Neutral Citation Number: [2018] EWHC 2071 (Ch)

Case No: PT-2017-000052

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
(CHANCERY DIVISION)

The Rolls Building,
7 Rolls Building, Fetter Lane, London,
EC4A 1NL

Date: Thursday, 15 February 2018

BEFORE:

HIS HONOUR JUDGE PAUL MATTHEWS

BETWEEN:
SNARECROFT LTD

Claimant

- and -

QUANTUM SECURITIES LTD

Defendant

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(Official Shorthand Writers to the Court)

MR M WARWICK, QC (instructed by Bude Nathan Awanier) appeared on behalf of the Claimant
MR A KINNISON (instructed by Greenwood & Co) appeared on behalf of the Defendant

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Judgment (As Approved)

No of words:
No of folios:

1. JUDGE PAUL MATTHEWS: This is an application brought in a claim which was started in October last year in relation to a property at 46 Brick Lane, London E1. The claimant in the claim is the freehold owner of the property, which acquired the freehold in January 1996. In April 1996 the claimant granted a 999-year lease to a company called Rosedraft Ltd of certain parts of the building at 46 Brick Lane. That lease was assigned to the present defendant, who is the present tenant of the lease, in 1997. I will come back to the terms of the lease. In broad terms there is a dispute about building work which is going on in the tenant's part of the building, the subject of the demise. The claim, as I have said, was issued in October with the intention of obtaining an interlocutory injunction. The claim form was accompanied by Particulars of Claim, and there was an application notice issued on 18 October. That application is still before the court, although an interim injunction was granted over until the adjourned hearing of the application by Mr Edwin Johnson QC on 27 October 2017.

2. However, the application which is currently before the court, and in relation to which I am giving my judgment, is an application by notice issued on 26 January this year, 2018. It is an application for summary judgment on one part of this claim. The application notice asks for: (1) summary judgment under CPR Part 24 against the defendant on a particular issue in the case, namely whether paragraph 11 of the fourth schedule to the lease referred to in paragraph 2 of the Particulars of Claim permits the defendant as the tenant under that lease to use the premises or any part thereof as a hotel; and (2) the costs of this application; because (i) the defendant has no real prospect of successfully defending such issue, and (ii) the claimant knows of no other reason why the disposal of the issue should await trial. That is the application which was argued yesterday, and in respect of which I am now giving my judgment.

3. The procedure that has brought the parties to this point is long and complex, and I will not burden this judgment with any of the real detail. But there have been two appearances previously in court: one, as I say, before Mr Edwin Johnson QC on 27 October last year; and the second before Mr Andrew Sutcliffe QC on 28 November

2017. The purpose of the present application is simply to deal with a short point of construction which on any view arises in the claim, and also in the application for an injunction. Part 24 of the Civil Procedure Rules, as is well known, provides for summary judgment to be given in certain circumstances.

4. Rule 24.2 says this:

> "24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

It is clear from the notes to the White Book that, where a short point of construction arises, and the court is satisfied that the evidence so far as it goes to it is complete and that neither side is disadvantaged by deciding the point at this stage, then the court should go on and deal with it as a matter of construction. That is what I have been invited to do, and that is what I am doing now.

5. The background facts relating to this matter are relatively short. As I say, the claimant company demised part of the building at 46 Brick Lane to Rosedraft Ltd in 1996, which in 1997 assigned the lease to the defendant, the present tenant. That lease was of the first floor of the building together with an access staircase leading from the ground floor up to the first floor. According to schedule 1 of the lease itself,

> "The Premises comprise the entrance passageway and staircase leading from the ground floor to the first floor and all the first floor premises as the same is shown for the purposes of identification only edged red on the plan attached hereto together with all the air space above the height of the Building,"

and then it continues to make a detailed provision for the margins such as floorboards, doors, windows, walls and so on. It is perfectly plain that at that stage the property consisted only of ground and first floors, but it was contemplated that a second floor could be added, and indeed I am told (although it is not formally in evidence) that the second floor was indeed added by the original lessee, Rosedraft Ltd, having obtained planning permission for this purpose on 28 June 1996.

6. So at that stage the property had been enlarged as envisaged by the lease. But, after the completion of the second floor and the assignment of the lease to the defendant, the present tenant, the matter took on a different complexion. This was because the tenant was connected with the owner of the next door property at 48 Brick Lane, and it was possible that the two properties could be enjoyed, in part at any rate, in common. Indeed, as I understand it, for some considerable time the ground floor of both premises, 46 and 48, and also upper floors, were used for the purposes of a restaurant, although that use ceased some years ago. The party wall at ground floor level separating 46 and 48, which had been in whole or in part removed in order to facilitate the use of the ground floor as a restaurant, was ultimately restored, so that the two properties became entirely separate again. But, as I say, with the connection between the tenant of the assigned lease of the upper floors at 46 and the ownership of 48, other projects were of course possible.

7. It appears that the defendant conceived the idea of changing the use of the upper floors completely so as to create a boutique hotel in the upper floors of both properties, 46 and 48. The entire litigation has arisen from the building works which are necessary in order for that change of use to take place. I should say, however, that the defendant did apply for, and obtain, planning permission for both 48 and 46 Brick Lane to change the use to a hotel with 19 bedrooms plus access from the ground floor. That planning permission was obtained on 22 October 2014 and lasted for three years. It would have expired on 22 October 2017, a fact which may explain the appearance of building materials in the street in September last year, and which ultimately led to these proceedings to prevent works being carried on, it is said, in breach of the covenants in the lease.

8. I must therefore turn to the lease itself. It was granted on 9 April 1996 by the claimant to Rosedraft Ltd for a term of 999 years, at a premium but with a small ground rent of £10 per annum, of the upper floor and the airspace above the upper floor of the property at 46 Brick Lane. I should read the second recital to the lease:

> "The tenant intends to carry out all such works as are necessary to make a self-contained flat on the first floor of the building and also intends to create an additional self-contained flat above the first floor of the building in the area which is currently the airspace of the building (which is included in the premises hereby demised) and to subdivide the premises by way of two or more separate leases or licences."

9. And then there is a definition clause; there is a clause granting the lease; there is a third clause dealing with the covenants by the tenant, referred to in the fourth schedule; and a fourth clause dealing with the landlord's covenants contained in the fifth schedule. There is also a re-entry clause at clause 5, and then there are some other clauses. I have already mentioned the first schedule, setting out the extent of the demise. The second schedule deals with the rights granted. The third schedule deals with rights which are reserved.

10. The fourth schedule dealing with the tenant's covenants is important. In this schedule the following paragraphs are relevant to this case. First of all, there is paragraph 4. The first half of it deals with repair, but I will read the whole:

> "To keep in good and substantial repair and condition the whole of the premises and every part thereof and all fixtures and fittings therein and to renew and replace from time to time all the landlord's fixtures, fittings and the pertinences in the premises which may become or be beyond repair at any time during or at the expiration or sooner determination of the term and to keep the premises clean and tidy and to clean all plate glass and other windows in the premises at least once in every month …"

Then there is this important proviso:

> "… provided that the obligations to repair and maintain contained in the lease shall not apply until after the tenant shall have completed all such works as are required to convert the premises to

> two separate flats or three years have elapsed from the date hereof, whichever is first."

So, again, we see the contemplation of the lease that there will be works to convert the premises to two separate flats.

11. Then paragraph 10 provides that the tenant is

> "not to make any structural alterations or additions to the premises without first providing the landlord with a full specification thereof including plans".

It will be noted that this does not require the landlord's consent. It is a provision requiring the landlord to be informed of the plans which are to carry out any alterations or additions. No doubt this is so that the landlord has the opportunity to consider whether they comply with the terms of the lease or not, and to take any action which the landlord considers appropriate in the circumstances.

12. Then there is paragraph 11:

> "Following the obtaining of planning consent for residential use, not to use the premises or any part thereof other than for residential purposes."

13. This is followed by paragraph 12:

> "Save with regard to the building work referred to in paragraph 2 of the recitals to this lease, not to do anything on the premises which may be or become a nuisance or annoyance or cause damage to the landlord or to the owners, tenants or occupiers of neighbouring property."

14. Then I can move on to paragraphs 20 and 21:

> "20. Not to erect nor install on the premises without the landlord's consent (such consent not to be unreasonably withheld) any engine or machinery, provided always that the landlord's consent shall not be required for normal domestic machinery.

> 21. Not to load or use the walls, ceilings or structure of the premises in any manner which will cause damage to or undue strain upon the main timbers or structural parts of the building."

15. And then finally paragraph 24:

> "24.1 To comply in all respects with the Planning Acts.
>
> 24.2 Immediately after the grant or refusal thereof, to supply to the landlord a copy of any planning permission or refusal relating to the premises or their use."

16. I think that is all I need to read from that schedule. Then there is the fifth schedule, containing the landlord's covenants with the tenant. Paragraph 4 reads:

> "To raise no objections to any application within the next three years for planning permission or other consents or any reasonable works which the tenant may carry out to create a flat on the first floor of the building and an additional flat in the area currently forming the airspace above the height of the building."

17. Those I think are all the provisions which I need read for present purposes. It will be seen that at various points there are references to works to create a flat on the first floor and another flat in the airspace directly above.

18. I mention here, because it was something that was mentioned on a number of occasions during the course of the argument, in particular on behalf of the defendant by Mr Kinnison, that this is a lease for 999 years, practically a millennium, at a nominal ground rent, and it is often supposed that such a lease is the virtual equivalent of a freehold. Yet in English law there is a fundamental difference between these two ideas. Economically the value may be the same, whether it is a freehold or a 999-year lease at a nominal rent, but legally they are quite different. This is because the relationship between the landlord and the tenant which subsists in relation to the lease is not replicated in any way, shape or form in relation to a freehold which is granted by one person to another. For example, it is well known, especially by lawyers but also by others who work in the property field, that covenants in a lease are more easily

transmissible and enforceable than in the case of freehold properties. Accordingly, although there is, it may be said, not much difference *economically* between a 999-year lease and a freehold, there is an immense gulf *in law* between the lease, however long it is for, and the freehold. It is the more so in a case like this (which is not necessarily the case in a 999-year lease of a lease) that contains a right of re-entry for breach of covenant. It was I think Archimedes who said, "Give me a place to stand and I will move the world". Well, the reversion that a landlord has on a 999-year lease may be a very small place to stand, but it does enable the landlord to move the lease in certain circumstances. So that is an important point to bear in mind in what follows.

19. As I have already said, during the period immediately after the granting of the lease the then tenant, Rosedraft Ltd, obtained planning permission (a residential use planning permission) to convert the first floor into a flat and to build another one immediately above it. It appears that that is what happened, although I was told during the hearing that the flats have not been fitted out and remain as shells. The consequence, however, was that clause 11 of the fourth schedule of the tenant's covenants was engaged. It will be recalled that that clause reads:

> "Following the obtaining of planning consent for residential use, not to use the premises or any part thereof other than for residential purposes".

That residential planning consent having been obtained, there can be no doubt that clause 11 became effective in binding the tenant and the tenant's successors in title. However, a second planning permission, as I have said, was obtained in 2014 for a 19-bedroom hotel. I interpose at this point to mention simply that the plan apparently now is slightly different, for a 17-bedroom hotel, but I do not think anything turns on that for the purposes of what I have to decide.

20. In short, the claimant in this case says that building a hotel on this site would not be a use for residential purposes, but for other than residential purposes, and therefore it would infringe clause 11. He has referred to two authorities which I will come back to. On the other side, the defendant says, first of all, that providing a hotel on these premises would be strictly speaking for residential purposes because the point of having a hotel is to allow people to come and stay there and to sleep and do other

things that ordinary people do in their own homes, except they would be doing them in the hotel. Hence this would be for a residential purpose. Alternatively, the defendant says that clause 11 only applies so long as the planning permission that is in force is for residential purposes, but now there is planning permission for the purposes of a hotel, and therefore clause 11 cannot restrict the activity which the tenant carries on on the premises to purely residential purposes. In particular in this respect, the defendant refers to clause 24.1 and clause 24.2. Clause 24.1 is the covenant of the tenant to comply in all respects with the Planning Acts, and 24.2 is to supply details of planning permissions or refusals of planning permissions relating to the premises. I do not think that clause 24 really has any weight in this argument. It seems to me that it puts an obligation on the tenant to comply with planning rules but does not in itself modify a covenant to use for residential purposes only or not to use for other than residential purposes.

21. As I have said, the claimant referred me to two cases. The first was *Mayflower Cambridge Ltd v Secretary of State for the Environment* (1975) 30 P & CR 28. That was a decision of the Divisional Court of the Queen's Bench Division comprised of Lord Widgery CJ and Justices Ashworth and May. It concerned the question whether there was a breach of planning control, in that there had been a material change of use in a building on the land to part use for hotel purposes. It was a seven-storey building containing some 100 bedsitting room units, and the top three storeys appeared to be used for lettings on nightly rather than weekly terms. So that was the point that was taken. Lord Widgery (with whom the other two judges agreed) said this:

> "I go back to the notice for a moment to illustrate that. The fault committed is described as the part use for hotel purposes. If it is right that hotel purposes is a vague expression with no clear and consistent meaning, then it may very well be that the enforcement notice is not good enough because it does not detail with sufficient clarity the complaint which is being made. Mr Howard says that if use of a building of this kind for bedsitting accommodation is not equally clearly understood and recognisable, it can be said in this case that the part of the enforcement notice which requires those steps to be taken to restore the situation before the development took place is also too vague and ineffective for present purposes. On the other hand, if, as I believe, the distinction is clear and fully understood by all concerned, then those objections disappear because in the context of this case and with the premise of

> themselves to look at without studying the enforcement notice, that which is complained of and that which is required becomes clear enough. I have no doubt that this is well understood and is acceptable as an ordinary use of English, namely that the real difference between use as bedsitting rooms and use for the purposes of a hotel turns on the stability or instability of the population in the premises and the extent to which they are making the individual flatlets their homes. The essence of a hotel is that it takes transient passengers. Of course, there may be an individual here and there who stays for a long time if it suits him, and there a buildings which are wrongly described as hotels or residential hotels, but the basic feature of a hotel as the word is used in the English language is that it contains a transient population because it is there to serve people travelling who require short stays only. By contrast, the bedsitting room and the way in which the phrase is used in English is somebody's home. It is where somebody lives. It is where somebody remains for a substantial time. Accordingly, one has in bedsitting room use a far more stable population than one has in a hotel use."

22. So in that case the Divisional Court was concerned not with a covenant in a lease but with a question of breach of planning control, and the court drew a clear distinction between hotel use for nightly lettings and bedsitting lettings on weekly terms for longer periods. It is not particularly helpful, I think, in the context of this case, although it does illustrate the distinction.

23. Closer to home perhaps is the second decision relied on by the claimant. That is *Falgor Commercial SA v Alsabahia Inc* (1985) 18 HLR 123, [1986] 1 EGLR 41. The Court of Appeal in that case was comprised of Fox LJ and Sir Roger Ormerod. That was a case about landlord and tenant law. It concerned a 999-year lease which had been granted to a lessee, and the lessee company in fact was lessee of a number of flats in the block concerned. The leases all contained a covenant, which was

> "not without the company's consent to use or occupy the flat otherwise than as a single private residence in one occupation only, so that the total number in residence shall not exceed three persons".

That is a very precise form of covenant.

24. The facts of the case were that the lessee of the flat was granting occupational licences to visitors to reside in the flats for short stays in return for payments, the flats being equipped and furnished by the lessees and cleaned by their employees, and the argument was that this was a breach of the covenant which I have read. The judge at first instance, Scott J, on an application under Order 14 of the Rules of the Supreme Court, as it was then, the summary judgment jurisdiction under the old rules, granted an injunction to restrain the lessee company from using the subject flat otherwise than as a single private residence without the lessor's consent.

25. The Court of Appeal affirmed that decision. What Fox LJ said, at page 42L, was this:

> "In my view, the defendant's user is not residence user at all. It is the business of providing service accommodation, and it seems to me there is no question of the defendant using it as a residence, much less as a private residence. It is true that this was a lease granted to the company in expensive premises and a company (unlike an individual) may have limited use for such premises unless it can exploit it for value. Licencing in the manner which has been adopted in this case is such a method of exploitation, but in my view the judge's decision does not mean that the property is frozen in the defendant's hands. The defendant can exploit it simply by subletting it, and it seems to me that it is reasonable enough to suppose that a landlord would in a lease of this sort stipulate for exploitation by subletting rather than by licencing. The occupancies in the case of subletting are likely to be longer periods with less comings and goings. The subtenants will probably be more carefully chosen than would be the case with licensees, and the creating of subleases requires the consent of the landlord."

26. Although the covenant in that case was a longer, more detailed and more precise covenant than in our case, it is notable that Fox LJ chose to decide the point at a very high level of generality. What he said was that the defendant's user was not residence user at all. It was the business of providing service accommodation, and it seems to me that there was no question of the defendant using it as a residence, much less as a private residence. So he did not even found on the fact that the words "single private" were used in the covenant. He simply referred to the fact that it required it to be used as a residence and said this was not that case. Sir Roger Ormerod agreed with Fox LJ, and the appeal was dismissed.

27. On the other side, Mr Kinnison cited a number of authorities. The first of these was a more recent decision of the Court of Appeal in the case of *Caradon District Council v Paton and Bussell* (2001) 33 HLR 34, the Court of Appeal comprising Clarke LJ and Latham LJ. In that case the defendant had bought a house under the statutory right to buy scheme, and in the conveyance there was a restrictive covenant in these terms:

> "… not to use or permit to be used the property for any purpose other than that of a private dwelling house, and no trade or business or manufacture of any kind shall at any time be permitted to be set up or carried on on any part of the property or in any building now or hereafter within the perpetuity period erected thereon."

28. There was evidence in the case that the defendant was letting the property as a holiday home for short lets in the summer. The claimant brought these proceedings for an injunction. The judge at first instance dismissed the claim (in other words, there was no breach according to the judge) and the claimant appealed to the Court of Appeal. The Court of Appeal allowed the appeal. Latham LJ said this at paragraph 16:

> "16. There are many people who have holiday homes to which they go as and when they can, and a significant proportion will let their properties on holiday lets when they do not want to or need to use them. For my part, if the matter was free from authority, I would have no difficulty in concluding that insofar as someone uses his or her own property for a holiday, they are using that property as their second home, and there would be no difficulty in coming to the conclusion that they were using it as a private dwelling house. Again, if the matter were free from authority, I would conclude that any use being made of that property by their family would essentially fall into the same category.
>
> 17. However, and again, apart from authority, I have difficulty in accepting the proposition that where there is a commercial transaction by which property is let on a holiday let, the use of that property for that purpose can properly be described as use of the property as the holidaymaker's own private dwelling house.
>
> 18. Although there is no direct authority on the meaning of the phrase 'use as a private dwelling house' in the context of holiday lets, there is authority to which we have been referred dealing with the phrase in other contexts."

29. The judge then went through some of those earlier authorities, and he concluded at paragraphs 34 and following:

> "34. It follows that there would have been a respectable argument for saying that the use of the phrase 'dwelling house' and the word 'dwelling' in the Rent Act could, even in the absence of section 9, have excluded a tenancy for the purposes of a holiday. Clearly, however, Parliament considered that express exclusion was appropriate. That does not to my mind afford any assistance to the respondents in relation to the proper meaning to be given to the phrase which we have to consider in the covenants in question, which must be construed in their context.
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> 35. In the light of all these considerations, I consider that the answer to the question posed by this case is dependent on whether or not one can properly describe the occupation of those who are the tenants for the purposes of their holiday as being an occupation for the purposes of the use of the dwelling house as their home.
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> 36. Both in the ordinary use of the word and in its context it seems to me that a person who is in a holiday property for a week or two would not describe that as his or her home. It seems to me that what is required in order to amount to use of a property as a home is a degree of permanence, together with the intention that that should be a home, albeit for a relatively short period, but not for the purposes of a holiday. It follows from that analysis that the evidence before the judge and before this court really permits of only one conclusion, namely that that is that the occupation of the holidaymakers of these two properties was not for the purposes of use as a private dwelling house within the meaning of the phrase 'in these covenants'."

30. And so he was for allowing the appeal. Clarke LJ took the same view. In paragraph 43 he said this:

> "It appears to me that the concept of using a property as a private dwelling-house involves the use of it, at least in some way, as a home. I can understand that a person with two houses, who spends his holidays in one of them, may fairly be regarded as spending them in his second home. However, we are not concerned with that situation here. A person renting a holiday house for, say, one or two weeks is not using it, in any sense, as his home. On the contrary, he leaves his home in order to have his holidays somewhere else."

31. That is of course a case on a covenant which is rather different, because what it refers to is using the property for any purpose other than that of a private dwelling house. So we have the word "private", and we also have the words "dwelling house" rather than "residence". But, nevertheless, it is interesting that the same distinction in broad terms as was made by Lord Widgery in the *Mayflower Cambridge* case is being made, *ie* between a transient population and those who have a greater degree of permanence.

32. The second authority relied on by the defendant is that of *Nemcova v Fairfield Rents Ltd* [2016] UKUT 303 (LC), which is a decision of HHJ Stuart Bridge sitting in the Upper Tribunal (Lands Chamber) on appeal from a decision at first instance at the First-tier Tribunal. That was a case of a long lease in relation to which the question was posed in paragraph 1:

> "A long lease contains a covenant not to use the demised premises or permit them to be used for any illegal or immoral purpose or for any purpose whatsoever other than as a private residence. If the leaseholder advertises on the internet the availability of the premises (a flat) for short term lettings and grants a series of such lettings, do the leaseholder's actions breach the covenant?"

33. And in paragraph 2 the judge explained that the decision of the First-tier Tribunal was a determination on this issue in favour of the freeholder and, permission to appeal having been granted, the appeal was being dealt with by way of a review of the decision on the written representations procedure, without any oral argument. There had been a series of short term lettings advertised on the internet, and the question was whether the covenant which I have referred to had been breached. The judge examined a number of earlier cases including both *Falgor Commercial SA v Alsabahia Inc* and *Caradon District Council v Paton and Bussell*, and ultimately what he said was this:

> "41. The emphasis is therefore on the meaning of the relevant words used in their particular, fact-specific, context. It follows that the assistance to be given from a prior decision of the courts which construes a similar provision in a particular way may be limited. Each lease is different; and so is each clause. It is necessary for considerable caution to be exercised when considering prior decisions as due weight being given to the context may lead to a different conclusion."

34. The judge then went on to consider further matters. At paragraph 48 he said:

> "The clause does not state that the premises are to be used as the private residence of the lessee or the occupier, but as 'a private residence'. The use of the indefinite article ('a') is significant. A person may have more than one residence as any one time a permanent residence that he or she calls home, as well as other temporary residences which are used while he or she is away from home on business or on holiday. It is immaterial that the occupier may have another, more permanent residence elsewhere as there is no requirement that the occupier is using the property as his or her only (or main, or principal) residence. However, it is necessary, in my judgment, that there is a connection between the occupier and the residence such that the occupier would think of it as his or her residence albeit not without limit of time. In short, for the covenant to be observed, the occupier for the time being must be using it as his or her private residence."

35. Then at paragraphs 52 and 53 the judge said:

> "52. The main thrust of the landlord's submissions concerns the duration of the lettings being advertised and granted by the appellant. I must consider whether the duration of the letting affects the answer to the question whether the occupier is using the premises as a private residence. As I have emphasised, it is the use being made for the time being, by the occupier for the time being, that is material. If the occupier is in the property for a matter of days (rather than weeks or months or years), does that transform the nature of the use being made of the premises such that the occupier would not then be using them as a private residence?
>
> 53. I have reached the view, consistent with the decision of the Ft T, that the duration of the occupier's occupation is material. It does seem to me that in order for a property to be used as the occupier's private residence, there must be a degree of permanence going beyond being there for a weekend or a few nights in the week. In my judgment, I do not consider that where a person occupies for a matter of days and then leaves it can be said that during the period of occupation he or she is using the property as his or her private residence. The problem in such circumstances is that the occupation is transient, so transient that the occupier would not consider the property he or she is staying in as being his or her private residence even for the time being."

36. So therefore the judge dismissed the appeal. It will be noted that the covenant in that case did use the word "residence", although it was qualified as private residence, so it is not exactly the same as in the present case. Nevertheless, once more we see the judge drawing the distinction between transient and longer term use of a premises.

37. The defendant also relied on another planning case, called *Moore v Secretary of State for Communities and Local Government and another* [2012] EWCA Civ 1202. The court comprised Lord Neuberger MR, Longmore LJ and Sullivan LJ, although Sullivan LJ delivered the judgment of the court. That was a case where a property which originally formed part of an extensive hospital complex had been sold off, and permission had been granted for a particular property forming part of that complex to be converted into an eight-bedroomed dwelling. The conversion works were carried out, and originally the property was occupied as a dwelling pursuant to the permission granted to use the property for C3 purposes. That is a reference to class C3 in Schedule 1 to the Town and Country Planning (Use Classes) Order 1987, which refers to:

> "Use as a dwellinghouse (whether or not as a sole or main residence) by -
>
> > (a) a single person or by people to be regarded as forming a single household;
> >
> > (b) not more than six residents living together as a single household where care is provided for residents; or
> >
> > (c) not more than six residents living together as a single household where no care is provided to residents (other than a use within Class C4)."

38. What happened in this case was that the owner of the property, Ms Moore, had let the property for short term holiday lets, and the question was whether this constituted a breach of planning control. At paragraph 17, I was referred to a statement of Jupp J agreeing with Ackner LJ in a case called *Blackpool Borough Council v Secretary of State for the Environment* (1980) 40 P & CR 104 that "not every residential use is necessarily a use as a private dwelling house". Then, at paragraph 19 I was referred to this statement:

> "McCullough J said that whether a building is or is not a dwelling-house is a question of fact. Having considered a number of situations where buildings would still be dwelling-houses even though they were not occupied throughout the year - second homes, houses left empty pending sale, houses unoccupied because they are flooded or undergoing extensive repair - McCullough J said at p.146:

> 'Suppose that a London-based company requires a succession of employees to be based one at a time for four months in a location far distant from London. Suppose that the company buys a house and makes it available to each employee and his family for his tour of duty. It would still be a dwelling-house. Take a holiday cottage subject to time-share with a number of owners each enjoying the right to occupy it for two particular weeks each year. That would still be a dwelling-house.'
>
> What have these examples in common? All are buildings that ordinarily afford the facilities required for day-to-day private domestic existence."

Of course, this case is a case about planning control. It is far removed from the kind of case I am dealing with. The defendant, it is fair to say, relied on it really to show that there was another approach that could be taken contrary to the approach taken in the *Mayflower* case in the planning context.

39. I turn to two other authorities which were relied on by the defendant. One was an extract from *Emmet on Title*. In chapter 19 there is a lengthy paragraph at 19.053 cross-headed "Private dwelling house". I will not read it all out, but in one particular paragraph we find this:

> "In *Jenkins v Price* [1908] 1 Ch 10 it was held that a covenant as to residence impliedly prohibited any assignment to a limited company. As to paying guests, see *Thorn v Madden* [1925] Ch 847. In *Blanway Investments v Lynch* (1993) 25 HLR 378 it was held that where a residential property is let to an individual subject to a covenant that it is to be used as a private residence for the tenant, the natural presumption is that the tenant should be entitled to occupy with his or her family, including anyone de facto a member of the family. Clear words would be necessary to confine occupation to the tenant herself or to exclude those with no legal relationship to the tenant."

The defendant relies I think on those closing words to show that it does not matter in construing the covenant that the persons might be residing in the property who had no legal relationship to the tenant.

40. The other authority is a passage from Preston and Newsom: *Restrictive Covenants Affecting Freehold Land*, 10th Edition, at paragraph 7-19. It reads as follows:

> "A covenant which limits use of land to that of a private dwelling house or to that of a private residence prohibits such non-residential uses as a shop or a school or a classroom or an office for taking orders for coal, even if no coal is kept on the premises or use of part of the land is as a roadway to other properties. The adjective 'private' makes the domestic nature of the restriction clear, thus excluding, for instance, use for a hospital, or a house where a doctor had patients under her care, or a hotel or a guest house, or for licensing a serviced apartment to tourists, or letting to holidaymakers under short tenancies, or a charitable boarding school, or a boarding house distant from a school, or a home for former medical inpatients. But it can include letting to a small group of students for a year or detached accommodation for domestic staff, even where the overall restriction is to one family."

So there we see in the second part of that paragraph the importance which the editors of the work attach to the adjective "private" when in conjunction with the word "residence", and the defendant plainly founds on that.

41. Nevertheless, what I am obliged to do in this case is to ascertain the intentions of the parties as expressed in the lease in the context in which the lease was entered into. I say at once that, in considering whose intention is relevant, it is obvious that it is that of the claimant on the one hand and Rosedraft on the other, and the current tenant, the defendant, is not relevant for this purpose. The parties to the original lease are those whose intentions are to be gleaned from the lease. Indeed, it is all the more important that the intention should be gleaned from the document, because a lease is inherently transferrable and the only way that a prospective assignee, either of the landlord's interest or of the tenant's interest, would know what the rights and duties of the parties were would be from looking at the lease itself.

42. The relevant principles of construction of leases of this kind have been considered in a number of cases, in particular the decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 36. Those principles were distilled and summarised by O'Farrell J in a case called *Royal Devon and Exeter NHS Foundation Trust v ATOS IT Services UK Ltd* [2017] EWHC 2197 (TCC), where she said:

> "When interpreting a written contract, the court is concerned to ascertain the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions …"

43. So those are the principles upon which I must construe this clause. The defendant says, well, here, if the covenant had used the words "single private residence", undoubtedly it would not have been permissible for the tenant to convert the premises into a hotel. It goes on to say that even simply "private residence" might be good enough, relying on what is said in Preston and Newsom, but "residence" on its own is not.

44. It seems to me that I must focus very much on the context of this particular lease. This lease is not the same as any other lease. This lease is unusual in a number of ways, and of course every lease is unique in the sense that the land it relates to is a unique piece of land. One has to look at the context in which it arises. At the time the lease was granted, it was clear from the terms of the lease that what was contemplated was that the tenant would apply for planning permission to build two flats, one in the airspace above the existing building. It is also clear that that is in fact what happened, that planning permission for that purpose was granted and that that is what happened subsequently. The lease itself contemplates in a number of the provisions which I have already referred to that it would be used for the purposes of these two apartments. So, when I look at the covenant in clause 11, I am naturally thinking of it in the context of a property which has two flats which would be ordinarily occupied for residential purposes.

45. It is clear on the authorities that a person may have more than one residence and therefore use of a particular property for staying in even for a short time, say, for the purposes of a holiday, can still be a residential purpose. But, even if a person has several residences, each one of them has some stability. Even if one of your several

residences is only a bedsit on a weekly licence, you return to it; you keep your own clothes, your own furniture, your own other effects there. But that is not true of a transient hotel where you arrive with a suitcase and you depart the next day. Even if you come back frequently to the same hotel, you do not necessarily occupy the same room, you bring back your clothes and effects, and others may have occupied that room during your absence. So, in the context of this lease, it seems to me that what is plainly contemplated is two flats, *possibly* subdivided into smaller units such as bedsits, but all of them as residences and not as overnight accommodation. There is a non-transient, longer term idea at work here. I do not say that the phrase "residential purposes" in the abstract could never apply to a hotel, but I do say that in the context of this lease, "residential purposes" does not include conversion into a hotel. Here, in my judgment, "residential purposes" as a phrase is being used in opposition to "business purposes". So flats, even, as I say, perhaps divided into bedsitting rooms, which were let on weekly or monthly tenancies or licences, would be used for residential purposes, whereas a hotel for short stay travellers would not. The planning permission which has been granted in the present case for use as a hotel is plainly restricted to short stay travellers, being limited to a maximum of 90 days and not to longer term occupiers. This in my view is use for a business purpose.

46. It is not possible also to avoid the fact that a hotel is very much a place of work for its staff. Even if the guests sleep in bedrooms, there are offices, there are kitchens, there are dining rooms, luggage stores and so on where people are working. It is their place of work. Even if a hotel could be said to be used in part for residential purposes where the guests are sleeping, it is also being used at least in part as a place of business. So in my judgment it would infringe the covenant such as we have here, which is not to use for other than residential purposes. In my judgment, the approach taken by Fox LJ in the *Falgor* case, where he says, at page 42L,

> "In my view, the defendant's user is not residence user at all. It is the business of providing service accommodation, and it seems to me there is no question of the defendant using it as a residence",

is very much the principle which applies in the context of this lease. Accordingly, I hold that the purpose of carrying on a boutique hotel pursuant to the planning

permission granted in that behalf would infringe covenant number 11 in schedule 4 of the lease.

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