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Case No: G30MA092

IN THE COUNTY COURT AT MANCHESTER
BUSINESS & PROPERTY WORK

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: Friday, 10 June 2022

Before HIS HONOUR JUDGE HODGE QC

Between:

BRITANNIA MILLS MANAGEMENT LTD

Claimant

-and-

ROBERT YOUNG

Defendant

MR DANIEL METCALFE (instructed by **Betesh Middleton Law**) appeared on behalf of the **Claimant**
THE DEFENDANT appeared in person

APPROVED JUDGMENT
(Approved on **26 October 2023**
without reference to any documents)

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JUDGE HODGE QC:

I: Introduction

1. This is my extemporary judgment following the trial of a part 7 claim issued on 25 September 2019 under claim number G30MA092. The claimant is the freehold reversioner of Britannia Mills, which is situated at Hulme Hall Road, Manchester M15 4LA. The claimant seeks declaratory and injunctive relief in respect of alleged breaches of covenant on the part of the defendant, Mr Robert Young, in relation to his lease, dated 14 July 2000, of apartment 41, of which he is an assignee.

2. The claimant is represented by Mr Daniel Metcalfe (of counsel). The defendant, who is in his mid-50s, appears as a litigant in person, although he has had the benefit of assistance from his adult son, Theodore. At the start of this claim, the defendant had instructed DWF Law LLP to act as his solicitors; and the defence was settled by Miss Lisa Feng (also of counsel).

3. This judgment is divided into six sections as follows:

I: Introduction

II: Background

III: The hearing

IV: The relevant case law

V: Analysis and conclusions

VI: Disposal

However that arrangement is for structural purposes, and for ease of understanding, only, and each section has informed the contents of others.

4. A number of points have been raised during the course of the proceedings which are extraneous to the real issues in the case. An example is the extent to which the claimant is supported in this claim by other leaseholders of apartments in Britannia Mills who, like the defendant, are members of the claimant company. An issue has also been raised over a short period of time during which there was no insurance cover in place for Britannia Mills because Ecclesiastical Insurance had cancelled the cover taken out by the claimant company. I am satisfied that there is no proper legal basis why that lapse in cover should not prevent the

claimant seeking to enforce the covenants in Mr Young's lease. I will not address these extraneous matters in this judgment.

II: *Background*

5. I can take the background from the amended particulars of claim. Paragraphs 1 and 2 pleads the respective interests of the claimant and the defendant in the property. Paragraph 3 pleads that the defendant holds the property under the terms of an assigned lease, dated 14 July 2000.

6. Without prejudice to the claimant's right to rely on the full terms of the lease, the following terms are said to be relevant:

> 3. The Purchaser covenants with the Company and the Management Company and also as a separate covenant with every other person who is now or will hereafter become a lessee of any part of Britannia Mills (for the benefit of Britannia Mills and each and every part thereof and with the intention of binding the Property) …
>
> (6) (a) That no part of the Property shall be used for any purpose other than as or incidental to a private residential dwelling in the occupation of one household only … and at all times to keep the Property fully furnished as a private residence, and to keep all floors carpeted or otherwise suitably covered; (b) That no trade, profession, or employment shall be carried on at the Property ...
>
> (8) Not to do permit suffer or omit to be done on the Property or Britannia Mills any act matter or thing within the control of the Purchaser: (a) which may cause damage to or be or become a nuisance annoyance disturbance or inconvenience to the Company the Management Company or the Lessees or which in the reasonable opinion of the Company or the Management Company may prejudicially affect or depreciate Britannia Mills the Property or the property demise by the Leases or which may damage the Service Installations … (b) Whereby any insurance effected in respect of Britannia Mills or any part of it including the Property may be rendered void or voidable or whereby the rate of premium may be increased …
>
> (11) (a) Not to transfer or otherwise part with possession or occupation of part only of the Property; (b) Not to underlet or otherwise part with the whole of the Property or grant a licence in respect thereof save that with the consent of the Company (or its successors in title to the freehold) which shall not be unreasonably withheld or delayed the Lessee may grant a residential tenancy whereby any proposed tenant is of good character and is the subject of good character and financial references supplied to the Company or its said successors in title …

> (16) To pay all expenses (including solicitors' costs and surveyors fees) incurred by the Company or the Management Company incidental to … (b) The failure by the Purchaser to carry out any of its obligations hereunder or the monitoring or approval of any matters hereafter pertaining to the Property or its use …
>
> (20) To indemnify and keep the Company and the Management Company indemnified from and against all actions proceedings costs (including legal costs on a full indemnity basis) fees damages claims demands and all other liabilities and consequences whatsoever incurred by the Company or the Management Company in respect of or as a result of: (a) any breach or non-observance or non-performance by the Purchaser of the covenants contained on the registers of the freehold title of Britannia Mills insofar as they remain capable of being observed and performed by the Purchaser and relate to or directly affect the Property or the use thereof or of the use of the Common Parts; (b) any act omission or negligence of the Purchaser or any persons at the Property expressly or impliedly with the Purchaser's authority.

7. At paragraph 4 of the amended particulars of claim it is pleaded that the defendant has, from about 2016 to date, been accepting guests at the property, at times whilst present, and at other times whilst absent, from at least the following three websites:

(1) Homeexchange.com.

(2) Travelcommunity.com; and

(3) Couchsurfing.com.

8. Paragraph 5 pleads that on or about 21 June 2019 the claimant's solicitors wrote to the defendant setting out allegations of breach in connection with the defendant's acceptance of guests and the potential for a claim, and attaching draft undertakings for signature. Paragraph 6 pleads that on or about 24 June 2019 the defendant responded stating that he has "… not accepted short-term lettings, no money changed hands, and there is nothing wrong with having guests in my apartment either when I am present or by swapping apartments for a weekend."

9. Paragraph 7 (as amended) avers that the defendant is in breach of the lease. The particulars of breach are as follows:

i. Between August 2016 and July 2019 the defendant accepted at least 62 guests via the website couchsurfing.com, as evidenced by the guest reviews.

ii. On unknown dates the defendant has accepted at least five guests via the website Homeexchange.com as evidenced by the defendant's advertisement.

iii. The claimant has no knowledge as to the number of guests that the defendant has accepted via the website Travelcommunity.com but which would constitute a breach of the lease. The defendant is required to confirm the same in the course of disclosure.

iv. The claimant has no knowledge as to any other websites via which the defendant may have accepted guests, e.g. Airbnb.com, but which would constitute breach of the lease. The defendant is required to confirm the same in the course of disclosure.

(a) The conduct pleaded in paragraph 7(i) to 7(iv) of these particulars of claim has been and/or may become a nuisance and/or annoyance and/or disturbance and/or inconvenience to the claimant and/or residents of the building including by way of: (a) noise resultant from parties involving guests introduced to the property via websites; (b) noise resultant from movement of luggage involving guests introduced to the property via websites; and/or (c) the presence of unknown and/or unidentified persons and guests introduced to the property via websites roaming and/or loitering in communal areas of the building.

(b) The conduct pleaded at paragraph 7(i) to 7(iv) of these amended particulars of claim in the reasonable opinion of the claimant may prejudicially affect or depreciate the buildings and/or the property and/or other residences at the building.

v. The conduct pleaded at paragraphs 7(i) to 7(iv) of these amended particulars of claim may be such as to render the policy of insurance in respect of Britannia Mills void or voidable and/or increase the rate of insurance premium.

vi. The conduct pleaded at paragraphs 7(i) to 7(iv) of these amended particulars of claim, whether or not for reward, constitutes a use of the property for a purpose other than as incidental to a private residential dwelling in the occupation of one household only.

vii. To the extent that the defendant has received any reward for the conduct pleaded at paragraphs 7(i) to 7(ii) of these amended particulars of claim,

including non-monetary reward, the same constitutes the carrying on of a trade or profession from the property.

viii. To the extent that the defendant is present at the property during the course of the conduct pleaded at paragraphs 7(i) to 7(ii) of these amended particulars of claim, such conduct constitutes a parting with possession and/or occupation of part of the property.

ix. To the extent that the defendant is absent from the property during the course of the conduct pleaded at paragraphs 7(i) to 7(ii) of these amended particulars of claim, such conduct constitutes the parting with possession and/or occupation of the whole of the property by licence without the consent of the claimant.

x. The defendant, by failing to provide the undertakings requested in the claimant's letter dated 21 June 2019, has intimated an intention to continue his conduct in breach of the lease.

10. Paragraph 8 avers that the claimant is entitled to, and seeks, a declaration that the defendant's conduct pleaded at paragraph 7 of the amended particulars of claim renders the defendant in breach of the lease. Paragraph 9 further avers that the claimant is entitled to, and seeks, an injunction restraining the defendant from:

i. accepting guests from the websites listed at paragraph 4 of the amended particulars of claim and such other relevant websites as become apparent upon disclosure;

ii. accepting guests, whether or not for reward, who are not possessing and/or occupying the whole or part of the property as or incidental to a private residential dwelling in the occupation of one household; and

iii. continuing to breach the covenants in the lease.

11. Paragraph 10 further avers that pursuant to clauses 3, 16, and 20 of the lease, the claimant is entitled to and seeks an assessment of its costs on the indemnity basis.

12. The claim is for declaratory and injunctive relief and for costs to be assessed on the indemnity basis.

13. The defence pleaded by counsel on Mr Young's behalf accepts, in paragraph 4, that the defendant has accepted guests via the websites Homeexchange.com, and Couchsurfing.com from about 2016, but avers that accepting guests from such websites is no different from allowing friends or family to stay at the property. Both websites prohibit hosts from asking for money or services in exchange for someone staying. The defence denies that the defendant accepted guests from the travelcommunity.com website, which is said not to exist. The defendant confirms that no financial remuneration has been accepted in respect of any person or persons staying at the property.

14. Paragraph 5 admits the fact of there being correspondence to the effect described in the amended particulars of claim; but it makes the point that the exhibit simply exhibits the letter of 21 June and does not exhibit any draft undertakings. Notably, the draft undertakings which were in fact attached to that letter are said to differ from the relief sought in the present claim; in particular there is said to be no reference to the website couchsurfing.com at all. In any event, the defendant reiterates that he denies the allegations set out in the claimant's correspondence. He also notes that the claimant has failed to comply with the requirement in clause 4 (c) of the lease to refer any disputes relating to covenants in the lease for determination by an expert surveyor. The defendant will also seek to refer to this failure on the issue of costs; and he reserves the right to seek a stay of these proceedings to allow for expert determination under clause 4 (c).

15. Paragraph 6 denies that the defendant is in breach of the lease. It is said that only the defendant lives at the property. He admits that between August 2016 and July 2019 he accepted guests via the website couchsurfing.com; but he puts the claimant to proof as to the precise number. The defendant denies that having such guests amounts to any breach of the lease whatsoever. Guests from the couchsurfing.com website do not make any monetary or other payment in kind to the defendant whatsoever. Receiving guests through this website is said to be no different from having the defendant's friends and family stay over at the property. In fact, the defendant emphasises to guests on his profile that: "This is not a hotel. You are my guest and I expect you to interact with visitors as if they were visiting friends." The defendant's guests are always said to stay on the bed deck at the property, which essentially forms part of the lounge as it has no door and only half-height walls. All guests have shared the common areas, bathroom, kitchen and lounge; and they have often shared meals with the defendant.

16. It is further denied that the defendant has accepted at least five guests via the homeexchange.com website. The defendant is said only to have accepted three guests from this website. Again, he did not receive any monetary payment for such guests. He only swapped apartments with two such guests from this website for a weekend. He denies in any event that this constitutes a breach of the lease. The defendant has never accepted any guests via the website travelcommunity.com. This website does not exist. The defendant has never accepted any guests from Airbnb.com, or any other websites which would constitute a breach of the lease.

17. So far as insurance in concerned, the claimant is put to strict proof. The defendant notes that the claimant has failed to provide any details as to the terms of any relevant policy, or details as to why such a policy would be void or voidable, or how the defendant's conduct might increase the rate of insurance premium.

18. As to the covenant preventing anything other than residential use, the defendant avers that his conduct is well within the terms of the lease. He says that he has never received any monetary reward for receiving guests at the property. To the extent that the claimant suggests that, insofar as the defendant has swapped apartments with a guest for a weekend, that constitutes non-monetary reward, that allegation is denied. In any event, the defendant has only swapped apartments twice with guests. This was done through the homeexchange.com website. No apartment swapping takes place through the couchsurfing.com website at all.

19. The defendant avers that when he was present at the property, this simply cannot constitute a parting of possession and/or occupation of part of the property. The guests sleep in what is essentially part of the lounge as opposed to a separate room.

20. The defendant denies that there has been any parting with possession and/or occupation of the whole of the property by licence without the claimant's consent. The property has continued to be the defendant's only home, and has been for at least 15 years. For the vast majority of guests staying at the property, the defendant was also present. In the cases where he was not, the defendant's personal possessions remained at the property and were kept in their usual unsecured state.

21. Additionally, the defendant denies, as a matter of construction, that his conduct can amount to a breach of any of the terms of the lease alleged. Accepting guests through couchsurfing.com and homeexchange.com is not barred under the lease. Notably such (or similar) websites did not even exist at the inception of the lease. In any event, the defendant avers that the claimant has consented to him accepting guests in the manner he did:

(1) On or around 5 September 2018, Joe Farrell, a director of the claimant, invited the defendant to visit his apartment and informed the defendant during that visit that he was aware of the defendant having guests. Mr Farrell did not express any objection to such guests.

(2) The defendant also informed another director of the claimant, Ian Edmondson, on or around 14 May 2019, that he would be exchanging with a Spanish family for the coming weekend. Mr Edmondson expressed no concerns and afterwards specifically told the defendant that he had no problems with the defendant carrying out exchanges. There is evidence from Mr Edmondson that he denies that expression and statement.

22. The defendant denies that the claimant is entitled to the declarations alleged. He denies that his conduct renders him in breach of the lease. He also denies the claimant's entitlement to any of the injunctions sought. He points out that the final injunction sought, referring to conduct contrary to the covenants in the lease, is too broad, and the claimant cannot be entitled to such a blanket order.

23. The defendant denies the claimant's entitlement to any costs. He denies that he is in breach of the lease. In any event, he avers that clause 3 (16) does not give the claimant a right to seek costs on the indemnity basis, and that clause 3 (20) does not give the claimant a contractual right to seek costs arising from these proceedings.

24. It is perhaps appropriate for me to explain something about the home exchange and couch surfing websites since these may not be familiar to readers of this judgment. The home exchange website makes it clear that the concept involves

> … a gracious exchange of hospitality. As a host we open our doors. As a guest we are greeted graciously as if we were a friend or family. A home exchange is a human exchange, a time during which we create bonds, welcoming, sharing, trust and respect are essential to home exchange.

There are three reviews for the defendant's apartment (at pages 416 to 419 of the trial bundle); and it is also clear that the defendant, on two of the occasions that his home was

occupied, swapped that home for his visitor's own home, in one case in Spain and in the other case in Italy.

25. In her supporting witness statement for the claimant, Mrs Pearce addresses home exchange at paragraphs 10 to 12. At paragraph 12 she explains that the nature of the service means that the defendant will vacate his property altogether and allow his guests to occupy his entire home for a few nights at a time. In return, he accumulates "guest points" which he can redeem for the use of another member's home. The claimant maintains that the defendant has used this service on at least five occasions since 2018. In both the skeleton argument of Mr Metcalfe, for the claimant, and in her oral evidence, Mrs Pearce accepted that, by that, she meant that there had been three visitors to the defendant's apartment, and that he had twice occupied in exchange homes of two of those visitors.

26. The couch surfing website explains how couch surfing works as follows:

> You have friends all over the world. You just have not met them yet. Couchsurfing is a service that connects members to a global community of travellers. Use couch surfing to find a place to stay or share your home and hometown with travellers. Couch surfers organise regular events in 200,000 cities around the world. There is always something to do and new friends to meet.

In his personal profile on the couch surfing website, Mr Young explains why he is on couch surfing:

> Meet new people and have interesting experiences. I like travelling but it is mostly because of the cultures I experience. I would like to let these cultural experiences come to me through couch surfing. I like guests who want to go out or chat at home and share experiences. If you want to keep yourself to yourself this is not the place for you. Although you will have your own room the rest of the place is open plan.

Later, Mr Young describes the sleeping arrangements: "Private room. You will have the bed deck in my apartment which has a single bed and a double bed. It is set above and out of sight from other areas but does not have a door which is typical of upstairs bedrooms in my development." Addressing the roommate situation, Mr Young explains "I live alone. My room is on the lower floor with my own shower."

27. Mrs Pearce addresses the couch surfing website at paragraphs 12 to 18 of her witness statement. Having exhibited screen prints from the website, she explains that, in essence, it connects travellers or holidaymakers to hosts who provide free accommodation. The

defendant offers his guests his second/guest bedroom, and he will sometimes make his whole property available to them whilst he is away from the country or his property.

28. The claimant maintains that the defendant has hosted guests using this service on at least 62 occasions between August 2016 and July 2019. That is, on average, a booking once every two to three weeks over a three-year period. Since July 2019 up until February 2020, the outbreak of COVID, the defendant has hosted at least a further 10 guests, meaning he has taken bookings on at least 72 occasions since 2016. If it was not for the COVID outbreak, the claimant expects that those numbers would have been higher, and continuing to increase, even now. As such, it is not just occasional stays involved here. The defendant hosts travellers and holidaymakers on a frequent, and wholesale, basis which has continued even after this claim has commenced. Bearing in mind that a booking sometimes involves more than one guest, the defendant has quite conceivably had around 100 guests staying with him over a four-year period, including home exchange guests.

29. According to the defendant's couch surfing reviews, his guests will stay from one night up to 20 nights at his property. A table produced by the claimant summarises the duration that the defendant's guests have stayed, accurate as at the date of the witness statement. That table shows the number of nights and the number of guests as follows: one night: 19 guests; two nights: 22 guests; three nights: 20 guests; four nights: five guests; five nights: one guest; six nights: one guest; seven nights: one guest; nine nights: one guest; 20 nights: one guest.

30. I specifically asked Mr Young, when he was cross-examining Mrs Pearce, whether he challenged any of that evidence, and he indicated that it was approximately correct. Mrs Pearce goes on to say that for the longer stays, there will almost certainly be significant periods of time when the defendant is not home and/or is not supervising his guests. It is inconceivable that he is at home supervising his guests constantly for a period of 20 nights. The defendant is sometimes not even in the country when these guests stay at his apartment.

31. According to the reviews, there would appear to have been at least two occasions when the defendant allowed couch surfers to stay in his apartment in his absence, and a further one occasion when he allowed a couch surfer a key so that they could come and go as they pleased: see the summary of the reviews at paragraph 23 of Mrs Pearce's witness statement.

32. So far as Airbnb is concerned, at paragraph 19 of her witness statement Mrs Pearce explains that Airbnb is a service which allows users to list their homes, or spaces in their homes, to holidaymakers seeking a short-term lodging. It is said to share many of the same features as the hotel industry, save that it puts hosts in control of the listing, the booking, and the financial reward. Hosts register their property on the website and travellers book a room, or a home, just as one would expect with a hotel booking. Mrs Pearce understands from online literature that it is a service that has become hugely popular around the globe and is quickly overtaking the hotel industry as the primary source of holiday lodging.

33. At paragraph 20, Mrs Pearce says that although the defendant has confirmed that he does not use the Airbnb service, a review on his couch surfing website suggests otherwise. In response to one of his guest's reviews - Pauline Zeigler from Berlin - which had expressed a wish for more privacy during her stay, the defendant responded as follows: "It is probably best to mention this to hosts in the future. I generally clear a weekend ready to entertain any visiting couch surfers. However, if people send me a request on Airbnb, I usually assume they want to keep themselves to themselves." Mrs Pearce is therefore doubtful as to whether the defendant is being fully open and honest regarding his use of this service. That is why details of it have been included in the claim. As no disclosure has been provided by the defendant, she is unable to comment further as to the frequency of the defendant's use of the Airbnb service and how much he has earned from it.

34. Mr Young was questioned about that hosting during the course of his cross-examination. It was suggested that he had listed the apartment on Airbnb. My note of Mr Young's evidence was as follows: "That confuses me. Why did I say that? I cannot remember saying this. I do remember saying that you are treating me as though I am on Airbnb." He referred to the hosting, to which his response was made, which is at page 460 of the hearing bundle. That posting said that Rob's flat is very nice, and so is he. "Throughout our stay he was very generous and took us to many interesting places. Thank you again!!! However, we felt obliged to spend most of our time with him and we would have wished for more privacy." Mr Young explained that he had felt offended because he had spent time with them, and then they had said that they would have wanted more privacy. What Mr Young meant was that, next time, you should have booked on Airbnb rather than on the couch surfing website. He reiterated that he had not been asking people to come and stay with him on short-term lets, or to pay any money at all. He explained that, in about 2015, his

son had listed the apartment on Airbnb, and that he had been upset about that. He said his son had never let it, although later in his evidence he appeared to concede that there had been one letting. He said that he was annoyed, and he had got his son to take it off. He explained that this was his adult son, Theodore, who lets his own apartment on Airbnb. The claimant was said to have been perfectly happy when Theodore had taken his apartment off Airbnb, and had pressed matters with him no further. That was in 2016. No one was said to have said negative things about Airbnb at that time.

35. I should also mention that in response to a request by the claimant for further information, seeking particulars of each and every guest that the defendant had accepted via the couchsurfing.com website with reference to dates, so that the claimant could establish the precise number of bookings which the defendant had accepted, when such bookings had been accepted, and with whom, the defendant stated that he was unable to provide this information. There is said to be no booking system on couchsurfing.com from which the defendant might ascertain a list of bookings. The lack of a formal booking system reflects the fact that the terms of couchsurfing.com prohibit the demand of money or other resources from guests in exchange for accommodation. The defendant also does not keep separate records of each stay.

36. Against that background, Mr Metcalfe identifies the following issues as arising for determination:

(1) How the relevant provisions of the lease fall to be construed.

(2) The extent and nature of the defendant's hosting of guests.

(3) The materiality and risk of the defendant's conduct in an insurance context.

(4) In all of the circumstances, whether the defendant is in breach of the lease.

(5) Whether the claimant waived that breach; and

(6) If the defendant is in breach of the lease the relief that ought to be granted.

III: The hearing

37. The claim was originally listed for trial on 26 and 27 of July 2021 but at a hearing before me on 3 June last year I vacated that trial and adjourned it to the first convenient date after 23 September 2021, with an increased time estimate of four days. At that hearing, the defendant had been represented by Mr James Davin (of counsel), instructed directly by the

defendant. Unfortunately, Mr Davin was not available at all during the four month trial window which was eventually established for this case.

38. After some difficulty in identifying potentially convenient dates, this case was originally re-listed for the trial to start on Monday 6 June. Unfortunately, on that day there was a complete, and persistent, failure of the CCTV and panic alarm systems in the Manchester Civil Justice Centre and the court was closed to court users all of that day. The trial therefore began at 10 o'clock on Tuesday 7 June 2022.

39. At the outset of the hearing, and as foreshadowed by an application he had issued, dated 31 May, Mr Young complained of the late delivery of Mr Metcalfe's skeleton argument, which had only been sent to him shortly before four o'clock on the previous Tuesday, rather than on the Monday as had been agreed. However, Mr Young made it clear that he did not want this trial to be adjourned, and therefore this is a matter that may sound, if at all, in costs at the end of the day.

40. Having dealt with various housekeeping matters, and with the benefit of having pre-read detailed written skeleton arguments from both Mr Young and, albeit belatedly, Mr Metcalfe, there was no need for any formal opening of the case. The court proceeded to hear from the claimant's three witnesses, all directors of the claimant company. The court heard first from Mrs Elizabeth Pearson, for about an hour; then from Mr Ian Edmondson, for just over 15 minutes; and then from Mr Joseph Farrell, for a little under 15 minutes.

41. I am satisfied that all three witnesses were not deliberately seeking in any way to give false evidence or to mislead the court. However, it is fair to comment that all three individuals are heavily invested in this litigation because it is they who have brought it on behalf of the claimant management company, and they who, ultimately, will have to be answerable to the other apartment holders, as members of that company, for the outcome. I am satisfied that such differences of recollection as there are are genuine differences of recollection and emphasis between the claimant's witnesses and Mr Young.

42. In his witness statement, Mr Edmondson had referred, at paragraphs 13 and 14 of his witness statement, to an unfortunate incident involving the letting through Airbnb of an apartment. It became clear during his cross-examination that that incident involved neither

the defendant, nor the defendant's apartment, but related to a quite separate apartment. Mr Edmondson had simply been picking up on evidence that had appeared in Mrs Pearce's witness statement, at paragraph 58, where she was not addressing any problem with Mr Young's own apartment, but rather was addressing other underlying policy considerations, in terms of problems that might be caused by partygoers; and that is nothing at all to do with Mr Young's activities.

43. In cross-examination, but not foreshadowed in his witness statement, Mr Edmondson claimed that Mr Young had spoken to him of the benefits of using Airbnb. However, Mr Edmondson went on to concede that it might have been he (Mr Edmondson) who had first mentioned the Airbnb letting platform because it was the most popular of what Mr Edmondson considered to be similar websites. It is clear that Mr Edmondson regarded the couch surfing website in precisely the same light as Airbnb. In re-examination, he said that he had seen photographs placed by Mr Young on an Airbnb website. He also said that one of Mr Young's witnesses, the owner of another apartment (Eva), had told him that Mr Young was using Airbnb at the same time that she was. That was something that Eva denied when she came to give evidence.

44. About all of those matters, I prefer the evidence of Mr Young and Eva to that of Mr Edmondson. I am satisfied that Mr Edmondson viewed Airbnb in very much the same way as the couch surfing website; I am not satisfied that Mr Young ever told him that he was using Airbnb; and I am not satisfied that Eva told Mr Edmondson that Mr Young was doing so. Mr Farrell, in cross-examination, accepted that he had no personal knowledge that Mr Young had been using the Airbnb website and that it was only hearsay knowledge that he had of this.

45. After the conclusion of the claimant's factual evidence, the court adjourned early for lunch, and, after resuming, Mr Metcalfe made an application to amend his particulars of claim to plead the terms of clause 3.8(a) of the lease and particulars of breach thereunder. For the reasons that I gave in an extemporary ruling, I permitted that amendment. Insofar as necessary, this substantive judgment should be read in conjunction with the reasons I gave in that extemporary ruling.

46. The court then proceeded to Mr Young's evidence, which was given over two hours on the afternoon of day 1, and continuing for about 45 minutes the next morning. During the course of his evidence, Mr Young appeared to moderate his evidence with regard to the Airbnb website. I have already referred to some of that evidence in response to questions about postings referring to it, and his evidence developed further the next morning.

47. There is no real issue as to the extent of the provable activities of Mr Young in relation to the home exchange and couch surfing websites. So far as Airbnb is concerned, I find that Mr Young had at one time posted his apartment on the Airbnb website. I find that it has not been demonstrated whether there were any more lettings on that website than the one to which Mr Young eventually spoke on the morning of the second day. What I can be clear about is that the apartment has not been offered for letting on the Airbnb website since, at the very latest, the middle of 2019, and thus before these proceedings commenced; and there is no evidence that Mr Young intends hereafter to place the apartment on the Airbnb website.

48. Mr Metcalfe accepted, when I put the point to him, that if there had been any evidence of the apartment being on the Airbnb website from, at the latest, June of 2019 (or thereabouts), the claimant would have come up with that evidence. So I find that there is no risk, at the present time, of the property being placed on the Airbnb website, and that it has not been so placed since before June 2019.

49. Mr Young, after the conclusion of his evidence, called his two witnesses, who gave evidence remotely through the CVP video platform. The first, who gave evidence for about 30 minutes, was Eva Þórarinsdóttir, who is a friend of Mr Young who has for some time had an apartment at Britannia Mill. Eva's evidence was mainly directed to her own dispute with the claimant over her admitted letting of her own apartment on a number of occasions using the Airbnb website. In the course of her evidence, and under cross-examination, Eva accepted that she had not given a full and frank account of that dispute in paragraph 5 of her witness statement. In particular, Eva stated that, after receiving what she had regarded as a wholly unnecessary solicitor's letter, with which she took issue, she had been angry; and she had taken one further booking through the Airbnb website from an Indian doctor who came to stay for some three weeks. So I have to regard Eva's evidence with some caution. However, I find that Eva felt genuinely very hurt by her treatment by the claimant company, which she regarded as unfair. I make no finding that any part of her evidence is untrue. She

is, however, not an entirely reliable witness; but I accept Eva's account that she was not aware of Mr Young having had any involvement with Airbnb, and that she had never suggested any such involvement to any director of the claimant company.

50. Mr Young's second witness was Nadia Bloch, whom he had met when she came to stay with him through the couch surfing website. They became very good friends as a result and, in fact, she extended her stay much longer than either of them had originally envisaged. She gave evidence for about 10 minutes and was a patently honest and reliable witness. She told the court that she had visited, and hosted, through the use of the couch surfing website. She had never known of any demand for, or acceptance of, payment through couch surfing, which was not allowed. Though not obliged to do so, the couch surfing website encouraged couch surfers to share in the social life of their host. In the case of the defendant, Nadia's stay with him was the start of a friendship; and she extended her stay with him for about two weeks in July of 2019. Nadia said that she had been free to come and go to and from the defendant's apartment but, as far as she could recall, when she was actually at the apartment, he was always there. Nadia did not think that she gave any form of identification to Mr Young; but she explained that they had been talking and messaging before she had physically come to stay with him at the apartment, and that they had established mutual interests at that stage. As I say, I accept all of her evidence.

51. At the conclusion of the evidence of Mr Young's witnesses of fact, I gave everyone a short adjournment. After that adjournment, as foreshadowed by an application he had sent into the court by email at about eight o'clock the previous evening, Mr Young made an application to dismiss the claim on the basis that there was no live issue between the parties. For the reasons that I gave in a second extemporary ruling shortly before the luncheon adjournment on day 2, I dismissed that application. Insofar as it may become relevant, that extemporary ruling should be read in conjunction with this substantive judgment.

52. The court then moved to the evidence of the two insurance experts. For the claimant, Mr Graham Pipe had produced a report dated 11 June 2021. This was expanded a little in an addendum dated 21 August 2021, written in response to questions addressed to Mr Pipe by Mr Young. Mr Young instructed his own insurance expert, Mr Peter Mills, who produced a report which is said to be dated 25 June 2021. That report states that Mr Mills was instructed by the defendant to provide a rebuttal of the claimant's insurance expert's report. In the body

of the report, he uses the phrase "… rebuttal of Mr Pipe's opinion." Mr Metcalfe points out that an expert should not be engaged in rebutting another expert's report. Choosing between conflicting expert evidence is a matter for the court. However, I put Mr Mills's use of the word 'rebuttal' down to the fact that he has clearly also been involved in litigation in the United States, where references to 'rebuttal' may be more widely adopted, even by experts.

53. The joint experts had met and produced a helpful joint statement, dated 6 November 2021, which they then signed. As a result of that joint statement, the issues between the experts have been considerably narrowed. Mr Pipe's conclusion is that the defendant's conduct may result in a void or voidable policy of insurance; that it may result in increased premiums; or that it may result in insurance being offered on different terms. He considers Mr Young's conduct to be material to insurance risk, and would be relevant to a prudent insurer's assessment of that risk. Mr Mills largely agrees with Mr Pipe, save that he considers:

(1) The absence of any payment to avoid a material change of exposure; and

(2) That any risk is mitigated by reference to the defendant's own insurance, or a guarantee provided by home exchange.

That, as I say, is clarified in the joint statement.

54. In accordance with an indication I had given when, shortly before trial, I had allowed the experts to give oral evidence, the two experts went into the witness box together and gave their evidence concurrently. The way it worked was that for about 20 minutes before the luncheon adjournment I took the lead in identifying, and then clarifying, the views of each expert. Mr Young then asked questions of Mr Pipe, effectively by way of cross-examination. Mr Metcalfe then asked questions of Mr Mills, also effectively by way of cross-examination. Mr Young then effectively re-examined Mr Mills; and Mr Metcalfe then re-examined Mr Pipe.

55. At the conclusion of all of that, I then made an inquiry about how a hypothetical insurer might approach dog-sitting at an apartment. That was very much a hypothetical situation because paragraph 5 of the rules and regulations (in the 4th schedule to the subject lease) contains an absolute prohibition against having pets in the apartment. The example I put was of a homeowner who goes on holiday for one or two weeks introducing someone into the house to look after their two dogs rather than putting them in kennels. Mr Pipe dealt with

that first. He said that in the normal course of events, and subject to any express policy wording, he did not consider that an insurer would raise any objection. He pointed to the benefits of having someone actually permanently in the house whilst the homeowner was on holiday. He acknowledged that a homeowner would only be likely to invite responsible adults, known to themselves, to dog-sit, so an insurer would have a reasonable level of confidence that the homeowner would know them, and would probably regard the matter in the same way as an instance of friends housesitting during a holiday. Mr Mills completely agreed with that, and did not consider that there would be any need to disclose it.

56. Mr Mills's evidence was that the fact that there was no monetary, or other, consideration passing between Mr Young and his guests changes the level of risk, as perceived by an insurer. If one is addressing a letting of a property, an insurer is not concerned with how much rent is being charged; that is immaterial. What is material is the underlying risk. Mr Pipe expressly disagrees with Mr Mills, and that even if there is no consideration passing, then the fact that a stranger is occupying the property would, in Mr Pipe's view, need to be disclosed to an insurer. Mr Pipe was also clear that he would not put any weight upon, or derive any comfort from, Mr Young's own insurance. He pointed out that there was a lot of wording there which might give rise to difficulties. Mr Pipe's view was that if there was a home exchange, or a couch surfing, occupier then an insurer might well be concerned because they did not fully understand the potential risks, or they were not prepared to accept it, or because it would not be covered by their own reinsurance.

57. In the present case, the current insurance, with an insurer called Aspen, expressly contains an exclusion, by way of an endorsement to section 1A of the policy, relating to material damage, in the following terms: "This Policy will not cover Damage to any Apartment which is being used for Airbnb, Couch Surfing, or any other similar short term sub-let agreement." Mr Pipe was clear that if an exclusion in those terms were to be challenged, Aspen could either say that they would not cover the risk, or alternatively could increase the insurance premium. The inclusion of that exclusion within the Aspen policy had come about because the claimant company had received Mr Pipe's report during the course of negotiating for the renewal of the insurance for Britannia Mill with Aspen. The claimant had appreciated, as a result, that that was a matter that was a material and disclosable risk; and it therefore invited the insurer to insert the exclusion within the policy.

58. That exclusion had followed an email from Mrs Pearce to the broker of 19 July 2021. That said that she had a query on apartment 41, whose owner had been couch surfing, and offering Airbnb and holiday lets, or similar. She said that she understood that this apartment would not be covered under the policy while these people were staying there. She was wondering also whether, if any of these people caused damage to the communal areas whilst staying at apartment 41, this would also be excluded from the policy. She asked whether an exclusion for couch surfing, Airbnb, or similar might be added on to the policy so they had something in writing from the insurers so that if anyone thought of using them, they could then say that they would be excluded from the policy. The response was that the insurers had confirmed the following in regard to her questions: "Yes any damage caused by anybody from Apartment 41 will be excluded from the policy whether that be in the apartment or communal areas. I'll have to endorse something in the schedule excluding cover from Apartment 41, so I'm happy to amend that endorsement to say something along the lines of cover is excluded from any apartment that is being used for Airbnb, couch surfing or any other similar arrangement." Mrs Pearce's response was, "Yes that would be better so it does not look as if we are directly having a go at Apartment 41."

59. The matter was summarised in a later email of 10 August 2021 from the insurance broker, Reich Insurance:

> As you know we have a duty to disclose all risk information provided to the insurer including occupancy types. We are obliged to disclose if there are short-term lets such as Airbnb taking place at the property address.
>
> Insurers, in this case, Aspen have determined that during the underwriting process they do not want to cover this type of activity under the policy either at policy inception or in the future period of this policy. Therefore, there is a policy endorsement noted on page 4 of the attached insurance schedule specifically noting this policy will not cover any damage to any apartment which is used for this, or any similar type of short term sub-let.

60. Mr Young is right to point to the fact that the exclusion appears to assume that Airbnb, couch surfing, and other similar arrangements are to be equated to short-term subletting agreements. On the evidence, couch surfing is not a short-term subletting, but more in the nature of a home-sharing arrangement, and in that regard is different from Airbnb. However, that is clear evidence of an insurer - even though the matter may have been drawn to its attention by the claimant - taking the view that it is something that should be excluded from

cover. Mr Pipe's evidence was that if that exclusion were to be challenged, then Aspen could either say it was not offering any cover at all, or could increase the premium.

61. Insofar as there are differences between Mr Pipe and Mr Mills, these reduced during the course of their evidence. Insofar as such differences remained, I have no hesitation in preferring the evidence of Mr Pipe to that of Mr Mills. I am satisfied that Mr Pipe's evidence makes more sense than Mr Mills. I cannot see that whether there is payment or not for occupancy by strangers is relevant to an insurance company's perception of the risk, and of the increase in risk, that letting strangers into one's apartment may produce.

62. So far as the defendant's own insurance is concerned, or the guarantee offered by home exchange, I am satisfied that that is not an acceptable mitigation of any resulting risk. There is a complete lack of clarity as to what might, or might not, be covered, and as to who might, or might, not benefit from that insurance or guarantee. That is compounded by incomplete disclosure of the insurance documentation; but, in any event, the insurance itself provides nowhere near the degree of protection afforded by the insurance taken out by the claimant; and it is not an insurance against which the claimant would have a direct claim in any event.

63. At the conclusion of the expert evidence, the court adjourned overnight a little early for the parties to prepare their closing submissions. On the third day of the trial, the court resumed at 10.30 rather than 10 o'clock (as previously). Mr Young had prepared a detailed summing up - as he described it – overnight, extending to some 27 pages, and incorporating his opening skeleton. He took the court through that for about an hour and 40 minutes.

64. The court then rose for about 15 minutes to enable Mr Metcalfe to get his thoughts together. He then addressed the court for about 35 minutes before the luncheon adjournment, and for about an hour and a half thereafter. Mr Young then briefly replied. The court then adjourned at 3.25 yesterday afternoon for me to deliver this judgment at 10.30 this morning.

IV: *<u>The relevant case law</u>*

65. I find it unnecessary to consider the authorities cited by Mr Metcalfe on the principles which govern contractual interpretation. These are a well-trodden road. The principles are summarised at paragraphs 11 through to 13 of Mr Metcalfe's written skeleton. He cited from

paragraphs 14 to 23 of Lord Neuberger's judgment in *Arnold v Britton* [2015] AC 1619. The present law on contractual interpretation is summarised at paragraph 8 of Popplewell J's judgment in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The 'Ocean Neptune')* [2018] EWHC 163 (Comm), which is reproduced at paragraph 13 of Mr Metcalfe's skeleton.

66. It is, however, necessary to refer to the authorities governing clauses similar to those in issue in the present case, which are analysed by Mr Metcalfe at paragraphs 14 and following of his skeleton argument. I will deal with them, as Mr Metcalfe did, chronologically.

67. The first in point of time is the decision of the Court of Appeal in *Tendler v Sproule* [1947] 1 All ER 193. There the Court of Appeal held that the taking in of two lodgers, or paying guests, gave rise to breaches of covenants not to use the premises, or any part thereof, for any trade or business, and to keep them as a private dwelling house only.

68. The next authority in point of time is one cited by Mr Young. It is the decision of Sachs J in the case of *Segal Securities Ltd v Thoseby* [1963] 1 QB 887. This is said by Mr Young to be highly relevant to this case because it involved the High Court's consideration of a covenant to use premises for the purposes of a private residence in the occupation of one household only. Sachs J began his judgment (at page 893) by stating that the authorities bound him to hold that if a tenant, for any length of time, or regularly, takes in paying guests - which is after all a euphemism for the word 'lodgers' - that is a breach of a covenant to use premises as a private residence only. It must however be borne in mind that in both cases there was also a covenant against using any part of the premises for business purposes; and, in each case, it was that covenant which was primarily held to have been broken.

69. Mr Young places particular reliance on a passage at page 894:

> To my mind, in the way of life of 1962, the mere taking in of a single paying guest who shares the family life so far as practicable would not, save in exceptional circumstances, be regarded by a reasonable man as a breach of a covenant to use the house as a private residence only, nor would I myself be willing hold that to be such a breach, nor do the authorities, on analysis, bind a court so to hold. It is, in each case, a question of fact and of degree whether the taking in of paying guests is of an order that, having regard to all the circumstances, constitutes a breach of the covenant in question. The way in which those who are sharing the accommodation under the same roof do, or do not, live as one family could be a relevant circumstance, as could the size and layout of the premises. Each covenant has to be interpreted as if entered into between two reasonable people familiar with the premises and their location.

70. Sachs J later went on to say that it was as well to make it clear that nothing in the covenant against use as a private residence in the occupation of one household precludes a true sharing between a tenant and a friend or friends. He instanced two friends of the tenant sharing the accommodation, all living there at the same time, having their meals together, and then at the end of a given period, be it a week, a month or a quarter, dividing by three all the costs of so living there. Sachs J was of the view that that would not be a breach; nor would that covenant be broken even if, instead of dividing the costs by three precisely at the end of each month, an arrangement was made to save paperwork by contributing a sum truly estimated to cover the relative one-third. Sachs J added:

> I mention those examples but there may of course be other types of sharing arrangement which would not constitute a breach of the covenant. It seems to be always a question of fact whether the circumstances fall on one side or the other of a somewhat tenuous line and whether the landlord can show that the arrangement ought to be regarded as a paying guest arrangement rather than a sharing arrangement.

71. Mr Young submits that *Thoseby* cannot legitimately be distinguished from the facts of this case simply because the latter involves non-paying guests being sourced online. The case is said to turn on the existence of a sharing arrangement, and not the genesis of such an arrangement. The circumstances under which the arrangement came into existence in the first place is irrelevant to the precedent set in *Thoseby*. If anything, it is the purpose of the arrangement that is said to be decisive. He submits that here there was a mutual, non-commercial sharing arrangement, as referred to by Sachs J in *Thoseby*.

72. The next authority identified by Mr Metcalfe is the Court of Appeal's decision in *C&G Homes Ltd v Secretary of State for Health* (1991) 23 HLR 145, where Nourse LJ considered the authorities on the transitory use of properties. At pages 150 to 151 Nourse LJ summarised the law as follows:

> These authorities show that the question of fact and degree which has to be answered in each case will involve a consideration of all or some of the following matters: the number of occupants; the degree of permanence of their occupancy; the relationship between them; whether payment is made or not and, if so, whether it is only a contribution to expenses or something more; whether the owner or lessee resides there himself and, if not, whether he has people there to supervise and support those who do.

In his submissions, Mr Metcalfe emphasised the fact that in that case, there was a breach of covenant even though there was no payment. So, Mr Metcalfe submits, payment cannot be the determinative factor.

73. In addition to the passage I have just cited from Nourse LJ's judgment, I derive assistance from a question to which Nourse LJ averted at page 152 of the judgment. There he said:

> In summary, I would say that if a house cannot fairly be described as someone's private dwelling house, it cannot be said to be being used as such. I therefore ask myself the question which was asked by James LJ in *German v Chapman* (1877) 7 Ch D 271: Whose private dwelling house can it be said to be?

In that case, the answer was that it was not the Secretary of State's; and Nourse LJ was unable to say that it was the residents. I find the question: "Whose private dwelling house is it?" of some assistance in the present case.

74. The next authority cited by Mr Metcalfe is the Court of Appeal's decision in *Caradon District Council v Paton* (2001) 33 HLR 34. There the Court of Appeal held that the use of a property for holiday lets for one or two weeks' at a time constituted the breach of a term in a lease that a property should not be used for any purpose other than that of a private dwelling house. In that case, not only was the property being used for short-term holiday lets during the summer months, but the owners were not present, and no use was being made of the premises by them.

75. At paragraphs 35 and 36 Latham LJ, delivering the leading judgment, said this:

> 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 [in] occupation for the purposes of the use of the dwelling house as their home.
>
> 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 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.

In that case, the Court of Appeal did not need to go on to consider the issue of business use.

76. The next authority is the decision of His Honour Judge Stuart Bridge sitting in the Lands Chamber of the Upper Tribunal, in *Nemcova v Fairfield Rents Ltd* [2016] UKUT 303 (LC), [2017] 1 P&CR 4. There the Upper Tribunal found that the hosting of guests from the Airbnb.com website constituted the breach of a term in the lease that the property should not be used as a private dwelling house. There, there had been a series of short-term lettings of a few days' each for business visitors working in London for about 90 days a year. For much of the rest of the time the owner had lived in the flat herself. The Upper Tribunal held that the grant of very short-term lettings, measured in days rather than months, was a breach of the user covenant against being used as a private residence when the owner was not living there. At paragraph 50 Judge Bridge said this:

> I do not consider that the demand and acceptance of payment by the lessee from the occupier has any affect on the nature of the use. It may remain a 'private residence' whether it is occupied by a tenant of the lessee who pays rent, or by a friend of the lessee who is allowed to live there rent free as a philanthropic gesture.

77. The next of the authorities to which I must refer is the second of the authorities cited by Mr Young. It is the decision of His Honour Judge Paul Matthews in the case of *Snarecroft Ltd v Quantum Securities Ltd* [2018] EWHC 2071 (Ch.) Mr Young refers to the judge's citation (at paragraph 40) from paragraph 7-19 of the 10th edition of *Preston and Newsom: Restrictive Covenants affecting Freehold Land*:

> A covenant which limits the use of land to that of a private dwelling house or to that of a private residence prohibits such non-residential use 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.

78. Mr Young relies, in particular, upon the last sentence from that citation. He submits that it is authority for the proposition that a guest staying with the defendant did not result in a breach of covenant. The private use is said to be strongly supported by the fact that there

was no payment, and therefore no contract with the guests. The actual decision itself is not of any particular direct relevance since it concerned the purpose of carrying on a boutique hotel ,which was held to infringe a covenant against use of the premises or any part thereof other than for residential purposes.

79. The final authority cited to me is the decision of the Deputy Chamber President, Mr Martin Roger QC, sitting in the Lands Chamber of the Upper Tribunal, in *Triplerose Ltd v Beattie* [2020] UKUT 180 (LC), reported at [2020] HLR 37. In that case, the Deputy Chamber President followed the earlier decision in *Nemcova* in holding that the hosting of guests from the websites Airbnb.com and Booking.com constituted a breach of a term in a lease that a property should be used as a private dwelling house for occupation by one family at any one time. The case involved the provision of short-term serviced accommodation for paying guests most weekends, where one of the owners stayed in the flat two or three nights during the week.

80. At paragraph 20 Mr Roger QC said this:

> These and other authorities reviewed in *Nemcova* and collected in Woodfall: Landlord and Tenant at 11.206 demonstrate that the use of residential property for short-term occupation by a succession of paying guests has always been treated as a breach of a covenant requiring use only as a private residence or dwelling house. Occupation by a sub-tenant who uses the property as his or her own private residence is permitted, as may be occupation by a group of individuals living collectively, or by non-paying guests, family members, or servants occupying with the tenant. But short-term occupation by paying strangers is the antithesis of occupation as a private dwelling house. It is neither private, being available to all comers, nor use as a dwelling house, since it lacks the degree of permanence implicit in that designation.

The Deputy Chamber President went on to hold that there was no breach of a further term which prevented the carrying on, or the permitting of being carried on, upon the property of any trade or business whatsoever. Mr Roger QC held that no activity was carried on upon the property which in itself amounted to a business.

81. Mr Metcalfe invites the court to depart from the approach in the latter part of that decision. He submits that that approach is inconsistent with the decision of the court in *Tendler*. He says that it seems to have escaped the Tribunal Judge's notice that the property was being utilised as business premises for the purpose of deriving an income. The

defendant was granting a licence to occupy in return for payment. That was quite different to granting a tenancy, whereby a landlord was excluded from possession of the property. He submits that there was too little analysis in this part of the judgment.

82. I reject that challenge to Mr Roger's decision. At paragraph 35 the Deputy Chamber President said this:

> The covenant in *Tendler v Sproule* obliged the tenant 'not to use the premises or any part thereof for any business', and it was held that the taking in of paying guests constituted a breach of that obligation. Counsel drew a distinction between using the premises for a business (as a 'business resource' as he put it) and carrying on business upon the premises. In this case it was not in dispute that the flat was being used for the business of short-term letting, but that business was being carried on from elsewhere, not upon 'the property', and those who were at the property were using it for residential purposes. In other words, the prohibition is against conducting business in the flat, not against using the flat for short-term residential purposes albeit as part of a business.

83. At paragraph 37, the Deputy Chamber President emphasised that no business was being conducted 'upon the Property'. No activity was carried on upon the property which in itself amounted to a business. He did not consider that the provision of laundry services between lettings, leaving breakfast goods for visitors, and handling check-in and check-out (which was not said to happen at the flat) did not alter that assessment, and did not amount to carrying on business in the property. He therefore considered that the first tier Tribunal had been right to find that letting the flat for short-term residential use did not breach the covenant against carrying on business upon the property. I would entirely accept that analysis of the decision. It turned upon the difference in wording of the relevant covenants in *Tendler v Sproule* and *Triplerose v Beattie*.

84. Following that recital of the authorities, Mr Metcalfe acknowledges that he has been unable to find any authority which deals directly with the hosting of strangers gratuitously.

V: *<u>Analysis and conclusions</u>*

85. I propose to follow the scheme of Mr Metcalfe's skeleton argument and to address each of the relevant clauses relied upon by the claimant in turn.

86. Clause 3 (6) (a): Mr Metcalfe submits that the authorities plainly demonstrate that hosting guests for payment of a sum of money, whether or not the defendant is himself present, constitutes a breach of clause 3 (6) (a) of the lease. That would cover any instances of the defendant accepting guests from Airbnb.com. I accept that submission.

87. Working on that foundation, Mr Metcalfe proceeds to submit that the same principles apply in respect of home exchange. Payment may not be made in the form of a sum of money, but rather in money's worth, that is by allowing the defendant to stay at his guest's property, instead of procuring alternative accommodation, or by taking receipt of guest points. Those guest points are said to be a form of currency which a person can redeem by booking accommodation. In terms of construction, there is said to be no logical basis for distinguishing such guests from paying guests. More difficult is said to be the issue of accepting guests who are, in effect, strangers, from websites such as couchsurfing.com.

88. I deal first with home exchange. In my judgment, there needs to be an intense focus upon the actual wording of the relevant covenant: "no part of the property is to be used for any purpose other than as or incidental to a private residential dwelling in the occupation of one household only ..." In my judgment, exchanging one house for another for a short period of time is not a breach of clause 3 (6) (a) where no consideration passes other than the opportunity to occupy an alternative property for a short period of time. Such use is either use as a private residential dwelling in the occupation of one household only, or is incidental to such use, in the sense of ancillary to, or associated with, use as a private residential dwelling. In my judgment, therefore, allowing guests to occupy the property by way of home exchange is not a breach of clause 3 (6) (a). That is also the case, in my judgment, with strangers who come into the property from the couchsurfing.com website.

89. Mr Metcalfe submits that an invitation to strangers to frequent the property, unlike an introduction to family or friends, is an invitation to all comers, to adopt the words of Mr Roger QC in *Triplerose*. Mr Metcalfe submits that listing a property on the couchsurfing.com, and similar, websites is the antithesis of private. He submits that it is making the property open or public. In my judgment that is not the case. The couch surfing website enables the owner of the property to select those whom he (or she) is going to allow to couch surf. The temporary, and extremely transient, nature of the occupation means that, whether the defendant is actually physically present during the couch surfing stay or not, the

use of the property remains that of use as, or incidental to, a private residential dwelling in the occupation of one household only. Mr Young has made it quite clear, in his profile, that his preference is for those guests who want to go out or chat at home and share experiences. He emphasises that if they want "to keep yourself to yourself, this is not the place for you. Although you will have your own room, the rest of the place is open plan."

90. In my judgment, as Mr Metcalfe recognises, the present case is not only different from the other cases, which have not involved the hosting of strangers gratuitously, but it is also qualitatively different because the emphasis remains, even when couch surfers are visiting the property, that of use of the apartment as a private residence in the occupation of Mr Young's household only. Couch surfers occupy what is effectively an area without doors, although it is not visible from the main living area. It is effectively a bed deck; and couch surfers use the other amenities of the apartment, such as the sitting room, the kitchen and the bath and shower rooms.

91. Mr Metcalfe submits that his interpretation of clause 3 (6) (a) accords with commercial common sense. He invites the court to ask the purpose of the sub-clause, and to query why the parties to the lease might wish to limit the use of the property in accordance with it. He identifies numerous factors, particularly taking into account the nature of the building as follows: security considerations, community and resident feel, nuisance and disturbance, insurance coverage, and lease compliance.

92. In my judgment, those factors are not sufficient to overcome the fact that what is required is use of the property as or incidental to a private residential dwelling in the occupation of one household only. If I pose the question: "Whose private dwelling can this apartment be said to be when there is a couch surfer staying there?" the answer is still: "It is the private residential dwelling of Mr Young." I therefore do not accept that either occupancy through the home exchange website by way of house swapping, or occupancy through the couch surfing website by way of sharing with a couch surfer, amounts to a breach of clause 3 (6) (a) of the lease. Mr Young retains direct control over those whom he allows to couch surf in his apartment. He made it clear that some people whose profiles which he does not like will not be extended an invitation to stay in his apartment. I can see no relevant difference between a couch surfer occupying the property and Mr Young inviting someone who he has met on a first date on a dating app to come and share the apartment with him.

93. I turn next to clause 3 6) (b). Mr Metcalfe accepts that there is no profession or employment being carried on in the apartment; but he submits that a trade is being carried on at the property when it is being used by guests introduced to the property through either the home exchange or the couch surfing websites. He submits that if guests are accepted for reward in kind then the property is being used for trade. He invites the court to depart from the Deputy Chamber President's reasoning in *Triplerose*.

94. In my judgment, the decision in *Triplerose* is correct. It was founded upon the express wording of the covenant in question. In the present case, the wording is similar. It is that no trade shall be carried on at the property. In my judgment, even allowing the property to be occupied by way of home exchange in return either for guest points or occupancy of the exchanger's own property, does not mean that a trade is being carried on at the apartment. Mr Metcalfe accepts that accepting guests without payment of money or money's worth will not constitute a breach of clause 3 (6) (b) of the lease; but in my judgment the receipt of money or money's worth makes no difference. The fact remains that no trade is being carried on at the apartment.

95. I move next to clause 3 (8) (a). This clause comprises two limbs. The first relates to "… acts which may cause damage to or be a nuisance annoyance disturbance or inconvenience to the Company, the Management Company, or the Lessees." The second limb applies to "… acts … which in the reasonable opinion of the Company or the Management Company may prejudicially affect or depreciate Britannia Mills the Property, or the property demised by the Leases or which may damage the Service Installations."

96. Mr Metcalfe draws attention to the wide wording of clause 3 (8) (a) and, in particular, to the use of the word "may". He submits that breach does not require an actual finding as to nuisance, annoyance, disturbance, or inconvenience; rather, breach only requires a finding that there exists a risk of nuisance, annoyance, disturbance, or inconvenience. The words in that list are also said to suggest a low threshold for breach. Whilst "nuisance" is a cause of action in tort, and may invoke a high threshold, the words "annoyance", "disturbance", and "inconvenience" are said to refer to more minor infractions.

97. The claimant's evidence has referred to nuisance, annoyance, disturbance and inconvenience caused by parties at the premises. However, I am not satisfied that the claimant has demonstrated that such noise is attributable to the presence of those who are occupying the property, either by way of a home exchange or as a couch surfer or surfers. I am not satisfied that there is any greater risk of nuisance by such people than by any other guests, whether friends or family members, who may be introduced into the apartment by Mr Young. Indeed, complaint is made of noise having been caused by Mr Young's own son.

98. In my judgment, the presence of those who come to the apartment by way of home exchange or couch surfing are adequately and sufficiently addressed by the terms of paragraph 15 of the 4th schedule to the lease: the regulation which requires the lessee to be responsible for the observation by any non-resident permitted to have access to Britannia Mills of the Rules, and which prevents any resident from allowing anyone authorised by them to have access to the development to engage in any activity that may in any way disturb or inconvenience other residents.

99. I am not satisfied that the movement through the development of those who are present through the home exchange or the couch surfing websites, or the difficulties that they may experience in properly locking the door to Mr Young's own apartment, properly fall within the scope and ambit of the first limb of clause 3 (8) (a). I see no material distinction in this regard between those introduced to the property through the home exchange and couch surfing websites and those who may be invited there through a dating app, or who may be met for the first time by Mr Young in a public house or wine bar, or some other social environment. I do not see that there is any additional cause for concern, within the terms of clause 3 (8) (a) as a result of introductions being affected through those two websites.

100. I will deal with the second limb of clause 3 (8) (a) when I deal with clause 3 (8) (b), relating to insurance. In relation to that clause, Mr Metcalfe again emphasises the use of the word "may", whereby any insurance effected in respect of Britannia Mills, or any part of it, including the property, may be rendered void or voidable, or whereby the rate of premium may be increased. What is noteworthy about that sub-clause is that there is no reference to either the risk of exclusion of cover for a particular activity or the application of special terms to such an activity. In the present case, the existing insurer has already applied an express exception in terms of damage to any apartment which is being used for Airbnb, couch

surfing, or any other similar short term sub-let. There is therefore no present risk of the insurance which has been effected being rendered void or voidable, or the rate for it being increased.

101. Mr Metcalfe emphasises that, as Mr Pipe recognised, if that exclusion were to be withdrawn, then the insurer might well either refuse cover altogether or require payment of an increased premium. I agree with Mr Metcalfe that that is within the spirit of clause 3 (8) (b); but it does not seem to me to be strictly within its letter. However, it is here that the second limb of clause 3 (8) (a) may come into play. I am satisfied on the basis of Mr Pipe's evidence, which I accept, and which is reinforced by what has happened in practice, whereby an express exception has been applied to damage caused whilst any apartment is being used through the home exchange or couch surfing websites, that those activities may, in the reasonable opinion of the claimant, prejudicially affect or depreciate the development.

102. In my judgment, on the expert evidence, home exchanges and couch surfing do amount to a breach of clause 3 (8) of the lease, either the second limb of 3 (8) (a) or 3 (8) (b). If the claimant were to change insurer, as Mrs Pearce says has to be done more frequently than in the past since the risks which have become apparent after the Grenfell Tower disaster, a new insurer would clearly consider home exchanging and couch surfing to be relevant to its assessment of risk; and if it did not apply an exclusion in relation to those activities, then it might well either refuse cover at all, or apply an increase in premium. So, for those reasons, I am satisfied that occupancy through home exchange and couch surfing do constitute a breach of clause 3.8 of the lease, whether 3 (8) (b) or the second limb of 3 (8) (a).

103. I then turn to clause 3 (11) (a). Mr Metcalfe submits that the bed deck mezzanine is plainly part of the property. Whilst 'possession' has a particular legal meaning, in the sense that a 'possessor' generally excludes others, 'occupation' suggests the status of a licensee, which does not involve the exclusion of others, much as one occupies a hotel room, with the servicing staff largely being able to come and go.

104. Mr Metcalfe submits that Mr Young's guests may therefore 'occupy' the mezzanine, even though they may not be able to exclude him from it. There is therefore said to be a parting with occupation of part of the apartment, in the form of the mezzanine. Mr Metcalfe

submits that it is plainly demarcated and constitutes its own part of the property, separate from the living area; after all, the property was sold as a two-bedroom apartment.

105. In my judgment, allowing the couch surfer to stay in the mezzanine for one, two, or three nights is not a parting with 'occupation' of part of the property. It may involve a sharing of occupation of the property; but that is not prohibited by the terms of the lease. In the case of home exchange, there is an exchange of the apartment by way of licence. There is no sharing of occupation during a home exchange. The defendant is elsewhere whilst the home exchange goes on.

106. In my judgment, that does amount to a parting with the whole of the property by way of the grant of a licence. The licence may be short-lived; but whilst it is in existence there is the grant of a licence in respect of the whole of the property. The situation may be different in the case of someone who comes in to dog-sit, because in that situation there may be no form of contractual relationship. The dog-sharer's occupancy may be entirely gratuitous, other than by way of looking after the dog; and there may be nothing to prevent the dog owner returning and inviting the dog-sharer to leave prematurely. Such a case would have to be determined on its own particular facts; but in the case of a home exchange, it does seem to me that there is the grant of a licence in respect of the whole of the property. So, although I do not consider that there is a breach of clause 3 (6) of the lease, there does seem to me to be a breach of clause 3 (11) (b) in the case of a home exchange.

107. That, I think, deals with all of the relevant covenants going to liability, as distinct from costs. There are a few subsidiary matters with which I must deal. The first relates to waiver. I accept Mr Metcalfe's submissions that there is no tenable argument of waiver in this case. I have already set out the way in which it is pleaded by counsel then representing the defendant. This is not a case where the claimant can be said to have made an election between inconsistent remedies or courses of action. This is not a case in which there has been any representation that the claimant will not rely upon the relevant covenants for the future, in respect of either home exchange or couch surfing. The allegation as to waiver is simply said to be that the claimant has consented to the defendant accepting guests in the manner he did when: (1) Mr Farrell expressed no objection to the defendant having guests to visit his apartment; and (2) Mr Edmondson expressed no concerns about Mr Young

exchanging with a Spanish family for the forthcoming weekend, and said he had no problems with the defendant carrying out such exchanges.

108. I am not satisfied that Mr Edmondson ever told the defendant that he had no problems with exchanges. Even if he did, that would not be binding for all time; and any such assurance could be withdrawn for the future; and, in any event, that assurance, by only one of the board of directors, would not be binding on the claimant company. I am satisfied that there is nothing in the waiver point.

109. Mr Young has also relied upon his convention right to respect for private and family life, his home, and his correspondence, under article 8 of the ECHR. Whilst Mr Young clearly has a right to respect for his private and family life and his home, that right cannot prevail over the express terms of the lease, which represents a balance between the competing and countervailing rights and interests of other occupiers of apartments within Britannia Mills, and also the property rights which are entitled to protection, under article 1 of the first protocol of the convention, of the claimant and of other apartment-holders, who are entitled to the benefit of the covenants in the lease, together with the claimant. So that affords no defence to the present claim.

VI: *Disposal*

110. It follows from the forthgoing that I have rejected the claims of breaches of clause 3 (6) and the first limb of clause 3 (8) (a) of the lease. I have found in relation both to home exchange and couch surfing that there is a breach of the second limb of clause 3 (8) (a) or clause 3 (8) (b). I have rejected couch surfing as constituting a breach of clause 3 (11 (a) of the lease; but I have found that home exchanges would constitute a breach of clause 3 (11) (b).