B2/2005/0407,
Neutral Citation Number: [2005] EWCA Civ 1296

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON
CIVIL JUSTICE CENTRE
His Honour Judge Dean QC
CHY04339

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 2nd November, 2005

B e f o r e:

LORD JUSTICE MUMMERY
AND
LORD JUSTICE NEUBERGER

– – – – – – –

HUSEYIN AKICI

Appellant

– v –

L R BUTLIN LIMITED

Respondent

– – – – – – – – –

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Simon Butler and Mr Ali Sinai (instructed by Messrs J Garrard & Allen) for the Appellant
Mr Stephen Lloyd (instructed by Messrs Clifford Watts Compton) for the Respondent

J U D G M E N T
As Approved by the Court

Lord Justice Neuberger :

1. This is an appeal brought by Mr. Huseyn Akici against a decision of His Honour Judge Michael Dean QC, sitting in the Central London County Court on 17th February 2005. In a full and careful judgment, the Judge decided (a) that Mr. Akici's landlord, L R Butlin Ltd ("Butlins") had validly forfeited his lease dated 6th August 1997 ("the lease") of unit 4, 16−18 High Street, Olney, Buckinghamshire ("the premises"), and (b) that Mr. Akici should be refused relief from forfeiture. With the permission of the Judge, Mr Akici appeals against both parts of the decision.

The basic facts

2. The lease was granted by Butlins' predecessors in title to Mr. Akici's predecessor in title. It was for a term expiring on 8th December 2011. Butlins acquired the reversion on 12th October 1999, and the lease was subsequently assigned to Mr. Akici on 5th August 2002.

3. The lease contained a number of covenants on the part of the lessee, of which the only directly relevant one is clause 4.18, which contains comprehensive provisions relating to alienation. The Clause included the following provisions:

> "4.18.1 Not to charge assign equitably assign underlet or part with possession of a part of the demised premises nor to hold the whole or any part of the demised premises on trust for another nor to share possession of the whole or any part of the demised premises nor to part with possession of the whole of the demised premises (except as hereinafter permitted) all of which are expressly prohibited.
>
> ×
>
> 4.18.7 Not in any event to assign or underlet the whole or any part of the demised premises without the written license of the lessors first had and obtained which consent shall not be unreasonably withheld or delayed×"

4. The lease also contained a proviso for forfeiture in familiar form, whereby the lessors were entitled to re−enter on to the premises in the event of the lessee being in breach of covenant.

5. Four days after the lease was assigned to Mr. Akici, the two issued shares in a company called Deka Ltd ("the company") were acquired by a Mr. Gultekin who also became the sole director of the company. The company first filed accounts on 28th May 2004, and those filed accounts recorded Mr. Gultekin as the sole shareholder and director of the company. From very shortly after the lease was assigned to Mr. Akici,

the company started trading from the premises, in the business of preparing and selling takeaway pizzas. That situation effectively continued until 25th August 2004.

6. During the early months of 2004, Mr. Akici complained of nuisance from building works being carried out by Butlins on neighbouring property, and this led to correspondence between the parties' respective solicitors. In the course of that correspondence, Mr. Akici's solicitors referred to the fact that they were acting for the company as well as Mr. Akici, which prompted Butlins' solicitors to enquire as to the status of the company in the premises. No satisfactory answer was received. Butlins' solicitors then served a notice on Mr. Akici on 28th June 2004 pursuant to section 146 of the Law of Property Act 1925 ("section 146").

7. This notice ("the section 146 notice") contained seven paragraphs. Paragraph 1 identified the lease and stated that Butlins were the lessors. Paragraph 2 set out clause 4.18.1 of the lease in full, and that part of clause 4.18.7 which I have quoted above. Paragraph 3 of the section 146 notice was in these terms:

> "This covenant has been broken and the particular breach complained of is the assignment or alternatively subletting or alternatively parting with possession of the premises without the landlord's consent. You have assigned, sublet or parted with possession to Deka Ltd."

8. Paragraphs 4 and 5 of the notice alleged breaches of other covenants in the lease, which are not relevant for present purposes. Paragraph 6 required Mr. Akici to pay compensation for the breaches and to reimburse Butlins all expenses. Paragraph 7 stated:

> "Insofar as the aforesaid breach is not remedied the Landlord shall exercise right of re−entry contained in the lease and will forfeit the lease 14 days after service of this notice or after such other period as shall be held to represent a reasonable period for remedying the breach of covenant."

9. During the ensuing weeks there was correspondence between the two solicitors, in which it was consistently maintained on behalf of Mr. Akici that he had not committed any breaches of clause 4.18 of the lease ("clause 4.18"). The position taken on behalf of Mr. Akici by his solicitors was that he had formed, and was a director of, the company, and that Mr. Gultekin was an employee of the company who had no "equitable interest in the business".

10. However, by early August, by when it had been made clear more than once by Butlins' solicitors that they did not accept his case, Mr. Akici's solicitors admitted that the facts were not as they had stated, and explained that Mr. Akici was in the process of becoming the sole director of the company. That was duly achieved on 10th August 2004, when he replaced Mr Gultekin as the company's sole director. At the same time, all the shares in the company were also transferred to Mr. Akici. The fact that

Mr. Akici had become a director of the company was relayed to Butlins' solicitors on 12th August, but they were not told that Mr. Akici had become a shareholder in the company for the first time.

11. The precise arrangement between Mr. Akici, Mr. Gultekin and the Company, at least until 10th August 2004, was a matter which the Judge found difficult to determine. This is not surprising. In the correspondence up to 10th August, it had been stoutly, but wrongly, maintained on behalf of Mr. Akici that he was the sole director and shareholder of the company. The truth was that it was Mr. Gultekin who was the sole shareholder and director until 10th August 2004, when the position changed as I have explained.

12. The oral evidence given by Mr. Akici and Mr. Gultekin was, in the Judge's justified view, inconsistent, unreliable, and hard to understand. In those circumstances, he found it particularly difficult to assess what had really been agreed between Mr. Akici and Mr. Gultekin up to 10th August. He concluded that the position apparently revealed by the formal records up to 10th August 2004, namely that the company was owned and controlled by Mr. Gultekin and Mr. Akici had no involvement in it, was inaccurate, and intentionally so. That was, the Judge thought, at least partly for dishonest reasons. If Mr. Akici had been in control of the company, whether directly or indirectly, it would have been a close company with undesirable tax consequences for Mr. Akici. It was also probably attributable to Mr Akici's aim to evade VAT.

13. On 25th August 2004, after the company's employees had left for the night, Butlins peaceably re−entered the premises and changed the locks. On 27th August, the instant proceedings were issued, and an application was made on behalf of Mr. Akici to the Northampton County Court, seeking interim readmission to the premises. The proceedings were transferred to the Central London County Court, where they were heard by Judge Dean, who received evidence from a number of people, including Mr. Akici and Mr. Lester, one of the two directors of Butlins.

14. In his judgment, Judge Dean decided that:

i) There had been no assignment, subletting or parting with possession of the premises by Mr. Akici to the company;

ii) Mr. Akici had shared occupation of the premises with the company, and that represented a breach of the covenant against the sharing of possession;

iii) Although the section 146 notice did not specify sharing of possession as a breach of covenant, it was nonetheless open to Butlins to rely on that notice to justify its re−entry;

iv) If the breach had been capable of remedy, the Judge would have held that it had been remedied when Mr. Akici acquired ownership and control of the company;

v) However, the breach was incapable of remedy, and therefore the landlord's re−entry was effective to forfeit the lease;

vi) Primarily as a result of the inaccuracies perpetrated by Mr. Akici through his solicitors in correspondence, relief from forfeiture should be refused.

15. Mr. Akici contends that the Judge was wrong in holding that there was a breach of covenant, that, if there was such a breach, the breach was adequately specified in the section 146 notice, that any breach was incapable of remedy, and that, if the forfeiture was valid, relief from forfeiture should be refused. By way of cross−appeal, Butlins argue that the Judge was wrong to hold that there was no parting with possession within clause 4.18, and that, if any breach committed by Mr. Akici was capable of remedy, the breach had been remedied.

16. I propose to deal with the issues in the following order:

i) The meaning of clause 4.18.1 insofar as it precludes parting with possession or sharing possession;

ii) Whether Mr Akici was in breach of contract;

iii) Whether the section 146 notice was valid;

iv) Whether the breach was capable of remedy;

v) Whether the breach was remedied;

vi) Whether the Judge was right to refuse relief from forfeiture.

The covenants against parting with, and sharing, possession

17. The central questions are the extent and meaning of the covenants in clause 4.18.1 of the lease not to "part with possession" of part of the premises, not to "share possession" of the whole or any part of the premises, and not to "part [with] possession" of the whole of the premises without consent.

18. The Judge held that Mr. Akici could not have broken the covenant against parting with possession by his arrangement with the company, unless the arrangement had "wholly oust[ed] him from legal possession" of the premises and that "nothing short of a complete exclusion of [Mr. Akici] from the legal possession for all purposes amounts to a parting of possession". In this connection, he was purporting to apply the reasoning in a number of cases, culminating with, and considered and applied by, the decision of the Privy Council in *Lam Kee Ying Sdn. Bhd. -v− Lam Shes Tong* [1975] AC 247 at 255F−256C. As was stated by the Privy Council in that case at 256B:

> "A covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises."

19. However, insofar as clause 4.18 precluded sharing possession, the Judge held that "possession" was not to be given the strict legal meaning which it was given in the covenant against parting with possession, and that it should be construed as referring to sharing occupation. In that connection, he was following the decision of Sir Douglas Frank QC sitting as a Deputy High Court Judge, in *Tulapam Properties Limited -v− De Almeida* [1981] 2 EGLR 55.

20. In *Tulapam* , the lessee had covenanted not to part with or share possession, but had been sharing occupation, but not possession. At 56A, Sir Douglas Frank said this:

> "In a strict legal sense the word "possession" has a highly technical meaning, and the sharing of possession is an unknown concept. It has been said that a possession is single and indivisible. So when you get what might be termed a sharing of possession, the two sharers become one, as, say, joint tenants and one is back to the original concept. But "possession" also has a broader popular meaning, and it means the sharing of the use or occupation."

21. He then went on to hold that, rather than giving the word "possession" in the covenant its strict legal meaning, with the result that the covenant against sharing possession would have no effect, it would be right to construe the covenant as precluding the sharing of occupation.

22. For Butlins, Mr. Lloyd contends primarily that the Judge in this case was right to construe "possession" in its strict legal sense in the covenant against parting with possession (following *Lam Kee Ying*), but in a looser sense, namely as meaning occupation, in the covenant against sharing possession (following *Tulapam*). Alternatively, he contends that the word "possession" should be treated as meaning occupation in both parts of the covenant. For Mr. Akici it is contended by Mr. Butler that "possession" should be given its strict legal meaning in both covenants.

23. The difference between possession and occupation is rather technical, and, even to those experienced in property law, often rather elusive and hard to grasp. Nonetheless, it is very well established, and is particularly important, and indeed well known, in the field of landlord and tenant law, especially in relation to the question of whether an agreement creates a tenancy or a licence, and in relation to alienation covenants such as clause 4.18.

24. While interpretation of a word or phrase in a document must ultimately depend upon the documentary and factual circumstances in which it was agreed, it is desirable that the courts are as consistent as they properly can be when construing standard phrases in standard contexts. In that connection, a covenant against parting with possession is included in many, quite possibly most, modern commercial leases. Further the Courts have consistently given the strict meaning to such covenants as was adopted in unreserved terms by the Privy Council in *Lam Kee Ying* , and in the five cases therein referred to at 255H to 256B.

25. Accordingly, while one cannot lay down any immutable rule as to how a particular word or expression is to be construed in every document or lease, I consider that any court must be very cautious before construing the word "possession" as extending to occupation which does not amount to possession, especially in a familiarly expressed covenant against parting with possession in a detailed professionally drafted commercial lease, such as that in the present case.

26. In these circumstances, I consider that it would require a very strong and clear case before a covenant against parting with possession should be construed in any way other than that adopted by the Privy Council in *Lam Kee Ying* , particularly in the light of the consistent approach taken in the earlier authorities cited therein. In agreement with Judge Dean, therefore, I would hold that the covenant against parting with possession of the whole or part of the premises in the present case should be given its normal, and technically legally correct, meaning, unless there is any good reason to construe it in some other way.

27. I turn to the covenant against sharing possession. On the face of it, one would expect the word "possession" to have the same meaning each time it appears in clause 4.18, particularly in light of the fact that it is a word which is familiar, especially in the context of leases, to lawyers. The only reason for not giving the word "possession" its normal technical meaning in a covenant against sharing possession appears to be that identified by Sir Douglas Frank, namely that possession is, as it were, unitary and cannot be shared.

28. I do not accept that possession cannot be shared. It seems to me that, as a matter of principle, it would have been open to Mr. Akici to share possession of the premises in this case with the company, or indeed with Mr. Gultekin. I accept that, as stated by Sir Douglas Frank, possession in those circumstances would be joint, and, in a sense, therefore unitary. However, it seems to me that, as a matter of ordinary language, a lessee who lets another person into possession of the demised premises, so that they are both in possession, can properly be said to "share" possession with that other

person. Joint owners can be said to enjoy "shared" ownership. Indeed, I note that both section 34 of the Law of Property Act 1925 and section 36 of the Settled Land Act 1925, which are concerned with joint ownership of land, refer to the land being owned in "undivided *shares* ".

29. In consequence, I do not agree with Sir Douglas Frank that to give the word "possession" its usual meaning in the context of the phrase "sharing possession" deprives the covenant of any legal effect. It has a real effect, namely to prevent the conversion of a tenancy to a single lessee into what, in practical terms, will amount to a joint tenancy.

30. It may be said that this conclusion will result in a covenant against sharing possession having relatively little value. The answer to that point may be said to be same as that given in *Lam Kee Ying* at 256C, namely that "the words of the covenant must be strictly construed, since if the covenant is broken a forfeiture may result". That approach may well be a little less powerful than it was 30 years ago, on the basis that such canons of construction are now given rather less weight. Nonetheless, the modern approach, namely that such covenants should be given what is, in their documentary, factual and commercial context, their natural and commercially sensible meaning, indicates, in my judgment, the same result. Further, I do not think one should lean in favour of giving a wide meaning to an absolute covenant (i.e. one which is not subject to a proviso that consent cannot be unreasonably withheld).

31. Another reason for giving "possession" the same meaning in the covenant against parting with possession and the covenant against sharing possession was identified by Mr. Lloyd in the course of his submissions. If, as the Judge thought, clause 4.18 forbids parting with possession of the whole or part of the premises and sharing occupation of the whole or part of the premises, it means that the lessee is not precluded from parting with occupation (as opposed to possession) of the whole or part of the premises. Given that he is not permitted to share occupation of the whole or part, that would be a rather odd result. As Mr. Lloyd submits, that is a factor that suggests that "possession" should either, as he contends, be given the meaning of "occupation" throughout clause 4.18 or, as I prefer, its natural technical meaning throughout the clause.

32. A further reason why it seems to me that it would be inappropriate to construe a covenant against sharing possession in a full and carefully drafted commercial lease as extending to sharing occupation is because many leases do contain covenants against parting with possession or occupation and/or covenants against sharing possession or occupation, as opposed to possession only. Indeed, as the facts in *Jackson -v− Simons* [1923] 1 Ch. 373 at 374 show, even as long ago as 1906 commercial leases were being drafted with covenants by the lessee not to "part with or share the possession or occupation [of the demised premises] or of any part thereof".

33. I also note that in *Jackson* at 380, Romer J, in a reserved judgment, found that the lessee had "retained the legal possession of the whole of the premises" and therefore

had not committed any "breach of covenant against parting with possession". However, he went on to say that what the lessee had done "amounted to a sharing of the possession of part of the demised premises". This was, it should be added, in the context of a covenant which also precluded sharing of occupation. It therefore appears that that experienced Judge had no difficulty with the notion of sharing possession, because he would otherwise have found that there had been a sharing of occupation.

34. In my judgment, therefore, the reasoning in *Tulapam* was simply wrong on this point, because the whole basis upon which Sir Douglas Frank considered that he was justified in not giving "possession" its normal meaning was flawed.

35. For what it is worth, in this case the conclusion that the word "possession" in clause 4.18 should not be given the same meaning as "occupation" derives a little support from the fact that there is reference to occupation elsewhere in the lease (namely in the covenant restricting the user of the premises and the proviso providing for an abatement of the rent in the event of damage by an insured risk). That is a makeweight point, but it certainly does not detract from the conclusion that "possession" should be given its natural, if technical, meaning when it appears in clause 4.18.

36. In these circumstances, I conclude that there would only have been a breach of clause 4.18 in the present case if Mr. Akici had parted with possession, or shared possession, of the whole or part of the premises, and that there would have been no breach of covenant if he had merely shared occupation of the whole or part of the premises.

Was there a breach of clause 4.18 of the lease?

37. In *Lam Kee Ying* at 256B−C the Privy Council stated that:

> "A covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises."

38. As they went on to explain, earlier decisions, such as *Jackson* and *Chaplin -v− Smith* [1926] 1 K.B. 198, a decision of this court, show that it is perfectly possible for a lessee to permit a company, in which he has an interest, to occupy the demised premises for the purpose of its business, without parting with possession of those premises to that company. Of course, as the Privy Council made clear in *Lam Kee Ying* at 256E−F, the question whether the lessee in such a case had parted with possession "must depend upon all the facts and circumstances of the × case".

39. The distinction between possession and occupation is, as mentioned, somewhat elusive and not entirely easy to define. Nonetheless, where the person prima facie entitled to possession, in this case Mr. Akici, is alleged to have parted with possession

to an entity which is admittedly in occupation, the ultimate question is whether he has effectively ceded possession to that other entity.

40. In this case, the Judge said that the following facts were relevant. All "the business invoices in relation to stock and the provision of utility services" were addressed to Mr. Akici and not to the company or Mr. Gultekin. Both Mr. Akici and Mr Gultekin "could enter the place whenever he wanted." For that purpose Mr. Akici retained a key, and he visited the premises "for a minimum at least every two weeks to oversee the business".

41. While the takeaway pizza business was owned and managed by the company, which appeared to be run effectively by Mr. Gultekin, the Judge concluded that there had been no parting with possession. Apart from the facts already mentioned, he considered that, as "an experienced businessman", Mr. Akici would have been unlikely "to have divested himself of all control of the premises".

42. Mr. Lloyd submitted that, on this evidence, the Judge was wrong in concluding that there had been no parting with possession. However, I consider that it was a decision to which the Judge was plainly entitled to come. Indeed, it seems to me that, in light of the findings and inferences of fact he made, no other conclusion would have been permissible in the light of the law as explained in *Lam Kee Ying* . In view of the stringency of the test which has to be satisfied to establish that a lessee has parted with possession, it appears to me that the Judge was right to conclude that Mr. Akici had not parted with possession of the premises to the company.

43. The potentially more difficult question is whether Mr. Akici had shared possession of the premises with the company. The Judge held, indeed it was conceded on behalf of Mr Akici, that he had done so, albeit on the basis that the covenant against sharing possession should be construed as precluding the sharing of occupation.

44. However, given that the covenant against sharing possession is to be construed as precluding the sharing of possession in its normal, and strict legal, sense, rather than the sharing of occupation, the analysis could become a little more difficult. The question would boil down to this: Did Mr. Akici retain possession in himself alone and merely permit the company to occupy the premises, or did the company share possession with Mr. Akici? If the former, then there was no sharing of possession; if the latter, there was.

45. It is in relation to this issue that the somewhat elusive nature of the distinction between possession and occupation becomes particularly pronounced. However, not least because Mr Akici's concession that he had shared possession with the company has never been withdrawn, I consider that it would be wrong to conclude that he had not done so. Indeed, I take the view that, on the facts found by the Judge in this case, he would have been entitled to conclude that there was a sharing of possession.

46. The fact that the company was not directed or owned by Mr Akici, at least until 10th August, and the degree to which the company exercised control over the premises was such, in my view, as to entitle the Judge to conclude that the company enjoyed a degree of control over the premises which amounted to its having possession (albeit non−exclusive). The company, which was owned and controlled by Mr Gultekin, owned and ran a business, which was effectively the only active purpose for which the premises were used, and the business was relatively an intensive one, involving employees, all of whom were employed by the company. It is clear that at least one employee of the company, Mr. Gultekin, had keys to the premises which were routinely used for the purpose of locking up (and opening) the premises virtually all the time (save on the relatively rare, twice a month, occasions when Mr. Akici visited the premises). The company paid the rent for the premises direct to the landlord (a factor thought to be of relevance in *Lam Kee Ying* at 256G) and reimbursed Mr Akici in respect of other outgoings. Furthermore, at least until 10th August 2004, the Judge was satisfied that the business being conducted by the company was "for the principal benefit of Mr. Gultekin", although he had "little doubt that there was something of value to Mr. Akici in this arrangement".

47. As the Privy Council emphasised, the question whether there has been a parting with possession in any particular case "must depend on all the facts and circumstances" of that case. So, too, on the issue of whether there has been a sharing of possession. In my judgment, looking at all the facts in this case, there was evidence upon which a Judge, properly directing himself, could have concluded that Mr Akici had shared possession of the premises with the company.

Was the section 146 Notice valid?

48. As explained above, the Judge found, rightly in my view that Mr. Akici had not parted with possession of the premises to the company, but that he had shared possession of the premises with the company. However, the Section 146 Notice upon which Butlins relied alleged that the particular breach complained of was assigning, underletting or parting with possession of the premises. There was no express allegation of sharing possession.

49. Section 146(1) of the Law of Property Act 1925 provides:

> "(1) A right of re−entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice -
>
> (a) Specifying the particular breach complained of; and
>
> (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;

> and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

50. The simple point made on behalf of Mr. Akici is that the section 146 notice in the present case does not "specify × the particular breach complained of", in that the only breach (or at least the only relevant breach) which has been established against him is sharing possession, whereas the notice specifies assigning, subletting or parting with possession.

51. As I understand it, while he would have accepted that argument if he had been construing the notice simply by reference to its terms and the nature of the breach, the Judge considered that, once one construed the notice in the context of the correspondence passing between the parties, it did specify, or at least should be read as if it specified, sharing possession as a breach.

52. 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 breach complained of, which is 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. Although included in the clause of the lease which was quoted, it was excluded from the list of breaches complained of. To put the point 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. In this connection it is not irrelevant that an alienation provision such as clause 4.18.1 is, when properly analysed, in fact a series of separate covenants wrapped up together in a single clause: see *Jackson* at 383 per Romer J and *Marks -v− Warren* [1979] 1 All ER 29 at 31a per Browne−Wilkinson J.

53. I was at one time attracted by Mr. Lloyd's point that this objection to the notice is unduly technical, because it would have been clear to the reasonable recipient that what was being complained of was the presence of the company on the premises. In those circumstances, it was argued, the notice made clear the nature of the lessors' complaint, and, insofar as the breach was capable of remedy, it also made it clear what the lessee had to do to put matters right. In that connection, Mr Lloyd relied on the approach to the construction of contractual notices under leases adopted by the majority of the House of Lords in *Mannai Investments Limited -v− Eagle Star Assurance Company Limited* [1997] AC 749.

54. I accept the submission that the approach of the majority of the House of Lords in *Mannai* to contractual notices would 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 of the notice cannot stand. Even applying *Mannai* , 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 *Mannai* can save it.

55. Quite apart from this, if, on its true construction, the section 146 notice did not specify sharing 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 of possession (or assigning or underletting) by Mr. Akici to it.

56. Accordingly, a reasonable recipient in this case (and it is the understanding of such a hypothetical person by reference to which the validity of the notice is to be assessed according to *Mannai*) could, to put it at its lowest, reasonably have taken the view that the lessors were not objecting to any sharing of possession, and consequently that no steps need to be taken, either with a view to remedying the breach or with a view to improving the prospects of obtaining relief from forfeiture.

57. We were referred to authorities relating to the validity of notices served under section 146 Act and its statutory predecessor. I do not consider that they provide much assistance on the point that we have to determine in the present case. It is, however, appropriate to mention the decision of the House of Lords in *Fox -v− Jolly* [1916] AC 1, where the last sentence of the speech of Lord Parmoor at page 23 appears to me to encapsulate the proper approach to section 146 notices and, it may be said, to notices generally:

> "I think that the notice should be construed as a whole in a common−sense way, and that no lessee could have any reasonable doubt as to the particular breaches which are specified."

58. In this case, I think it is impossible to say that no lessee would have been in any doubt but that the lessors were not contending that he was sharing possession of the premises

59. Despite the Judge's apparent reliance on the contemporaneous correspondence as assisting his conclusion that the section 146 notice was valid, Mr. Lloyd did not place much emphasis on that correspondence, and in that, in my view, he was correct. Although the section 146 notice must obviously be construed in the context of the correspondence which preceded it, it does not appear to me that that correspondence takes matters any further. All that happened was that Butlins' solicitors had asked about the status of the company in the premises, and had not received a reply.

60. If, which I doubt, the correspondence after the section 146 notice could be taken into account, it does not help either. It merely shows that Mr. Akici, through his solicitors, was maintaining that there was no breach of any part of clause 4.18 of the lease, relying in part on untruthful statements, and Butlins, through their solicitors, were maintaining that there was such a breach. That does not seem to me to help establish the validity of the section 146 notice.

61. In one letter, it is fair to say, Mr Akici's solicitors went through each part of clause 4.18.1, including the covenant against sharing possession, and stated that there was no breach of any covenant in that clause. I do not accept that this shows that Mr Akici or his solicitors thought that the section 146 notice specified sharing possession as a breach. The letter is at least equally consistent with Mr Akici wishing to avoid any allegation of further breaches. In any event, although the actual recipient's understanding of, or reaction to, a notice may be of assistance to a court interpreting the notice, I do not think it could assist Butlins in this case. There is no question of ambiguity in the section 146 notice, and no argument based on estoppel has been, or could be, raised against Mr Akici.

Was the breach capable of remedy?

62. The Judge was of the view that a breach of covenant against sharing possession was not capable of remedy within the meaning of section 146, in the light of the reasoning of the court of appeal in *Scala House Limited -v− Forbes* [1974] QB 575, although he made it clear that he would have decided otherwise in the absence of that authority. Mr. Sinai who argued this point on behalf of Mr. Akici, contends that the Judge was wrong, and that the breach was capable of remedy.

63. Considering the matter free of authority, I would, like the Judge, be firmly of the view that a covenant against sharing possession, indeed a covenant against parting with possession, should be capable of remedy. It seems to me that there are two principal purposes of section 146 in relation to forfeiture clauses in leases. The first is to enable a lessee in breach of covenant to have the opportunity to remedy the breach, where that is possible, and thereby to avoid the forfeiture altogether, provided the lessors are fully reimbursed with regard to damages and costs. The second principal purpose of the section, which only arises where the lessee fails to remedy the breach or where the breach is incapable of remedy, is to enable the court to accord the lessee relief from forfeiture, where the lessors enforce the forfeiture.

64. In those circumstances, it seems to me that the proper approach to the question of whether or not a breach is capable of remedy should be practical rather than technical. In a sense, it could be said that any breach of covenant is, strictly speaking, incapable of remedy. Thus, where a lessee has covenanted to paint the exterior of demised premises every five years, his failure to paint during the fifth year is incapable of remedy, because painting in the sixth year is not the same as painting in the fifth year, an argument rejected in *Hoffman -v− Fineberg* [1949] Ch. 245 at 253, cited with approval by the this court in *Expert Clothing Service & Sales Limited -v− Hillgate House Limited* [1986] 1 Ch 340 at 351C−D. Equally, it might be said that where a

covenant to use premises only for residential purpose is breached by use as a doctor's consulting room, there is an irremediable breach, because even stopping the use will not, as it were, result in the premises having been unused as a doctor's consulting room during the period of breach. Such arguments, as I see it, are unrealistically technical.

65. In principle, I would have thought that the great majority of breaches of covenant should be capable of remedy, in the same way as repairing or most user covenant breaches. Even where stopping, or putting right, the breach may leave the lessors out of pocket for some reason, it does not seem to me that there is any problem in concluding that the breach is remediable. That is because section 146(1) entitles the lessors to "compensation in money for the breach", and, indeed, appears to distinguish between remedying the breach and paying such compensation.

66. On this basis, I consider that it would follow, as a matter of both principle and practicality, that breaches of covenants involving parting with or sharing possession should be capable of remedy. One can see an argument, albeit that it strikes me as somewhat technical, for saying that the breach of covenant against assigning or subletting is incapable of remedy, because such a breach involves the creation or transfer of an interest in land, and a surrender or assignment back does not alter the fact that an interest in land has been created or transferred. Were the point free of authority, I would see much force in the contention that such an analysis is over−technical, and I would be attracted to the view that a surrender or assignment back could be a sufficient remedy, at least in most cases, for the purposes of section 146.

67. So far as the authorities are concerned, it appears to me that, at least short of the House of Lords, there are two types of breach of covenant which are as a matter of principle incapable of remedy. The first is a covenant against subletting: that is the effect of the reasoning of this court in *Scala House* . At least part of the reasoning in the leading judgment of Russell LJ at 588 justifying that conclusion is defective, as was explained by O'Connor LJ in *Expert Clothing* at 364E−F, in a judgment with which Bristow J agreed (at 365C). However, as O'Connor LJ also said, *Scala House* is a decision which is binding on this court. In terms of principle (which may not be a wholly safe touchstone in this field), this is, I think, based on the proposition that one cannot, as it were, uncreate an underlease. It therefore appears to me that it should very probably follow that the general assumption that an unlawful assignment also constitutes an irremediable breach is correct. (This would suggest that breach of a covenant against charging a lease is irremediable, which strikes me as arguably unsatisfactory; failure to comply with a covenant to give notice of a charge, a somewhat different breach, is remediable - see *Expert Clothing* at 355D).

68. The other type of breach of covenant which is incapable of remedy is a breach involving illegal or immoral use: see *Rugby School (Governors) -v− Tannahill* [1935] 1 KB 87 and *British Petroleum Pension Trust -v− Behrendt* [1985] 2 EGLR 97. This has been justified on the basis of illegal or immoral user fixing the premises with some sort of irremovable "stigma", which results in the breach being incapable

of remedy. Especially in the light of the provision for damages in section 146, it is not entirely easy to justify this, particularly as it does not appear to apply where the lessee himself does not know of the illegal or immoral user, see *Glass -v− Kencakes* [1966] 1 QB 611. However, in terms of policy, there is force in the view that a lessee, who has used premises for an illegal or immoral purpose, should not be able to avoid the risk of forfeiture simply by ceasing that use on being given notice of it, particularly as relief from forfeiture would still be available. Another example, mentioned in *Expert Clothing* at 355A, might be a breach of covenant to insure against damage by fire, where the property burns down before insurance can be effected.

69. In *Expert Clothing* itself, the Court of Appeal held that a covenant to carry out substantial building works was capable of remedy at the time of the service of the section 146 notice, even though the work should have been completed by the date of service and had not even been started. At 157, Slade LJ said that breach of a positive covenant "could ordinarily for practical purposes be remedied by the thing being actually done". However, the notion that any breach of a negative covenant will be irremediable plainly cannot be right, as is demonstrable by considering an innocuous and innocent breach of a user covenant.

70. There are three types of classification of covenants. They are (a) positive and negative (relevant to the transmission of the burden of freehold covenants, equitable in origin), (b) continuing and "once and for all" (relevant to waiver of forfeiture, with a common law origin), and (c) remediable and irremediable (relevant for section 146, and thus statutory in origin). These three types of classification are, thus, for different purposes and have different origins. Attempting to equate one class of one type with one class of a different type is therefore likely to be worse than unhelpful.

71. Any idea that negative covenants are, by their nature, irremediable has been put to rest by the decision of this court in *Savva -v− Hussein* (1997) 73 P&CR 150. In that case, the breach of covenant consisted of carrying out alterations in breach of a covenant not to do so. After quoting the passage I have just cited from *Expert Clothing* , Aldous LJ said at 156 that he could "see no reason why similar reasoning should not apply to some negative covenants". He went on to quote with approval of a subsequent passages in Slade LJ's judgment:

> "if the section 146 notice had required the lessee to remedy the breach and the lessors had then allowed a reasonable time to elapse to enable the lessee fully to comply with the relevant covenant, would such compliance, coupled with the payment of any appropriate monetary compensation, have effectively remedied the harm which the lessors had suffered or were likely to suffer from the breach?"

72. As Aldous LJ, with whom Sir John May agreed, then went on to say, "It is only if the answer to that question is "no" that it can be said that the breach is not capable of being remedied."

73. In these circumstances, it appears to me that, unless there is some binding authority, which either calls into question the conclusion or renders it impermissible, both the plain purpose of section 146(1) and the general principles laid down in two relatively recent decisions in this court, namely *Expert Clothing* and *Savva* , point strongly to the conclusion that, at least in the absence of special circumstances, a breach of covenant against parting with possession or sharing possession, falling short of creating or transferring of legal interest, are breaches of covenant which are capable of remedy within the meaning of section 146.

74. The only authority which could be cited to call that conclusion into question is *Scala House* itself, but that does not deter me from my conclusion. First, it was only concerned with underletting; secondly, the reasoning of the leading judgment in the case is, at least in part, demonstrably fallacious and inconsistent with common sense and many other authorities; thirdly, it has been overtaken and marginalised by *Expert Clothing* and *Savva* ; fourthly, there is no reason of logic or principle why the reasoning or conclusion in *Scala House* should be extended to apply to a breach which falls short of creating a legal interest.

75. It is true that Slade LJ said at 354G in *Expert Clothing* that the principle in *Scala House* extends to parting with possession, as well as assigning and underletting. That was an obiter observation, which I do not regard as binding. At 365C, Bristow J agreed with Slade LJ's judgment, but he also agreed with the judgment of O'Connor LJ, who, at 365A−B, said that *Scala House* , while authority for the proposition that breach of a covenant against underletting was irremediable, "was not authority for any wider proposition". As I have indicated, my present view is an intermediate one. I think that principle and precedent probably require one to go along with Slade LJ and conclude that *Scala House* applies to assigning, but, in agreement with O'Connor LJ, I certainly do not see why it extends to parting with (let alone sharing) possession.

Was the breach in this case remedied?

76. The Judge appears to have formed the provisional view that if, contrary to his conclusion, the breach consisting of sharing possession in this case was capable of remedy, it had been remedied by 10th August. However, he was not by any means certain that it had been remedied within the "reasonable time" contemplated by section 146.

77. As I see it, the Judge's conclusion that the breach was remedied was based on the fact that, by ensuring that he had acquired all the shares and had become the sole director of the company, Mr. Akici procured a situation whereby he was no longer sharing possession of the premises with the company. In my judgment, that was a conclusion to which the Judge was entitled to come, at least on the facts of this case.

78. As I have explained, the Judge's conclusion that there had been a sharing of possession was inevitable, in the light of the concession to that effect on behalf of Mr Akici, and of the Judge understandably following the approach to the construction of

the covenant in *Tulapam* . As I have also explained, even on the basis that the covenant against sharing possession is to be more strictly construed than was held in *Tulapam* , we should not, in my judgment, interfere with the Judge's conclusion that there was a breach of the covenant, on the basis that that was a conclusion to which he could reasonably come to on the facts before him in this case.

79. As I see it, the Judge considered that, by acquiring all the shares in the company and becoming the sole director of the company, Mr Akici regained the exclusive possession he was granted at the start of the lease, but which he then relinquished by sharing possession with the company while it was effectively, or mainly, owned and controlled by Mr Gutelkin. In my view, at least as present advised, that was a conclusion to which he was entitled to have come. Where a lessee owns all the shares in, and exclusively controls, a company which is operating the only activity conducted in the demised premises, it appears to me that, unless it is inconsistent with other facts, it is permissible to treat the company as the agent of the lessee for the purposes of identifying who is in possession of those premises.

80. It is clear that such an analysis is open in principle from the reasoning of the House of Lords in *Rainham Chemical Works Ltd -v−. Belvedere Fish Guano Co* [1921] 2 AC 465 - see, for instance the speech of Lord Buckmaster at 478 and 483. It is only right to acknowledge that in that case the arrangement to that effect was expressly agreed - see at 474. Nonetheless, where the lessee has covenanted not to part with or share possession (and even more, perhaps, where he is seeking to remedy the breach of having done so) it appears to me right at least to lean in favour of an analysis of the relationship between lessee and occupier which results in there being no breach of covenant. This approach appears to derive some support from the judgment of Bankes and Warrington LJJ in *Chaplin* at 207 and 209 to 210.

81. It is true that the very fact that a person chooses to conduct his business through a company is because the company is treated as a different entity in law from him, and that there is therefore nothing unfairly artificial in treating him as sharing possession with (or, depending on the facts, as parting with possession to) the company. However, where the lessee owns all the shares in, and is in sole control of a company, it seems to me that it is justifiable in principle, as well as commercially sensible, to treat the lessee as in possession through the medium of the company (possibly as well as through his own presence). In such a case, it is no more artificial to treat the lessee as being in possession through the company than it is to treat an employer who requires an employee to reside in premises as enjoying possession through his employee - see *Street -v− Mountford* [1986] AC 809 at 818F−G.

82. In this connection, I also note that in *Harrison -v− Povey* (1956) 168 EG 613, Denning LJ (with whom Hodson and Morris LJJ agreed) referred to one partner (who was the lessee of the premises concerned) as having "retained possession by his co−partner", albeit that he was not considering a covenant against sharing possession. It is unnecessary and inappropriate to decide whether, and in what circumstances, this conclusion would apply in a case where the lessee does not own all the shares and/or is not the sole director.

83. If the breach in the present case was capable of remedy, the Judge thought that it had been remedied, but was unsure whether the remedy had occurred within a "reasonable time" of the service of the section 146 notice, as referred to towards the end of section 146(1). I share his doubts. The notice was served on, or shortly after, 28th June, and the breach was remedied on 10th August. Almost six weeks seems on the long side, at least on the face of it. On the other hand, the requisite remedial action involved Mr Akici obtaining legal advice, negotiating with Mr Gutelkin, and arranging for the formalities involved in changing the shareholders and directors of the company.

84. In principle, it seems to me that, where the breach is causing no serious continuing commercial harm to the lessors, the court should not be too strict in assessing whether the remedy has been quick enough. On the other hand, the court should not be too indulgent to a lessee, especially one who is not honest with his lessors. The statutory formula uses "reasonable", a word which raises two points of relevance. First, it does not, at least in most cases, require remedial action to be completed as fast as possible. Secondly, what is reasonable must be a question of fact, which depends on all the facts and circumstances of the particular case.

85. Given that the Judge made no finding on the issue of whether, if remediable, the breach in this case was remedied in a reasonable time, I do not think we should do so in this court, unless it is necessary to determine this appeal (or, possibly, relevant on the issue of costs). That is because the arguments are quite finely balanced, their resolution may depend on a detailed analysis of some of the evidence and of company practice, and is thus very much a matter for the trial Judge. I would therefore leave that aspect of the issue of whether the breach was remedied open.

Relief from forfeiture

86. As I have mentioned, having decided that the lease was validly forfeited, the Judge declined to accord Mr Akici relief from forfeiture. This was essentially because of the "evasions and aggressive responses" in Mr Akici's solicitors' letters (for which the Judge held Mr Akici, and not his solicitors, responsible) and the fact that Mr Akici "covertly" arranged for the breach to be remedied "without discussion". As a result, the Judge accepted the evidence of Mr Lester of Butlins that "there had been a complete breakdown of trust in the commercial relationship between them."

87. In my judgment, that was a conclusion that the Judge was entitled to come to on the evidence, and a reason he was entitled to conclude was strong enough to justify departing from the course which he himself described as appropriate "in the overwhelming majority of cases of a breach [involving] a mere sharing of possession", especially where matters had been put right. Another Judge may have taken a different view on whether to grant relief from forfeiture, but that cannot help Mr Akici on this issue. Unless the Judge was mistaken in his reasons (i.e. was wrong in his facts, took into account an irrelevant factor, or failed to take into account a relevant factor) or he reached a conclusion which no reasonable Judge could have reached, it would be wrong in principle for us to interfere. I do not consider that either basis is made out here, despite Mr Butler's contention to the contrary.

Conclusion

88. It follows that my conclusions are:

i) Clause 4.18.1 of the lease precludes the lessee parting with, or sharing, possession, and is not infringed if he merely parts with, or shares, occupation;

ii) In this case, the Judge was entitled to conclude that the lessee had shared possession with, and had not parted with possession to, the company;

iii) The section 146 notice did not allege that the lessee was sharing, as opposed to parting with, possession, and therefore was ineffective to support the lessors' re−entry;

iv) The breach of the covenant against sharing possession was capable of remedy;

v) The Judge was entitled to conclude that the breach had been remedied by the lessee acquiring all the shares in, and becoming the sole director of, the company;

vi) If the re−entry had been valid, the Judge's decision to refuse the relief from forfeiture would have been one to which he could justifiably have come.

89. Mr Akici's appeal must therefore be allowed, in the light of my conclusions in sub−paragraphs 88(ii) and (iii) above. It may appear to a neutral observer that Mr Akici has had a lucky escape from a difficult situation which was, to a significant extent, of his own making.

Mummery LJ:

90. I agree.