

**IN THE COURT OF APPEAL
(CIVIL DIVISION)**

APPEAL Ref. 2017/3419

ON APPEAL FROM:

*The High Court of Justice
Queen's Bench Division
Bristol District Registry
Case No.: CL/17/047/TR
Dingemans J. (Order dated 24.11.2017)*

AND ON APPEAL FROM:

*The County Court at Truro
(Siting at the County Court in Plymouth)
Case No. C00TR266
Mr. Rec. Richard Mahwinney (Order dated 24.8.2017)*

B E T W E E N:

MR ANDREW TOMS

Claimant/Appellant

- and -

MRS MARILYN RUBERRY

Defendant/Respondent

RESPONDENT'S REPLACEMENT SKELETON ARGUMENT

*References to page numbers in the Appeal Bundle prepared by the Appellant are in **bold** in [square brackets] thus [p. x] unless otherwise stated or the context otherwise admits.*

Introduction

1. By the claim herein, Mr Toms, the Appellant ("A") sought possession of licensed premises known as 'The Queen's Arms', Falmouth, on grounds that Mrs Ruberry ("R") had breached the Lease so as to give rise to a right of re-entry and had failed to remedy those breaches having received a valid notice served pursuant to section 146 of the Law of property Act 1925 ("LPA").
2. Notwithstanding the Learned Judge's findings that R was, at the date of issue of the claim, in breach of some obligations under the Lease he dismissed the Claim for possession because he found that the section 146 Notice, dated 25.2.2016 [p229-231] ("S.146 Notice") upon which A relied had been served before A's right of re-entry had arisen.

The 2nd Appeal

3. By an Order dated 15.1.2018 Lewison LJ granted (“A”) permission to Appeal to the Court of Appeal on seven (7) Grounds [p53-54] (“PtA”)
4. It is R’s position that in fact A’s 7 grounds of appeal are directed towards a single question; i.e. whether the right to re-enter for breach of covenant must have arisen prior to the service of a notice under section 146(1) LPA for as a by action or otherwise.
5. R contends that on a proper construction of section 146(1) LPA the question should be answered in the affirmative: i.e. that to comply with the statutory restriction on exercise of a right of re-entry imposed by LPA section 146, the contractual right must have arisen before the section 146 Notice is served.

Respondent’s Notice

6. On 6.2.2018 Mrs Ruberry filed a Respondent’s Notice (“RN”) [p9-22] seeking to uphold the dismissal of A’s claim for possession on an alternative ground; in the circumstances, CPR Part 52. applies and R does not require permission to appeal.
7. R contends that even if the proper construction of LPA, s. 146(1) does not require the landlord’s right of re-entry to have arisen, section 146(1) does require that the “breach complained of” be correctly identified and be one which gives rise to the right to forfeit and not some other breach.
8. A contends that in this case, A’s S. 146 Notice did not identify the breach of the Lease that gave rise his right of re-entry and thus that the statutory restriction on forfeiture imposed by LPA, section 146 was not complied with and that A was not entitled to enforce a right of re-entry by action or otherwise as at the date of issue of the Claim.

Background

9. This Appeal relates to the A's claim for possession based upon forfeiture of a lease ("the Lease") of the Queen's Arms Public House in Constantine, Cornwall ("the Property"). A also claimed damages for breach of covenant and "mesne profits" on the basis that the lease was forfeit.

The Lease

10. The Lease is dated 22.4.2005 and was made between Punch Taverns (SPML) Limited as landlord and Ian Philip Dunn as tenant: see [p172].
11. In the Lease the landlord is referred to as "the Company" and the tenant as "the Business Partner". The Lease is typical of leases of licensed premises granted by large pub companies.
12. Ian Phillip Dunn assigned the Lease to R on 9.12.2015. On 7.7.2015 A purchased the freehold reversion of the Property.
13. The Lease provides for the landlord's right of re-entry in Clause 4.1, and at Clause 4.1.7 provides as follows [p.202]:

1. TERMINATION

1.1 In any of the following events namely:-

.....

*4.1.7 If the Business Partner commits any other breach of any of his obligations under this Agreement and (where such breach is capable of remedy) the Business Partner fails to remedy any such breach within fourteen 14 days following the receipt of written notice from the Company to remedy the same ("a **Default Notice**")*

.....

then and in any such case it shall be lawful for the Company (in addition to or in substitution for any other remedy open to it) or any person or persons duly authorised by it in that behalf at any time thereafter and notwithstanding the waiver of any previous breach of covenant or condition or right of entry to enter into or upon the Premises or any part thereof in the name of the whole whereupon this Agreement shall absolutely determine but without prejudice to any right of action or remedy of the Company for any arrears of rent or in respect of any antecedent breach of any of the agreements by the Business Partner and the conditions herein contained.

14. In summary, the other sub-clauses of Clause 4.1 reserve a landlord's right of re-entry in the following circumstances:
1. If the tenant fails to keep the Property open for business (Clause 4.1.1);
 2. If the tenant fails to comply with undertakings relating to the Licences in force in respect of the Property or commits an offence related to licensed premises (Clause 4.1.2);
 3. If the tenant becomes bankrupt or has a receiving order made against him (Clause 4.1.3);
 4. If the tenant fails to maintain '*the standards*' set out in the Lease '*and the Manual*' (Clause 4.1.5) (emphasis in italics from the Lease);
 5. If the tenant is convicted of an offence relating to the supply of drugs etc. (Clause 4.1.6); and
 6. If any of the Licences are revoked or are suspended for a period of more than 7 days without the landlord's prior consent, or conditions are imposed on those Licences which the Landlord considers will damage the Landlord's interest in the Property (Clause 4.1.8).
15. Other tenant's covenants under the Lease included the following:

3.6 Repairs

3.6.1 To keep up and so deliver up at the end of the Term all the interior and exterior of the [Property] including the Company's Fixtures Fittings and Effects car parks outbuildings gardens grounds and bowling greens (if any) clean and well tended.

...

If the [Tenant] shall make default in the performance of these obligations then without prejudice to any other remedy available to the Company the Company may enter upon the Premises and carry out all necessary work at the expense of the Business Partner and the cost of such work shall be a debt due by the Business Partner to the Company on demand and recoverable as rent in arrears.

[p175]

3.7 Decorations and Decoration Scheme

3.7.1 To keep and so deliver up at the end of the Term the interior of the [Property] including all Company's Fixtures and Fittings and Effects painted polished papered and otherwise decorated to the satisfaction of the Company ...

3.7.2 *To observe and perform and be bound by the provisions of the Decorations Scheme set out in the Third Schedule hereto so far as such provisions relate to the [Tenant]*

[p176]

16. By Clause 3.45 of Part II of the Lease compliance with a Default Notice, served by the Landlord pursuant to Clause 4.1.7 was a Tenant's obligation:

3. Business Partner's Obligations

3.45 Notice

To comply with the terms of any Default Notice (as defined by clause 4.1.7) specifying a breach of the provisions of this Agreement and requiring the breach to be remedied so far as it may be but nothing in this clause is intended to require the Company to serve notice of any breach before taking action in respect of it

[p201]

17. The premises demised by the Lease include a car park but does not include any area beside that car park that could be described as a 'garden'.

Relationships between the Parties

18. Before A served the S. 146 Notice, R had complained to A about his failure to carry out significant repairs to the Property, including to prevent water ingress.

S. 146 Notice and Default Notice

19. On the same day; i.e. 25.2.2017, A served a Default Notice [p227-228] for the purposes of Clause 4.1.7 of the Lease and the S. 146 Notice.

20. The letter accompanying the Default Notice stated as follows [p226]:

We now enclose by way of service upon you Default Notice pursuant to clause 4.1.7 of the Agreement. This Default Notice is served without prejudice to any other Notices served upon you and without prejudice to any alternative causes of action available to our client.

If, upon expiry of the Default Notice, you have failed to remedy the breaches of the Agreement set out in that Notice then in accordance with Clause 4.1.7 of the Agreement, our client will be entitled to re-enter the Property and the Agreement shall absolutely determine.

21. The Default Notice itself set out Clause 4.1.7 and the final paragraph of Clause 4.1 (as set out in paragraph 14 herein above) and identified the 'breaches' as 'the breaches set out in the Report of Mr Jon Stone FRICS, ... dated 17 February 2016.'

22. The covering letter to the S. 146 Notice made no reference to the Default Notice. That letter stated as follows [p228]:

We now enclose by way of service upon you Notice pursuant to section 146 of the [LPA]. The enclosed Notice is served without prejudice to any other Notice(s) served upon you and without prejudice to any alternative causes of action available to our client.

If, upon expiry of the enclosed section 146 Notice, you have failed to remedy the breaches of the Agreement set out in that Notice then in accordance with the Agreement, our client will be entitled to re-enter the Property and the Agreement shall absolutely determine.

23. The S. 146 Notice set out in full the following clauses of the Lease:

1. 3.5, 'Alterations';
2. 3.6, including, 3.6.1 and 3.6.2, 'Repairs', and
3. 3.7, including, 3.7.1 and 3.7.2, 'Decorations and Decoration Scheme'.

24. The alleged breaches were set out in tabular form as follows:

Clause	Area/Room	Breach
3.5	Conservatory	<i>Tenants have added conservatory to the front elevation of the Property without landlord's consent. Structure of poor quality with limited foundations leaks at wall/roof junctions and incomplete finishings.</i>
3.6	Garden beside car park	<i>Garden overgrown and has not been tended for some time.</i>
3.6	Garage door	<i>Tenants have lost keys to aluminium garage door.</i>
3.6	Electrical installation	<i>Tenant has not obtained and provided for inspection by the landlord of all test and other certificates for gas and electric equipment fire alarms and emergency lighting.</i>
3.7	<i>All trading areas including cellar storage kitchen non domestic accommodation and all areas connected with the business and domestic accommodation</i>	<i>The tenant has not redecorated the interior of the property within the last three years.</i>

25. Paragraphs 2 and 3 of the S 146 Notice stated as follows:

2. *You are required to remedy the breaches with a reasonable time so far as they are capable fop remedy.*
3. *If you fail to comply with this notice within 7 weeks the Landlord intends to re-enter the premises pursuant to Clause 4.1.7 of the Agreement and claim damages for the above breaches of covenant.*

First Instance Judgment

26. The trial was heard by Recorder Mahwinney over three days commencing on 9.5.2017. The Learned Recorder handed down reserved judgment on 27.7.2017 [p111-141].

27. At § 46 of his judgment the Learned Recorder found R to be in breach of covenant(s) under the Lease:

1. Clause 3.6.1, in failing to keep the car park clean and well-tended;
2. Clause 3.6.1, in failing to repair renew or replace the lock to the garage;
3. Clause 3.6.2, in failing to provide an electrical certificate; and
4. Clause 3.7.1 in failing to redecorate [p131]

28. Before the Recorder A pursued his forfeiture claim on two alternate bases: first that the breaches of Clauses 3.6 and 3.7 of the Lease, and alternately, under clause 4.1.5 of the Lease: see Judgment, § 53.[p132]

29. A's possession claim failed because the learned Recorder found that:

1. In relation to the claim relying on Clauses 3.6 and 3.7 of the Lease breach of those clauses did not give rise to a right of re-entry under Clause 4.1.5: see Judgment, §§ 55 to 61 [p132-133]; and
2. In relation to the claim relying on Clause 4.1.7 and R's alleged breach of the requirements of the Default Notice, that the time for compliance with the Default Notice had not expired before the S. 146 Notice was served: see Judgment § 65 [p135].

30. The Learned Recorder also dismissed a counterclaim by the Respondent for a declaration that the Appellant was required to provide a Code of Practice under

the lease and stayed the Defendant's application for relief from forfeiture pending any appeal [p140].

31. Following argument, the Learned Recorder made no order for costs.
32. A appealed to the High Court; permission to appeal was granted by HHJ Cotter Q.C.
33. A's appeal was dismissed by Dingemans J. after a hearing on 16.11.2017. The basis of the decision of Dingemans J. is set out in his Judgment dated 24.11.2017 [p58-66]

Outline of the Issues on Appeal

34. It is R's position that the issue raised on this Appeal, including those set out in the RNs can usefully be set out under the following three headings:

Issue 1

1. A's Grounds 1 to 4 (inclusive) – The right of re-entry and construction of section 146(1)

Issue 2

2. A's Ground 5 – An analysis of the "waiver" cases.

Issue 3

3. A's Ground 6 and RN and Other Grounds for upholding the decision of the Courts below.

A's Position

35. Before addressing the three issues identified above R submits that it is significant that A appears to have abandoned Ground 2 of his appeal to the High Court; namely, that the right to forfeit arose due to a purported failure to comply with "standards" in the lease under clause 4.1.5 of the lease, meaning that, on the Appellant's earlier case, a Default Notice was not required.

36. It follows this that A must, by implication, concede (as he did in the High Court explicitly) that service of “Default Notice” and a failure to comply with it is a precondition to the right to forfeit under the lease in question.
37. R submits, that on this Appeal the Court should consider the following issue: ‘if contractually a Default Notice is required before forfeiture can take place, what is the purpose of such a notice if it can be served at the same time as any s146 Notice, as if a mere formality?’

R’s Submissions

Issue 1 Ground 1-4: The right of re-entry and construction of s146

38. A’s Grounds 1 to 4 (inclusive) [p8] essentially deal with the proper construction of LPA, section 146(1) as to the timing of service of the s146 Notice and the right of re-entry.

The Right of Re-Entry

39. It is convenient to deal first with the right of re-entry/ forfeiture. “Forfeiture” and “re-entry” are used interchangeably. The classic definition of “forfeiture” was set out by Fox LJ in *Clays Lane Co-operative Ltd v Patrick*¹:

A right to determine a lease by a landlord is a right of forfeiture if (a) when exercised, it operates to bring the lease to an end earlier than it would “naturally” terminate; and (b) it is exercisable in the event of some default by the tenant”.

40. The right of forfeiture, as rationalised in the definition above, is not something that arises at common law (or indeed under statutory provision); it is a contractual right.
41. There are two kinds of contractual right to re-enter: the first, which we are not concerned with in this case, is based upon a breach of “condition” or “condition subsequent”. The second kind of right of re-entry (most commonly found in practice) and the kind relied upon in this case by the Appellant is that of a “re-entry proviso” or “forfeiture clause”.

¹ (1984) 49 P & CR 72, at 78.

42. Such provisions or clauses are subject to the usual rules of contractual construction. However, as far as re-entry provisions themselves are concerned (as opposed to the covenants relied upon said to have been breached) they must be construed '*contra proferentum*'; i.e. against the party who seeks to benefit from them². It follows that the right of re-entry must be exercised strictly in accordance with the requirements of the relevant lease.
43. The relevant contractual provision in the current case is Clause 4.1 of the Lease: see paragraphs 14 and 15 above. It is significant that the contractual provisions in this case mirror terms set out in LPA section 146(1). It is self-evident that the Lease in the current case was drafted in the context of the regime created by LPA section 146. The probable reasons for this will be explored below under Issue 3.
44. Thus, in this re-entry provision, where the breach (assuming there is one) is capable of remedy and is not remedied within 14 days of the date of receipt of the "Default Notice" then the right of re-entry arises. In the case of a remediable breach the right to re-enter cannot arise without more.
45. This on its plain construction (let alone on strict interpretation *contra proferentum*) means that, without more, 14 days following receipt must have passed before the right to forfeit arises.
46. In this case, A served a Default Notice at the same time as the S 146 Notice. The provisions in the Lease relating to Default Notices are set out in Clause 4.1.7 and Clause 3.45 (of Part II of the Lease): see paragraph 17 above.
47. It follows that for A's right of re-entry to arise there must have been a relevant breach of covenant, that a Default Notice had been served, that the Default Notice must have expired and that R had not complied with the requirements of that Default Notice.

² Woodfall §17.066 citing Doe d. Abdy v Stevens (1823) 3 B. & Ad. 299; Creery v Summersell and Flowerdew & Co. [1949] Ch. 751.

48. Strictly speaking it is the failure to comply with a Default Notice which gives rise to the landlord's right to forfeit (for which see below under Issue 3).
49. In this case the Learned Recorder found that the Respondent was in breach of covenant in 4 respects: see paragraph 28 above. In more detail the findings of fact were that:
1. An overgrown area next to the car park had not been tended for some time (the notice specified the garden which was not the car park);
 2. A garage door (which was in poor condition) was not and could not be made secure in its current state and for which the keys had been lost (NB the Notices refer only to a key having been lost³);
 3. Certificates for electrical equipment etc., required by statute, bye law or regulatory authority had not been obtained by R or provided for inspection (A's predecessor in title had provided these certificates at their own cost);
 4. There had been very little redecoration (if any) of the Property for 3 years prior to the notice(s) – albeit there was no specific finding on this issue bearing in mind that the expert evidence agreed that certain work had been carried out between Mr Stone's visits in January 2016 and April 2016 – it was not necessarily to the requisite standard in every instance, nor indeed required to be done.
50. There was no reliance in the S 146 Notice on a failure to comply with the **Default Notice**. This is not surprising as the **Default Notice** was served on the same date as the S 146 Notice.

LPA 1925 S146(1)

51. Section 146(1) of the LPA provides as follows:
- (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*

³ It should be noted that following the Trial A repaired the door. The key retained by R; i.e. not lost and as she maintained at Trial, is currently being used to secure this door. There is no application made under *Ladd v Marshall* [1954] 1 WLR 1489 CA).

- (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.*

52. In those circumstances where a landlord's right of re-entry is subject to the service and expiry of a notice pursuant to LPA section 146(1) the contractual right of re-entry is postponed until after the statute has been complied with. In effect section 146 provides a protection for the lessee where forfeiture determines what otherwise might be a valuable interest in land. This is central to the construction of, and thus compliance with, LPA, section 146(1).
53. A section 146 Notice is not a technical document, in the way, for example, that a Notice to Quit is. It does not bring an end to the lease itself. Nor does it give a freestanding right to forfeit a lease. It simply makes a right of re-entry enforceable if the notice complies with the requirements of section 146(1) on the particular facts of the case. In a strict sense "validity" of the Notice does not arise; either it complies, in which case the right of re-entry is enforceable, or it does not, in which case the right is not enforceable.
54. A's Skeleton Argument at §21 [p28] refers to the purpose of a section 146 Notice, and relies on Fox v Jolly⁴, Fletcher v Nokes⁵; and Horsey v Steiger⁶.
55. In Horsey v Steiger, Lord Russell, considering the effect of a notice under section 14(1) Notice under the Conveyancing Act 1881, stated is as follows:

The object seems to be to require in the defined cases (1.) that a notice shall precede any proceeding to enforce a forfeiture, (2.) that the notice shall be such as to give the tenant precise information of what is alleged against him and what is demanded from him, and (3.) that a reasonable time shall after notice be allowed the tenant to act before an action is brought. The reason is clear: he ought to have the opportunity of considering whether he can admit the breach alleged; whether it is capable of remedy; whether he ought to offer any, and, if so, what, compensation;

⁴ (*Supra.*)

⁵ ([1897] 1 Ch 271

⁶ [1899] 2 QB 79

and, finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against him.

56. Reliance on the passage from Lord Russell's judgment set out above, requires some caution because in it he is identifying the purpose or function of a section 146 Notice (or s14(1) Notice under the Conveyancing Act 1881); he does not address the time at which such a notice can be served.
57. However, as identified by Lord Russell, the purpose of a section 146 Notice is not just to make the landlord's right of re-entry enforceable (indeed, there would be no statutory purpose in such an outcome as the right of re-entry is contractual); rather a section 146 Notice gives the tenant the opportunity to consider whether he ought promptly to apply for relief: Applying for relief from forfeiture brings with it a number of significant consequences for both landlord and tenant (and potentially others with an interest in the continuation of the lease).
58. R accepts that the terms of section 146(1) make no express reference to the time at which a notice served in relation to the existence or otherwise of a contractual right of re-entry. However, the following words and phrases in the section, together with its statutory purposes support the proposition that there must be an existing contractual right of re-entry before a section 146(1) notice can be served:
 1. By section 146(1)(a) the notice must specify 'the breach';
 2. The breach must be one that gives rise to a right of re-entry;
 3. By section 146(1)(b), if the breach is capable of remedy the notice must state the same and require the lessee to remedy the breach;
 4. It follows that the breach must have arisen as at the date of the section 146(1) Notice is served;
 5. In relation to remedial breaches section 146(1) postpones the right of re-entry until after a reasonable period of time after the notice has expired;
 6. Such reasonable period of time is measured by the period necessary to remedy the breach; and
 7. It follows that a Notice served in relation to remedial breaches further postpones the right of re-entry until after the breach has been identified to

the tenant and the tenant has been given a reasonable period of time to remedy that breach.

59. It follows that a section 146(1) notice can only validly be served in relation to a breach that has given rise to a right of re-entry.
60. For the reasons set out under Issue 3, R's position is that there must be some direct and causative link between the breach complained of and the right to forfeit. The word "for" is not only instructive to the correct construction of s146 but means that a breach giving rise to the right to forfeit must be identified. See Starokate Ltd v Burry [1983] EGLR 56; Halliard Property Co. Ltd v Jack Segal [1978] 1 WLR 377; and Akici v LR Butlin Ltd [2006] 1 WLR 201.
61. It follows that for a breach which gives rise to the right to forfeit to have been properly identified in a section 146 Notice it must have occurred prior to the service of the Notice.

Issue 2 – Ground 5: The Waiver Cases

62. A's Ground 5 [p8] asserts that the Learned Judges below purportedly failed to apply the principles in Penton v. Barnett [1898] 1 QB 276 (CA) correctly.
63. In Penton's case and in the other waiver cases that followed; e.g. Greenwich v Discreet Selling Estates Ltd⁷, there was no question as to whether the correct breach had been identified. These were continuing breaches which first gave rise to the right to forfeit when they were committed by the tenants in each case. The question in those cases was whether, if waived, a new section 146 Notice had to be served in order to enforce the right to re-enter.
64. A further asserts that the waiver cases are binding to the level of this Court. Penton has attracted significant criticism, not least in the Court of Appeal in

⁷ [1990] 2 EGLR 65

Farimani v Gates⁸ and in Greenwich v Discreet Selling Estates Ltd itself where Neil LJ stated

Mr Mann bases his argument on the wording of section 146(1) itself and on the later provisions contained in section 18(1) of the Landlord and Tenant Act 1927 and in section 1(1) of the Leasehold Property (Repairs) Act 1938. He submits that the wording of section 146(1), when properly construed, shows quite clearly that the right of re-entry should ante-date the service of the statutory notice. Thus it is provided in that subsection that a right of re-entry or forfeiture shall not be enforceable unless and until a lessor serves on a lessee a notice containing the information set out in that subsection. Those words, it is submitted, indicate that the right of re-entry should arise before the notice contemplated by the subsection is served. Accordingly, so the argument goes, where a right of re-entry or forfeiture has been waived and a new right arises, that new right cannot be enforced unless a later notice is served.

For my part, if the matter were free from authority, I would see some force in that argument, but this court is bound by the decision of the Court of Appeal in Penton v Barnett [1898] 1 QB 276. I can see no satisfactory basis for distinguishing this case from the decision in Penton's case. The breaches which were specified in the schedules attached to the seven notices remained unremedied at the date when the actions began in April 1985. As it seems to me, the plaintiffs in those circumstances were entitled to rely on the matters set out in the notices for the purpose of the present proceedings.

65. The Court is not bound by the decision in Penton in this case in the same way that it was in Greenwich v Discreet Selling Estates Ltd as it is faced with a very different set of circumstances and a section 146 Notice which did not identify a breach giving rise to the right to forfeit. It is not so much a question here of a continuing breach, as a failure to identify a breach which gave rise to the right to forfeit.

Issue 3 – Ground 6 and Respondent’s Notice and Other Grounds for Upholding the Orders of the Courts below

66. Ground 6 alleges that the Courts below wrongly identified the “breach complained of” as the failure to comply with the **Default Notice** as opposed to the remaining breaches of covenant identified in the section 146 Notice and which were found by the Learned Recorder. R asserts that this ground is unfounded.

⁸ (1984) 271 EG 887, [1984] 2 EGLR 66.

67. The Court of Appeal has relatively recently taken a tougher line on the specificity required by section 146 Notices. In Akici v LR Butlin Ltd⁹, the lease contained a familiar proviso for forfeiture and a comprehensive covenant in relation to alienation, which prohibited not just assigning and underletting, but also sharing or parting with possession of the premises.
68. The tenant set-up a company which traded from the premises selling takeaway pizzas. The landlord served a section 146 notice alleging “assignment or alternatively subletting or alternatively parting with possession of the premises without the landlord’s consent”.
69. The tenant had initially claimed that he was the owner and sole director of the company, even though he was not. The shares in the company were later transferred to the tenant and he became the sole director. Soon afterwards the landlord forfeited the lease. At trial, the judge found that the tenant had breached the relevant covenant by sharing possession with the company, and that the s. 146 notice was valid.
70. The Court of Appeal overturned the decision of the trial judge on the basis that although the tenant and the company were “sharing” possession, the section 146 notice had not mentioned “sharing”. Thus, the court found that the requirement in s. 146(1)(a) to “specify the particular breach complained of” had not been satisfied. Neuberger LJ held that:

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.

⁹ [2006] 1 W.L.R. 201

71. Counsel for the landlord tried to defend the validity of the section 146 Notice on the basis that, applying the test in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd, one should not be “unduly technical” and the reasonable recipient would have understood that the presence of the company on the premises was the subject of the complaint. Neuberger LJ rejected that argument stating that:

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... However, I have none the less come to the conclusion that Mr Lloyd's defence of the notice cannot stand. Even applying the Mannai case the notice has to comply with the requirements of section 146(1) of the 1925 Act, and if, as appears pretty plainly to be the case, it does not specify the right breach, then nothing in the Mannai case can save it.

72. This more technical approach appears to be being adopted more widely and was repeated as recently as 2013 in Anders v Haralambou¹⁰ in the High Court. It follows that a section 146 Notice must give the tenant sufficient information of the actual breach alleged to allow them to take the necessary steps to avoid the right of re-entry being exercised, and not some other information however “similar” it may be.

73. It follows that all that A needed to do was to have served upon R a **Default Notice** and if R failed to comply with the same, and if he remained intent on forfeiting the Lease, then serve a section 146 Notice upon R specifying that she had failed to comply with the **Default Notice**. The failure to do so is fatal to the enforceability of any right of re-entry, by action or otherwise.

74. At this stage it is worthwhile considering the purpose of the Default Notice. A appears to consider that compliance by him with the requirements of service of a Default Notice are a mere formality and a curiosity of the lease. Indeed, A complains in his skeleton argument in this Appeal at §4 that:

If the decision below is correct, then landlords must be astute to ensure that their specific right of re-entry has arisen before they even serve the statutory notice.

[p24]

¹⁰ [2013] EWHC 2626

75. It is submitted that the nature of the lease itself and context in which it was created is instructive. It was initially between a large Pub Company (Punch Taverns) and an individual, R's predecessor in title. The **Default Notice** provision gives the landlord, as landlord of many hundreds of public houses with teams of managers and local representatives managing their estate, the opportunity to enforce the provisions of the Lease before engaging the mechanisms for forfeiture and relief from forfeiture under section 146 and all that this might entail.
76. It is not necessarily in the interests of the Pub Co., when managing such a large estate to engage in formal proceedings in order to ensure that individual tenants comply with the "other covenants" in the lease which are not necessarily fundamental to Punch Tavern's operations. It is submitted that if a tenant is persistently in breach of his or her obligations and has not remedied them informally, the Default Notice procedure allows the landlord to set out all of the breaches of covenant which it wants to enforce without the risk of waiver of the right to forfeit having occurred and require compliance within a particular period of time, in this instance 14 days. It is the (continued) failure to comply with the **Default Notice** which must then be identified and relied upon as giving rise to the right to forfeit which the landlord seeks to enforce.
77. The fact that A is not the original landlord to the Lease is not relevant for these purposes. He takes the Lease as he finds it and must operate within the contractual provisions of the lease in order to bring it to an end if he chooses to do so.
78. In the current case, the S. 146 Notice did not specify Clause 4.1.7 as that clause that had been breached nor as the breach that required remedy. In the circumstances and applying the analysis in Akici the S. 146 was not valid in that it did not specify the breach with sufficient precision to satisfy the requirements of LPA section 146(1).

Conclusion

79. A's Appeal should be dismissed.

80. If A's Appeal is allowed, A's claim for possession should be dismissed on the ground that the S. 146 Notice fails to comply with the requirements of LPA section 146.

81. In either event A should be ordered to pay R's costs of the Appeal.

19 February 2018

[Cross Referenced 11 September 2018]

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Five Paper

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