23.6.89.

Forfeiture of lease by Landlord - prerequisite notice of intent to forfeit - reasonableness thereof - opportunity to put right breach - denied tenant - Forfeiture wrongful.

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CIVIL JURISDICTION

CAUSE NO. 25/88

BETWEEN:	CAYMAN ARMS (1982) LTD.	PLAINTIFF
AND:	(1) ENGLISH SHOPPE LTD. (2) RICHARD E. ARCH. (3) MARGARET ARCH.	DEFENDANTS

GC civil judgments

For the plaintiff: Mr. Pierre Lamontagne Q.C., with him Mr. Charles Adams
For the defendants: Mr. Norman Hill Q.C., with him Mr. O. Panton.

JUDGMENT

This is an application by originating summons for a declaration that a lease of premises known as the 'Cayman Arms' is still subsisting and that the plaintiffs are entitled to regain possession of the premises; damages; and an order that the defendants surrender the premises and be restrained from entering upon them.

The premises in dispute consist of the first floor above ground of a building owned by the first defendant, the ground floor of which comprises the establishment known as 'The English Shoppe'. The first floor premises known as 'The Cayman Arms', which was a place of entertainment, have been closed since 20th September 1987. The legal questions arising from the circumstances preceding and surrounding this closure are the matters for determination in this case.

The plaintiff's case rests on the following propositions

> there was no valid notice of defect or breach under section 53 (h) of the Registered Land Law nor any valid notice of forfeiture under section 56;
>
> there was no lawful reentry by the defendants and consequently an ongoing trespass is taking place;
>
> accordingly the lease has not been terminated and still subsists.

The breach, if breach there was, is alleged to have been of clause 2 of the lease. I was invited by counsel for the plaintiff, without admission on the part of his clients, to take it for granted that there was a breach, and I do so. Indeed, in the absence of any argument to the contrary I see no other way of addressing the issues in this case.

Clause 2 had been amended in June 1986 and read, at the material time, as follows -

> "The Lessee hereby covenants and agrees that it will use the demised premises for the business of a cocktail lounge and restaurant only and will in pursuance hereof and at its sole expense obtain and at all times keep in its own name (or the name of a nominee on its behalf) as sole owner hereof in full force and effect during the term hereby created all necessary liquor and other licences and approvals required under the laws of the Cayman Islands for the conduct of the business aforesaid. The Lessee further covenants and agrees that it will keep the demised premises open for business as afore-mentioned as permitted by the laws of the Cayman Islands."

Following various difficulties which had arisen previously and into which I need not go, an agreement dated 1st December 1986 was entered into by the parties to the present suit. It provided for consent to be given by the plaintiff for reconstruction work to be done on the premises and for the plaintiff to give up certain rights which they had as lessees. As consideration for that, the defendants agreed that they would provide alterations and services as set out in the agreement for the benefit of the demised premises, and give consent to others to be provided by the plaintiff involving expansion into the Cayside premises.

On 5th December 1986, the plaintiff applied, as envisaged by the agreement, to the Central Planning Authority for permission to open two doors in the south wall of the Cayman Arms premises. After an exchange of correspondence between he plaintiff and the Authority the Authority wrote to the plaintiff a letter of clarification, dated 8th January 1987, of the terms of its permission. It contained the

following passage -

> 'In clarification, I advise that permission for the relocation of the present ingress/egress door is valid permanently (as long as it is acted on within a year); the rear doorway as an emergency exit is only approved for two months: this was done on the advice of the Chief Fire Officer, for which purpose he is a co-opted member of the Central Planning Authority, to allow Cayman Arms to continue operating until such time as an alternative emergency exit to the satisfaction of the Chief Fire Officer could be devised.'

It is not in dispute that the rear doorway emergency exit remained open beyond the two months period for which permission was given, and indeed for the whole period until the defendants retook the premises in December 1988.

The plaintiff's view of the reasons for the closure of the premises in September 1987, is described in an affidavit of Mr. Paireaudeau, its Managing Director, dated 18th January 1988.

He says this -

> 'That following the execution of the said agreement dated the 1st day of December 1986 the plaintiff anticipated that following the carrying out by the defendants of the works provided for in the said agreement the plaintiff would be able to carry out an extensive programme of improvements within the demised premises. In the events which occurred the defendants did not remove their scaffolding from the exterior of the demised premises until towards the end of April 1987 and a dispute arose between the parties over the cutting of a doorway in the south wall of the demised premises which delayed the plaintiff's programme to renovate and upgrade the demised premises.
>
> That on the 24th day of August 1987 the Public Health Department inspected the demised premises and on the 2nd day of September 1987 the plaintiff received 'a food service inspection report' a copy whereof is now produced and shown to me marked 'BP4'. As appears by the said report the Public Health Department required the various matters set out in the report, to be complied within thirty days of the service of the report, that is by the 3rd October 1987.

> That upon receipt of the said report the plaintiff put in hand a thorough review of the condition of the demised premises and the equipment therein and commenced to deal with the requirements of the said Department. In the course of the review it was found that the electrical and plumbing services in the building were inadequate, some of the major items of equipment within the demised premises needed to be replaced, e.g. the walk-in freezer and other equipment needed to be dismantled and as the review progressed it became evidence (sic) that the building itself should be surveyed to ascertain its condition and safety, taking into account the live loads which frequent the premises during busy periods. That on 20th September 1987, after many of the requirements of the Health Department had been dealt with, the plaintiff company decided to close for business and have the demised premises structurally surveyed. The plaintiff instructed Bould chartered Quantity Surveyors to inspect the premises and also retain structural engineers."

Mr. Paireaudeau wrote to the Public Health Department on 21st September 1987 to inform them of the closure, which was described as being "to allow a complete clean up and renovation of the whole of the premises to be carried out as a matter of urgency". His letter includes the following -

> " We have long considered the kitchen area and washroom facilities are no longer adequate and later this year we are going to demolish the existing facilities completely and build new washrooms and also a modern kitchen in adjoining premises."

The Liquor Licencing Board met on 21st September 1987. It refused renewal of the plaintiffs liquor licence for the "Cayman Arms"

That is the background against which the defendants' attorney wrote to the plaintiffs' attorney on 19th October 1987. It is this letter which the defendants claim to be due notice under S 56 of the Registered Land Law. It was in the following terms -

> "We have been instructed to inform you that our clients regard your failure to comply with the provision of clause 2 as a substantial breach of the terms of the lease.
>
> We have been further advised to

> state that unless your clients comply with the terms of the said clause within two (2) weeks from the date hereof, our clients intend to treat the Lease as having been forfeited."

On 22nd October Mr. Paireaudeau wrote a letter to the Chairman of the Liquor Licensing Board. It was undated, although it appears from the Chairman's reply that it was hand delivered on that day, and was in the following terms -

> "We refer to our application dated 23rd July 1987 for the renewal of the licence in respect of our premises situated at Harbour Drive. You will recall that the Health Officer asked that a number of matters be attended to before the renewal of the licence at the hearing on 21st September 1987.
>
> While we have substantially dealt with the health requirements we decided to take the opportunity to examine a wider schedule of works including some structural matters, which could not be completed before 1 October 1987.
>
> The premises are now undergoing a complete renovation, including new toilets, bar, etc. and when the writer spoke to you on or about 27th September 1987 you gave us your assurance that the licence would be issued as soon as the remedial work was completed.
>
> In order to protect our investment in the Cayman Arms, our Board would appreciate it if you would issue the licence (as 'a protection order') under section 6(7) of the Liquor Licencing Law subject to the condition that upon the completion of the renovations to the satisfaction of your Board the licence will become unconditional.
>
> We feel sure you will understand our concern and we should be grateful if you could deal with the matter as soon as possible."

The Chairman replied as follows -

> "In response to your letter delivered by hand to this office on 22 October 1987, I am able to confirm the renewal of the licence (held by the Cayman Arms) to take effect at a future date subject to the satisfactory completion of the renovations in progress."

Further correspondence followed. On 30th November 1987 English Shoppe

Ltd wrote to the plaintiff. The letter was signed by Mr. Arch, the second defendant, and read as follows -

> 'I refer to our letter of 19 October, 1987. The Chairman of the Liquor Licensing Board has confirmed that as of 5th October that Cayman Arms (1982) is without a Liquor License.
>
> In view of the fact that Cayman Arms (1982) Ltd had notice of these violations and have had over one year to comply and further, in view of public disclosure of the violations, and inview of the adverse effect this can have on English Shoppe Ltd., we have no alternative but to forfeit the lease as of 1st December, 1987.
>
> Your cheque number 003152 in the amount of two thousand and thirteen dollars and fourteen cents (CI2013.14) is herewith returned.'

The cheque for the December 1987 rental was also returned. No further rent has been paid by the plaintiff.

Some negotiations took place in the first half of 1988 and over a year passed before any action was taken to retake possession of the premises. It was during the evening of 30th December 1988 that Mr. and Mrs. Arch were seen carrying out activities there. By the next morning a sign was in place on the front door saying 'No trespassing by order of R.E. Arch, owner', and there was a new lock on the door. On 3rd January 1989 a member of the plaintiff's staff went to a room upstairs in the adjoining premises and opened a door leading into the Cayman Arms. He found that the opening on the Cayman Arms side was covered with plywood with a sign on it the same terms.

These activities had been preceded by further correspondence. The first item to which I need to refer was a letter dated 29th November 1988 from the defendants' attorney to the plaintiff's. It referred to an enforcement notice served by the Central Planning Authority on Cayman Property Corporation (of which the Chairman of the plaintiff was also a director) relative to the proposed use of adjoining premises ('the Cayside premises') as a kitchen and/or restaurant and alleged that it was clear that the plaintiff did not have permission directly or indirectly through Cayman Property Corporation to operate

a kitchen on the Cayside premises prior to and since 1st December 1987. The letter then referred to the negotiations which had taken place to resolve outstanding problems, one of which was what would happen if the plaintiff's permission to use the kitchen in the Cayside premises were revoked. It concluded as follows -

> Further, a review of the correspondence between the Cayman Islands Fire services, the Central Planning Authority and your clients prior to September 1987 shows clearly that your clients were unable to satisfy the requirements of the Fire Services and the Central Planning Authority since the rear doorway as an emergency exit was only approved for two months from December 1986. It is not surprising that the Liquor Licensing Board did not place your application for a variation of your licence on the agenda for its meeting on 21 December 1987.
>
> Your clients closed the restaurant the day before this meeting of 21 September 1987 but it seems that the reasons given to Mr. Mills of the Public Health Department by your clients as well as that of Mr. Paireaudeau in his affidavit filed in support of your clients' application for relief from forfeiture do not reveal the true state of affairs relative to the refusal of the Central Planning Authority to allow your clients to operate the kitchen from the Cayside premises and to use the doorway to and from the proposed kitchen as a permanent emergency exit.
>
> The failure to disclose the position of the Central Planning Authority during the negotiations which took place after the Lease had been terminated at the end of November 1987 between our respective clients raises concern as to the bona fides of your clients. In any event, it is difficult to understand how your clients would have been able to carry out the agreement, if one had been concluded, unless it was intended to ignore the Central Planning Authority.
>
> Our clients are of the opinion that the correspondence indicates that the real reason why the Arms was closed in September 1987 related to the inability of your clients to satisfy the need for a permanent emergency exit and to obtain permission to use part of the Cayside premises as a kitchen
>
> Our clients did not request that your clients hand over possession of the premises immediately after the lease was terminated as a gesture of

> good faith in relation to the without prejudice negotiations between our respective clients. On the otherhand, now that the true state of affairs has been revealed through the discovery of documents, our clients have instructed us to demand that Cayman Arms (1982) Ltd firstly, give up possession of the said premises immediately in the condition in which it was before it was gutted,secondly, pay our clients the sum of $53,146.84 in respect of rent for November 1987 and the period up to the end of November, and in respect of any further period of holding over double the monthly rent, and thirdly, that the doorway at the rear leading to the Cayside premises be closed and that part of the premises be restored to it's earlier condition.
>
> Please inform us as soon as possible what arrangements your clients propose in relation to the handing over of possession of the said premises."

These demands were wholly rejected in a letter from the plaintiff's attorney dated 7th December 1988.

Yet another problem arose in December 1988. Water escaped from the Cayside premises into the English Shoppe. More correspondence ensued. A letter dated 16th December 1988 from the defendants' attorney referred to the previous correspondence and demanded in the following terms that the premises be handed over -

> "In our letter to you dated 29th November 1988 we requested on behalf of our clients that your clients give our clients possession of the said premises immediately upon restoring the premises to their original condition before it was gutted by your clients. Had your clients complied with our request it is unlikely that water would have entered our clients' premises from the Cayside building and flooded our clients' business,
>
> Our clients have instructed us to say that, in light of the fact that the Central Planning Authority gave permission to open the doorway at the rear of the second floor limited to two months from 8 January 1987, your clients are now required to close the doorway immediately and to hand over the premises no later than 4.00pm on Friday 30 December 1988, failing which our clients will take such steps as are necessary to protect their property and business."

That, in outline, is the history of the matter. I shall need to refer to some aspects of it in more detail later.

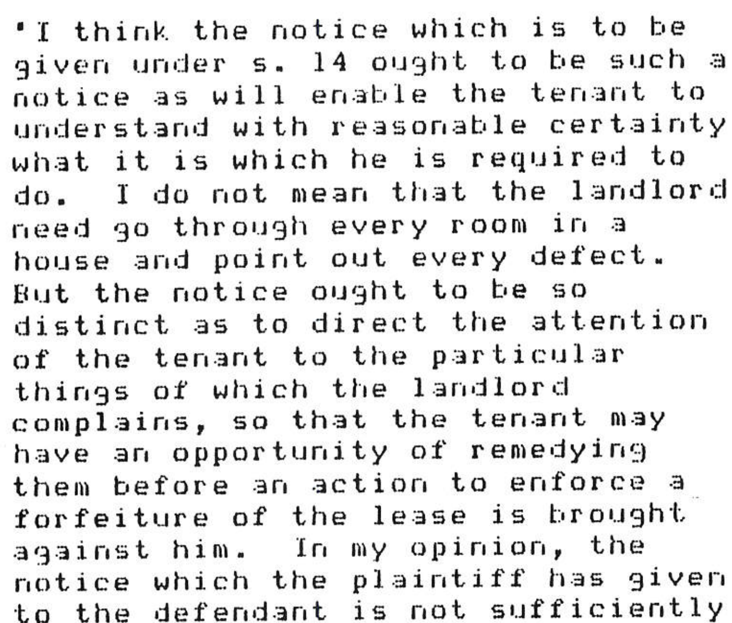
The first task which I have to perform in relation to the law is one of interpretation of the Registered Land Law. I can dispose quite briefly with the relationship between sections 53 and 56. An obligation is implied by law by section 53 (h), unless the lease otherwise expressly provides that if a notice to repair or otherwise make good any defect or breach or agreement for which the lessee is responsible is given by the lessor, the lessee must make it good within such reasonable period as may be specified in the notice. A notice before forfeiture under section 56 may be the same notice as that served under section 53(h), provided that all the requirements of section 56 are included. On the other hand, if there are provisions in the lease which otherwise expressly provide, section 53 has no application. Its purpose is to import implied terms in the absence of express terms. Section 56 is quite different. It applies notwithstanding anything to the contrary contained in the lease.

The next question, therefore, with which I must deal is whether the reentry by the landlord into the premises was lawfully made following a proper and sufficient notice under section 56 and as an exercise of a right of forfeiture arising under section 55. Section 55 (1) is expressed as being subject to the provisions of section 57 (which relate to relief against forfeiture). There is no mention there of section 56 and counsel for the defendants argued that the consequence of that was that exercise of a right of entry under section 55 (2) (a) could take place without prior notice under section 56. That is not my view. To be sure section 55, as a whole, is not expressly made subject to section 56. Section 56 applies only to the exercise of a right of forfeiture for the breach of any agreement or condition in a lease - that is to say a right arising under section 55 (1) (a). Section 57, on the other hand, gives a right to relief against forfeiture in all the instances, whether under section 55 (1) (a), (b) or (c) where a right to forfeiture has arisen (whether or not a prior notice is required under section 56). But that does not derogate from the requirement to serve a section 56 notice in cases where the right to forfeit arises from the breach of any agreement or condition in the

lease.

The first requirement of a notice under section 56 is that it should specify the particular breach complained of. In this case it was described as 'failure to comply with the provision (sic) of clause 2.' The plaintiff says that clause 2 contains several alternative provisions, and from that it follows that the whole clause cannot be breached. The particular breach complained of has not, says the plaintiff, been sufficiently specified, and in consequence no assessment of the reasonableness of the period given to remedy the breach can be made. In response to that, the defendants say that clause 2 means no more than 'you will keep the premises open for the business of a cocktail lounge and restaurant and in so doing you will obey the law,' and that the Chairman of the plaintiff company, a highly experienced businessman and lawyer, could have been in no doubt, in the circumstances which I have described, as to what the particular breach complained of was.

I was referred to a number of English authorities on the requirements of a notice before forfeiture. The first cases in the line of authority arose under section 14(1) of the Conveyancing Act 1881, under which a lessor could serve on the lessee a notice 'specifying the particular breach of covenant complained of' so as to entitle him to enforce a right of reentry. In Fletcher v. Nokes (1897) 1CH 271 a notice was served by a lessor on his lessee to the effect that 'you have broken the covenant for repairing the inside and outside of the houses' (describing them) contained in a specific lease. There were six houses involved. North J. reached the following conclusion -



> 'I think the notice which is to be given under s. 14 ought to be such a notice as will enable the tenant to understand with reasonable certainty what it is which he is required to do. I do not mean that the landlord need go through every room in a house and point out every defect. But the notice ought to be so distinct as to direct the attention of the tenant to the particular things of which the landlord complains, so that the tenant may have an opportunity of remedying them before an action to enforce a forfeiture of the lease is brought against him. In my opinion, the notice which the plaintiff has given to the defendant is not sufficiently

> specific. Sect. 14 says that is to be notice 'specifying the particular breach complained of.' I do not think that is met by a notice which simply says, 'You have broken the covenants for repairing.' The plaintiff has not condescended upon any details, and, in my opinion, the notice is not sufficient under s. 14.'

There followed a case which was reported in the Court of Appeal as Jolly v. Brown and others (1914) 2KB 109 and in the House of Lords as Fox v. Jolly (1916) AC 1. It was another case where breaches of a repairing covenant were set out in a notice under section 14 of the Conveyancing Act 1881. The House of Lords approved the decision of the Court of Appeal and it is to the following passages of the speeches of their lordships to which I turn for the most enlightening statements of the principles which I should follow in accordance with the very similar wording of the Registered Land Law in the Cayman Islands.

Lord Buckmaster LC described the burden which lies upon the lessor as follows -

> 'He must serve a notice and that notice must specify the breach of covenant which is the subject of complaint. That is, he must point out the covenant which he says is broken, and he must specify the breach of which he complains.'

But later he says this -

> 'No form whatever is provided by the statute as the form in which the notice is to be given. It might be associated with useless and irrelevant matter and it would nonetheless be a notice under the section if it was clear from its terms that it was intended and if in fact it contained in plain language the information the section requires.'

He then went on to refer to the judgment in Fletcher v. Nokes by North J and in particular the passage which concluded with the opinion that the notice ought to be so distinct as to direct the attention of the tenant to the particular things of which the landlord complains, so that the tenant may have an opportunity of remedying them.

On that Lord Buckmaster LC said this -

> "I see no reason to differ from this statement except so far as it seeks to establish the standard - often fluctuating and uncertain - of particulars in an action as a test of the sufficiency of the notice."

The decision of the House of Lords was unanimous. The following passages are from the concurring speeches -

Lord Atkinson said -

> "In applying [the statement of the law by North J in any given case it should be borne in mind that the notice is addressed to a person who knows, or ought to know the nature and condition of the premises of which he is a tenant, so that the statement might be sufficient to draw his attention to the things of which the landlord complains, which might be insufficient so to do in a case of a stranger who had never seen or knew nothing of the premises."

Lord Sumner said this with regard to the nature of the notice -

> "It confers a great boon on the tenant but it ought not to be turned into a trap for the landlord. To hold this notice to be in law no compliance with the section would, in my opinion, arm the tenant with a quibble, where only a shield against oppression was intended."

Lord Parmoor said that in his opinion a notice was sufficient to comply with the statute if it specified to the lessee the breach complained of with such particularity as fairly to tell him what it was that he was required to remedy, if it was capable of remedy, and what it was for which he was required to make compensation in money. To determine whether a notice complied with this test would depend on the information which the notice as a whole might be fairly said to give. He concluded his speech with the following passage -

> "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."

From these authorities I conclude that the question which I have to determine is this. Could the lessee, in the light of all the circumstances prevailing at the time and its knowledge through its officers of these circumstances, have had any reasonable doubt as to the particular breaches which were being complained of? That, in my view is the subjective common sense test which has to be applied in the light of the English authorities to which I have referred. It is not a matter of deciding whether the requirements of section 56 are mandatory or regulatory only. The question is whether the notice has fulfilled its purpose of imparting the necessary information. In that respect the notice, for which no specific form is provided, is quite different in nature from a certificate with prescribed contents such as was considered by Lord Hailsham LC in London & Clydeside Estate v. Aberdeen District Council and anor (1979) 3 ALL ER at p 880.

On 19th October 1987, the date of the notice, the premises had been closed for just under one month and renewal of the liquor licence had been refused less than a month before. On 22nd October Mr. Paireaudeau wrote the letter to the Liquor Licensing Board to which I have already referred. On 3rd November the company's attorney wrote to the defendants' attorney enclosing consultants reports on the structural condition of the premises. The plaintiff's assertions on the basis of these reports are set out in the following paragraph of this letter -

> "Our client has been compelled to close the restaurant as a consequence of the inherent defects in the building and the risk to life, not because of the requirements of the Liquor Licensing Board. The Board have confirmed that they will renew the licence as soon as the renovations have been completed."

The plaintiff was disputing the complaint of breach. But I find that it understood perfectly well that what was being complained of was the closure of the premises as a result of failure to comply with the requirements of the Liquor Licensing Board.

By November 1988 the defendants were alleging that there was yet another reason why the Cayman Arms had closed in September 1987. It

was, they said, because the plaintiff could not satisfy the need for a permanent emergency exit nor obtain permission to use part of the Cayside premises as a kitchen. To support that allegation they had to impugn the reasons for the closure which were given on 21st September 1987 by Mr. Paireaudeau to Mr. Mills of the Public Health Department. They did that in their attorney's letter of 29th November 1988 to which I have already referred. What Mr. Paireaudeau wrote to Mr. Mills was this -

> "Following receipt of your department's inspection report management put in hand remedial works to meet your requirements.
>
> It has been decided however to close the premises to allow a complete clean up and renovation of the whole of the premises to be carried out as a matter of urgency. Accordingly, the premises were closed as of yesterday and the necessary work has been put in hand.
>
> We have long considered the kitchen area and washroom facilities are no longer adequate and later this year we are going to demolish the existing facilities completely and build new washrooms and also a modern kitchen in adjoining premises.
>
> We will contact with your offices at the appropriate time as it would be of assistance to have the benefit of your support and advice in developing the new facilities and ensure they meet the required standards in all respects."

At that time the approval for the kitchen extension had been deferred by the Central Planning Authority until Cayman Property Corporation had satisfied certain health and safety requirements of the Authority. These requirements were set out in a letter from the authority dated 10th April 1986. They had not been met by 21st September 1987, nor indeed have they ever been. The extent to which development at the Cayside premises took place in disregard of the requirements of the Central Planning Authority is not an issue in this case. What does fall next for determination is whether remedial work which would have sufficed to satisfy the requirements of the Liquor Licensing Board could have been carried out, the Liquor Licence issued and the Cayman Arms reopened for business within 2 weeks of the notige of forfeiture of 19th October 1987. By that time the premises had been inspected,

on 6th October, by Bould Quantity Surveyors whose report describes the premises as having been emptied of furniture, with the old bar and fittings and an area of flooring removed. It would have been quite impossible to reinstate the premises and have them operating legally again within 2 weeks. It was a wholly inadequate time and the notice must fail on that ground alone, if the breach was capable of remedy. It was submitted that the time which the plaintiff had had to put matters in order before the notice was served should be taken into account. In rejecting that, I adopt the following statement of principle enunciated by Slade LJ in Expert Clothing Ltd v. Hillgate House Ltd and anor (1985) 3 WLR 358 at 373 -

> 'In contrast with breaches of negative user covenants, the breach of a positive covenant to do something (such as to decorate or build) can ordinarily, for practical purposes, be remedied by the thing being actually done if a reasonable time for its performance (running from the service of the section 146 notice) is duly allowed by the landlord following such service and the tenant duly does it within such time.'

Later he says this -

> 'An important purpose of the section 146 procedure is to give even tenants who have hitherto lacked the will or the means to comply with their obligations one last chance to summon up that will or find the necessary means before the landlord re-enters. In considering what 'reasonable time' to allow the defendants, the plaintiffs, in serving their section 146 notice, would, in my opinion, have been entitled to take into account the fact that the defendants already had enjoyed 15 months in which to fulfil their contractual obligations to reconstruct and to subject the defendants to a corresponding tight timetable running from the date of service of the notice, though, at the same time, always bearing in mind that the contractual obligation to reconstruct did not even arise until 29th June 1981, and that as at 8th October 1982 the defendants had been actual breach of it for only some 10 days. However, I think they were not entitled to say, in effect: 'We are not going to allow you any time at all to remedy the breach, because you have had so long to do the work already.'

These principles apply equally to a notice under section 56 of the Registered Land Law, and I conclude that a wholly inadequate period, such as two weeks in this case is open to the same objection as 'no time at all', assuming that the breach was capable of remedy within a reasonable time. That is the next question for determination.

The notice dated 19th October 1987 records the view of the first defendant that the breaches were capable of remedy, and indeed capable of remedy within two weeks. That was the period which it gave to the plaintiff to put matters right. It was, moreover, also submitted in argument at the hearing that the problem was intractable because of Mr. Adams' total commitment to putting the kitchen onto the Cayside premises. Implicit in that is the contrary proposition that the problem would became tractable if Mr. Adams abandoned that total commitment. I cannot find in the agreement dated 1st December 1986 any basis for the proposition that the possibility of leaving the kitchen in the original premises no longer existed, although it did envisage that the Cayman Arms would be extended into the Cayside premises by providing, among other things, that the defendants would -

> 'Concur in 1982's application to the Central Planning Authority to make two doors leading from the Demised Premises to premises on the south belonging to Cayman Property Corporation Ltd. to set out in suit No. 105 of 1986 between the parties hereto and of the proposed lease by 1983 from Cayman Property Corporation Ltd. of the said premises adjoining the Demised Premises on the south thereof for the more efficient conduct of 1982's said business including 1982's application for the extension of its liquor licence thereto.'

There was no question of the defendants believing at that time, that the necessary permission had been granted. Nor is there any obligation in the agreement to construct a kitchen on the Cayside premises. As I read that document the references are to alterations to the demised premises and are permissive only. The agreement also provides that the lease should be amended to give effect to its provisions. That was never done. In particular, as is clear from the letter from the defendants' solicitor dated 29th November 1988, no agreement had been reached on amendments to the lease relating to the

relocation of the kitchen. Moreover, the Central Planning Authority had not refused permission for the relocation of the kitchen when the Cayman Arms was closed or when the notice of forfeiture was served on 19th October 1987. The plaintiffs were indeed in breach of the approval which had been given for a temporary emergency exit for two months only, but the matter had not been brought to a conclusion. In particular, there is evidence, which I accept, that the plaintiff intended to meet with the fire Department, review their requirements as part of the complete renovations to the premises which were on hand, and otherwise ensure that all the requirements of the appropriate authorities were satisfied. It was seeking to remedy any breach. All these matters point to the possibility of the breach being remedied, and remedied within a reasonable time. The plaintiff was not given that time by the notice. There could well have been serious difficulties in satisfying the regulatory requirements, but the plaintiff was entitled to his opportunity to do so.

The refusal by the Liquor Licensing Board to renew the liquor licence in September 1987 was not a matter which attached such a stigma or notoriety to the premises as to make breach incapable of remedy.

If I am right in this finding, no question of frustration of the lease arises. In any event, the defendants argument on frustration was put on the basis that now that the Central Planning Authority's enforcement notice relating to the Cayside premises dated 29th December 1988 has issued, the defendants are entitled to submit that the lease has been determined for the purpose of this hearing. That submission also depends on the proposition, which I have rejected, that the possibility of the kitchen remaining in the original premises of the Cayman Arms no longer exists.

I now turn to the landlords reentry on 30th December 1988. Section 55 (2)(a) of the Registered Land Law provides that a right of forfeiture of a lease may be exercised, where neither the lessee nor any person claiming through or under him is in occupation of the land, by entering upon and remaining in possession of the land. The alternative remedy, under section 55 (2)(b) is to enforce the right by action in the Court. If I am wrong in my conclusions about section

56, the question of whether or not the plaintiff was in occupation of the demised premises at the time when the defendant retook them on 30th December 1988, falls for consideration. The premises had then been closed for well over a year. By August 1988, when an inspection was carried out and photographs taken, the premises were gutted. The defendants claim that they were also unsafe. The plaintiff says that little work was done on the premises since closure because the first defendant had forfeited the lease and returned rental cheques and because of the other difficulties between the parties. Work did continue on the adjacent Cayside premises. The lock on the front door of the Cayman Arms was changed in February 1988, according to an affidavit sworn by an employee of the plaintiff. He also says that there were several items within the Cayman Arms premises which belonged to the plaintiff, including a quantity of angle iron brackets ordered to strengthen the floor of those premises.

I was referred to various other legal and factual situations, from which I was invited to draw conclusions as to the meaning of the word 'occupation'. I will simply refer to Lloyds Bank plc v. Rosset (1988) 3 ALL ER 915 and the references in it to the speech of Lord Wilberforce in Williams & Glyns Bank v. Boland (1980) 2 ALL ER 408. Both these cases were concerned with residential premises, and with the overriding interest of persons in 'actual occupation' as against banks as mortgagees. In the Boland case Lord Wilberforce regarded the word 'actual' in the phrase 'actual occupation' as mere emphasis that what is required is some physical presence, not some entitlement in law. The word 'occupation' undoubtedly has different meanings in different contexts. What constitutes occupation of a dwelling house, a piece of woodland or a dismantled place of entertainment will not be the same in each case. In my view the meaning and intent of section 66 (2)(a) is to express in statutory form the landlords right to make peaceable reentry onto the land as a means of exercising his right of forfeiture. Had it been necessary for me to decide this case on the question of whether or not the plaintiff was in occupation of the land so as to preclude reentry for the purposes of section 55 (2)(a), I would have decided it in favour of the defendants. However, they have already failed to clear a previous hurdle by their failure to specify in their notice under section 56 a reasonable time within which the

lessee was required to remedy the breach.

To conclude my findings on the matter of the reentry, I reject the argument that the defendants were entitled to reenter 'to protect their property and business'. I need not consider whether any such right might exist in a situation of emergency. On 30th December 1988 there was no such emergency.

I now have in conclusion to consider what are the appropriate remedies open to the plaintiff. It has claimed a declaration that the lease subsists and it is entitled to regain possession. That carries the consequence that the plaintiff has the obligation to pay the outstanding rent since November 1987. The damages which the plaintiff seeks is in an amount which would set off that obligation. The plaintiff wants his declaration because of the undetermined status of the lease which has existed since the notice under section 56 of the Registered Land Law was served. This is not an application for relief against forfeiture, but the following observations of Sir Robert Megarry V-C in Meadows v. Clerical, Medical & General Life Assurance Society (1980) 1 ALL ER 454 are pertinent -

> 'There are of course, curiosities in the status of a forfeited lease which is the subject of an application for relief against forfeiture. Until the application has been decided, it will not be known whether the lease will remain forfeited or whether it will be restored as if it had never been forfeited. But there are many other instances of such uncertainties. When the validity of a notice to quit is in dispute, until that issue is resolved it will not be known whether the tenancy has ended or whether it still exists. The tenancy has a trance-like existence pendent lite; none can assert with assurance whether it is alive or dead.'

The plaintiff is entitled to have the position determined by the declaration which he seeks in paragraph (1) of his originating summons.

The question of damages is less easy. My conclusion is that this is not a case where it would be appropriate to award aggravated or

exemplary damages. The first defendant's attorney served a notice on the plaintiff alleging breach of the lease. The plaintiff first sought relief against forfeiture, then changed course and attacked the forfeiture itself. In so doing it has neither admitted no denied breach. It was said that that could not be done because the notice had not sufficiently specified the breach complained of. I have found that it did. It is also said that the defendants are committing an ongoing trespass, as their reentry was illegal. But that reentry took place on 30th December 1988. It cannot be the basis for damages relating to a period before that. However, I have found that the entry by the first defendant on 30th December 1988 was an unlawful sequel to a defective section 56 notice, and I make an award of damages against the first defendant of a sum which will have the effect of relieving the plaintiff of the obligation to pay rent from the time of the first defendant's reentry to the time when they hand back the premises. I express that as being a sum, calculated at the rate of CI$2214.45 per month from the 30th December 1988 to 30th April 1989 and CI$2435.89 per month (an increase of 10% as provided for by the lease) from 1st May 1989 to the date when the defendants hand over possession of the demised premises to the plaintiff.

I also order that the defendants and each and all of them surrender possession of the demised premises.

I decline to make an order that the defendants be restrained from entering upon the demised premises. That additional equitable relief is not necessary, nor indeed appropriate in all the circumstances of this case. There is not the slightest indication that the defendants will disobey the order of the Court to surrender possession of the premises. If they do, they do so at their peril. Once the surrender is made the plaintiff will have the protection of the terms of the lease and the provisions of the Registered Land Law. There is no need for more.

I will determine the question of costs after hearing any submissions which counsel may wish to make.

G.E. Harre

Judge

Dated 23rd June 1989.