

**IN THE COUNTY COURT AT CENTRAL LONDON**

Thomas More Building  
Royal Courts of Justice,  
Strand, London  
WC2A 2LL

19 February 2021

**Before:**

**HIS HONOUR JUDGE LUBA QC**

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**Between:**

**ALMACANTAR CENTRE POINT NOMINEE  
NO.1 LIMITED (1)  
ALMACANTAR CENTRE POINT NOMINEE  
NO. 2 LIMITED (2)**

**Claimants**

**- and -**

**C.I.D. INVESTMENTS LIMITED (1)  
A.M.M PROPERTIES LIMITED (2)  
AGP PROPERTY LIMITED (3)  
ALFRED GREZA (4)  
EDMOND GREZA (5)  
LIANG ZICONG (6)  
XU SUZHI (7)**

**Defendants**

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**MS LINA MATTSSON (Counsel)** (instructed by **Harold Benjamin Solicitors Ltd**) for the **Claimants**  
**MR AARON WALDER (Counsel)** (instructed by **Derrick Bridges & Co.**) for the **First Defendant**

**THE SECOND DEFENDANT** appeared in by its director, Mr Ahmed  
**THE THIRD TO SEVENTH DEFENDANTS** were not present or represented

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**Approved Judgment**

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## **HIS HONOUR JUDGE LUBA QC:**

### **Introduction**

1. Where a lease provides that a tenant is not to sublet without the landlord's prior consent, what measure of damages, if any, is the landlord entitled to recover from the tenant and/or any sub-tenants if the property subject to the lease is sublet without its consent? That is the central question arising in this claim brought by joint landlords against their tenant and also against multiple sub-tenants and sub-sub-tenants. It is a case in which it is admitted that the tenant sublet without consent and, indeed, did so more than once.
2. The landlords seek to recover substantial damages by one of two alternative routes. Putting them in my own order, those routes are as follows. First, the claimants ask that they be awarded the proceeds obtained from the unauthorised sublettings; i.e. the profits made from the breach of the lease. This form of remedy is sometimes described as the making of an order for the 'disgorgement of the wrongdoer's profits', or, alternatively, described as the 'taking of an account of the profits made by the wrongdoer'. Second, and in the alternative, the claimants ask that they be awarded damages equivalent to the amount they would have theoretically negotiated with the wrongdoers as the price of their being permitted to do the wrongs. These are sometimes described as 'negotiating damages' or as 'licence fee damages'. By either of these two routes, the claimants claim sums well in excess of £100,000.
3. The claimants have already secured judgment on liability against all the sub-tenants and the sub-sub-tenants. In respect of them, the damages to be awarded, if any, fall to be assessed in so far as agreement on the sums has not already been reached. In respect of the tenant, the claim is fully defended in respect of both of the heads under which damages are claimed and as to the amount of any such damages.
4. This judgment is being delivered on the fifth, and hopefully the final, day of a trial originally listed to be heard over four days. The judgment will be necessarily lengthy. It will contain a good deal of factual material. It is being delivered from my notes. It is inevitable that I may err in relation to a name or a date or the like, and I should be grateful if any such slip could be noted by the parties. I invite counsel to draw my attention to such matters, or indeed to any matters I have omitted, at the conclusion of the judgment.
5. The trial was conducted remotely through the platform Microsoft Teams. It was therefore a video and audio hearing. The arrangements for that hearing passed off reasonably successfully and, on occasion when signal was lost, proceedings were paused to allow those who had left the hearing to rejoin. I am satisfied that this was a full and open and public trial, advertised in the usual way in the court's Cause List.
6. I must record at the outset that I have received submissions of the highest quality in writing and orally, first from counsel for the landlords, Ms Lina Mattsson, and, secondly, from counsel for the first defendant, Mr Aaron Walder. These counsel also helpfully provided an agreed list of issues for determination at trial. The oral submissions of Ms Mattsson in particular were very full, occupying the time of a whole day of the trial, but none of that time was wasted. That much time was spent precisely because the claims advanced are not at all the usual fare in a landlord and tenant matter, and because there was, of necessity, a good deal of judicial probing of the arguments

advanced. Mr Walder's helpful submissions were equally well marshalled and tightly focussed.

7. The second defendant company, the first of the sub-tenants, was represented at trial by its director, Mr Ahmed. Mr Ahmed participated fully in the hearing. He put forward a skeleton argument in advance. He put questions to the witnesses called and he made a closing speech. He was even provided with the opportunity, as was Mr Walder, to make a short reply to Ms Mattsson's lengthy closing submissions. Although Mr Ahmed was courteous and reasonably patient throughout, he could not assist me at all on the essential questions of law that arise for my determination on this claim. Indeed, as so many lay persons seek to do, he sought repeatedly to tell me about facts which were not in evidence before me. He had even, during the course of the trial, copied to the Court an email he had sent to the claimants' solicitors making further assertions as to facts. For obvious reasons, I had no regard to such material.
8. At the opening of the trial, on 15 February 2021, I dismissed an application made by the second defendant by application notice dated 8 February 2021. That application sought permission to put in what purported to be a late defence to the claim and a late defence to an additional claim made against the second defendant by the first defendant. It also sought to adduce a late witness statement. At the opening of the trial, the application had not even been issued by the court because the second defendant had not paid the application fee. That fee was in due course paid. I gave my reasons for dismissing the application notice in a short judgment on the first day of the trial.
9. Before I come to the interesting issues arising in relation to the damages claimed in this case, I must of course set out the relevant factual background.

### **The Facts**

10. The claimants are two limited companies which are the joint freehold owners of the iconic tower block, Centre Point, in London's West End. As every Londoner knows, Centre Point House stands at the approximate junction of Oxford Street where it meets Tottenham Court Road and the Charing Cross Road. The tower block's lower floors are used for commercial purposes, but the many upper floors are occupied by dozens of residential apartments. As I say, the claimants are the freeholders. They have contracted out the day-to-day management of the block to an agent, HML Holdings Plc. (I shall refer to them as "HML").
11. HML employ a Mr Kaler as the building manager, and he has an office in Centre Point House. Among his responsibilities is maintaining an up-to-date record of who is residing in the various apartments. That is, not least, so that he may assist the fire and other statutory authorities if an emergency were to arise. I heard and read the evidence of Mr Kaler and I accept his evidence, as indeed I accept the evidence that I received in writing from Mr Kim Rutter, a senior property manager at HML who had dealt with aspects of the tenancies at Centre Point House from 2019 onwards. His written evidence was, as to its content, confirmed by Mr Kaler, and I accept it as accurate and truthful.
12. The claimants are the current landlords and the first defendant limited company is the original and current tenant under a long lease of Apartment No. 23 at Centre Point House. (I shall refer to that hereafter as either "the apartment" or "the flat".) Apartment 23 contains two bedrooms with several additional rooms and extends over the fifth and sixth floors of the building at Centre Point House.

13. For its part, the first defendant company (the tenant under that lease) has contracted out its management of its property interests to an agent. The agent trades as Planet International, which is the trading name of one or more private companies which own the agency. The current managing director, who has held his position since mid or late 2016, is Mr Vas Hava. I have read his evidence and I saw and heard him give evidence under examination. I shall have to assess his evidence in detail later in this judgment.

14. The lease of Apartment 23 at Centre Point House was granted in 2004, and it is a long lease which will expire in 2113. It contains various landlord and tenant covenants, as one would expect. Their terms have been framed, it appears, with the aspiration that all the leases of all the apartments in Centre Point House will be, or will become, in broadly common form. The tenants' covenants are contained in clause 3 of the lease. The user covenant is contained in clause 3.11 and is in these terms:

"Not to use the Apartment or any part thereof nor permit or suffer the same to be used otherwise than as a single private residence for the occupation of one family only."

15. Clause 3.15 of the lease deals with what might broadly be described as alienation. Clause 3.15.1 provides:

"3.15.1 Not to assign charge underlet or part with or share possession of part only of the Apartment

3.15.2 Not to underlet the whole of the Apartment save upon terms that the undertenant shall be liable throughout the term of such underlease to pay rent and other payments totalling no less in any year than the aggregate of the rent and Service Charge from time to time payable hereunder and otherwise subject to the same covenants and regulations as are contained or referred to herein and are to be performed or observed by the Tenant hereunder

3.15.3 Subject as aforesaid not to assign underlet or part with the possession of the Apartment without first obtaining the written consent of the Landlord (such consent not to be unreasonably withheld)

3.15.4 To cause to be inserted in any underlease of the Apartment a covenant by the undertenant with the Landlord to observe and perform the Regulations with a condition permitting re-entry by the Landlord in case of any breach thereof".

(I interpose that the regulations are set out in a separate schedule to the lease.)

"3.15.5 Upon any assignment of the Apartment to cause the assignee to enter into a direct covenant with the Landlord (to be contained in the licence permitting such assignment) to observe and perform the covenants on the part of the Tenant and the conditions herein contained".

16. Also relevant is clause 3.16 which reads as follows:

"Within 21 days next after any assignment charge underlease or other devolution of or relating to the Apartment or of the grant of probate or letters of administration or a court order affecting the said term to give notice thereof to the Landlord or to its solicitors and to provide them with a certified copy of the instrument evidencing the same and to pay to them a reasonable fee for the registration thereof being not less than £30 plus value added tax thereon".

17. The language and operation of these provisions is relatively straightforward, even if written in somewhat legal terminology. The clauses provide that the tenant is free to sublet the whole of the apartment, provided that it obtains in advance the consent of the landlord. Because the provisions of the lease will need to be mirrored in the underlease for which consent is needed, subletting will be for use of the apartment as a private residence for one family only. To ensure that the income from any authorised subletting enables the tenant to meet its own financial responsibilities, the rent charged to the subtenant must be higher than the rent and service charges due under the lease itself. In case, for any reason, the landlord cannot enforce the obligations of the lease against the tenant, it will by any underlease be given a direct right to re-enter and oust the subtenant.
18. To facilitate the smooth use and operation of these provisions of the lease, HML has long since produced a *pro forma* document. That document records a request for consent and contains an annexe which sets out, in broad outline, the terms of the proposed sub-tenancy. Just such a *pro forma* application was completed, subject to approval, by the first defendant in December 2012. At that time it was seeking retrospective approval for the grant of a one-year sub-tenancy to three people of Chinese origin from July 2012 to July 2013. There is no evidence as to what happened to this application for retrospective consent to sublet. It is not clear whether it was approved or was refused, but it demonstrates that there was a system known to the first defendant as to how any consent for subletting could and should be obtained.
19. Indeed, the application made in 2012 by the first defendant to the claimants was signed by a Mr Ioannou. The address given for the first defendant in the application was the same as that of the office of its agent, Planet International. At that time the processing fee for such a request was £75 plus VAT.
20. I now jump forward from 2012 to 2016. On 2 January 2016 the first defendant sublet the apartment to the second defendant without prior written consent of the claimants. The sublease was for a term of 24 months. The tenant was the second defendant, a limited company, A.M.M Properties Limited. The rent expressed to be payable was £2,520.33 per calendar month for the first year of the tenancy, and £2,607.01 for the final 12 months of the tenancy. The first payment was due on the date of the making of the lease, 12 January 2016.
21. The guarantor for the tenant's obligations under the lease was Mr Mohamed Mohsen Hamdi Ahmed; that is to say, the director of the company who has represented it at this trial. Indeed, Mr Ahmed initialled each page of the tenancy agreement, indicating that he had read and understood its content. I was told in evidence that the terms of this subletting were standard terms created and used by Planet International for company lettings in respect of its portfolio of properties held for its clients.

22. The sublease contains some 86 clauses. Fortunately, it is only presently necessary to set out a few of them. Clause 8 appears under the heading "Head Lease". It reads as follows:

"Where a landlord's interest is derived from another lease, the head lease, the tenant will observe the restrictions in the head lease applicable to the premises. In this case the premises will be subject to the reservations and rights of entry stated in that head lease."

There is no evidence in the present case that the head lease between the claimants and the first defendant was ever provided to the second defendant or was ever required by the second defendant from the first defendant.

23. Clause 27 provides, under the heading "Misuse":

"The tenant will use the premises in a tenant like manner only as a private dwelling house and will not (nor allow others to) use it for any improper, immoral or illegal purposes."

24. Clause 32 provides:

"The tenant will not (nor allow others to) sublet the premises, receive paying guests or part with possession of the whole or part of the premises without first obtaining the landlord's prior written consent."

There is no evidence that the second defendant ever sought or obtained prior written consent for any such dealing with the property from the first defendant.

25. Clause 59 of the sublease deals with vacation of the premises and it provides:

"The Landlord will require two months written notice should the tenants wish to vacate the property at the end of the Tenancy Agreement. The Tenant should send such notice by recorded delivery or deliver by hand to the Landlord's office."

At clause 60 provision was made for an either way determination of the tenancy by the giving of two months' notice in writing after the first year of the term.

26. Only one further clause presently need be mentioned, and that is clause 81 under the heading "Necessary consents". That provides:

"The landlord warrants that any consents necessary to enable him to enter into this agreement, (whether from superior lessors, mortgagees or others), have been obtained."

27. That sub-tenancy was, as I have said, to run from 12 January 2016 for a period of two years. However, within 48 hours of entering into this sub-tenancy, the second defendant granted a sub-sub-tenancy of the apartment. That was by a lease with a term starting on 13 January 2016 which was entered into on 14 January 2016. No written consent had been sought or obtained by the second defendant from the first defendant to enter into this sub-sub-tenancy.

28. The letting by the second defendant was to a limited company, Welk. The tenancy was a joint tenancy held, in addition to being held by Welk Homes Limited, by three of its directors identified by name in the agreement. There were thus four joint tenants. The document used was prepared by the second defendant and is headed "Company let tenancy agreement". It is quite plain that this is a very poorly prepared document. It is in fact a cannibalised version of what might have been described as an ordinary assured shorthold tenancy. Indeed, by paragraph A on the first page of the document it is said to create an unknown species of tenancy called "an assured company let tenancy". As I say, there is no such thing.

29. Clause 1 of this letting, under the heading "Let Property", provides that:

"The landlord" (that is to say, by this stage the second defendant) "agrees to let to the tenant and the tenant agrees to take the lease of the flat known and forming 23 Centre Point House ... for use as residential premises only".

The tenancy term was 12 months from 13 January 2016 and the rent payable was expressed at £2,946 per calendar month.

30. As to what the company and the three individual joint tenants might do with the property, specific provision is made, for example, at clause 59 for the further sub-transmission or use of the apartment. Clause 59 provides:

"The tenant is allowed to relet the property as student accommodation or to a professional worker for a short period minimum of three months."

31. Having entered into this sub-sub-tenancy, it soon became clear, at least to the first defendant, that what the second defendant had done was to, in turn, sublet the apartment. To the extent that this was not already known to, or anticipated by, the first defendant, it was soon made clear. There were communications between the first and second defendant by which it was apparent that the accommodation was in fact being used for residential occupation by persons other than either the second defendant or the corporate sub-tenants.

32. The fixed term of this agreement let to Welk Homes and its directors expired on 13 January 2017. It is not entirely clear what happened in terms of occupation of the apartment or the sub-subletting of the apartment thereafter. The fixed term of the sublease to the second defendant expired the following year in 2018, but the second defendant neither entered into a new agreement, as the original agreement had envisaged, nor did the second defendant vacate. It seems that the second defendant simply held over in occupation of the property from month to month.

33. On 3 April 2018, Apartment 23 began to be marketed for short-term lettings through the platform Booking.com. User reviews on that site indicate a number of frequent short-term bookings made from that date onwards. At that date and beyond it, the second defendant was still holding over in relation to its lease of the property. On 15 April 2018, in that capacity, it sublet the flat to yet another limited company, the third defendant. That letting is shown, by a tenancy agreement, as letting for a term commencing on 15 April 2018 and ending one year later. The parties to that agreement were, as landlord, the second defendant and, as tenant, a limited company AGP Properties. There were two other joint tenants, both of them with the surname Greza,

and they thus became the three joint tenants of the flat. In due course AGP Properties and the two Messrs Greza were to become the third to fifth defendants in this claim.

34. This letting was described as yet another ‘company let’, but it was, in exactly the same way as the previous agreement used by the second defendant, a somewhat irregular version of a true or proper letting agreement. It rather unhelpfully opened with a completely false representation made by the second defendant, as set out in the mid-page under the heading "Background". It reads as follows:

"The Landlord", that is to say, the second defendant, "is the owner of residential property available for rent and is legally entitled to grant this tenancy."

Again, provision is made for a monthly rental payment, and again this is, in turn, higher than the rent which the second defendant is itself obliged to pay. The rent is £3,000 per calendar month for the first six months and £3,100 per calendar month thereafter.

35. By this time, for his part, Mr Ahmed had further diversified into property marketing, having established the website easylondonapartments.com. However, it appears that it was not he or his company or his trading name that was making an exploitative use of the apartment in day-to-day practice. That seems to have been the activity of the then sub-sub-tenant, AGP Properties and the two other joint tenants. It is they who appear to have been making the most of the control of Apartment 23 by exploiting it for short-term lettings on the market.
36. On 5 July 2018, and then again on 7 January 2019, the third to fifth defendants (that is to say, AGP Properties and the other two joint tenants) unlawfully sub-sublet to three individuals: Raoul Russ(?), Adela-Georgiana Man and Briegita Victoria Sandru. These were two back-to-back, six month lettings, each at a rental of £3,300 per calendar month. These individuals then continued to use the flat for short-term lettings on Booking.com and other platforms and, of the three, Ms Man advertised and offered sexual services from the flat.
37. In August 2018, whilst this form of agreement was in place, remedial lift work was needed in Centre Point House. The first defendant caused news of that development to be sent to the second defendant. There was no need for such communication to be made unless it was understood by the first defendant that the second defendant was in fact subletting the property to individual tenants.
38. That the apartment was being used in this way finally came to the attention of HML, the claimants' agents, in late 2018. There was no evidence before me as to why this use being made of Apartment 23 had not come earlier to the attention of Mr Kaler, especially because a large number of people would have been going in and out and because, in order to facilitate handovers of short-term lets through these platforms, a key drop box had been affixed at the front entrance door of Apartment 23. However, for whatever reason, HML either did not know of this use or did not alert the claimants to it until early 2019.
39. Thus it was that on 9 January 2019 the claimants' solicitor, Mr Ross, wrote to the first defendant requesting access to inspect the flat. Mr Ross is the claimants' solicitor with conduct. I read and, as it happened, heard his evidence and, given the short examination of him and the calibre of his written materials, both in his statements and in his correspondence, I found him to be an impressively competent solicitor.



40. No response was received from the first defendant to the request for access. Nevertheless, two members of the HML staff, Mr Rutter and Mr Kaler, did attend the flat for inspection on 17 January 2019. They found persons in occupation who confirmed that there were four tenants staying at the flat. The four were said to include Ms Man, to whom I have already referred, and Ms Sandru. These were the persons to whom the third to fifth defendants had sublet. This inspection also identified the key box which, as I say, is synonymous with the use of flats for short-term lets.
41. On 1 February 2019 the claimants' solicitors again wrote to the first defendant, this time copying their correspondence to the address of Planet International. This letter set out the details found at the inspection and enclosed evidence of what had been discovered by an examination of Booking.com. This correspondence did come to the attention of Mr Hava, the first defendant's agent, and he responded on 18 February 2019. By his response he indicated that his agency represented the first defendant, that they were surprised to hear of the findings and "We have never advertised the flat ourselves, as we have an AST (attached) with a business owner and were under the impression that it was as long let". That single sentence, if I may say so, manifestly demonstrates the incompetence of Mr Hava in relation to matters of property management. One cannot have an AST with a company. An AST is not a long let. The letter in reply from Mr Hava indicated that the agency would be sending someone to the property to inspect and that, meantime, a notice to quit was being prepared for service on the second defendant.
42. The claimants heard nothing further, and, through Mr Ross, they chased up on 27 February 2019. To that chaser, on 4 March 2019, Mr Hava responded by email, this time saying, "We do have some suspicions along with yours, so I will be going down to inspect this week." Following further chasing by the claimants' solicitors, on 13 March 2019 Mr Hava emailed to say, without any explanation, "We will be getting back possession of the flat on 7 May 2019".

### The Litigation

43. On the next day, 14 March 2019, the claimants issued this claim and, with it, an application for an interim injunction. For that interim injunction application they were given a hearing date of 29 March 2019. The papers were then served on the first defendant, and on the following day - that is to say, the day after issue - and having been served with those papers the first defendant provided a full copy of the tenancy it had entered into with the second defendant. The email from Mr Hava again reiterated "We will be getting this flat back on 7 May 2019".
44. On 15 March 2019 the flat was found to be occupied by four young Chinese women. That discovery, and the circumstances of it, gives one a flavour of how the premises were being used at this time and no doubt in the time immediately preceding. I take the account of what occurred from the witness statement of Mr Rutter:

"5. On 15 March 2019 I visited Centre Point House where I met with Mr Kaler, the Building Manager. He advised me that the Apartment was being short let and was occupied by 4 Chinese girls who had moved into the Apartment on 12 March 2019 and had told Mr Kaler that they were on vacation and that their tenancy of the Apartment would end on 17 March 2019.

6. I went up to the Apartment with Mr Kaler and rang on the doorbell but there was no answer. At around 1 pm we were in the communal hallway of the building on the 5<sup>th</sup> floor when, by chance, we saw 2 of the girls returning with their lunch. I asked them to show me their passport or other form of identification to demonstrate that they had a right to stay in the United Kingdom.

7. The girls' command of English was poor but they claimed to be students. I asked them what they were studying and, after some thought, one of the girls replied 'business'. The girls provided me with their UK Residence Permits and I took copies.

...

8. The girls told me that they rented the Apartment via a website on the internet. Within 15 minutes of taking photocopies of the girls' Residence Permits we saw them leaving the building with their suitcases and believe that they had immediately vacated the Apartment after our meeting."

CCTV images are available corroborating that account. Despite the issue of proceedings, nothing was done by any of the defendants to stop bookings being taken through Booking.com and other platforms.

45. By 21 March 2019 at the latest, the court papers had reached the second defendant. That caused him to send a message to Mr Ross. In it he candidly admits the fact of the subletting. The same day Mr Hava writes again. He indicates that he is surprised to have received the paperwork for the court process and protests that he has heard nothing back from Mr Ross since an email a week earlier. He indicates that "I will now be passing this on to our legal team and we will be holding you liable for costs, as we acted straightaway by serving notice and provided you with all the information you requested".
46. Mr Ross's answer left no doubt in anyone's mind as to the intent of the claimants to address matters seriously. The response contained eight numbered paragraphs of which I can relevantly read two - paragraphs 5 and 6:

"5. Mr Ahmed says that A.M.M has been renting the flat from 'Planet International' since 2015 which, of course, pre-dates the tenancy agreement that you provided to me. Whilst I am waiting to receive a copy of that tenancy agreement, what seems quite clear is that C.I.D. Investments Limited ... has been unlawfully subletting the flat since at least 2015 and been profiting unlawfully from doing so. My client will be seeking an account of the profits made by CID as a result of the unlawful subletting.

6. Since at least last Friday the flat was still being sublet to temporary occupants and I note that the flat still remains advertised for short lets on AMM's website".

47. It having transpired that the second defendant had unlawfully sub-sublet the flat to the third to fifth defendants, the claimants then made an application to add those defendants to the proceedings. The hearing was due to take place on 29 March 2019. One might, perhaps naively, have expected that matters would have drawn to a close in relation to

the use of Apartment 23 well before the court hearing date, but that was not the circumstance at all, as again shown by evidence from Mr Rutter. He reports as follows:

"At around 12.45 pm on 28 March 2019 the building manager and I saw a family of 5 people waiting with their luggage in the hallway immediately outside the Apartment. These people were a husband and wife, who later identified themselves to us as Mr and Mrs Nidal, their 2 daughters and an elderly lady in a hijab. We asked them if they were renting the Apartment and they confirmed they were renting it for 4 days. They explained that they were waiting for the letting agent/owner as the key box had been removed. They confirmed that the Apartment had been rented in Mrs Nidal's name and that they were US citizens on vacation in the United Kingdom."

The inspection on that date identified that the keys being used to hand over the apartment on short lets from one to another were now being located in the apartment's meter cupboard.

48. As anticipated, on 29 March 2019 the application for interim injunctive relief was listed and heard before Mr Recorder Bellamy at this court. The recorder granted an injunction by consent prohibiting the first defendant until trial or further order from subletting otherwise than in accordance with the lease. But further his order, again by consent, required the second defendant to surrender the underlease or subletting to the first defendant. Permission was also granted by the recorder to amend the claim form so as to bring in the third to fifth defendants.
49. On the hearing date, the second defendant executed a deed of surrender of the sub-tenancy back to the first defendant. However, the third to fifth defendants had not surrendered their sub-sub-tenancy. Following a further application made to this court on 2 April 2019 and heard on 5 April 2019, His Honour Judge Freeland QC granted a further injunction restraining the third to fifth defendants from subletting, requiring them to deliver up and surrender their interest and requiring the defendants to terminate any rights of occupation existing at the flat
50. Thus it was that on 4 April 2019 there comes to be a surrender by the third to fifth defendants of their interest to the first defendant. It appears that, at last, the immediately desired result had, by the means of this litigation, been achieved. The flat was empty and available, once again, for proper use under the terms of the lease. The unauthorised subletting activity ceased.
51. The litigation then evolved, in the usual way with statements of case, directions and orders, and on 8 May 2019 the first defendant filed and served a defence to the claim. That included an additional claim for a contribution made against the second defendant. The second defendant did not put in a defence, either to the claim or the additional claim, and neither of the second to the fifth defendants filed a defence or otherwise resisted the claim. Thus it was that judgment in default against the second to fifth defendants was entered on 30 May 2019.
52. On 3 June 2019 those defendants made application to set aside the default judgments. On 11 December 2019 those applications were heard before Her Honour Judge Baucher. She maintained the judgments against the second to fifth defendants, but, instead of being default judgments, they were expressed as judgments in a sum to be

awarded by the court. Her Honour Judge Baucher also granted the claimants permission to re-amend the particulars of claim and to bring in two further individuals, the sixth and seventh defendants, whom I shall mention in a moment. Directions were then given towards the trial which eventually came on for hearing before me earlier this week. On the eve of the trial, the third to fifth defendants settled the claim against them with the claimants, and they have played no part.

### **The Introduction of the Sixth and Seventh Defendants**

53. Despite the existence of the extant litigation and of the injunction, the first defendant again took steps to sublet the apartment, again without the written consent of the claimants. The availability of the apartment to let was marketed through Messrs Portico. They were letting agents and they were taking their instructions from Planet International, who were of course the first defendant's agents.
54. By the end of June 2019, Portico had found prospective tenants sufficiently interested to pay a holding deposit and to agree outline terms for payment of a rent of over £3,000 per calendar month. These were two male Chinese nationals, Mr Liang Zicong and Mr Xu Suzhi.
55. On 4 July 2019 the first defendant granted a tenancy of the apartment to the sixth and seventh defendants jointly for a one-year term to end on 30 July 2020. This was expressed to be an assured shorthold tenancy agreement and was made in writing on terms prepared by the first defendant or its agents or its sub-agents. The sixth and seventh defendants, as joint tenants, paid a deposit of £3,500 and, in addition, they paid six months' rent in advance, totalling over £18,000. After deduction of the commission of Portico, that produced a payment of £14,600 made to the first defendants later that month. On or about 4 July 2019 the sixth and seventh defendants moved in.
56. On 10 July 2019 the first defendant's solicitors emailed the claimants' solicitors seeking written consent to what was described as this "proposed tenancy". The request for permission was met with a request for information from Mr Ross. Unsurprisingly, he wanted to know whether the two proposed joint tenants had moved into the property and what, if any, was their relationship. That was important for the purposes of knowing whether they were members of the same family. The response given on 16 July 2019 - that is, more than ten days after the letting agreement had been made - was in these terms: "The proposed new tenants have not entered into possession of the flat. The proposed new tenants are final year architecture students at UCL. They are both from China and friends."
57. Permission was accordingly refused by the claimants on 19 July 2019 on account of the proposed tenancy being in breach of the terms of the lease. The reasons are set out very clearly in an email from Mr Ross on 19 July 2019. The refusal concluded with a request for confirmation that the proposed tenants would not be moving in. On 22 July 2019, Mr Timmis, the solicitor for the first defendants wrote:

"We note your client's position on this proposed subletting and have let our client know that position."

In other words, no direct answer was given to the enquiries made by Mr Ross. Nothing further was then heard from the first defendant by the claimants or from the first defendant's solicitors. But, as anticipated, the sixth and seventh defendants had taken up occupation.

58. Later, Mr Kaler, in the course of his duties, found the sixth and seventh defendants in the building. Thus it was that whilst these proceedings were on foot, the claimants discovered that the sixth and seventh defendants were in fact residing at the flat, notwithstanding consent having been refused. Unsurprisingly, the point was immediately raised with the first defendant's solicitors. Their response was, to say the least, surprising. They wrote back indicating that the premises had been let on a further tenancy agreement dated 4<sup>th</sup> August 2019. The covering response reads:

"The flat is only let out to and occupied by Zicong Liang and it is not let to or occupied by Suzhi Xu or anyone else. I attach a copy of the assured shorthold tenancy agreement evidencing this."

No suggestion was made that any consent was sought or had been granted in respect of this sub-tenancy, but the suggestion being made was that the only sub-tenant was the sixth defendant and only the sixth defendant was in occupation.

59. It has, and has throughout been, the claimants' case that this August 2019 tenancy agreement is a sham created in order to mislead the claimants and to mislead the court; further, that there has been pretence that the only tenant living in the apartment was the sixth defendant and that he was living there alone. To give the lie to that pretence, Mr Kaler visited the flat again on 4 November 2019 and found both students in occupation. Notwithstanding that discovery, on 14 November 2019 the first defendant's solicitors asserted that only the sixth defendant was in occupation of the flat.
60. In due course, the first defendant took steps to relocate the sixth and seventh defendants to alternative premises. That process began by no later than early December 2019. In response to the overtures that they should move being made to them by the first defendant or its agent, the two men responded that they were prepared to move on suitable terms, but what should be provided to them was accommodation with two bedrooms of equal size, so far as possible. The sixth and seventh defendants are then said to have moved out of the property in early 2020.
61. The sixth and seventh defendants have taken no part in these proceedings and default judgments, as I have indicated, were entered against them in an amount to be decided by the court. There is no doubt that they are aware of the proceedings against them, not least from the fact that, as recently as 22 December 2020, they communicated with Mr Ross, the claimants' solicitor, to say this:
- "We have rented the flat from 4<sup>th</sup> July 2019 to 19<sup>th</sup> January 2020 from Planet International. We have paid our rent in time and evacuated the flat after Planet International told us the matter they involved. We did not know the legal issue involved in this flat and were completely victims."
62. I should record that the first defendant has subsequently obtained permission from the claimants for the subletting of the flat on terms agreeable to the claimants. As Mr Walder was to point out in submissions, the terms agreed were terms on a rather unexceptional assured shorthold tenancy.
63. Down to this point, the account of the facts that I have given has been largely uncontroversial as between the parties, but I am invited by Ms Mattsson for the claimants, for purposes which will shortly become clear, to make certain further

findings of fact about the way in which the first defendant has conducted itself through its agents, Planet International, over the past six years or so.

### **The Conduct of the First Defendant**

64. Although the way in which the claimants' case would be put, and was put, had been known for some time to the first defendant, no director or employee of the first defendant at all has come forward to provide any evidence to the court. As to the position of the first defendants at the time of the grant of the lease to the second defendant in January 2016, there is no direct evidence at all as to how that came about or the circumstances in which it came about from the perspective of the first defendant. What must be noted, however, is the warranty that was given by the first defendant to the second defendant; namely, that the first defendant had obtained the necessary consent from its own landlord to enable it to enter into the tenancy with the second defendant. (I am there, of course, referring to clause 81 of the agreement which I have already read.) That warranty and representation was simply untrue and, in the absence of any evidence from the first defendant, stands entirely unexplained.
65. In the absence of any direct evidence as to what occurred at the time of that grant, much turns, in my making factual findings as to the conduct of the first defendant, on my assessment of the written and oral evidence of Mr Hava, who became managing director of Planet International after the subletting to the second defendant had been entered into. I record immediately that I found both his witness statement and his oral evidence wholly unsatisfactory. His written and oral evidence was vague and lacked detail on matters in respect of which, as he admitted, his agency would have had records had he cared to inspect them or make them available. Far from being anxious to assist the court, Mr Hava's evidence was given casually, almost flippantly, notwithstanding the seriousness of the allegations made against his client. He confirmed that the agency held, as one would expect, a property file for this apartment and for all the other properties it managed and operated, and indeed that it maintained a computer-based information management system. The material in that file and on that system contained the very detail that would be needed to assist the court and to answer the questions being put to Mr Hava. That material should also have been used to frame his witness statement, but it was, with no good explanation, simply not disclosed and not used by Mr Hava.
66. Despite his confirming in oral evidence that his agency were managing agents for the property, his witness statement said that it was only a letting agent. Any competent property manager would know and understand the difference between a letting agent and a managing agent. I am not at all sure, having listened to his evidence over a number of hours, that Mr Hava has the least understanding of the difference between those two important and different concepts. But, if he does, his reference in his witness statement to "letting agents" demonstrates the gross carelessness which was a hallmark of his evidence.
67. His evidence that the first defendant did not know of the covenants in the lease - the lease held from the claimants - was flatly contradicted by the evidence of the instance in 2012 when the first defendant had sought to get permission for subletting. That request had been generated from his office by his staff. Although he was not in post at that time, the signatory to the request form in 2012 was the same Mr Ioannou, the director of the second defendant, to whom Mr Hava turned in 2019 for the purposes of putting his name to a notice to quit.

68. Mr Hava's belief that his agency had been free to let the apartment to the second defendant on its ordinary company letting terms was not correct. But that belief was not only incorrect, it was also manifestly without reasonable justification. I do not believe the assertion made in his witness statement (paragraph 10) that he did not know that the second defendant was subletting the property. One asks rhetorically, how could he not know? The tenant under the sub-tenancy was itself a property company. It might have been thought that this property company would perhaps have been taking the property for use by its own staff or directors, but that is conceptually inconsistent with Mr Hava's admission that in fact the first defendant had a portfolio of numerous properties let to the second defendant. The exchanges about tenants needing hot water and their use of the lifts demonstrate that either he personally, or at least his staff, knew on behalf of the first defendant that the second defendant was subletting.
69. I find that the first defendant knew perfectly well, through Mr Hava and his agency, precisely what the second defendant was going to do with the property; that is to say, to introduce others. That is consistent with the knowledge of a named director of the first defendant whom Mr Hava acknowledged was a person with whom the third defendants dealt in relation to the portfolio of properties. Those are my findings in relation to matters between 2016 and 2019. I now therefore move ahead to examine the first defendant's conduct in 2019.
70. On the evidence before me, I am amply satisfied that early in that year the first defendant, through Mr Hava, knew that its wrongdoing had been uncovered by the claimants and their solicitors. I am further satisfied that he, on behalf of his agency and on behalf of the first defendant, then embarked on a strategy designed to obscure the truth and to delay the day of ultimate reckoning. That conclusion is drawn from a number of inconsistencies between his witness statement and his oral evidence and within his oral evidence. I shall not labour this already lengthy judgment with more than just a few instances of the basis of these adverse findings. It is sufficient perhaps to mention just the following.
71. First, in paragraph 13 of his witness statement, Mr Hava had written this:
- "Planet International did send someone down to the Property on the morning of 19<sup>th</sup> February 2020 and found that persons were there who confirmed they were renting the property through a holiday let website like Booking.com."
- In his oral evidence, Mr Hava completely retracted that account and admitted that nobody had found anybody at the flat. He accepted that whoever had gone there had made an assumption about letting through Booking.com through the presence of the key drop box. Mr Hava was not the least troubled in his oral evidence to have been discovered putting forward this patently false material, which he knew at the time he made the statement was false. Indeed, he was able to give no evidence as to who had actually visited, and that person was not tendered to give evidence before me. That was not the only inaccurate or misleading information given by Mr Hava about visits to the property.
72. There were then misleading impressions conveyed by Mr Hava as to what was found on a subsequent visit to the property. He gave the impression to the claimants' solicitors that Mr Mohamed Ahmed, the director of the second defendant, had been acknowledged to be in occupation and was in fact in occupation. This was manifestly

untrue and, on further probing, it was clear that Mr Hava's account of this incident was grossly exaggerated, to put it mildly. As he acknowledged in his oral evidence, he simply made a guess that the person present, who may have been known as "Mohamed", was in fact Mr Ahmed. This was typical of the careless and flippant way in which his evidence was provided.

73. It is a consequence of that extraordinarily casual approach that he wrote to Mr Ross on 13 March 2019: "The person who opened the door on inspection was Mr Mohamed Ahmed". That was a plain untruth. Nobody ever suggested it was Mr Ahmed who had opened the door, and nobody ever gave any evidence that it was Mr Ahmed who was present. At its very highest, as Mr Hava said, he had made a guess based on information he had been given and he, without any difficulty, simply passed on his guess to Mr Ross as though it was fact.
74. There were more and more inconsistencies. Given my doubts about the truthfulness of any of Mr Hava's evidence, I cannot even accept that he actually delivered the notice to quit that he said he had delivered to the apartment or to Mr Ahmed's offices. Even if he did deliver the notice, it was inadequate and he took no action by way of enforcement of it. Instead, he wrote in his evidence and told me that he had relied on an apparent assurance from Mr Ahmed that the property would come back on 7 May 2019. He was entirely casual as to how that might be achieved and there is no email trail or correspondence or record to that effect. Likewise, Mr Hava had no informed recall as to whether he took any action at all between the service of the proceedings on 15 March 2019 and the hearing on 19 March 2019. His witness statement completely misrepresents the series of events which happened so as to culminate in the surrender which actually took place at the court hearing on 29 March 2019. He had at least the good grace to acknowledge that he was "possibly wrong" in his evidence. That may be recorded as 'the understatement of the year'.
75. I find that these were no accidental lapses. On behalf of, and as agent for the first defendant, Mr Hava was deliberately obfuscating the position in February and March 2019 and deliberately misleading the claimants. I reject entirely the assertion made at paragraph 22 of his witness statement to the effect that the first defendants were not being resistant to giving back possession and getting it back from the occupants.
76. What then of Mr Hava's accounts as to how the property came to be re-let again in July 2019 without consent? Mr Hava was fully aware of the litigation underway against the first defendant. Indeed, he was the person instructing the first defendant's solicitors. Notwithstanding the obvious sensitivity of dealings in relation to this apartment and despite his having been, by then, the managing director and in post for several years, Mr Hava asked me to accept, in essence, that the subletting to the sixth and seventh defendant occurred through the unsupervised, unauthorised activities of one of his 14 staff. That staff member was not called and there was no document from the staff member corroborating Mr Hava's account. Despite its relevance, there was no disclosure of how and when the staff member instructed Portico. At least two Planet International staff were involved in this subletting, but Mr Hava purported to tell me that he did not know of it. I do not believe him.
77. Mr Hava accepts that the sixth and seventh defendants moved in on 4 July 2019, and he says in his witness statement, at paragraph 27:



"Following that, I instructed solicitors to seek consent from the Claimants for the subletting to the 6<sup>th</sup> and 7<sup>th</sup> Defendants."

The assertion in his statement, therefore, is that he told his solicitors that the tenancy had been entered into and the tenancy had begun. In the event, the solicitors were to write to the claimants that this was a proposed sub-tenancy and the sub-tenants were not in occupation. I find that the solicitor did not act improperly, and the solicitor acted on the instructions given by Mr Hava. Mr Hava thus falsely provided his solicitor, or the first defendant's solicitors, with an unsigned version of the assured shorthold tenancy and told him it was a proposed document even though the tenancy had actually been executed. Faced with this obvious inference from the documents that his statement was wrong, Mr Hava changed his account and discredibly sought to suggest that others than he had given the relevant instructions to the solicitor.

78. Mr Hava knew in early to mid-July 2019 that permission from the claimants for this subletting had been refused, and he understood the essence of why; namely, that two separate male students were not one family and therefore for that and other reasons consent was being refused. In order to try and get round that difficulty, Mr Hava advanced an explanation that somebody in his organisation had thought, relying on information that somebody at Portico had assumed, that these two men were in a gay relationship and thus members of the same family. In spite of the importance by now of at last recognising that the first defendant should be providing correct and accurate information to the solicitors for the purposes of transmission in due course to the court, Mr Hava took no such sensible steps to check the position despite its importance. Again, this was a casual and cavalier approach.
79. Against this background of being unable to believe that I could trust any of Mr Hava's evidence, I am quite satisfied that I can place no reliance at all upon his account, derived from what he himself admits is the hearsay of others, about how the August 2019 purported tenancy to the sixth defendant alone came about. I am quite satisfied that the sixth defendant was no party to that document and for that reason it was no sham. A sham is a device entered into by A and B to deceive C. I am not satisfied in this case that B was a party to that document at all.
80. Everything about the August 2019 agreement, and the context in which it came about, strongly suggests that it is not genuine. There is no suggestion in any communication from the sixth and/or seventh defendants that any such second agreement was made with them or one of them. There is no suggestion that, although the second agreement provided for a lower rent, they were ever repaid anything. Strong submissions were made by Ms Mattsson on the similarity of the writing having been copied over from the first to the second agreement. I am quite satisfied that both men were in occupation throughout, as the evidence showed.
81. No consent was sought for this supposed additional agreement, even though the only purpose of it would be to get round the family restriction. Perhaps certain advice was given. One cannot know. I find, however, that it was Mr Hava who provided the false information to the defendant's solicitors that led those solicitors, in turn, to give inaccurate information about the August 2019 and July 2019 lettings to the claimants. It was bad enough for one solicitor to mislead another, but this misleading account made its way into the statement of case eventually put forward in the Defence. (I there refer to paragraph 10 of that document.)

82. Once again, in relation to this matter, the truth came out. The sixth and seventh defendants were discovered to be in possession and the claimants were, through their solicitor, contacting the first defendant to let them know that. Notwithstanding the fact that it may be said that all of this had occurred in the face of an injunction prohibiting it, no urgency was deployed by Mr Hava and his staff to rectify the position.
83. Mr Hava's skewed understanding of matters of property management is no better underscored than in paragraph 31 of his witness statement, which describes what happened when legitimate tenants were found for the first defendant and the consent of the claimants was properly sought in advance. Mr Hava painted a picture of delay and incompetence on the claimant's part, when the reality is of expedition and precision.
84. In short, the evidence tendered for the first defendant was wholly unsatisfactory. By its agent, not simply through incompetence, but I find deliberately, set out to mislead the claimants, mislead prospective occupiers and ultimately mislead the court. In that account I say nothing about any breach of the injunction. That would be a matter to be dealt with in different circumstances and to a different standard of proof on any application made in proceedings for committal.
85. I now turn to the issues for determination.

### Issue 1

86. The first agreed issue is whether the terms of the under-leases granted by the first defendant to the second defendant and by the first defendant to the sixth and seventh defendants were in accordance with the terms of the lease. It is accepted by Mr Walder for the first defendant that they were not so, at least in respect of the provision as to 'user'. However, I accept the detailed particularity of the differences between what the leases by way of under-lease contained and the actual obligations of the lease. They are set out most particularly in Ms Mattsson's skeleton argument and particularised not least at paragraphs 46 and 47 thereof. There is no point in my going over the detail.
87. It is a feature of the obligations of the lease that they required exactly the same terms to be imported into any under-lease. I am satisfied from the reference to the judgment of Lightman J in the *Crestfort Limited v. Tesco Stores* [2005] EWHC 8095 (Ch) at paragraph 45 that, while an obligation to enter into like covenants does not require identical covenants, the use of the term "same" in a lease imports a requirement for identical provisions.
88. Mr Walder tentatively suggested that in some way the breadth of clause 8 of the underlease from the first defendant to the second defendant could exonerate the first defendant from a wider breach than simply breach of the user clause. I do not accept that for the reasons given by Ms Mattsson, not least because clause 8 operates only in relation to 'restrictions' under the lease and not 'obligations'.
89. There were similar breaches of user clauses in relation to the agreements later entered into, and in particular in relation to the agreement made by the first defendant with the sixth and seventh defendants.
90. I am satisfied, and indeed Mr Walder accepts, that there is a direct right of action based on the breach of the user covenant available to the claimant as against the other defendants. That arises not least from the provision of the Landlord and Tenant (Covenants) Act 1995. That emerges in particular from section 3, subsection (5). As

Mr Walder further highlighted, where there is, as it were, a chain of breach of covenant in this form, then the various parties are jointly and severally liable in respect of that breach (see section 13(1)), and I take that to be a necessary preface for his claim for an additional contribution.

## **Issue 2**

91. The second issue is whether the assured shorthold tenancy dated 4 August 2019 granted by the first defendant to the sixth defendant was a sham. My answer to that question is: no it was not, for the reasons I have given. On the balance of probabilities, however, I am satisfied that this purported agreement was never made at all. It was a device conjured by the agency Planet International on behalf of the first defendant in an attempt to mislead as to the occupation of the apartment by one family. I draw that inference from the facts found above, as well as from the failure to call, in order to give evidence, the member of staff, of the first defendant or Planet International, who brought it about, and, moreover, from the fact that, for some unexplained reason, Planet International was not able to produce the document in its original form from its records.

## **Issue 3**

92. If the answer to Issue 2 above is no, the third issue is whether the first defendant breached the terms of the lease when granting the tenancy to the sixth defendant. As I have already indicated, my answer to this issue is that there was no grant to the sixth defendant alone.
93. Issues 4 - 8 are concerned with damages and are expressed in different formulations individually against each of the defendants and as to their joint and, potentially, several liability. I propose to gather together Issues 4 - 8 and simply describe them as "the damages issue".

## **Issues 4 - 8 - The Damages Issue**

94. As I have already indicated, the claimant seeks to obtain damages in this case by one of two routes: the first, the 'disgorgement' route; the second, the 'negotiating damages' or 'licence fee' route. However, before I consider, those two routes in any detail, it is important to step back and examine what is required when a claimant seeks to recover damages, whether from a party who has defended the claim or from a party who has been debarred from defending the claim. The first and most important requirement is a requirement for the claimant to plead out the loss which it seeks to recover. In this case, the re-amended particulars of claim set out the pleaded loss as expressed in paragraphs 34 to 36. They read as follows:

"34. The Defendants have profited by their breaches of covenant in circumstances where the Claimants could have negotiated a release fee with them and damages should be awarded on a negotiating basis. The rental income payable to the First Defendant in accordance with the Underlease amounts to not less than £61,528.

35. Further/alternatively, the Claimants are entitled to an account of the profits made by the Defendants."

And then paragraph 36 pleads for interest.

95. The response to that made in the defence of the first defendant is as follows:

"13. Paragraphs 34 - 36 are denied so far as they relate to the First Defendant. It is denied that the First Defendant has profited from its breach in the sum of £61,528 as pleaded or at all. There is no breakdown for that figure and the First Defendant is unsure of its origin.

14. Further, and in the alternative, it is denied that the Claimants have suffered any loss, none having been pleaded. The effect of the injunction is that the First Defendant's obligations under the Lease continue.

15. Further still, even if some unparticularised loss has been suffered, it is denied that 'damages should be awarded on the negotiating basis' or that any damages should be considered by reference to any monies or profits made by the First Defendant."

96. Although the second defendant, Mr Ahmed has been unable to defend the claim, he provided a skeleton argument which put the claimants to proof in much the same way. He wrote in the very last paragraph of his skeleton:

"The second defendant does not accept that the claimants have suffered any loss and denies that they are entitled to an account of profits. The claimant has not identified in these proceedings that it has suffered the loss of any valuable asset and has not pleaded any."

97. As I have said, the first important principle in any claim for damages is that it must be pleaded, and I have set out the pleadings in this case. The second important point is that it is for the claimant to prove the loss which it asserts that it has suffered. That is made clear, not least, by Lord Reed in giving the judgment of the Supreme Court in *One Step (Support) Limited v. Morris-Garner* [2019] AC 649. Lord Reed says this on behalf of the majority of the Court at paragraph 95(7):

"(7) Where damages are sought at common law for breach of contract, it is for the claimant to establish that a loss has been incurred, in the sense that he is in a less favourable situation, either economically or in some other respect, than he would have been in if the contract had been performed.

(8) Where the breach of a contractual obligation has caused the claimant to suffer economic loss, that loss should be measured or estimated as accurately and reliably as the nature of the case permits."

98. Against that background, I turn to the two ways in which the claim for damages is advanced.

### **Disgorgement Damages**

99. The availability to a claimant, in a claim for breach of contract, to damages in respect of that breach calculated at the amount of the profit made from the breach, was first

recognised as part of our common law some 20 years ago by the House of Lords in *Attorney General v. Blake* [2001] 1 AC 268. Mr Blake had been an intelligence officer employed by the British security offices who later became a spy. As part of his contract of employment, he had given an undertaking not to disclose confidential information obtained in the course of his work. Notwithstanding that, he wrote a book based on his experiences and thus breached his obligations of confidentiality. He was to be paid handsomely by his publisher. The Attorney General sought remedies designed to strip Mr Blake of the gains of his wrongdoing.

100. The nature of the claim was reformulated many times as it passed through the appellate layers of the civil courts. When it reached the House of Lords, the Attorney General was prompted by the House itself to advance an argument that restitutionary principles ought to operate to enable the recovery of what profit Mr Blake was to make from his breach of contract. That this invitation came from the court itself is clear from the speech of Lord Nicholls at 277 H, Lord Steyn (at 290 G) records the matter as having been raised at the initiative of the House itself.
101. Counsel for Mr Blake, whose argument was strongly commended by their Lordships, cautioned in blunt terms that the House should not enable such recovery. Mr Clayton QC (lead counsel for Mr Blake) made a submission, (recorded at 272 H of the report) in the following terms:

"To award restitutionary damages for breach of contract so as to reflect what a defendant has gained from a breach rather than what a claimant has lost will disturb settled principles of contract law and is wrong in principle. The restitution principle involves a departure from the principle that contractual damages compensate a claimant for his loss. To concentrate on the motive of the party who committed the breach is contrary to the general approach to the assessment of damages in contract. It will lead to uncertainty in the assessment of damages in commercial and consumer disputes where predictability is important. The possibility of a windfall being awarded to an aggrieved party will discourage economic activity and has important implications for insurance."

That is, of course, to quote only part of the submissions made by Mr Clayton. Their Lordships were not persuaded. By a majority, they declined the invitation to the court to stay its hand in relation to restitutionary damages. The court well recognised that it was going to break new ground.

102. Lord Nicholls, recognised that in terms. At 284 A he stated:

"The claim is for all the profits of Blake's book which the publisher has not yet paid him. This raises the question whether an account of profits can ever be given as a remedy for breach of contract. The researches of counsel have been unable to discover any case where the court has made such an order on a claim for breach of contract."

As their Lordships were to demonstrate, such a claim is in fact, in certain circumstances, now available.

103. Having identified the question, Lord Nicholls answered in the affirmative. Lord Nicholls set out the principles to be applied to an award of such damages in a claim of contract at 284 H onwards. First, he identified the principle to be applied. He said:

"My conclusion is that there seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression 'restitutionary damages'. Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract."

104. At 285 B his Lordship said:

"The law recognises that damages are not always a sufficient remedy for breach of contract. This is the foundation of the court's jurisdiction to grant the remedies of specific performance and injunction. Even when awarding damages, the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer. This applies to interference with property rights. Recently, the like approach has been adapted to breach of contract."

105. Thus it was that their Lordships' House identified the availability of the award of this category of damages. But the next question was in what circumstances they might be available. Lord Nicholls answers that at 285 F:

"I see no reason why, in practice, the availability of the remedy of an account of profits need disturb settled expectations in the commercial or consumer world. An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit."

106. Having thus identified the principle and the occasions in which, in practice, such a case might arise, Lord Nicholls then offered some thinking as to the situations in which such

awards would not be applicable. He rejected alternatives proposed by no lesser a source than Lord Woolf. He says at 286 D:

"Something more is required than mere breach of such an obligation before an account of profits will be the appropriate remedy."

But what more? He identified three options put forward by Lord Woolf, including that the breach was cynical and deliberate and identified that none of them alone would justify an award of damages of this nature.

107. The overall effect of this judgment, therefore, was, it might be thought, to give rise to a new discretion to make an award, but not to identify with any precision the circumstances in which such an award might arise. Lord Steyn, with typical precision, identified at 291 E, that:

"Exceptions to the general principle that there is no remedy for disgorgement of profits against a contract breaker are best hammered out on the anvil of concrete cases."

Ms Mattsson would have it that this is a suitable case to be set to the anvil and Mr Walder contends, unsurprisingly, that it is nothing of the sort. The overall *ratio* of *Blake* is neatly encapsulated in the second holding in the headnote which I shall simply treat as having been read by me into this judgment.

108. What then, standing back, are the features that a breach of contract case must have in order to justify an award of disgorgement damages? As is obvious, a keynote of *Attorney General v. Blake* and subsequent cases of disgorgement of damages has been the need for exceptionality of circumstance to justify an award. As Lord Neuberger has noted in a different context, exceptionality is an outcome of a decision rather than a guide to making a decision (see *Manchester v. Pinnock* [2011] 2 AC 104, paragraph 51).
109. In addition to exceptionality, another feature described by Lord Nicholls as a useful guide is whether the claimant had a legitimate interest in preventing the defendant's profit-making activity.
110. Beyond the law reports, both parties took me to *McGregor on Damages*, and in particular to chapter 15 which bears the title "Account and disgorgement of profits". I was taken to many passages, some of which were of assistance. In addition, Mr Walder took me to the judgment of Lawrence Collins J in *CMS Dolphin Limited v. Simonet* [2002] BCC 600. In that case, submitted Mr Walder, the judge had succinctly summarised the situation in relation to disgorgement damages as follows:

"In *Att. Gen. v. Blake* [2001] 1 AC 268, 285, Lord Nicholls said that one of the exceptional circumstances which would justify a restitutionary remedy for breach of contract was the characterisation of a contractual obligation as fiduciary and a finding that the claimant has a legitimate interest in preventing the profit-making".

Persuasive as that is, I believe that there is a better statement of the law to the same effect in paragraph 64 in the judgment of *One Step* given by Lord Reed. He says:

"Lord Nicholls, with whose speech the rest of the majority agreed, emphasised that such an order was available as a remedy for breach of contract only in exceptional cases, where other remedies were inadequate, and at the discretion of the court. A useful guide was said to be whether the plaintiff had a 'legitimate interest' in depriving the defendant of his profit."

111. Ms Mattsson ably sought to demonstrate that the facts of the instant case, and indeed the incidence of unauthorised letting in residential premises in high end apartments in London, was such that this case was fit for an award of disgorgement damages. What, she asked rhetorically, could be a greater and more obvious mischief than had occurred in the instant case where, through breach of the obligations of the lease, the claimant freeholders had found themselves landed with a string of short let visitors, including one engaged in selling sexual services on the internet? If ever there was a case, she contended, that was sufficiently fit and exceptional for the award of disgorgement damages, it was this one.
112. She, like Mr Walder, took me to a passage in *McGregor* suggesting that the hallmark of disgorgement damages was deterrence. She submitted that such damages were required precisely to deter the first defendant in this case, other defendants in this case, and other tenants more generally at any future time from abdicating their responsibilities, breaching their obligations and bringing about circumstances such as those found in the instant case. For his part, Mr Walder submitted that there was nothing the least exceptional about this case. It contained no fiduciary element and it contained no element of an interest of the claimants in preventing the defendants from taking a profit.
113. To my mind, the essential starting point in resolving these competing contentions is with the nature and terms of the particular contract in question. Here I am dealing with a wholly unexceptional long lease of residential premises. It contains what might in broad terms be described as the 'usual' landlord and tenant covenants, even if perhaps more strongly couched in this particular case in the landlord's favour than in the general run of cases. To my mind, it establishes, and this class of contract establishes, no fiduciary relationship between the parties. Moreover, and to my mind importantly, this lease does not speak against the tenant making a profit from being a party to it. Quite the contrary. The whole premise of the relevant covenants in the lease relating to alienation is that consent for subletting will be given, and will only be given, if the subletting is on terms by which, at least, the tenant will break even and produce sufficient to cover his or her rent and service charge liability, together with, one assumes, the ordinary expenses of letting. To put that another way, this is a contract expressly enabling the tenant to profit from being a party to it in the normal course of it. Mr Walder pithily invited me to ask the rhetorical question: is there an anti-profit agenda here? I believe that to be a pithy litmus test, and the answer is that there plainly is not.
114. So this is not a case of a fiduciary relationship. It is not a case in which there is a legitimate interest in preventing profit. However, Ms Mattsson sought to persuade me that disgorgement profits had, post-*Attorney General v. Blake*, been awarded in similar cases. She took me, for example, to an unreported decision of the Vice-Chancellor, Sir Andrew Morritt, in *Esso Petroleum v. Niad Limited*, the judgment being delivered on 22 November 2001. In that case a petrol retailer had breached a contractual agreement with Esso by failing to reduce the price of petrol charged to customers in line with a



price-fixing agreement recommended by the oil company. The retailer had profited from its departure from an arrangement which bound all other retailers being supplied by the same oil company. The court held that the claimant was entitled to recover appropriate recompense, either by way of damages by way of an account of profits or by way of a restoration of the amount of the difference in price.

115. The Vice-Chancellor considered *Attorney General v. Blake* and Ms Mattsson relied in particular on what the Vice-Chancellor had said at paragraph 63 as to four features pointing towards disgorgement as a relevant remedy: first, the inadequacy of damages; second, the obligation to maintain the contract being fundamental to its nature; third, that the retailer had apparently said it was complying with the agreement when it was not; and, fourth, that the oil company had a legitimate interest in preventing the retailer from profiting. If I may say so, one might have thought that to be a paradigm case for the application of disgorgement damages. The precise purpose of the agreement made was to avoid exactly what the defendant had then done.
116. Turning back to the instant case, there is here no contract not to sublet. There is no contract not to sublet at a profit. The obligation broken here was one of getting specific advance written permission to do so, and indeed the contract - the lease itself - envisaged that, if there was compliance with its terms, permission to sublet at a profit would be permitted. There was, therefore, to my mind, no legitimate aim to prevent profit present here, in distinction to the *Esso* case.
117. Ms Mattsson very properly invited me, in dealing with disgorgement, to have regard to all the circumstances of the case. I have them, as I hope my judgment has indicated, firmly in mind. Her skeleton argument at paragraph 66 focused in particular on four specifics.
118. First, the deliberate and cynical nature of the conduct of the first defendant, as I have found it earlier in this judgment. That feature, standing alone, would not, as Lord Nicholls has made clear, carry her home. But she described it as an important feature in the current context. I cannot accept that submission. I cannot see why, in principle, it should make any difference if the breach is done in ignorance - perhaps as a result of incompetence - or by deliberate breach in this class of case. Indeed, accepting Ms Mattsson's invitation to deal with the matter by reference to conduct and cynicism would lead to a sliding scale in these cases from which it would be impossible to determine whether the relevant threshold would be met or not.
119. Her second feature was repetition of breach, but again I do not consider that that is of significance in the current context, whether the unauthorised underletting is done once, twice or three times. That is matched, as Mr Walder has shown, by the matter being dealt with correctly two or three times. There has been repeated compliance, as there has been repeated breach.
120. I accept Ms Mattsson's third point, that the landlord had a legitimate interest in preserving its property asset, but that, to my mind, is not in the same class or category as one of deterring the breach of contract for profit.
121. Finally, Ms Mattsson submitted that in this class of case only a stripping of profits would do in order to provide a sufficient remedy for a landlord faced with the possibility of its property being abused. I do not accept that at all. Abuse of property in this way can be avoided by vigilance by the lessor and its agents. If breach is discovered, it could, in an appropriate case, potentially lead to forfeiture of the lease. It could lead to

the obtaining of an injunction, as it did in this case, or, in certain circumstances, there could be situations in which the court would, through injunctive and other relief, force a surrender of any sub-interests, ensuring that the landlord was compensated in costs. If an injunction did not work at first attempt, it could be enforced by way of committal.

122. Sensibly, Ms Mattsson relied on none of the above features alone and she was right not to do so for the reasons I have given. She put them together as giving cumulative weight sufficient to take this case into the disgorgement damages category. As in *Esso*, she asked me to draw together a number of factors or features. To my mind, that places too much weight on the decision in *Esso* and fails to acknowledge the particularity of the facts of that case. To my mind, the safest port of call is with the decision in *Blake* itself and the important restatement of it that I have offered from Lord Reed's judgment in the *One Step* case.
123. Is this case in a wholly exceptional category of the type that *Attorney General v. Blake* envisaged? To my mind, with respect to Ms Mattsson's able argument, this case is a million miles from that. There is, to my mind, nothing the least exceptional about a breach of contract constituted by the subletting of residential premises without prior written consent of the landlord. Indeed, it might be suggested to be so commonplace as to be a modern social evil. It is a particular mischief that Parliament has sought to address already in the *social* housing sector through the Prevention of Social Housing Fraud Act 2013.
124. In essence, Ms Mattsson argues for the same form of unlawful profits order in an egregious *private* sector case to be recovered by disgorgement damages. In my judgment, such a remedy cannot sensibly be fashioned from *Attorney General v. Blake* so as to be made available to the landlord in this case or to landlords generally in this class of case. That is not to diminish in any way the court's disapproval of the conduct of the first defendant and the other defendants in this case. It is simply to say that this case does not reach the exceptional threshold necessary to come within disgorgement of profits territory. As I have already said, the scenario emerging in this case is not one in which a contracting party is without an effective remedy. I have set out those remedies already. Indeed, standing back from the case overall, it is perhaps no surprise that, in the many centuries that leases of this type have been in existence, no previous argument has been advanced to suggest that damages of this type might be recoverable.
125. It follows that I reject the claimants' claim for damages measured by disgorgement of profits against the first defendant. Ms Mattsson would, I believe, accept that, if I found against her in relation to the first defendant, I was unlikely to make any such award against any other defendant. I would plainly not have granted disgorgement against the sixth and seventh defendants because they have made no profit at all. I do not consider that the case for disgorgement against the second defendant is anywhere near the exceptional category and to a significant degree further away from it than the case against the first defendant.
126. There is no doubt, as I have found, that the second defendant was in breach, but in its case that was more the result of incompetence and blundering than by the methods of deception and likewise engaged upon by the first defendant and its agents. Indeed, the second defendant is entitled to rely, in this context, on the false warranty given in the letting to it.
127. Accordingly, the claim for disgorgement damages fails.

### **Negotiating Damages or Licence Fee Damages**

128. As with the claim for disgorgement damages, both parties invite me to take the relevant law on this head of damages from a relatively recent decision of the Supreme Court this time the *One Step* case. The question posed in *One Step* is neatly expressed in paragraph 1 of the judgment of Lord Reed on behalf of the majority. It is as follows:

"In what circumstances can damages for breach of contract be assessed by reference to the sum that the claimant could hypothetically have received in return for releasing the defendant from the obligation which he failed to perform?"

129. The case affirms that this head of damages, however it was historically described, is now to be described as "negotiating damages". That term was adopted by the Supreme Court, having first been introduced by Neuberger LJ (as he then was) in the *Lunn Poly* case. But, just as with my treatment of *Attorney General v. Blake*, I must recognise the importance of the starting point in the assessment of damages repeated here by the Supreme Court. In his treatment of damages for breach of contract, Lord Reed distils the relevant law in this way at paragraphs 31 and 32:

"31. ... The law of contract, on the other hand, gives effect to consensual agreements entered into by particular individuals in their own interests. Remedies granted by the courts are designed to give effect to what was voluntarily undertaken by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed.

32. In *Robinson v Harman* ... Parke B said: 'The rule of the common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.'"

130. Thus it is that Lord Reed sets out in paragraph 35 of the judgment of the court precisely what damages for breach of contract are. He importantly, for present purposes, says this:

"35. Damages for breach of contract are in that sense a substitute for performance. That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. Their function is confined to enforcing either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance (subject, according to the decision in *Attorney General v Blake*, to a discretion to order an account of profits in exceptional circumstances where the other remedies are inadequate). The damages awarded cannot therefore be affected by whether the breach was deliberate or self-interested."

131. As the headnote explains, however, in *One Step* the Supreme Court decided that one method of measuring damages or assessing compensatory damages would be by identifying what the defendant would have agreed to pay to the claimant for a licence to do the wrong. That fee (notional licence fee) is to be fixed by a hypothetical process of negotiation between willing parties. Again, I shall not read the relevant passages of the headnote, but shall simply treat them as having been imported into this judgment.
132. As with their treatment of *Blake*, the competing relevant passages of *McGregor* on negotiating damages were drawn to my attention by both counsel from Chapter 14 which bears the heading "Licence fee (negotiating and user) damages".
133. As the passages from *McGregor* make clear, there has, as a result of *One Step*, been a change of emphasis or approach in relation to the nature and understanding of negotiating damages. *McGregor* writes at paragraph 14-010:

"Until 2019 there was such an alternative. The alternative was for these damages to be measured by reference to the benefit received by a defendant. This measure would be restitutionary. The rectification of a wrongful act could comfortably represent not merely a consequential loss that was suffered, but also a benefit that was obtained."

At paragraph 14-014 he records:

"The restitutionary measure was rejected, or at least side-lined, in England and Wales in *One Step*".

134. Mr Walder was, in my judgment, right to submit, therefore, that what was identified in *One Step* was a remediation for breach of contract which was not restitutionary. It was not profit stripping from the wrongdoer, but rather it was a way of measuring - a new way of measuring - compensatory damages.
135. So again one is faced with the question, the issue of principle having been determined by the highest court, what are the circumstances in which this new measure or means of assessing damages can be used? The answer is given, so far as possible, by the Supreme Court itself in a series of some 12 sub-paragraphs to paragraph 95 of the judgment of Lord Reed. I have read at least two sub-paragraphs of that already. I shall not read further from it. Suffice it to say that those principles are firmly in mind.
136. The Supreme Court also took the trouble to identify circumstances in which the method of assessment of compensatory damages by reference to negotiating principles could not be used (see paragraphs 81 and 97 of the report). Ms Mattsson, however, and very properly, draws attention to the fact that the Supreme Court evidently envisaged the possible use of the negotiating damages principle in property cases. They were certainly recognised as being within the appropriate class. Thus it is that, although property cases are first mentioned by reference to the usual principles in paragraph 30 of the judgment, that principle is carried over as being relevant to the contractual context at paragraph 33. Indeed, in paragraphs 91 to 93 of the judgment, the Supreme Court make it clear that this class of damages might potentially be available in classes of cases including "breach of restricted covenant over land" and a case of "a right to control the use of land".

137. The essence drawn from these passages is that the case must be one in which loss of, or damage to, a valuable asset has been caused by a breach of rights. To put it another way, there must be present a right which the claimant could waive in knowledge that it would lead to possible or actual damage to an asset and waive it for a notional fee that would at least compensate for that harm.
138. Mr Walder submits that these principles can have no application in this case, and perhaps more widely in this class of case. He argues that the asset that the landlord holds is its lease. That lease continues. It (the lease) has not been harmed or damaged by the tenant's earlier breach of it. It still contains the same landlord's rights, and indeed the same tenant's rights, as before. It still binds and it is still enforceable. Further, in this particular case there is no asset or right such as an absolute bar on, or prohibition of, alienation. There is only the right to insist on certain preconditions as the price of obtaining an agreement to underlet.
139. Mr Walder derived from that the proposition the submission that, if there is any loss here on the claimants' part, it is simply the fee that would otherwise have been payable by the defendant to get consent, or perhaps a higher figure represented by what a sensible defendant would have done, perhaps in terms of taking legal advice, in order to avoid a breach of the lease. With characteristic clarity, he suggested an example or analogy of a prohibition against letting to a person unless they had white shoes. The measure of damages was, he submitted, appropriately that simply of the cost of buying such shoes so as to be able to comply with the requirement in the lease.
140. To my mind, Mr Walder's submissions, attractive as they are, cannot be accepted. Authority requires me to assume that the wrongdoing has occurred. All I am doing is measuring the loss to the claimant that results from that. Ms Mattsson, for her part, submits that I am bound to find that a breach of covenant case in relation to underletting can be a case fit for negotiating damages as a proper approach to assessment. She submits that the asset damaged is a right in property and a right to control its use. She submits that the value of that right is the ability to prevent misuse and to enforce the right against others.
141. In order to persuade me that this case, or this class of case, was suitable for the use of the negotiating damages principle, she relied on the decision in *Crestfort*, to which I have already made reference. That was a pre-*One Step* case. Mr Walder does not accept it was correctly decided, but he acknowledges that, unless he can distinguish it on fact or law, I am bound by it. Mr Walder therefore first set out to distinguish it by its facts. It is a somewhat exceptional or unusual underletting case, but I am not convinced that any sensible distinction can be drawn factually between that case and this. Therefore, *Crestfort* is binding upon me unless it is in some way overruled by *One Step* or inconsistent with it.
142. I have not troubled to set out the unusual facts of the *Crestfort* case, but they are helpfully encapsulated in the second judgment in *Crestfort* given under reference [2005] EWHC 2480 (Ch) by Lightman J himself at paragraph 2. I have those facts fully in mind. Therefore, I consider *Crestfort* to be binding authority for the proposition that, in an appropriate property use case between landlord and tenant, there may be compensatory damages assessed by reference to the negotiating principle. That much emerges, not least from paragraph 72 of the judgment of Lightman J and the authorities therein cited.

143. In principle, therefore, I am satisfied that one method open to the court in assessing the claimants' loss for breaches in the instant case is by reference to negotiating damages principles. Taking the approach adopted by Lord Reed and having identified the applicability of his principles, I need to consider whether they are applicable in this case. I remind myself that what the claimant is entitled to is compensation for the actual loss occasioned by the breach of contract, assessed, so far as the court can assess it, by reference to the hypothetical negotiated fee.
144. Ms Mattsson points to two temporal periods in which the first defendant - taking the first defendant first - was in breach of contract. Those periods are from January 2016 to the end of March 2019, and from July 2019 to January 2020. I ask, therefore, what is the measure of loss advanced by the claimants in respect of those breaches? Pursuant to liberty granted by the court, a schedule of damages has been put forward by the claimants setting out the basis upon which they say loss is properly to be measured.
145. Mr Ross, the claimants' solicitor, having been called, was asked in oral evidence to explain or give evidence in support of the schedule. It is no criticism of him that he could not do so, and he cannot be blamed. The schedule was obviously settled with the assistance of leading counsel. However, the claimants face this difficulty: in the absence of any ability to explain the basis of the alleged loss through its solicitors, it is required to rely on other evidence of its own. I record again that there is no evidence from any director of the claimant companies and no evidence from any of their employees of any loss. Nor is there any expert evidence assisting the court in identifying the nature of the claimants' loss.
146. In effect, Ms Mattsson encouraged me to do the best I could and to use the formulations put forward in the schedule of loss. In particular to do so because no alternative basis of assessment had been put forward in answer to the schedule. To my mind, that approach simply will not do. I am not concerned with restitutionary damages. I am concerned only with compensatory damages. Notwithstanding that the schedule is expressed in restitutionary terms, Ms Mattsson did her best to demonstrate that there were several routes to my finding in her favour that there was a loss suffered by the claimants which could be compensated by damages in this way.
147. Her first attempt was to persuade me, based on the schedule, to take a broad brush approach and assess damages as compensation for the claimants, drawn as a broad percentage of the profits made by the various defendants, and in particular the first defendant. This attempt, however, fell at its first hurdle. The figures presented as profits were no such thing. They were in fact receipts by the various defendants. There is no information or evidence before the court as to what their actual profits were or might have been in respect of any of the two periods of breach. Furthermore, there is no sensible or considered basis upon which I could identify any particular percentage. Ms Mattsson suggested 50%. But why 50% and not 15%; why not 75%? This exercise of approaching the matter of compensatory damages as an unguided percentage of receipts really did not provide me, I considered, with any sensible basis upon which to assess damages at all. In truth, these were restitutionary damages indistinguishable from disgorgement. I was being asked to, in effect, award by this route the whole, or a percentage of, the same damages I was being asked to award by way of disgorgement. That seemed to me to be contrary to principle and to provide no sound basis for making an award under this head.

148. Ms Mattsson's second attempt was, to my mind, on firmer ground. She invited me to work through, unassisted by any schedule, the various levels of rent that had been charged under the unauthorised leases and compare them to the levels of rent taken under the authorised leases. In so far as they were different, as they appeared to be, she invited me to treat the difference as a measure of the loss suffered by the claimants or to apply some form of percentage to that.
149. This methodology was not pleaded, which is a first principle requirement of a claim for damages, and was not formulated in the way that Ms Mattsson advanced it orally. No doubt, had I given her the opportunity, she would have produced for me a brilliant Excel spreadsheet setting out a route to a figure, but then she would have faced the same difficulty of inviting me to pluck from thin air an appropriate percentage of the 'profits' to award by way of damages.
150. Mr Walder, again characteristically succinctly, submitted that what Ms Mattsson was actually after was jackpot damages - i.e. restitutionary damages - getting back from the defendants by way of windfall that which they had, by their efforts, obtained. I accept Mr Walder's description. Ms Mattsson's first two ways of putting this case were not compensatory at all. They were restitutionary and, as already indicated, the decision in *Blake* sets out the only common law exception to the normal rule that damages in contract are compensatory.
151. The third way Ms Mattsson put her case was more firmly in the territory of *One Step* itself. She suggested that, if I could find no other adequate way of dealing with the matter, I should award to the claimants the figure that would have been achieved by the hypothetical negotiation between the parties of an authorisation legitimising the wrongdoing. So I have to ask myself: what would a willing landlord extract from a willing tenant as the cost of being freed (for example, as in this case) from highly restrictive covenants limiting, for example, the use of the premises to use by one family only (instead of more general residential use) and strictly regulating the terms on which the sub-tenancy would be held.
152. That was the question. In answer from the claimants, came there nothing. That is not intended to do a disservice to Ms Mattsson. What I would usually have received in answer to such a proposition is expert evidence. Experts abound, as everyone knows, in the field of Landlord and Tenant; even in the field of residential Landlord and Tenant. Notwithstanding the absence of any such expert evidence, Ms Mattsson invited me to try and work out for myself, from the sparse evidential material in this case, how such a hypothetical negotiation might have gone. She pointed to the temporal gaps in the legitimate letting of this property. For example, she said, the first defendant had been unable to let to a legitimate tenant between March and July 2019. Similarly, there appeared to be periods in 2020 when they were unable to find a sufficiently suitable tenant. Ms Mattsson invited me draw the inference from the existence of these two periods that there was some special difficulty in finding tenants of a 'one family' or 'one household' type to occupy residential property in the centre of London. However, she was unable, unsurprisingly, to point to any evidence at all about the state of the market in either of those two periods, the latter of which led into the period of the current Covid restrictions, and one can take judicial notice of the impact of such restrictions on the property market.
153. Ms Mattsson suggested that, by way of a clue, I could look at the different rent levels charged when property was held by a single family under an authorised subletting by

the first defendant and what was obtainable when the letting was not to a family, as in some of the leases in this case. From that analysis, she invited me to extrapolate that it was hard to get family occupancies for these high end apartments and higher rents could be taken, therefore, from different forms of tenancy. But I ask myself, rhetorically, why so? Why would it not be easy to find a single family occupier for an apartment of this type? Why would it not be attractive to a business for the accommodation of its executive or his or her family? Why not a member of embassy staff and his or her family? Why not professors at the nearby universities and their families? Where was the evidence to suggest that this did not provide a sufficient market for profitable letting to a single family?

154. To my mind, this is simply not the sort of exercise to be answered by the taking of judicial notice. If there is a settled approach to what the gap is worth between letting to a family and letting, in general terms, residentially, then it could and should have been subject to expert evidence. I am left with a most unsatisfactory evidential void. That is amply demonstrated by the earlier attempts of Ms Mattsson on behalf of her clients, very diligently, to persuade me to pluck percentages of profits or receipts from the air.
155. I remind myself once again that the burden in this category of damages claim, as in the remaining categories, is on the claimant. That is nowhere better expressed than in the two paragraphs starting at 14-041 in *McGregor*, chapter 14. *McGregor* assumes a case in which there is no established licence fee such as would be identified by experts. The editors continue as follows.

Where there is no established licence fee, "it is for the plaintiff to adduce evidence which will guide the court. This evidence may consist of the practice as regards royalty and the relevant trade, or in analogous trades, perhaps an expert opinion expressed in publications or in the witness box, possibly if the profitability of the invention and of any other factor on which the judge can decide the measure of loss. In some cases the exercise will be very difficult or impossible. For example, it will not be appropriate to conduct hypothetical negotiation where no reasonable claimant would grant a licence for the activity undertaken by the defendant."

156. In effect, Ms Mattsson is asking me to assess what a reasonable landlord would charge for the prospect of ending up in a situation where its property, and the quality of it, was traduced to the extent that it was occupied by a successive chain of back-to-back unattractive tenants, including those offering sexual services. To my mind, no reasonable or responsible landlord is likely to entertain any such negotiation. It seems to me, therefore, that it is extremely difficult to extrapolate from the evidential material -- or I should say the evidential void before the court -- any reasonable basis for assessing compensatory damages by reference to a negotiated or hypothetically negotiated fee.
157. Even if I assume it might be possible in the generality of cases, I am back to the difficulty of the absence of evidence in this case. This is not, to my mind, a case in which it is right in principle for the court to be taken to gaps in letting and to rents to be picked up from numerous leases and then invited to extrapolate something from that.



Accordingly, I am not satisfied that any of the principal ways in which Ms Mattsson puts her case for negotiating damages is made out in the instant claim.

158. Ms Mattsson's fallback, unsurprisingly, was that at least the loss could be measured for the claimants as a proportion of what it had cost them to bring the situation back into order; that is to say, not least their costs in the litigation and I suppose, although I have no evidence about it, the additional pre-litigation costs of the agents and the like. But I see no justification for importing an award in relation to costs into this element of the assessment of compensatory damages. If Ms Mattsson is awarded costs or a proportion of them, they will be paid. Her clients will have been compensated. If no costs are recovered, that will be because the court has determined that they are not reasonably to be recovered.
159. Bringing all the strands together, although I am satisfied, therefore, that this is a class of case, and indeed a case, in which negotiating damages might in principle have been awarded to the claimants, I am not satisfied that in fact any such compensation is available to them on the evidence. The alleged damage has not been proven.
160. For the reasons I have given, I am not satisfied that any of the alternatives advanced were appropriate because, to my mind, they were restitutionary and, to the extent they were not, they were not supported by the necessary evidence which in this case I consider would have been expert evidence. It follows, therefore, that no loss has been established under this head against the first defendant in respect of any of its breaches and none has, for the same reasons, been established against the second defendant. None in any event could, to my mind, have sensibly been sought from the sixth or seventh defendants, and, sensibly, Ms Mattsson did not pursue that.

### **Issue 9**

161. The next issue for my determination is what, if any, sum the second defendant is liable to contribute to the first defendant. As I have established that there is no liability in damages in respect of the first defendant, it follows that no contribution need be made by the second defendant towards any such damages. However, that does not deal with the question of costs. It may be that there is an adverse award of costs against the first defendant in respect of which it seeks a contribution from the second defendant. That is an issue I shall determine in relation to costs.

### **Issue 10 - Whether the injunction against the first defendant should continue after trial.**

162. Mr Walder says that I should not continue the injunctive relief granted on an interim basis in this case. To do so, he submits, would amount to the court supervising the performance of a contract on a continuing basis, which is something that law and principle speak against. He points to the fact that there have, since the breaches in this case, been legitimate subletting arrangements in place between the parties with the consent of the claimants.
163. The difficulty with those attractive general principles advanced by Mr Walder is that they do not fit the facts of this case. I have had nothing at all from the first defendant: no statement and nor oral evidence from any of the directors of the first defendant, any of its officers or any of its employees. That is notwithstanding the grave seriousness with which the issues in this case have engaged and the likelihood of a possible adverse remedy at a very considerable level for the first defendant. I have had from that

defendant not a whisper of an explanation as to why all this has happened, no apology, no contrition.

164. I also must bear in mind that, notwithstanding the clear terms of the interim injunction against the first defendant, it permitted its agents to proceed to grant the underleases to the sixth and seventh defendants in clear breach of the terms of the lease and in clear knowledge that they did not have the requisite consent under the lease. Not only did the first defendant take its eye off the ball to that extent, but it is then burdened with the misconduct of its own agent who created the fabricated August 2016 letting. This, to my mind, is ample demonstration of the need for the court's injunctive orders to remain in place. Indeed, it is in part the availability of these powers that has persuaded me that this is not a case for disgorgement damages, or rather it is one feature that has persuaded me that it is not a fit case.
165. Even when dealing with a potential legitimate subletting, the first defendant could not get its house in order. The events of July 2020 show that it had taken no approach of contrition or understanding of its obligations under the lease. Mr Hava unsurprisingly told me in blunt terms that he did not understand the provisions of the head lease and he did not even understand the provisions of the injunction. Notwithstanding that the first defendant must have known that that is what he was likely to say, it has taken no steps over the course of the last two years to displace Mr Hava or his agency from responsibility for managing this property or any part of it.
166. I am satisfied that, without an injunction continuing to restrain the first defendant from breaching the terms of the lease, it is highly likely that further future breaches will occur. In the circumstances, I consider that it is just and convenient for the court to order that the injunction shall continue. I am not satisfied that it should run virtually indefinitely, as suggested by Ms Mattsson; that is, until "further order", or until the first defendant lawfully assigns away its lease. But I am satisfied that the injunction should remain in place for a significant period so that compliance can be established and so the court can see evidence of the measures that the first defendant is actually going to take to ensure that incidents of this type are not repeated.
167. To put all of those last few points in pithy form, I simply have no confidence that the first defendant has turned a corner since the events with which I have been concerned in this case. If agreement cannot be reached, I will hear counsel as to the appropriate period for which the injunction should extend.

### **Issue 11 - Liability for Costs**

168. Costs are of course a matter for argument in light of my judgment and I will hear counsel if terms cannot be agreed. But it seems to my mind, even at this stage, that there are three important features which will bear on any decision as to costs and it is right that I spell them out so that counsel have them in mind.
169. The first is that all of this litigation, and all of the claimants' need to address what has happened, has been brought about by the defendants' acknowledged wrongdoing.
170. The second principle that I think bears on costs is that it is the acts of the agent of the first defendant which have exacerbated the situation, including, most egregiously, the manufacturing of a false document.

171. Thirdly, it seems to me important to bear in mind on any consideration of costs that the claimants have failed on an issue, or indeed on the issues, that have engaged the majority of time in preparation for this trial and have taken up the majority of the time required for its consideration.

### **Endnote**

172. I should end where I began, with the question I proposed in the first paragraph. The question was: where a lease provides that a tenant is not to sublet without the landlord's prior consent, what measure of damages is the landlord entitled to recover from the tenant and/or any sub-tenants if the property, the subject of the lease, is sublet without its consent? The answer in the instant case is none. In a possible alternative case, the answer may be 'negotiating damages' where there is sufficient evidence to demonstrate the basis for an assessment. In a wholly exceptional and egregious case, possibly 'disgorgement' damages. That concludes my judgment.

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**This judgment has been approved HHJ Luba QC.**