help [Mr Dhawan] in his quest ...*". But notably what he did not do was to raise any objection about the validity of the s.146 Notice or about the re-entry which had taken place on 5 July 2019.

20. While the negotiations for a new lease were going on, Mr Dhawan continued paying rent during August and September 2019. The Judge held (at [64]) that these payments were made under the agreement Mr Dhaliwal had reached with Mr Dhawan, that Mr Dhawan would be allowed to occupy the Premises as licensee pending negotiations for a new lease.

21. Mr Dhawan's proposal was in fact that the new lease be taken up by an associate of his, a Mr Malhotra. Heads of terms were exchanged, but problems arose, and by mid-October 2019 things were sufficiently bad for the Dhaliwals to give notice that the Property should be vacated and cleared out by 19 November, after which possession would be taken again.

22. On 24 October, a further rental payment was made, but this time *by Mr Chug*. By 7 November at the latest, Mr Malhotra had confirmed he did not wish to continue negotiations for a new lease. A further payment of rent by Mr Chug was made on 19 November; but when Mr Dhaliwal came to realise that it was Mr Chug who had made the last two rental payments, he paid the money back, on 22 November.

23. A second re-entry to the Premises was effected on 12 December 2019, which as the Judge put it at [61], terminated any remaining licence to occupy. Mr Dhawan was thereafter excluded, and later a new lease was entered into with a third party.

The Judgment and the Appeal

24. The Claimants in the present action were Mr Chug and Mr Dhawan's company, The Essential Homewares Limited. They sought a number of forms of relief, but principally a declaration that the re-entry effected on 5 July 2019 was unlawful, or alternatively relief from forfeiture.

25. The Judge rejected all the Claimants' claims for relief. Mr Chug and The Essential Homewares Limited now appeal. They do so on three Grounds:

    i) They argue that there were no effective breaches of the Lease by the time of the re-entry on 5 July. As to what the Judge found on the topic of breach, he held (1) that in fact there had been no breach of the alternation covenant (cl. 3(10)), because the relevant alterations were not of such a type as to have required consent; (2) although there *had* been the admitted shortfall in rent in December 2019, any resultant right to forfeit the Lease had been waived by Mr Dhaliwal continuing to accept rent in the period January to April 2019, and then again in June 2019; but (3) Mr Chug *was* plainly in breach of the alienation covenant (cl. 3(13)(a)) given his informal arrangement with Mr Dhawan, and the right to forfeit the Lease in light of that breach had *not* been waived, and that justified the re-entry. The Appellants now challenge this final point (i.e., conclusion (3)). They argue that the acceptance of rent by Mr Dhaliwal in periods after January 2019 must also have resulted in a waiver of any right to forfeit arising from breach of the alienation covenant, just as it resulted in a waiver of any right to forfeit arising from the failure to pay rent.

    ii) The Appellant's second Ground is that the s. 146 Notice served by Mr Dhaliwal on 1 May 2019 was deficient, specifically in that it did not specify in terms – as it should have done – that Mr Chug was required to remedy the breaches complained of. Since, in light of the Judge's other findings, the only breach of potential relevance is breach of the alienation covenant, the substance of the complaint is really that the Notice failed to specify that Mr Chug was required to remedy the breach which arose because of his informal arrangement with Mr Dhawan.

    iii) The final Ground is that, in exercising his discretion whether to grant relief from forfeiture, the Judge failed to take into account all relevant factors and/or failed to do so on a principled basis, and reached a decision which was perverse. The meat of this complaint is that the Judge failed entirely to take into account the value that would be lost to Mr Chug by immediate forfeiture of the Lease which, at the time, still had about six years to run. Depriving Mr Chug of that value was disproportionate given that the breach had not in any meaningful way caused any loss to the Dhaliwals (who had continued to receive rent in spite of it). Refusing relief was really in the nature of punishing Mr Chug for his wrongdoing, which was unfair unless balanced together with other factors; and moreover involved doing so in a manner which allowed the Dhaliwals to make a large windfall – because having forfeited the Lease they were able to enter into a new lease at a higher rent (£80,000 p.a.), and with payment of a premium (£60,000).

Discussion and Conclusions

26. In my judgment, all Grounds of Appeal must be dismissed. I will set out my reasons below. I first set out some general observations about what, in my view, the Judge decided. I will then make some specific points arising from the individual Grounds of Appeal.

What the Judge Decided

27. In my judgment, the Judge made some critical findings which mean that none of the Grounds of Appeal can succeed.

28. The first key point is that he accepted Mr Dhaliwal's evidence that in the period between 9 and 20 July 2019, he and Mr Chug reached an agreement, the effect of which was that Mr Chug would accept forfeiture of the Lease and relinquish any further interest in the Property in return for Mr Dhaliwal agreeing not to pursue him for dilapidations.

29. The Judge was perfectly entitled to make that finding. It was supported by the uncontested evidence of Mr Dhaliwal. Mr Chug in his oral evidence said nothing about it. The Judge in any event found Mr Chug an unreliable witness, who like Mr Dhawan was " *... prepared to say whatever [he] considered necessary to secure a positive outcome*" (see at [17]).

30. In any event, the conclusion is entirely consistent with the other known facts, and helps explain them.

31. For example, it is consistent with the idea that Mr Chug, having sold his "*homewares*" business to Mr Dhawan, had no ongoing interest in the Property, and was happy enough for his own purposes to relinquish the existing Lease if that wiped the slate clean for him and sorted out any remaining problems arising from his informal arrangement with Mr Dhawan. More specifically, he had cleared the arrears of rent. By relinquishing the Lease he could leave it to Mr Dhawan to sort out the terms of his future occupation. His only remaining concern, apparent from his solicitors' letter of 9 July (above at [14]) was a worry about having to put the Property*" ... into a state as it was at the time of the [L]ease*." That problem was sorted by Mr Dhaliwal agreeing there would be no claim for dilapidations. In summary, it makes perfect sense to think that Mr Chug relinquished the Lease on the terms suggested because it dug him out of a hole.

32. The agreement also explains why, in the period after 20 July, at least until October when negotiations with Mr Malhotra broke down, Mr Chug was content to drop out of the picture, except as regards trying to help Mr Dhawan obtain a new lease. He was no longer regarded himself as leaseholder and had no role to play. It further explains why Mr Dhaliwal and Mr Dhawan (and Mr Malhotra) felt able to conduct negotiations for a *new* lease, rather than for an assignment of the old one – that was because, as far as they and everyone else were concerned, Mr Chug and Mr Dhaliwal had agreed the old Lease was at an end. It further explains why Mr Chug during this period, as the Judge specifically noted, made no complaint about the lawfulness of the re-entry effected on 5 July: that was because, whatever the rights and wrongs of it, he had drawn a line under them by the agreement he had made that he would accept the forfeiture and wash his hands of the Property.

33. A corollary of this was the Judge's second key finding, namely that from 20 July 2019 onwards, Mr Dhawan continued in occupation of the Premises as a licensee or tenant at will (above at [17]). That also makes perfect sense in light of the agreement reached between Mr Dhaliwal and Mr Chug. The way was open for Mr Dhaliwal to try and reach a fresh agreement with Mr Dhawan (though Mr Dhaliwal was under no obligation to do so); and in the meantime, to avoid disruption, Mr Dhawan was to continue in

occupation, but on terms that if there was no new lease the occupation would have to come to an end.

34. The overall effect was a fresh start for everyone from about 20 July 2019 onwards. Mr Chug stepped away, and Mr Dhawan was allowed to stay in a holding pattern while an attempt was made to regularise the unauthorised occupation he had maintained for a period of over two years.

35. As I read the Judgment, these basic factual findings are critical to the Judge's analysis of the re-entries effected both on 5 July 2019 and on 12 December 2019.

36. As to the first, his conclusion was that it was lawful anyway (Judgment at [58]), but as I read it, his conclusion at [59] was that, lawful or not, the fact is that by means of his agreement with Mr Dhaliwal, Mr Chug agreed that he would make no further complaint about it as long as Mr Dhaliwal made no complaint against him. He thus washed his hands of the Property and relinquished any further interest in it. Whether or not Mr Chug gave up possession of the Property in the formal sense, there is no doubt that his conduct and that of Mr Dhaliwal was entirely consistent with the idea that they both wished the Lease to terminate. As I interpret the Judgment, that is what the Judge concluded had happened, and I agree.

37. As to the second re-entry, this was justified because after July 2019, Mr Dhawan was only a licensee or a tenant at will; and notice having been given in November 2019 terminating the licence to occupy, Mr Dhaliwal was perfectly entitled to re-enter and take possession again on 12 December 2019, as he duly did.

38. The payments of rent by Mr Chug on 24 October and on 19 November made no difference to this analysis, because as the Judge held, it was done surreptitiously and in "*an attempt to catch out or trap*" the Dhaliwals, by taking them unawares (see at [65]).

39. The implication from these later events is that Mr Chug, who thought he was out of the picture, was forced to re-emerge as a protagonist once the negotiations with Mr Malhotra had broken down, in order to try and salvage something for Mr Dhawan, who had bought his business and was now left facing the prospect of having no premises to operate it from. As the Judge put it in his Judgment at [68.5], Mr Chug's later interest in the Property was really motivated by a desire to try and wind back the clock to 5 July 2019, Mr Chug having realised that the real loser was Mr Dhawan, and that that was at least partly his fault.

40. When pressed on some of these points in submissions during the appeal, Mr Chug's counsel, Mr Modha, said that one could not be so emphatic about the nature of the agreement reached in July 2019 between Mr Dhaliwal and Mr Chug. He said it was equally possible that the nature of the agreement was that Mr Chug would step aside from the Property, but only in order to give Mr Dhawan a chance to try to make his own arrangements; and if that did not happen, then Mr Chug's interest would revive. I admire the ingenuity of this argument, but there are at least two serious problems with it. The first is that the Judge *was* emphatic about the nature of the agreement reached, both in [59] of his Judgment, which I have mentioned above, but also elsewhere, for example at [68.3] where he referred to Mr Chug having "*specifically negotiated his departure from the Property … in July 2019 in exchange for [the Dhaliwals'] not pursuing him for dilapidations*", and at [68.5], when he said, *"[a]ny residual value of*

his legal interest in the Property that might derive from, for example, 1954 Act protection, he negotiated away." The second fatal flaw in Mr Modha's argument is that there is nothing whatever in the evidence of Mr Chug to support it. As already noted, in his evidence, Mr Chug said nothing on the topic of the agreement reached with Mr Dhaliwal. Only Mr Dhaliwal addressed it, and thus the Judge's finding reflected Mr Dhaliwal's uncontested evidence.

41. It seems to me that these points on their own provide a complete answer to the Grounds of Appeal. They must do:

    i) As to Ground 1, any possible complaint about the lawfulness of the re-entry on 5 July was effectively settled by Mr Chug agreeing to accept the forfeiture which had taken place – whether rightly or wrongly – and thus wash his hands of the Property.

    ii) The same logic applies as regards Ground 2, because the same agreement had the effect of overriding any possible complaint about formal deficiencies in the s. 146 Notice. Whether deficient or not, Mr Chug was content (in the Judge's words from para. [59]) to " ... *set aside any further claims in respect of the Property*."

    iii) The same is true of Ground 3, which concerns exercise of the discretion to provide relief against forfeiture: since Mr Chug agreed to accept the forfeiture, he was not thereafter in any position to seek relief from it.

42. For these reasons alone, all of which flow from basic factual findings made by the Judge which have not been challenged, I would dismiss the Appeal.

43. Strictly speaking, that makes it unnecessary for me to go on and deal with the individual Grounds of Appeal. I will, however, do so, since they were the subject of detailed argument, and since certain other points will arise in the course of doing so which are relevant to the analysis above.

Ground (1): Waiver

44. This is the point that any right to forfeit the Lease arising from Mr Dhawan's unlawful occupation was waived by Mr Dhaliwal when he continued to accept rent after coming to realise that Mr Chug was in breach of the alienation covenant. The Judge found that Mr Dhaliwal acquired the relevant knowledge in January 2019. However, Mr Dhawan continued to accept rent in the period January to April. It is accepted that the rental payment made in May 2019, during the 28-day period specified in the s.146 Notice, is irrelevant for waiver purposes; but there was then another payment in June 2019, after the period in the Notice had elapsed but before the re-entry on 5 July.

45. The argument is essentially that if the acceptance of rent was effective (as the judge found at [50.4]) as a waiver of any right to forfeit arising from the December rental shortfall, it must also have been effective as a waiver of any right to forfeit from the unauthorised occupation of the Premises, given that Mr Dhaliwal knew about it.

46. The Judge plainly thought that the right to forfeit arising from Mr Dhawan's occupation was different, however. In addressing his analysis he assumed, but without giving reasons, that there had been no waiver of that right (see at [51]).

47. In my opinion, the Judge was correct to put the breach of the alienation clause in a different category to the failure to pay rent. I do not think it matters that the Judge failed to give reasons, because he was correct as a matter of law. That is because, in the circumstances, the breach of the alienation clause was a *continuing* breach of the Lease, and not (like the failure to pay rent) a one-off breach.

48. The importance of the distinction is explained in Woodfall, Landlord & Tenant, Vol 1, at §7.105. Where there is breach of a covenant which is committed *once and for all*, a waiver of the right to forfeit precludes the landlord from ever forfeiting for that breach. In the case of a *continuing* breach, however, the breach arises afresh every day and will accordingly survive an act of waiver.

49. It is well settled that falling into arrears of rent involves a *once and for all* breach: rent is typically due on a specified payment date, and is either paid or not; and if not, then that is the breach – it is *once and for all* in the sense that the time for performance has come and gone, and the breach has occurred once and once only upon the failure to pay. There is no repetition of the breach the day after.

50. Identifying precisely when the opposite occurs, and there is a *continuing* breach, can be somewhat elusive, but here I am persuaded by Mr Price's submission that the breach of the alienation covenant was a continuing breach. That follows from the nature of the breach.

51. By its terms, cl.3(13)(a) is a promise by the tenant not to do a number of things:

> "*Not to make or suffer any assignment underletting sharing or parting with possession of the whole or any part of the demised premises or suffer any person to occupy the whole or any part of the premises as licensee PROVIDED THAT the consent of the Landlord shall not be unreasonably withheld or delayed to an assignment or underletting at the full rack rental value of the whole or part of the demised premises*."

52. By the conclusion of the hearing before me, Mr Modha's submission was that the arrangement between Mr Chug and Mr Dhawan had involved Mr Chug allowing Mr Dhawan to occupy the premises as licensee. But as Mr Price submitted, even so, that was under an arrangement which was personal to Mr Chug and Mr Dhawan and which did not involve Mr Dhawan obtaining any rights in the Property. It was an informal arrangement which could be terminated by Mr Chug whenever he wanted.

53. I agree with Mr Price that this has the effect of the breach being a continuing one. In my opinion, if a tenant covenants not to suffer anyone else to occupy demised premises as a licensee, but then does so on terms which contemplate that the licence can be terminated at will, then there *is* a *continuing* breach, because each day the tenant suffers the unlawful occupation afresh by choosing not to give notice of termination.

54. Mr Modha submitted that that conclusion mixes up the question of whether the breach is remediable with the question whether it is a *once and for all* breach, but I disagree. Deciding whether there is a once and for all breach, to my mind, involves looking at the character of the obligation in question, and deciding how a breach occurs. If it involves paying rent on a particular day, then the breach is complete – once and for all – if the date comes and goes and the rent is not paid. But if it involves agreeing not to suffer someone else's occupation without the landlord's consent, it seems to me that there is a new breach each day when the unlawful occupation is tolerated by the tenant choosing not to do anything about it.

55. Although they were *obiter*, I think this conclusion is consistent with certain comments made by Mummery LJ in Seahive Investments Ltd v. Osibanjo [2008] EWCA Civ. 1282, [2009] 1 EGLR 32, at [25], where he assumed that breach of a covenant not to part with possession would be an example of a continuing breach, which would provide a recurring cause for forfeiture.

56. For all those reasons, I reject Ground 1.

Ground (2): Validity of the s.146 Notice

57. Had it been necessary to the outcome of the appeal, I would likewise have rejected Ground 2.

58. The basic objection taken here is that the s.146 Notice did not specify, as section 146 requires, that the breach of the alienation clause was to be remedied.

59. To begin with, I think that is a correct reading of section 146 itself: under s. 146(1), a right of re-entry or forfeiture is not enforceable unless a landlord serves a notice on a lessee (my emphasis added):

> *" … (a) specifying the particular breach complained of;*
>
> *(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and*
>
> *(c) in any case, requiring the lessee to make compensation in money for the breach.*"

60. Here the Notice, having set out the text of cl. 3(13)(a) (the covenant against alienation) and asserted breach of it, together with (at that stage) similar allegations of breach concerning the shortfall in rent and the alterations made to the Property, then continued as follows at paras 4 and 5 (again, my emphasis added):

> "*4. You are required to pay compensation in money for the breaches listed above. You are required also to pay all costs, fees, charges, disbursements and expenses incurred by the Landlord and the VAT payable by it in relation to or incidental to the preparation and service of this notice pursuant to Clause 14.1 of the Lease. You are therefore required to pay costs of £350 plus VAT.*

> *5. If you fail to comply with this notice within 28 days the Landlord reserves the right to re-enter the Premises pursuant to Clause 456.1(b) of the Lease and claim damages for the above breaches of covenant.*"

61. For Mr Chug, Mr Modha argued that these provisions were inadequate in terms of requiring Mr Chug to remedy the breach arising from Mr Dhawan's unlawful occupation because they did not in terms require him to remedy the breach, only "*pay compensation in money*."

62. During argument, Mr Modha also developed a further point. He accepted that this was entirely new, and had not formed part of his Appellant's Notice, but sought permission to rely on it anyway, because it was effectively a response to certain points made by Mr Price in his Skeleton but not prefigured in any Respondent's Notice. Mr Modha sought to argue that there were also deficiencies in the earlier part of the Notice (para. 2) which set out the details of breach of the alienation covenant. Mr Modha said the details given were inaccurate in light of how Mr Dhaliwal now put his case, because in doing so Mr Dhaliwal adopted the Judge's finding that the original agreement between Mr Chug and Mr Dhawan was an informal, personal arrangement in the nature of a licence, whereas the Notice characterised it as a *sub-lease* in favour of Mr Dhawan's company, The Essential Homewares Limited. The Notice said as follows (emphasis added):

> "*2.1 You are in breach of the above covenants [i.e. cl. 3(13)(a) as set out above]*
>
> *2.2 Without the consent of the Landlord you have let the premises to Essential Homeware Limited and or Mr Kamal Ahmed*."

63. Taking these points in turn, my conclusions are as follows.

64. To start with, although initially attracted by Mr Modhi's first submission that the Notice did not sufficiently require Mr Chug to remedy the breach, I have concluded that I should reject it. I do not find the point a straightforward one, mainly because the reference to the payment of compensation in money might be thought to suggest that Mr Dhaliwal was content to put up with the ongoing breach as long as he was compensated for it. Nonetheless, as Mr Price submitted, the law requires the Notice to be construed objectively, and the essential question is how it would be understood by a reasonable recipient taking into account the "*relevant objective contextual scene*" (as Lord Steyn put it in Mannai v. Eagle Star Life Assurance Co. Ltd [1997] AC 749 at p. 767G-H).

65. Here, I consider that a reasonable person in the position of Mr Chug would have understood the Notice to be asking him to regularise the irregular occupation of the Premises which had, by the time of receipt of the Notice, subsisted for a period of over two years. The reasonable person would have understood they were being told now to formalise the informal and indeed secret arrangement with Mr Dhawan which had enabled him to occupy the Premises without any sub-lease or any consent from the landlord. I think it too narrow and too lawyerly a construction to think that the reasonable person would have thought the Notice confined to a claim for compensation. I think Mr Price is correct to say that to the reasonable reader possessed of the relevant background knowledge, the injunction in para. 5 ("*If you fail to comply with this notice*

within 28 days …") would have conveyed a sufficient sense that they were being asked to remedy the breaches identified earlier in para. 2.

66. The Judge took this view of the Notice, and I agree with him. Mr Modha sought to criticise his reasoning on the basis that it relied too heavily on his conclusion about what Mr Chug subjectively thought was meant by the Notice – the Judge having stated at [56] that Mr Chug "*knew perfectly well what was required of him.*" Again, however, I reject that point. It seems to me entirely clear that the Judge was asking himself the correct legal question, because he said so in terms, including at the beginning of para. [56] where he said, "*I have reminded myself that objectivity is the order of the day when it comes to construing s. 146 Notices*." I do not think he was abandoning that correct legal analysis in commenting on what Mr Chug subjectively understood. He was merely making the observation that Mr Chug's understanding was a useful indication of what a reasonable person in his position was likely to think. I do not see that as having led the Judge into error. It is only another way of saying that sometimes the proof of the pudding is in the eating. So it was in this case.

67. As to Mr Modha's further point, about the inaccuracy of the s. 146 Notice referring to a sub-lease of the Premises, and not occupation under a licence as the Judge found, I am content to allow Mr Modha to run that point despite it not having featured either in his Appellant's Notice or Skeleton, but I reject it. Again, I think this is really a matter of construction of the Notice, and how it would have been understood by the reasonable recipient in the position of Mr Chug, in light of the relevant background. That background involved Mr Chug having knowledge of the precise arrangement he had entered into with Mr Dhawan, but Mr Dhaliwal not having such knowledge because, as the Judge found, Mr Chug had kept it secret from him. In such circumstances, I do not myself consider that Mr Chug should be able to take a formal point about Mr Dhaliwal's description of the precise nature of that arrangement being inaccurate. Mr Dhaliwal was taking a stab in the dark, but he had to, because Mr Chug had kept him in the dark. In context, though, and as far as the reasonable person in the position of Mr Chug was concerned, the nature of the breach alleged was sufficiently clear: it was that the informal and irregular arrangement entered into with Mr Dhawan as to occupation of the Premises either had to stop or be regularised. To put it another way, I consider that in context, the Notice did enough to specify " *… the particular breach complained of*" (see s.146(1)(a)). Mr Dhaliwal had done what he could to describe it; and a reasonable person in the position of Mr Chug, who had *all* the available information, would easily have been able to fill in the gaps (and Mr Chug in fact did so).

68. For all those reasons, I would also reject Ground 2.

Ground (3): Relief from Forfeiture - Discretion

69. This is the argument that the Judge failed to balance all relevant factors, and so reached a decision outside the generous ambit allowed to decision makers who exercise a discretion.

70. On this point, I agree there is something of an apparent inconsistency in the Judge's reasoning, because having reached the view earlier in his Judgment that Mr Chug had agreed to accept the forfeiture, the Judge could simply have said that Mr Chug was in no position thereafter to seek relief from forfeiture. Instead, at paras [66]-[69] of his

Judgment, the Judge conducted an analysis which involved asking whether or not to grant relief from forfeiture.

71. On reflection, however, it seems to me this is a somewhat hollow criticism of the Judge's reasoning, because the essential reason he gave for refusing relief was that Mr Chug had agreed to relinquish any interest in the Property. As a matter of form, that is not the same as him saying that Mr Chug had no right to seek relief from forfeiture, but in substance the Judge arrived at the same position. Indeed, it seems to me that is just the source of the assertion now made by Mr Chug that the Judge ignored other, potentially relevant factors: my reading of it is that the Judge focussed on the overriding factor which he thought was bound to be determinative, namely that Mr Chug had given up any remaining interest in the Property when he reached his agreement with Mr Dhaliwal in July 2019.

72. I think this analysis is borne out by a fair reading of para. [68] of the Judgment. This is where the Judge set out his conclusion. He said that in his view there were a number of factors which were " ... *decisive in the balance against granting [Mr Chug] relief from forfeiture*." It is true that the first two matters at [68.1] and [68.2] were not directly concerned with Mr Chug's July 2019 agreement with Mr Dhaliwal – they were Mr Chug's general lack of transparency in his dealings with Mr Dhaliwal, as exemplified by the secret arrangement under which Mr Dhawan was allowed to occupy the Property without permission. As it seems to me, however, the Judge's remaining points *were* concerned with the July 2019 agreement with Mr Dhaliwal, and its entirely terminal effect on any possibility of Mr Chug thereafter seeking relief from forfeiture. I have mentioned some of them already, but they were as follows:

i) At [68.3], the Judge referred expressly to the July 2019 agreement as resulting in Mr Chug's departure from the Property in exchange for the Dhaliwals dropping any claim against him for dilapidations.

ii) At [68.4], he referred to Mr Chug thereafter having raised no objection to the s.146 Notice until after the negotiations with Mr Malhotra came to an end, which was consistent with the idea that Mr Chug had stepped away from the Property in July, and that his later interest was an artifice.

iii) At [68.5] the Judge made a similar point, that what Mr Chug was now trying to do was to wind the clock back to 5 July and thus ignore the effect of his later agreement.

iv) At [68.6] the Judge said in terms: "*In plain language, by mid-July 2019 [Mr Chug] wanted rid of the Property and behaved accordingly thereafter until late autumn*."

v) At [68.7] the Judge said that Mr Chug's delay until January 2020 in even intimating any intention to seek relief from forfeiture was telling against him: which I take to mean, was consistent with the idea of him having reached an agreement with Mr Dhaliwal the previous July which was fatal to any question of his being entitled to relief.

vi) Para. [68.8] was the Judge's overall conclusion: "*It is just, fair and proportionate to let matters lie as they have fallen*."

73. In summary, my opinion is that there is an inconsistency in the Judge's approach at the level of formality. It would have been better had he said that in light of his factual findings, the question of relief from forfeiture did not arise. But the point is one of form not substance, because as I see it, the substance of the Judge's reasoning was that there was no question of relief being granted since, quite apart from anything else, the July 2019 agreement precluded it.

74. I prefer to state my own conclusion on the former basis, but even if the question is approached as the Judge approached it, I see no proper basis for interfering with his decision. For one thing, it seems to me that the Judge correctly identified the one factor which, whatever else was in the mix, was always going to be terminal to any application for relief from sanction – i.e., the July 2019 agreement. For another, I am not in any event persuaded that the Judge wholly ignored other, possible factors in his Judgment. In particular, the fact that the new lease entered into by the Dhaliwals was at a higher rent, and had been granted at a premium, was specifically noted by the Judge a little earlier in his Judgment at para. [63]. As to the value of the original Lease to Mr Chug, I think the Judge certainly had this in mind in carrying out his discretionary analysis in para. [68] because he said so expressly in para. [68.5], but he thought that on the facts any such "*residual value*" was nil, because Mr Chug had negotiated it away by means of the July 2019 agreement.

Overall Conclusion and Disposition

75. For all the above reasons, the Appeal must be dismissed.