Case No: QB-2022-001920
Neutral Citation No.: [2024] EWHC 2246 (KB)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (KBD)

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 12 July 2024

BEFORE:

MR STEVEN GASZTOWICZ KC sitting as a Deputy High Court Judge

BETWEEN:

DR MONICA BIJLANI

Claimant

- and

MEDICAL EXPRESS (LONDON) LTD

Defendant

MR S BUTLER appeared on behalf of the Claimant
MR T SALTER appeared on behalf of the Defendant

JUDGMENT
(approved)

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MR STEVEN GASZTOWICZ KC

1. It will be impractical in this oral judgment to refer to every piece of evidence before the court, and I shall not do so. I have however taken all of the evidence into account, whether I specifically mention any particular part or not.

2. The claimant's primary claim is for declaration that she has not broken the terms of a lease granted by the defendant, or, if she has, that any such breach has been waived. In the alternative, she seeks relief from forfeiture.

3. The lease involved is a sub-underlease from the defendant of a first-floor room at 117A Harley Street, London entered into on 21 May 2014 for the term of 20 years from that date, at an annual rent of £25,000. I shall refer to this as, "the Lease." I shall refer to the first-floor room that was the subject of the sub-underlease as, "the Premises."

4. There are some additional claims of lesser significance in the Amended Particulars of Claim dated 13 April 2024 – for declarations in relation to non-opening of windows in the premises, balcony access, use of a common waiting room, and data protection rules.

5. At the time the claimant entered into the Lease of the premises, there is no dispute that she was fully registered with the General Dental Council ("GDC") as a dentist and was therefore able properly to carry out a full range of dental treatments, as well as unregulated treatments such as the use of Botox for aesthetic purposes which is commonly administered by some dentists, as well as by unqualified people.

6. The defendant landlord has at all material times operated its own healthcare related business from other parts of 117A Harley Street. It appears that the basement is at present let to another dentist.

7. Clause 1.1 of the Lease, on page 5 of it, defines the property as the first-floor room I have referred to. On the same page it defines the 'Permitted use' as:

> "A consulting room for the purpose of consulting with patients and the carrying out of legitimate surgical/dental procures (inclusive of all treatments provided by a registered dental practitioner) by a registered

> dental practitioner who shall be duly qualified and remain fully registered in the United Kingdom with the General Dental Council and registered with the Care Quality Commission, or as agreed dental nurses or hygienists employed by the dentist."

8. Clause 28 provides that:

> "28.1 The Tenant shall not use the Property for any purpose other than the Permitted Use and such use remains subject for the following conditions.
>
> 28.2 The tenant (and any other dental practitioner) practicing [sic] at the Property shall be duly qualified and remain fully registered with the General Dental Council and shall conduct its practice in accordance with such registration."

9. What is referred to as, "the Property" is the Premises, that is to say the room let to the claimant.

10. Ancillary rights granted under the Lease include in clause 3.1(j):

> "The right to use the communal oxygen cylinder, emergency drugs box and defibrillator to be located in the communal part of the building for the shared use of the Tenant and other users of the Building."

As will be apparent, 'the Building' refers to 170A Harley Street.

And in clause 3.1(i):

"The right to a shared use of the ground floor waiting room."

11. Forfeiture in the event of breach of the Lease by the tenant was provided for in clause 36.

12. There is no dispute that the claimant was suspended by the GDC in April 2021. This was an interim suspension, followed by other interim suspensions. In June 2021 a 12-month suspension was imposed on a substantive basis, following admissions and findings by a professional conduct committee of the GDC.

13. An allegation by the landlord that she was issuing, "Fitness to fly" certificates during the COVID pandemic without carrying out PCR tests resulted in a separate interim suspension. However, the claimant was recently acquitted by the Crown Court of offences relating to the issue of such certificates, and the relevant suspension was removed, though she remains subject to a different interim suspension at the present time, which she hopes will shortly be removed.

Allegations of breach - the section 146 notices

14. There are two relevant notices that have been issued by the defendant landlord under section 146 of the Law of Property Act 1925.

15. The first relevant notice is dated 24 February 2022. Under 'Particulars of Breach', it was stated that the claimant had been suspended and thereby prevented, "from carrying out legitimate surgical/dental procedures (inclusive of all treatments provided by a registered dental practitioner) as defined under the Permitted Use' part of the Lease

and that:

> "Rather than using the property for the Permitted Use, you have been using the property for use other than the Permitted Use, namely providing cosmetic services, including Botox treatments (together 'Cosmetic Services' and which cosmetic services are not legitimate surgical/dental procedures falling within the permitted use ... " [*sic* re the non-closing of the brackets]

16. It was accepted by the claimant's counsel in his skeleton argument, and at the hearing, that read together, this is an allegation that the claimant has been using the premises the provide Botox treatments whilst suspended.

17. There are in the notice two, "Non-exhaustive examples" given from 2021, but they are merely examples and there is no dispute that the claimant continued to carry out Botox treatments in the Premises whilst suspended in alleged breach of the Lease between the end of January 2022, when rent was last accepted, and the date of the notice.

18. A possible suggestion in the Notice, on one reading, that there was also a breach by using the Premises to provide Botox services at all (even aside from the requirement for the use of them to be by a fully registered dentist) was sensibly not pursued by the defendant as the hearing.

19. There were some subsidiary matters also set out in the Notice, such as ancillary use of the bins, waiting room and other common areas by the claimant, not in connection with the Permitted Use.

20. The second relevant section 146 notice was dated 12 May 2022. Under particulars of breach, this again set out the fact that the claimant had been suspended by the GDC, and stated that:

> "In breach of the provisions of paragraphs 28.1 and 28.2 in the Lease during the period of the suspension new you;
>
> 7.1 have not used the Property for the Permitted Use; and
>
> 7.2 have practised at the Property whilst not being duly qualified and fully registered with the GDC".

21. In the course of the Notice, a particular patient, Mr Lee-Potter, was referred to as having attended for the replacement of a missing dental crown on 9 May 2022. Similar ancillary matters to those alleged in the first notice were then again set out.

The Issues

22. The skeleton argument filed on behalf of the claimant states that, "The primary issue to be determined by the court is whether the claimant has failed to use the premises in accordance with the permitted use (clause 28), in that the claimant's registration for practising as a registered dental practitioner with the General Dental Council (GDC) was suspended on 16 April 2021."

23. That is correct in terms of what is meant, though it is to be pointed out that strictly it is not a failure to use the premises in accordance with the permitted use that is an issue as such because the claimant was not compelled by the Lease to use the premises at all – but, rather, the issue is whether the claimant's actual use of the premises was not in accordance with the permitted use given that the claimant's registration as a dental practitioner was suspended.

24. If this issue is determined against the claimant, then the question arises as to whether there has been a waiver with the right to forfeiture.

25. If that question is also determined against the claimant, then the issues arises as to whether there should be relief from forfeiture.

The proper construction of the Lease

26. Accordingly, the first issue the court must decide is whether the claimant's suspension by the GDC meant that continuing thereafter to use the premises for Botox consultations and treatments (which is admitted to have occurred) or dental treatments (if found to have occurred despite being denied) was a breach of clause 28 of the Lease.

27. A Lease such as a the present one falls to be construed by reference to well-known principles in relation to the interpretation of a contract. These have been set out in particular by the House of Lord and the Supreme Court in a number of relatively recent cases including *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, *Rainy*

Sky SA v Kookmin Bank [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services* [2017] AC 1173.

28. In *Chartbrook,* Hoffman LJ at paragraph 14 summarised the position as being that the court is concerned to identify the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract mean.

29. In *Bank of Credit and Commerce International SA (in Compulsory Liquidation) v. Ali Others* [2002] 1 AC 251, Nicholls LJ pointed out at paragraph 26 that,

> "The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made."

30. It has also been emphasised on more than one occasion that notwithstanding that the focus is on particular words in issue, the contract as a whole falls to be considered in interpreting them.

31. In *Arnold*, which concerned the interpretation of a covenant in a lease, the Supreme Court stated that the meaning of the words used falls to be assessed by focussing on those words, and having regard to

(a) the natural and ordinary meaning of the clause in question,

(b) any other relevant provision in the contract,

(c) the overall purpose,

(d) the facts and circumstances known or assumed by the parties that find the document was executed, and

(e) commercial common sense, but

(f) disregarding subjective evidence of any party's intentions.

The majority of the court then expanded on these as can be seen from the report.

32. In *Wood*, the court emphasised, at paragraph 10, that

(a) the court's task in interpreting a contractual term is to ascertain the objective meaning of the language chosen by the parties to express their agreement;

(b) this is not a literalist exercise focused solely on a parsing of the wording of a particular clause, but requires consideration of the contract as a whole,

(c) depending on the nature, formality and quality of the drafting of the document, the court in reaching its view as to that objective meaning can give more or less weight to elements of the wider context, taking into account the factual background known to the parties at the date of the contract, but excluding evidence of the prior negotiations,

(d) when interpreting any contract, both textualism and contextualism are tools available to abstain the objective meaning and the language used by the parties, with the extent to which each tool will assist the court and its task varying according to the circumstances of the case.

33. Applying the principles set out in the authorities, in my judgment the use of the premises by the claimant performing Botox or dental treatments of any sort there (or carrying out consultations in relation to these things) whilst her registration as a dentist was suspended by the GDC was in breach of the Lease.

34. Section 33 of the Dentist Act 1984 provides that:

> "(1) While a person's registration in the register is suspended by virtue of a direction or order under this Part –
>
> (a) he shall be treated, except as provided in subsection (2), as not being registered in the register notwithstanding that his name still appears in it."

35. That is not withstanding that it is provided in sub-section 1(b) that sections 27, 27A, 27B and 27C shall continue to apply to the person, and that by section 1(2) he (or she) is still required to comply with rules made under section 34A of the Act.

36. The premises in question are located in Harley Street, which all witnesses in the case considered to be associated with clinical excellence. The claimant herself in her evidence said that she had had an ambition to practice there for that reason, though she felt that the quality of the street had been diminished somewhat over recent years.

37. The Lease itself contains clauses clearly relating to clinical practice, and the building the room let was in was used by the landlord itself for healthcare related purposes, and another dentist occupies the basement of it.

38. It is apparent that the user clause in the Lease that was intended to ensure that only a dentist authorised a practice as a dentist used the premises.

39. It seems to me that just taking the ordinary meaning of the words used, even without more, a person whose registration as a dentist is suspended is not during that time a fully registered dentist.

40. However, the matter does not end there. First by Act of Parliament, the person whose registration is suspended, "shall be treated ... as not being registered": see section 33(1) of the Dentists Act 1984.

41. Second the word, "fully" in the user clause emphasises that it is an ability to practice (in the UK) that is required.

42. Third, clause 28.2 of the Lease requires that the Tenant shall, "remain fully registered with the General Dental Council, and *shall conduct its [sic] practice in accordance with such registration*." This confirms that it is an ability to practice as a dentist under the registration that is important under the lease.

43. Fourth, having regard to the nature of the building, its location and its use, and all the circumstances as described in evidence, there were good reasons to require a meaningful registration in the form of an ability to practice as a dentist as the landlord's

reputation and the goodwill attached to the building, could otherwise be adversely affected by the person not within that category using it.

44. In my judgment, the requirement in the Lease that the premises must be used only by a fully registered practitioner meant that they could not be used by a person who was not, or who was by law to be treated as not being, a registered dental practitioner, unable to practice as such because their registration was suspended.

45. Whatever consultation with patients or treatments the claimant provided was not use by a fully registered dental practitioner, and so was not permitted. A user clause can cover use only by a particular person, or type of person, as well as what is done by them: see for example *Blumenthal v Church Commissioners* [2005] 2 P and CR 20.

46. This is not affected by the fact that cosmetic Botox treatments can be carried out under the general law by those not so registered as well as by a registered dentist, as is commonly done.

47. Whether performing regulated or non-regulated treatments, or holding consultations in relation to them, the use being made of the premises by the claimant was not used by a fully registered and was not permitted by the Lease whilst she was suspended.

48. It follows that the claimants admitted treatment of people with Botox for cosmetic purposes, was in breach of the user clause in the Lease.

49. There is also, as I have noted, an allegation that the claimant gave dental treatment to a patient, Mr Lee Potter, on 9 May 2022. This is alleged to have been by replacing a dental crown, which is denied was done, and by administering by Botox for pain relief to the jaw, which is admitted to have been done.

50. For the reasons I have set out, the claimants use of the Premises was in breach of the Lease, whether the claimant replaced the crown on this occasion or not and whether the use of Botox on this occasion for pain relief amounted to dentistry or not. It may be thought it is not important to determine this particular aspect of the matter therefore.

51. However, the defendant contends that the fact the claimant did this, if proved, makes the matter more serious, and is capable of affecting the application for relief from forfeiture, assuming that issue is reached. It is an issue I will therefore decide, notwithstanding the findings I have already made.

52. No-one other than the claimant and Mr Lee-Potter will ever know for certain what happened in the claimant's treatment room on the occasion in question. That does not mean, however, that in deciding the matter on the balance of probabilities, I must accept their version of events. I must have regard to all the evidence, am able to draw inferences from the evidence before the court, the way it was given and also from the absence of evidence of a type one would expect readily to see were a particular version of events to be correct.

53. It is not in dispute that Mr Lee-Potter was a longstanding dental patient of the claimant, and attended the Premises following two cycle accidents as a result of which the crown came off, an implant he had and that he had a painful jaw.

54. The evidence in relation to the crown is on the defendant's side that, as shown by CCTV footage of the waiting room (a transcript of which is before the court), Mr Lee-Potter said that the landlord's managing director, Mr Stephen Lingam, upon being questioned said that he was attending for, "My crown" and said, "Can you see? I have got the thing so she can just cement it back on surely."

55. The claimant's evidence was that she told Mr Lee-Potter that she was suspended and refused to put his crown back on despite his entreaties to do so.

56. Mr Lee-Potter's evidence was that the claimant did not put the crown back on, although he had gone there for that purpose, notwithstanding that his evidence was at the same time that he went there because he understood Botox might provide some relief for his jaw, and had the crown available ready to be simply back onto his implant. It is not in dispute that the CCTV footage from the waiting room records him as making the comments there that I have referred to.

57. An obvious question that arises is, who did put the crown back on if it was not the claimant?

58. There was no dispute that it was put back on, and in his witness statement 19 July 2022, Mr Lee-Potter said, "Dr Bijlani did not recement the crown. She did not do any dental work. I saw a dentist local to me for the broken crown."

59. In his oral evidence at trial, Mr Lee-Potter accepted this was not true. He said he went to a local surgery but the receptionist turned him away. He said he had the crown refixed in Turkey. No documentary evidence, such as a receipt for payment or confirmation for any such dentist, or anything, else was produced.

60. This change of stance warded off further questions relating to his witness statement about who the local dentist was, why no records from him had been produced despite a witness statement referring to this a long time previously, and the ability to easily obtain a duplicate receipt or other confirmation from a local dentist etc, all of which he would otherwise obviously have faced based on his witness statement.

61. On the balance of probabilities, I find that the claimant did put the crown back on. Mr Lee-Potter accepted in evidence that he sought to persuade the claimant to put the crown back on, as did the claimant. As Dr Tracey Bell, the dental expert called by the defendants subsequently said it would have been a straightforward task assuming there was no underlying damage. Here it was on the evidence being replaced onto an implant posed which, as described in evidence, would have been made out of a strong mental such a titanium, meaning it was resistant to underlying damage. Mr Lee-Potter had the crown with him. It probably appeared a simple job. No-one would know exactly what happened in the room other than the claimant and Mr Lee-Potter who was not likely to reveal anything. I consider that the claimant probably succumbed to the situation and the pressure she was under knowing Mr Lee-Potter was also separately in pain from his jaw and believing it would do no harm to help him to this small extent.

62. These mitigating circumstances as well as the fact of the breach will fall to be taken into account when the question of any relief from forfeiture falls to be considered, however.

63. On 22 June 2022, Mr Lee-Potter sent texts to the claimant saying his fiancé thought she needed an implant but [had then been told by her dentist that he could not do implants and she needed jaw reconstruction], asking, "Can that be right? Can she come to see you because you are the only dentist I trust." The claimant replied that most dentists do not do implants and that she would consult colleagues for the best price. That does not mean that the claimant intended to do the work herself and is consistent with seeing what colleagues could do the work for the best price. There is no evidence the claimant herself did any such work at the premises.

64. There was also an allegation by the defendant that one other patient had filled in one of signing sheets that he landlord had created for those attending to see the claimant, stating in response to the question, "Service you are attending for: teeth" on 1 June 2022. There is no evidence of exactly what that meant or what was actually done. It was one sheet out which what must have been many, or at least several, answered by attendees over a period, which also indicates the claimant was not generally providing such services still.

65. There was in addition a suggestion another person, Dr John Keet, may have attended for emergency treatment on one occasion whilst the defendant was suspended. Professor Lynch gave evidence he actually carried out the emergency treatment on that occasion, however. His evidence was convincing and I accept that the claimant got another dentist to carry out the emergency treatment because she could not do so due to her suspension. In my judgment that shows that she was complying with her regulatory duty not to continue to give dental treatment (even an emergency) and what happened in relation to Mr Lee-Potter's crown was a one-off.

66. I turn to the injection of Botox for the relief of Mr Lee-Potter's jaw pain. The question of whether this was dental treatment was, perhaps surprisingly giving the nature of the issues, the subject of expert evidence. On the one hand by Dr John Renshaw for the claimant, and on the other by Dr Tracey Bell for the defendant.

67. Dr Bell's view in her report of 24 February 2023, was that she believed that " ‘the act’ of injecting Botox into the jaw for purposes of pain relief following a crown falling out was a surgical or dental procedure." She continued: "Having considered the

circumstance and chronology, Mr Lee-Potter attended a registered dental practice, advertised and known as Dr Monica's Dental Clinic ... with dental/facial pain associated with a broken crown, obtained in a cycling accident."

68. However, there was no evidence at trial that the "broken crown" was the cause of the pain in the jaw and the evidence was that it was simply a crown on top of an implant, which crown had come off. There is no evidence, or obvious reason, why that was itself the cause of pain in the jaw, which appears to have been relieved, as Dr Bell accepted, by the Botox relaxing of the muscles.

69. I found Mr Renshaw's following view in his report convincing, namely that:

> "In order for the care to be described as, "Dental treatment" the dentist would have to perform some kind of action that would be seen as some form of dental care - a restoration, an extraction suturing a wound, or removing the nerve from a painful tooth",

which this was not.

70. However, under cross-examination Dr Renshaw said, somewhat to my surprise, that he had assumed the Botox had been used to alleviate pain in Mr Lee-Potter's face, not in the jaw. This appeared an unfounded assumption as the material before him when he reported showed that Mr Lee-Potter had pain in the jaw. Dr Renshaw subsequently accepted at one point under cross-examination that, "if the pain is to the jaw, it is dentistry." However, he was led to the answer by accepting that some things dentist do, such as reconstruction work in the jaw, are dentistry. That does not of course mean that anything done to the jaw is dentistry. A simple example would be the use of an icepack to relieve bruising to the tissue there.

71. Dr Bell in her oral evidence pointed out that there was no regulatory framework for the use of Botox. She explained how Botox could be used for pain relief by relaxing muscles, and that given the pain to the jaw went within 48 hours, that suggested the Botox worked here.

72. Having considered all of the evidence before the court, both oral and documentary, I am not convinced that in the particular circumstances of this case, administering Botox to relax muscles alleviating pain in the jaw of Mr Lee-Potter was an act of dentistry. It is not in dispute that as Dr Renshaw's report records, at paragraph 8.13, "The GDC has said they do not regard the use Botox as a form of dental treatment." The document before the court from the GDC at page 1962 of the trial bundle, expressly says, "The administration of Botox is not the practice of dentistry."

73. It is also difficult to understand why the administration of Botox, for example by a nurse to alleviate pain in the jaw should be unlawful, as it would be if it was an act of dentistry. Furthermore, the administration of Botox, for what might be thought less worthy cosmetic purposes, can be carried out by anyone and on the evidence the Botox works on muscles in the same way for pain relief as for anything else.

74. So far as the Care Quality Commission is concerned, it is to be noted that in the document provided at the hearing, albeit dealing with cosmetics, they make clear that they do not regard injections and muscle relaxing substances such as Botox, as involving a surgical procedure. There is nothing before the court to show it regulates such procedures, whatever their purpose.

75. For completeness, an undated email from a policy officer of the GDC produced by Dr Bell confirms the view that a person unregistered as a dentist is properly able to administer Botox. He merely then points out in that email that it should not be done for pain management "by virtue of being a dentist" by someone who is suspended. However, I accept that the claimant told Mr Lee-Potter she was suspended as a dentist, which is why he had to persuade her, probably against her better judgement, to put the crown back on, and she was not purporting to administer the Botox to him by virtue of being a dentist.

76. Nonetheless, for the reasons I have given, the claimant was not permitted under the Lease to carry out Botox treatments or anything on the Premises whilst suspended. Even if the injection of the Botox was properly to be regarded as amounting to dental treatment in the circumstances I have described, contrary to my conclusion, it would add little as that has been a matter of realistic technical debate, rather than being

apparent to the claimant as something she was not permitted to do at the time the work was performed.

77. As a separate matter, it is, however, to be noted that it merged into the course of the claimant's evidence that she gave Mr Lee-Potter Botox which had not been prescribed for him. This was not an added breach of the Lease, but it is against something I am asked by the defendant to take into account in relation to relief from forfeiture, and I shall return to this later.

Waiver of forfeiture

78. I turn then to the question of waiver by the defendant landlord.

79. Where a breach of covenant is waived, the waiver extends only to that particular breach and does not operate as a general waiver of the breach of the covenant, see *Chrisdell Ltd v Johnson and Tickner* [1987] 54 P and CR 257 and section 148 of the Law of Property Act 1925.

80. As was accepted by the claimant's counsel in argument, it is only in relation to breaches before the affirmation of the Lease occurs by the acceptance of rent or otherwise a waiver of forfeiture applies.

81. In the present case, the defendant was on the evidence of its managing director, Mr Stephen Lingam, aware of the claimant's suspension shortly after it occurred in April 2021 and was aware that claimant was using the Premises though suspended at least by late October 2021 according to his second witness statement, and in cross-examination he accepted he knew by September 2021 at the latest that she was continuing to provide Botox.

82. The defendant accepted rent up to the end of January 2022.

83. It is clear that the right to forfeit the Lease based on breaches occurring up to the end of January 2022 was waived by reason of this.

84. However, the section 146 notices relied on are dated 24 February 2022, and 12 May 2022 respectively. The claimant broke the terms of the Lease after the end of January 2022 up to the service of these notices by using the Premises while suspended. This continued subsequently.

85. There was no acceptance of rent, and no other act of affirmation of the Lease during this time. I find therefore that there was no waiver of a right of forfeiture by the defendant in respect of the continuing breaches, which occurred each day after the end January 2022 when the claimant used the premises, other than for the permitted use.

Relief from forfeiture

86. Section 146(2) of the Law of Property Act 1925 provides that:

> " ... the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit."

87. The claimant, through counsel, submitted that relief from forfeiture should be granted on the basis that:

(1) The defendant landlord had no concerns about the claimant carrying out cosmetic Botox treatments from the time of her suspension in April 2021, which its managing director accepted he found out about at that time, and continued to accept rent until the end of January 2022;

(2) The breach was not wilful - there was a genuine dispute as to whether the claimant was prevented by the user clause from carrying out Botox treatment from the premises once suspended;

(3) The evidence of the claimant was that everyone she saw on the Premises was told straight away by her that she was suspended as a dentist;

(4) There was no reputational damage from a non-dentist carrying out Botox treatments, which could be carried out by someone who did not need to be regulated at all;

(5) There was no evidence of damage or impact on the landlord's business, his income had increased during the period since the claimant's suspension;

(6) It was accepted by the defendant's managing director, Stephen Lingam, that his own father had been a registered dentist involved with the building and had been subject to more serious intervention by the GDC previously, with very significant adverse publicity but the defendant kept up his plaque outside the front door of the building up to the date of the trial, showing it did not consider the use of the premises by such a person to be seriously detrimental to the defendant at all;

(7) If the court found the claimant had cemented Mr Lee-Potter's crown back on, it was an isolated occurrence and no other such incident had been shown;

(8) The section 146 notices at the end of them suggested the breaches were capable of remedy; and

(9) It was not suggested by the defendant that the claimant did not provide proper information for the Botox prescriber or do anything other than act appropriately in the administration of the Botox.

88. I should say however in relation to the third point, that one of the claimant's own witnesses who attended for cosmetic Botox treatment told the court that in her particular case she was not initially made aware of the suspension. However, after she did become aware of it, she was content to carry on using her, being satisfied with her work even though in general terms a dentist would be seen by her as a more attractive provider for someone who was not. This may have been a simple failure of recollection by the witness, although whether so or not, the evidence suggests that the claimant did generally tell people about her suspension and inability to carry out dental work when they attended, which I accept. She did not carry out dental work and her evidence that

this stopped them talking about their dental problems, though there for Botox, had the ring of truth about it.

89. The defendant through counsel submitted that relief from forfeiture should be refused having regard in particular to the following matters:

(1) The nature and gravity of the breach. The breach put people at serious risk, as well as impacting on the reputation of the profession of dentist. The landlord should not have to tolerate illegal acts in their premises - here the dental treatment of Mr Lee-Potter when the claimant was not fully registered and the provision of Botox as a controlled drug to someone other than the person it was prescribed for;

(2) The breaches were deliberate in that the claimant must have known that doing these things was wrong;

(3) There being other breaches of covenant post-dating the section 146 notices, and doing such things as still having the plate up saying, "Monica's Dental Clinic" to the right of the door of the building, and having entries on Facebook under such name, and risks arising out of wrongful use of prescriptive medicine on the basis the claimant considered it appropriate to store unused Botox in the fridge rather than disposing of it.

(4) There being continuing breaches such as were evidence by the, 'Teeth' form I have referred to (although I have dealt with that already) and the continued use of the premises for Botox;

(5) Prejudice to the landlord arising out of the nature of Harley Street, the building and the protection required of the landlord's own business; and

(6) The personal suitability of the tenant, which is of importance where the personal qualifications of the tenant are important to the value and character of the landlord's building, see *Bathurst (Earl) v Fine* [1974] 1 WLR 905.

90. I have carefully considered all the evidence and the submissions made on both sides.

91. Personal suitability of the tenant was clearly important in that the clause required she be a fully registered dentist when using what was in effect a clinical building. I consider it to be true that there was a risk of reputational damage to the landlord and its building arising out of the defendant using it whilst suspended by the GDC. It was a risk the user clause was worded to guard against. This risk was particularly acute when the tenant was providing dental services. However, in relation to that, I have found only one isolated occasion of putting a crown back on an implant under a degree of persuasion.

92. Other than in relation to that, whilst the claimant's acts of providing Botox treatments were deliberately done, I accept it was not clear to the defendant as tenant that she was precluded from carrying on providing Botox treatments which were not required to be carried out by a registered dentist. The breach was not therefore wilful in the sense of the claimant knowing that what she was doing was not permitted.

93. Indeed, the landlord itself, who on Mr Lingam's own evidence was aware the claimant, whilst suspended was continuing to provide Botox treatments from at least September 2021, did not initially consider the Lease prevented this.

94. There is no evidence that such risk as there was of reputational damage, or damage to the goodwill of the building, materialised.

95. I appreciate this would be a hard thing to identify or prove.

96. However, the fact that the professional plate of Mr Lingam's father remained on the wall to the left of the entrance to the building after he had been struck off until a time when this was raised by the claimant during the trial (in the way that the same sort of plate of the claimant remained up, to the right of the entrance to the building during her suspension), suggests the reputational risk simply from a suspended dentist being connected with the premises was not in itself regarded by the landlord as likely to cause particularly significant damage.

97. The suggestion in submissions that by carrying out Botox treatments the claimant put people at serious risk is not in my judgment well founded. It was accepted that Botox

treatments are not required to be carried out by a dentist at all. They are not required by Parliament or otherwise to only be carried out by a qualified dentist, or indeed by any specific professional for safety reasons.

98. It is true that a small amount of Botox was used by the claimant for the alleviation of Mr Lee-Potter's immediate pain that was leftover from a previous treatment. However, the whole incident involving him was on the evidence an isolated occurrence. He was a longstanding client of the claimant, whose medical history was known to her and the available Botox was used to urgently alleviate the jaw pain he was in, as it did, with the use of the Botox not involving an act of dentistry in the particular circumstances of this case.

99. The witness statement of Mr Lingam dated 14 July 2022 opposing relief from forfeiture, put the matter as being that,

> "If the claimant were to be permitted to access the Premises, this will cause reputational damage to the defendant by having a dentist operating from the Building who is suspended because of very serious concerns about her conduct. To allow the claimant access may very well deter patients from visiting the defendant and/or negatively affect the defendant's ability to employ other dentists and staff."

100. This was not a contention that such damage had been suffered. Furthermore, whilst the defendant identified these possible effects and has shown itself determined to gather evidence to support its case where it can - for example by issuing the sign-in forms, speaking to persons attending to see the defendant, and using and monitoring CCTV, including CCTV that had a view for a time on the entrance to the claimant's own room - the claimant carried on using the Premises for a lengthy period after the date of the witness statement, and the defendant has not led any evidence of any such deterrence of patients or negative effects on its ability to employ staff having in fact occurred. There is no such evidence, and it seems to me unlikely there have in fact been any significant effects in the ways referred to (or at all).

101. The mere fact this is so does not mean however that the matters referred to by Mr Lingam as set out in his witness statement do not represent a real risk for the future as he says, should the claimant continue to use the Premises in breach of the user clause.

102. However, the claimant is now well aware by reason of this judgment that she cannot use the Premises for any purpose whilst suspended.

103. If relief from forfeiture is to be granted, such relief can in this case be granted on terms that will obviate such risk for the future and prevent damaging effects from materialising.

104. Having balanced all the factors, it is in my judgment appropriate to grant relief from forfeiture with conditions attached to prevent future breach. Relief will be granted on appropriate conditions. I will hear submissions to the parties as to the particular contents of these. They will however include the given of any undertaking, or the making of an injunction, to prevent use of the premises by the claimant in breach of the user clause in the future and thereby remove the risk Mr Lingam is legitimately concerned about if relief is granted. The conditions are also likely to include payment of any sums due to the defendant in respect of the claimant's occupation of the premises since rent was first refused at the end of January 2022.

105. The claimant will not then be able to use the premises herself unless and until her suspension is removed. The terms of the relief, or the injunction or undertaking relating to it, could also extend to the claimant not using the premises during any future period of suspension or other disqualification.

Further matters

106. As well as seeking a declaration that she has not used the Premises in breach of the Lease and relying in the alternative on waiver, or seeking relief from forfeiture, all of which I have dealt with, the claimant also, as distinct claims, seeks a declaration:

(1) that the defendant derogated from the grant of the Lease and has broken clauses 2.2 and 3 of it, in that it installed double glazing which prevents the claimant from opening the windows and prevented the claimant from using the window ledges and balconies;

(2) that the defendant has broken clause 3.1 of the Lease in that the defendant has prevented the claimant's patients from using the waiting room; and

(3) that the processing of the claimant's data by the defendant is unlawful and breached the provisions of the Data Protection Act 2018 and the regulations relating thereto.

107. I shall consider these in turn.

Windows and balconies et cetera

108. The undisputed evidence is that the claimant wished for double glazing to be installed in the premises and the defendant did this in 2014. When it was installed, due to the manner of installation the windows could not, unlike previously, be opened by the claimant by more than about 1 centimetre, restricting the flow of fresh air into the premises and meaning ledge and balcony access was not possible.

109. It is not disputed that the claimant had a right under the Lease to use the windows and small balcony areas, the nature of which I have seen in a video clip. Only recently have modifications been made enabling the windows to open more fully again, and outside access to be made possible again for the claimant.

110. Although this is accepted by the defendant as it must be, there were just two emails from the claimant complaining about this, one dated 9 June 2015 saying, " ... also my windows do not open as the glazing does not allow it. Can the windows open outwards? Or can we get the upper window please." There was another email dated 9 October 2018 saying, "Need the leak and fungus sorted out ASAP. It stinks up here, especially as the windows cannot be open." There is no claim in relation to any leaks or fungus.

111. I should add for completeness that in previous county court proceedings, the claimant in November 2021 brought a counterclaim in relation to her inability to use the small balcony, as shown by documents in the trial bundle, but that claim was struck out in March 2022 for non-payment of a required fee.

112. The first of the section 146 notices in the present proceedings had by then been served, so there may have been felt to be no point in continuing to pursue that matter by a separate action in another court, but whether so or not, there was no adjudication on the merits.

113. There was a breach of the Lease in relation to this matter.

114. The limited complaints made by the claimant, until the parties were in dispute about other matters, leads me to believe, however, that whilst I consider this was a breach of the lease, the claimant was not in reality very greatly troubled by it. It is also to be noted that in relation to the previous counterclaim to which I have referred, there was reference simply to inability to use the balcony and window ledges without reference to the flow of fresh air through the windows, but even leaving aside this point, the claimant was, from the time of her suspension in April 2021, not permitted to use the premises anyway, and in so far as she intends, when able, to resume her use of them, the situation has been remedied. There will be a declaration of breach, although it is in practical terms fairly unimportant. The fact of that breach to a minor extent adds to the justice of relying on relief from forfeiture that the claimant on terms, which I have already dealt with.

Use of the waiting room

115. The claimant has not satisfied me on the balance of probabilities that her patients were prevented from using the common waiting room. There is video evidence of a person being required to leave, but no evidence that she was a patient of the claimant who was unjustifiably required to do so. Beyond that, a separate video clip merely shows a person being required by the defendant to leave his bicycle outside, which is not shown to have been unreasonable. These events appear to have incurred in 2022 or 2023

when the claimant was not entitled to use the Premises as an unregistered dentist anyway.

116. The only other relevant video clip is of Mr Lee-Potter ordinarily using the waiting room whilst waiting to see the claimant in May 2022.

117. Dr Keet, who had been a friend of Mr Stephen Lingam's father, did say in evidence that he was made to feel unwelcome by Mr Stephen Lingam, who was abusive to him on an occasion in June 2020 - before the claimant was suspended - and made to leave, but this was not something specific to the use of the waiting room as such. I accept there was some sort of confrontation between them, but for reasons Dr Keet, who as I say had been an associate of Mr Stephen Lingam's father, was unable to unable to explain, and I do not have evidence before me sufficient to fathom the reason for this, what it related to, and whether was or was not justified.

118. It is for the claimant to prove her case on this aspect, and the claim for a declaration of breach of the Lease by prevention of use for the waiting room is dismissed.

CCTV

119. The evidence is that a CCTV camera was installed by the defendant by being affixed to the door frame above the entrance to the toilets in the building, on the same floor as the room let to the claimant, pointing at the stairs and the door to the claimant's room, that is to say the Premises. Which when the door was open, it allowed a partial view of the surgery itself. I have seen a video clip showing that. It was recording video images and sound for around a month from around 17 May 2021.

120. The claimant contends it was a breach of the data protection legislation for this camera to record images of the entrance to her room, and on occasions within it when the door was opened and sound. Mr Lingam's evidence was that a CCTV was placed there for the legitimate purpose of monitoring those going to the building's toilets.

121. I am unable to accept this. The camera was installed just after the claimant's suspension by the GDC, and around the time when Mr Lingam became aware of it.

The camera, as it was placed, had a distinct view of the entrance to the claimant's room, and, when it was opened, into the room itself. There is no real reason why it could not have been so positioned to exclude that, or why indeed it could not have been located to point in the opposite direction to monitor those coming out of the toilet area door.

122. On the balance of probabilities, it was an attempt to monitor who was attending the claimant's room and its use. It has not been pleaded or argued that this was a legitimate collection of data for that reason. I will grant the declaration sought limited to the data from the camera.

123. An injunction is also sought in the particulars of claim, requiring the defendant to remove the camera. However, the defendant did in fact stop use of the camera within about a month after it had been installed, when complaint was made by the claimant's lawyers. That is not disputed and no further orders have been shown to be necessary. The claimant was not actually entitled to use the Premises at the relevant time, and nothing turns on the declaration granted.

124. I will now after a short break hear submissions in relation to the precise terms of relief from forfeiture and consequential matters.

(After further submissions)

125. Having considered the matters to which I have been referred by counsel on both sides, I consider that the landlord is prima facie entitled to costs on the indemnity basis. The claimant lost on the issues of construction of the Lease and on waiver, and only succeeded on the issue of relief from forfeiture as a matter of the court's discretion (on the basis of provisions preventing her from carrying out work at the premises whilst suspended as she claimed to be entitled to do). The opposition in general terms to the grant of relief cannot be regarded as having been unreasonable in the particular circumstances of the case.

126. However, there was a discreet issue in relation to the non-opening of the windows and the use of the balconies, and of the CCTV that was installed, as I have found unjustifiably - by an extremely short period but nonetheless, it appeared, for about a

month - to monitor the claimant's use of her room. In addition, the landlord failed to lead evidence to show specific damage as a result of the matters about which it legitimately complained.

127. In all the circumstances of the case, I am going to award the defendant 95 per cent of its costs on the indemnity basis.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 46 Chancery Lane, London WC2A 1JE
Email: civil@epiqglobal.co.uk