Neutral Citation Number: [2021] EWHC 51 (Ch)

Case No: E80LS745

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
APPEALS
On appeal from the County Court at Leeds
Order of Recorder Nolan QC dated 28 February 2020

Combined Court Centre
1 Oxford Row
Leeds
LS1 3BG

Date: 14 January 2021

Before :

MR JUSTICE SNOWDEN

(Vice-Chancellor of the County Palatine of Lancaster)

- -

Between :

OLIVER RYAN WHEELER KENT	**Claimant/ Respondent**
- and –	
RICHARD GUEST	**Defendant/ Appellant**

- -

W.E. Hanbury (instructed by **Ware & Kay, Solicitors**) for the **Claimant/Respondent**
Richard Moore (instructed by **Mason & Co., Solicitors**) for the **Defendant/Appellant**

Hearing date: 24 September 2020

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m. on 14 January 2021.

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

1. This is a "rolled-up" application for permission to appeal, with appeal to follow if permission is granted, by the Appellant ("Mr. Guest") against a decision of Mr. Recorder Nolan QC that the Respondent ("Mr. Kent") had validly terminated Mr. Guest's business tenancy of land at Ingmanthorpe, Wetherby; that Mr. Guest should not be granted a new business tenancy; and that Mr. Kent was entitled to vacant possession of the property.

2. Having heard argument, I shall grant permission to appeal, but dismiss the appeal on the merits for the following reasons.

Background

3. The property in question ("the Property") is about 40 acres of land on which stands the Ingmanthorpe Racing Stables ("the Stables"). The Property once formed part of a larger parcel of land on which stands The Manor House, Ingmanthorpe. The Manor House and its land was originally owned by a Mr. and Mrs. Lumley, who employed Mr. Guest as their racehorse trainer. Mr. Guest lived in a large static caravan on the site near to the Stables.

4. In 2015 the Lumleys obtained planning permission to build a detached house near to the Stables. The permission was subject to a condition that the house be occupied by a person employed in the business occupying the Stables. After obtaining planning permission, the Lumleys decided to sell their land in two separate lots – (i) the Manor House and about six acres of surrounding land, and (ii) the Property on which stood the Stables and which benefitted from the planning permission.

5. Mr. Kent is a keen equestrian and his wife is a certificated trainer of horses. According to the facts as found by the Recorder (against which there is no appeal) they decided to buy the Property with a view to building a new house for themselves and running the Stables as a business. An amicable agreement was reached with Mr. Guest to the effect that after Mr. Kent completed the purchase of the Property, Mr. Guest would continue to train racehorses at the Stables until the Kents had constructed their new house and could move in. Pursuant to that arrangement, on 29 January 2016 Mr. Kent completed the purchase of the Property and Mr. Guest was granted a one-year tenancy until the end of 2016 at an annual rent of £24,000 which was contracted out of the security of tenure provisions under the Landlord and Tenant Act 1954 ("the 1954 Act"). That arrangement continued during 2016 and into 2017, with Mr. Guest holding over after his lease ran out.

6. On 5 April 2017 Mr. Kent executed a copy of the original lease which was intended to be for another year at the same rent and, as before, to be contracted out of the security of tenure provisions under the 1954 Act. Mr. Kent did not, however, take legal advice, and failed to comply with the notice provisions of the 1954 Act. The result was that he inadvertently granted a lease to Mr. Guest that was subject to the security of tenure provisions under section 23 of the 1954 Act ("the Lease").

7. When the term of the Lease expired in April 2018, Mr. Kent sent a letter to Mr. Guest requiring him to vacate the Property. He refused, and correspondence ensued.

8. On 27 July 2018 Mr. Kent served a notice under section 25 of the 1954 Act (the "Section 25 Notice") terminating the business tenancy on 2 February 2019 and relying on a number of grounds under sections 30(1)(a) and 30(1)(c) of the 1954 Act ("Section 30(1)") to oppose the grant of a new tenancy.

Section 30(1)

9. Section 30(1) provides (in material part),

> "The grounds on which a landlord may … make an application under section 29(2) of [the 1954 Act for the termination of a tenancy without the grant of a new tenancy**]** are such of the following grounds as may be stated in the landlord's notice under section 25 of this Act … that is to say:—
>
> (a) where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations;
>
> (b) that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due;
>
> (c) that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding."

The Proceedings

10. Following service of his Section 25 Notice, Mr. Kent brought a claim in the County Court at Leeds under Section 29(2) of the 1954 Act to obtain possession of the Property on the basis of his Section 25 Notice and the grounds of opposition to a new tenancy stated therein. That claim was defended by Mr. Guest, who counterclaimed for a declaration that if he was entitled to a new business tenancy, he was also entitled to occupy the new house that the Kents had built on the Property, because that was part of the land demised by the Lease.

11. In support of his allegations of breach of the covenants in the Lease, Mr. Kent relied on an inspection which he had performed and a series of 53 photographs which he had taken of the Property in November 2017. He also relied on an expert's report from a surveyor and valuer, Mr. Daniel Brumfitt, who had inspected the Property on 16 April 2018 and who catalogued the lack of repair and maintenance of the Property, observed that it appeared that a business was being run from the Stables selling and distributing artificial turf, and also described a number of alterations made to the Property.

12. Mr. Guest denied the breaches and relied on a report by a surveyor and valuer, Mr. Richard Turner, who had attended the property on 27 March 2019. Mr. Turner's report stated that he had been instructed to advise on the capital and rental value of the Property, and apart from stating in passing that he did not notice any evidence of disrepair, he did not provide any evidence of his own on the question of breaches of covenants in the Lease but simply recited instructions that he had been given by Mr. Guest.

13. The claim and counterclaim came before the Recorder sitting in the County Court in Leeds between 18 and 20 February 2020. Both Mr. Kent and Mr. Guest gave evidence, but neither expert was called to be cross-examined on their reports.

14. On 28 February 2020 the Recorder found for Mr. Kent and dismissed Mr. Guest's counterclaim for a new lease. In the course of his reserved judgment, the Recorder found that Mr. Guest had given opportunistic and dishonest evidence about the circumstances in which he had been granted the Lease, and as to the intentions of the parties concerning the house to be built on the Property.

15. The Recorder dealt with each of the allegations of breach of the covenants in the Lease. He found that the Property was "a mess" and accepted Mr. Kent's evidence that the condition of the Property in terms of maintenance and repair had greatly deteriorated. He also accepted Mr. Kent's evidence that there had been structural additions and alterations to the Property for which no permission had been given. He found that a company principally run by Mrs. Guest was carrying on an artificial turf business from the Property which was not permitted; and that Mr. Guest had continued a practice of burning trade waste at the Property in defiance of warnings from the local authority. Finally, the Recorder found that Mr. Guest had failed to insure the Property prior to 1 August 2018.

16. After setting out a summary of the law which was closely based upon the commentary in Hill & Redman's Law of Landlord and Tenant, the Recorder then referred in paragraph 26 of his judgment to a number of factors which he said he took into account in the exercise of his discretion. He referred to the fact that Mr. Guest had been forced by personal and financial circumstances to become employed by a stables in Newmarket and was thus substantially absent from the Property; that he had no real plan for his future at the Property; that as a consequence the Property "will continue to deteriorate probably at a greater rate than in the past".

17. The Recorder also found that to the extent that Mr. Guest had a plan, it was to use the Stables as an annexe for the stables in which he was employed at Newmarket. The Recorder found that this would cause the number of horses at the Stables to reduce further than the "considerable reduction" that had already occurred; and that any such future use of the Property by Mr. Guest would be likely to involve occupation by others (i.e. the Newmarket stables). The Recorder then stated that,

> "In my judgment this amounts to "any other reason connected with the tenancy and management of the holding" within Section 30(1). It seems to me that is an important matter when it comes to exercising my discretion".

18. The Recorder then concluded that,

> "In my judgment it would be wholly unfair to compel [Mr. Kent] to re-enter into legal relations with [Mr. Guest], and I have no hesitation in exercising my discretion in favour of [Mr. Kent] ... [who] … satisfies the grounds of opposition contained in Section 30(1)(a) and (c)."

19. After handing down his judgment, on 22 April 2020 the Recorder refused permission to appeal but made an order staying the order for possession until after final disposal of the appeal.

The Appeal

20. Mr. Guest's Appellant's Notice raised nine separate grounds of appeal in relation to the grant of a new tenancy which were, to some extent, refined or reformulated by Mr. Moore in his skeleton argument for the appeal and in oral submissions. Mr. Moore did not seek to persuade me that the Recorder was wrong in his assessment of the relative credibility of the evidence given by Mr. Guest and Mr. Kent. In essence Mr. Moore contended, however, that the Recorder went wrong in failing to determine whether certain alleged breaches of the covenants in the Lease had actually occurred during the term of the Lease; in failing to consider whether many of the alleged breaches were "substantial" as required by both Section 30(1)(a) and (c); in failing to consider the exercise of his discretion separately under Section 30(1)(a) and (c); and in taking into account in the exercise of his discretion matters that were not substantial breaches of the Lease, were breaches that had been remedied, or which were not breaches of the Lease at all.

The approach on appeal

21. The test to be applied on an appeal such as this, where there is no complaint on the grounds of procedural or other irregularity, is to determine whether the judge in the court below was "wrong". Depending on the case, this could mean wrong in law, wrong in fact, wrong in the exercise of discretion, or wrong in the assessment of a number of factors in forming a value judgment.

22. An error of law needs no elaboration. Where it is alleged that the error is an error of fact, the appeal court will generally only allow the appeal if a relevant finding of fact is unsupported by the evidence, or is one that no reasonable judge could have reached. It has also frequently been stated that an appeal court will not readily second-guess factual findings as to the credibility of witnesses that only the trial judge has seen give evidence.

23. Where it is alleged that there was an error in the exercise of discretion or in reaching a value judgment, the appeal court will only interfere where the judge has erred in principle in his approach, has taken into account irrelevant factors, has left out of account material factors, or (insofar as it involves an exercise of discretion) has come to a decision that is outside the range of decisions within which reasonable disagreement would be permissible.

24. In this regard I accept some of Mr. Moore's criticisms of the way in which the Recorder expressed the reasons for his decision. The Recorder did not, for example, expressly attach a date to each of the defects of repair and maintenance that he found to have been proven, or (save in one respect) expressly identify whether the other breaches of covenant that he found to be established were "substantial".

25. But the reasons for a judgment will always be capable of being better expressed, and it has frequently been emphasised that the appellate court should approach the matter on the basis that the judge in the lower court knew how to perform his function and what matters to take into account, unless it is demonstrated to the contrary: see e.g. Re C (a child) [2013] 1 WLR 3720 (CA) at [39] and Piglowska v Piglowski [1999] 1 WLR 1360 (HL) at 1372.

26. I approach Mr. Moore's critique of the Recorder's judgment on that basis, and shall concentrate on the substance of his decision.

The Law

27. The legislative purpose of Section 30 and the linkage between sub-paragraphs (a), (b) and (c) in Section 30(1) was described by Ormerod LJ in Lyons v Central Commercial Properties [1958] 1 WLR 869 (CA) ("Lyons") at page 878,

> "It is clear from the words of the section that there is a measure of discretion as regards the state of disrepair. The words are "ought not to be granted a new tenancy in view of the state of repair of the holding." Paragraphs (b) and (c) respectively refer to the "persistent delay" of the tenant in paying rent, and "other substantial breaches" by the tenant of his contractual obligations. These provisions seem to indicate that the neglect to repair to which the section refers should be substantial. But the word "ought" in the section in my judgment implies that the discretion of the judge is not confined to the consideration of the state of repair. Without attempting to define the precise limits of that discretion, the judge, as I see it, may have regard to the conduct of the tenant in relation to his obligations, and the reasons for any breach of the covenant to repair which has arisen.
>
> …. The object of paragraphs (a), (b) and (c) of section 30, as I see it, is to enable the judge to refuse to grant a new lease to a tenant who has shown himself to be unsatisfactory in the performance of his obligations under the contract of tenancy."

28. Although Lyons was a case under Section 30(1)(a), the structure of the statute indicates that the same two stage approach exists under subsections (*a*), (*b*) and (*c*). The landlord must first make out the relevant ground of opposition, for which purpose the breaches of covenant under subsections (a) and (c) must have been "substantial" and under subsection (b) must have been "persistent". The court must then go on to consider whether in light of such breaches (and any other reasons under subsection (c)), the tenant "ought not to be" granted a new tenancy.

29. In Horne & Meredith Properties v Cox and Billingsley [2014] 2 P&CR 18 at [27] Lewison LJ described the approach at this second stage in context of a case under Section 30(1)(c),

> "The … question … has been described as a discretion, although I would myself prefer to describe it as a value judgment. The phrase "ought not" does to my mind suggest that there would usually be some fault or culpability on the part of the tenant. The overall question under this head is whether it would be fair to the landlord, having regard to the tenant's past behaviour, for him to be compelled to re-enter into legal relations with the tenant; see Lyons."

30. As indicated above, in addition to criticising the Recorder for failing to make factual findings as to when various alleged breaches of covenant had occurred and whether they were substantial, Mr. Moore also submitted that the Recorder erred in law in his approach to this second stage of the exercise by failing to consider the "ought not to be granted" question separately under subsections 30(1)(a) and 30(1)(c).

31. Mr. Moore advanced two bases for that submission. His first point was based upon the approach of the Court of Appeal in Youssefi v Musselwhite [2014] 2 P&CR 14. Giving the lead judgment, Gloster LJ stated that in considering a failure to repair under Section 30(1)(a) the court had to focus "exclusively" on the state of repair, contrasting that with a case under Section 30(1)(c) where "the approach is broader". Gloster LJ stated, at [29],

> "… under s.30(1)(a), the court has to ask itself whether "in view of the state of repair of the holding", brought about by the tenant's breach of its obligation to repair and maintain the holding, the tenant "ought not to be granted" a new tenancy. This involves the court, for the purposes of this subsection, focusing exclusively on the state of repair and asking itself whether, looking forward to the hypothetical new term, "the proper interests of the landlord would be prejudiced", by continuing in a landlord/tenant relationship with this particular tenant (as per the formulation in John Kay Ltd v Kay); or, put another way, whether it "would be unfair to the landlord" (as per the formulation of Morris LJ in Lyons v Central Commercial Properties London Ltd), having regard to the tenant's past performances and behaviour in relation to its obligation to repair and maintain the holding, if the tenant were to be "foisted on the landlord for a new term" (as per the formulation of Harman J in Lyons v Central Commercial Properties London Ltd). The discretion is not circumscribed in any way other than by the requirement that, in asking itself the question whether the tenant "ought not to be granted" a new tenancy, the court has to focus on the state of repair of the holding. A similar approach applies in relation to the court's consideration of the question whether the tenant "ought not to be granted" a new tenancy under s.30(1)(b) . In that case the focus is on the persistent delay in paying rent which has

> become due and nothing else. Under s.30(1)(c), however, the approach is broader. The court, when considering the "ought not to be granted" issue, is entitled to focus not merely on "other substantial breaches" but also, or alternatively, on "any other reason connected with the tenant's use or management of the holding."

32. Mr. Moore's second point was that when read together with the subsections that preceded it, the reference in Section 30(1)(c) to "*other* substantial breaches" or "any *other* reason connected with the tenant's use or management of the holding" meant that when considering the "ought not to be granted" issue under Section 30(1)(c), the court was precluded from having regard to any breaches of covenant that fell within Section 30(1)(a) or 30(1)(b).

33. In other words, Mr. Moore's submission was that the "ought not to be granted" issue is required to be considered separately in relation to each of the three categories of breach of covenant in subsections (a), (b) and (c).

34. I should say that I have very real doubts that this submission is correct, and I note that Hill & Redman suggests that Youssefi v Musselwhite is not consistent with earlier authorities and may have been decided *per incuriam*.

35. I have already referred to the judgment of Ormerod LJ in Lyons, which points out that the same broad policy underlies each of the subsections in Section 30(1). In Lyons at page 877, Morris LJ also noted the breadth of the wording of the statutory discretion, and referred generally to the court having regard to "the tenant's past performances and behaviour",

> "… where Parliament has not precisely defined, I would hesitate to adopt any particular formula as being all embracing or which might be thought to be restrictive or definitive. I do not think that it is desirable to say more than that once a court has found the facts as regards the tenant's past performances and behaviour and any special circumstances which exist, then, while remembering that it is the future that is being considered, in that the issue is whether the tenant should be refused a new tenancy for the future, the court has to ask itself whether it would be unfair to the landlord, having regard to the tenant's past performances and behaviour, if the tenant were to enjoy the advantage which the Act gives to him."

36. At page 880, Harman J also spoke of Sections 30(1)(a), (b) and (c) in collective terms, referring generally to "the tenant's past conduct as a tenant",

> "In my judgment, paragraphs *(a), (b)* and (c) of section 30 (1) must mean that where the tenant is proved during the currency of the former lease to have been a bad tenant, no new lease ought to be granted unless some exculpating circumstances are enough to excuse the tenant's misdoings. The court must look at the position at the time when the application comes before it—see Betty's Cafes Ltd. v. Phillips Furnishing Stores Ltd. [1957]

> Ch 82, 84 per Birkett L.J - and if the landlord then satisfies the court that there have been substantial breaches either of repairing covenants or in payment of rent, or any other obligations under the tenancy, the court ought to refuse any lease under section [30(1)] whatever promises may be made in the future. Of course, a landlord may have waived the breaches, as it is said was done here, or there may be a sufficient excuse as explained above.
>
> In my judgment, the discretion vested in the court under section 30 (1) (a), *(b)* and (c) is a narrow one; it is limited to the question whether, having regard only to the grounds set out, a new tenancy "ought not" to be granted. This must mean, I think, whether, having regard to the tenant's past conduct as a tenant, it would be equitable to exclude the landlord from his property for a further term or to foist the tenant on him contrary to the contract."

37. In Eichner v Midland Bank Executor and Trustee Co. [1970] 1 WLR 1120 at 1123-1124, a case under Section 30(1)(c), Lord Denning MR referred to Lyons and also suggested that the "ought not to be granted" exercise was not compartmentalised,

> "I think the judge here was not confined to the breach of the tenant in carrying on the translation business of the Interlingua organisation. It was, I think, open to him to look at all the circumstances in connection with that breach: also, I may add, to look at the conduct of the tenant as a whole in regard to his obligations under the tenancy. The judge was not limited to the various grounds stated in the notice."

38. Finally, in Hutchinson v Lamberth [1984] 1 EGLR 74 (a case not cited to the Court of Appeal in Youssefi v Musselwhite) O'Connor LJ rejected a narrow approach to the exercise of discretion under Section 30(1)(c),

> "In my judgment that submission is not well founded, for this reason: if the case had been before the court solely on the ground of persistent delay in paying rent, it would have been open to the landlord to lead evidence of all collateral matters affecting the occupancy of the premises by the tenants, and they would have been permitted to give evidence in order to help the learned judge exercise her discretion as to what had been going on. Therefore it cannot be said that the evidence about nuisance was wrongly before her."

39. As a matter of principle, the relationship of landlord and tenant is a unitary contractual relationship, and the compartmentalised approach to Sections 30(1)(a), (b) and (c) advocated by Mr. Moore could have unjust results. The most obvious is that a tenant could breach covenants falling under each of Sections 30(1)(a), (b) and (c) which, if viewed separately, might not mean that he should be denied a new tenancy. But if taken collectively – as would reflect the situation of the parties in practice – the

totality of the breaches by the tenant could be of such significance as to make it obviously unfair to compel the landlord to re-enter into legal relations with the tenant.

40. There would also seem to be no obvious policy reason why, under Section 30(1)(c), the court could take into account reasons relating to the use and management of the holding that did not amount to a breach of covenant, but would be prohibited from taking into account conduct that actually amounted to a breach of the most significant obligations that a tenant has – namely to keep the property in good repair and to pay rent.

41. Nor do I think that the wording and structure of Section 30(1) or the reference to "other" breaches or reasons in Section 30(1)(c) obviously mandates a separate approach to each subsection. The separate delineation of breaches in subsections (a) and (b) might be seen as simply setting out explicitly the most important covenants likely to breached by a tenant.

42. However, having recorded my reservations about accepting Mr. Moore's submission, for reasons that follow, I do not think that I need to resolve this question to determine the appeal. In my view, even if the exercise of discretion has to be approached separately under subsections 30(1)(a) and 30(1)(c), the decision of the Recorder was manifestly correct.

Breaches of the Lease under Section 30(1)(a): repair and maintenance

43. Clause 18 of the Lease provided,

> "The tenant shall keep the Property clean and tidy and in good repair but in no better state of repair than the Property is in at the date of this Lease."

44. Mr. Moore contended that the Recorder erred because in finding that there were breaches of clause 18, (i) he failed to take into account that Mr. Turner had seen no evidence of disrepair in an inspection in 2019 after that of Mr. Brumfitt in 2018; (ii) that the Recorder failed to consider whether the breaches of the covenant to keep the premises in repair were "substantial"; and (iii) that the Recorder made no finding and had no basis for finding that the Property was in a worse state by reason of the items of disrepair than it had been at the date of grant of the Lease on 5 April 2017.

45. I reject those criticisms of the Recorder's judgment.

46. First, the Recorder observed at paragraph 15 of his judgment that Mr. Turner's report went largely to valuation, and that his single relevant comment about not noticing any evidence of disrepair in March 2019 was made in passing and was entirely unspecific. Mr. Turner also simply repeated his instructions from Mr. Guest about the various items in the Section 25 Notice, which were largely to the effect that Mr. Guest had been given consent for the alterations, sharing of the Property and burning of substances.

47. There was therefore nothing of any independent substance in Mr. Turner's report to cast any material doubt upon the weight of contrary evidence to which the Recorder referred, showing that the Stables were not clean and tidy and in good repair. In

addition to the oral evidence of Mr. Kent, that evidence included the photographs taken by Mr. Kent in November 2017 which showed numerous items of untidiness and disrepair which were confirmed as being unremedied by Mr. Brumfitt at the time of his inspection in April 2018.

48. Secondly, the parties were agreed that it was necessary for breaches of covenant to be "substantial" to engage the jurisdiction under Section 30(1)(a): see the judgment of Ormerod LJ in Lyons at page 878. Although the Recorder did not expressly use the word "substantial" when describing the items of disrepair in his judgment, it is quite clear that he was well aware of the need that they should be, because he quoted Ormerod LJ's dictum from Lyons when considering the law in paragraph 24 of his judgment.

49. Although the Recorder did not say so in terms, in my judgment it is quite clear that he took the view, and was entitled to take the view, that the breaches of clause 18 as regards repair and maintenance that he found to be proven were indeed substantial. In general terms, in paragraph 23 of his judgment, the Recorder accepted the evidence of Mr. Kent and his father, Mr. Mark Kent, which the Recorder described in paragraph 6 as being to the effect that by the end of the Lease in April 2018,

> "the condition of the [Property] in terms of maintenance and repair had *greatly* deteriorated."
>
> (my emphasis)

50. Further, as regards the requirement to keep the Property clean and tidy, the Recorder's general finding (in paragraph 16 of his judgment) was that the Property was "anything but" clean and tidy, and that, "In common parlance it looks a mess". That language is clearly indicative of a finding that the Recorder regarded the breaches of the covenant to maintain the state of the holding to be substantial.

51. Moreover, one of the breaches of the requirement to keep the Property clean and tidy which the Recorder accepted was the covering of the surface of the paddock and the areas surrounding the yard with plastic waste material. The Recorder considered that matter separately in paragraph 19 of his judgment, accepting the evidence of Mr. Kent's father, Mark Kent, that this would require specialist removal at a cost of "at least thousands of pounds". Again, I consider that it is implicit from his findings on the cost of removal, that the Recorder regarded the presence of this material as a substantial breach of clause 18. In my judgment he was right to do so.

52. Thirdly, as regards the timing of the breaches, it was common ground that by reason of the proviso in the second part of clause 18, in order to constitute a breach of covenant, the lack of cleanliness, untidiness or disrepair of the Property had to have occurred after the start of the Lease on 5 April 2017.

53. The criticisms of the Recorder's judgment in this respect on appeal should be considered against the background of the way in which Mr. Guest put his case at trial: see King v Telegraph Group [2005] 1 WLR 2282 at [54]. Mr. Guest's pleaded case was that,

> "The premises are in the same state of repair as at the start of the Lease and the previous lease which commenced in April 2016."

54. Mr. Guest's pleaded case therefore appeared to be that any disrepair had occurred prior to him becoming a tenant of the property, and no disrepair had occurred since that time. Mr. Guest's pleaded case was not that all of the items of disrepair had occurred during his first lease and holding over prior to the grant of the Lease. As indicated above, Mr. Guest's first lease was in fact granted on 29 January 2016 (not April 2016) at the same time as the sale of the Property to Mr. Kent completed.

55. Against this pleading, the Recorder had the contrary evidence of Mr. Kent to the effect that the Stables were relatively new and in a good state of repair when he bought the Property, and also by the photographs in the marketing brochure for the sale of the Property by the Lumleys which (unsurprisingly) showed that the Stables were clean and tidy and in a good state of repair when marketed. The photographs did not, for example, show any of the plastic waste material which was to be seen around the site in November 2017 and April 2018.

56. Mr. Guest did not deal with this issue in his written evidence at all. It appears, however, that he did so in his oral evidence at trial. But the Recorder dismissed Mr. Guest's evidence in this respect at paragraphs [6] and [23] of his Judgment when he stated that,

> "6. The term of the second Lease expired in April 2018. By this time, according to [Mr. Kent] and his father, the condition of the [Property] in terms of maintenance and repair had greatly deteriorated.
>
> …..
>
> 23. In general, [Mr. Guest]'s evidence was unsatisfactory. He attempted to avoid his responsibilities by suggesting that … the [Property was] in a poor condition prior to his Lease ... I reject his evidence. I prefer the evidence of [Mr. Kent] who, in my judgment, was a thoughtful and honest witness."

57. In my judgment, although the Recorder did not make explicit findings as to the date upon which the various items of untidiness or disrepair had occurred, it is quite clear from these comments that he accepted Mr. Kent's evidence that they had either occurred, or had significantly worsened, during the term of the Lease. In my view that conclusion was adequately supported by the evidence to which I have referred and the lack of any objective or credible evidence to the contrary.

Other Breaches of the Lease: Section 30(1)(c)

Alterations and additions

58. Clause 19 of the Lease prohibited the making of any external or structural alteration or addition to the Property, or any internal non-structural alteration to the Property, in

each case without the consent of the landlord, such consent not to be unreasonably withheld or delayed.

59. In paragraph 18 of his judgment, the Recorder detailed the various alterations and additions which were evident from the photographs taken in November 2017. These included five make-shift temporary stables, the addition of a Portacabin for use during the day by staff, the conversion of a canteen into a bedroom/flat for employees, the installation of internal lighting, and a substantial square conservatory style extension on what appears to be a raised base on the end of the static caravan and a wooden porch on the side.

60. Mr. Kent's evidence was that these alterations had been done without consent during the term of the Lease. In particular he recounted problems with the electricity supply to the Property tripping out as a result of being overloaded following the additions and alterations in the summer of 2017.

61. I accept that the Recorder failed to make explicit findings as to whether the various alterations to which I have referred had been made during the Lease, but again that omission should be viewed in context of the case that Mr. Guest advanced at trial.

62. Mr. Guest's pleaded case appeared to be that at least some of the alterations and additions had been done with the consent of the Lumleys's estate manager prior to the purchase by the Kents, but he adduced no written or other evidence to this effect. There is also no indication of any of the alterations or additions having existed prior to completion of the purchase, either in the marketing photographs or in the terms of the first lease. Nor did Mr. Guest produce any written evidence that he had sought consent from Mr. Kent for any of the additions or alterations at any time prior to the commencement of the Lease. Instead, it seems that Mr. Guest suggested in his oral evidence at trial that Mr. Kent had given his consent to the amendments, but this was roundly rejected by the Recorder in paragraph 23 of his judgment.

63. On this basis I cannot see how it could be contended that the Recorder could have reached any other conclusion but that the amendments and alterations to the Property had all been made without consent, and that they had either been made during the Lease or, if made prior to the Lease, that they were still in place and hence still a breach of covenant during the Lease.

64. Further, in circumstances in which no consent had even been sought from Mr. Kent, I do not see how the Recorder could be criticised for having failed to consider whether consent could reasonably have been withheld. Seeking consent was an essential requirement of the covenant, and the question of whether it could have been withheld was entirely hypothetical.

65. It is the case that the Recorder did not expressly consider whether the relevant alterations or additions amounted to a substantial breach of clause 19 so as to engage Section 30(1)(c). However, having seen the photographs and read the reports and evidence I have no doubt that they were.

Sharing occupation

66. The Recorder found that the sharing of the Property with the artificial turf business principally run by Mrs. Guest was a clear breach of Clause 22.1 of the Lease which prevented use of the Property for any purpose other than as a racing stables, paddock and ancillary uses. It was also a breach of the prohibition against sharing possession or occupation of the Property in Clause 17 of the Lease. There is no challenge to these findings.

67. Again, however, it is said that the Recorder failed to determine whether the presence of that other business amounted to a substantial breach of the relevant covenants. Mr. Moore also submitted that although potential customers were invited on the company's website to "Visit our Wetherby Showroom" there was no evidence of any members of the public actually having done so or having done so in materially greater numbers than might have visited the Property in connection with the permitted business carried on at the Stables. He therefore contended that there was no real prejudice caused to Mr. Kent as landlord.

68. I accept that the Recorder made no explicit findings as to the seriousness of these breaches, but I cannot see what conclusion could have been reached other than that these were substantial breaches. The user covenant prevented the use of the Property for purposes other than racing stables: this was using the Property to conduct a completely different sales business. Moreover, Mrs. Guest's company's occupation of the Property was being advertised in a way which indicated that it was intended to remain *in situ* so that this activity and sharing of occupation had a degree of permanence and was not simply on a transient basis.

69. Given the nature of the covenants, the question of whether the presence of the prohibited turf business caused material prejudice to Mr. Kent by increasing public footfall to the Property does not, as it seems to me, go to reduce the substantial nature of the breaches. Questions of the extent of prejudice caused to the landlord go to the exercise of discretion: see e.g. Beard v Williams [1986] 1 EGLR 148, CA at 150J per Mustill LJ.

Compliance with laws (burning of waste)

70. Clause 23 of the Lease required the tenant to comply with all laws as regards the occupation and use of the Property and all materials kept at or disposed from the Property.

71. The Recorder found, and there is no challenge to his finding, that Mr. Guest had made a practice of burning trade and domestic waste on the Property and had wilfully ignored warnings from the local council about doing so. The Recorder expressly rejected Mr. Guest's evidence that there had only been one fire resulting from a spontaneous ignition of a muck heap. It is also notable that that explanation does not appear to have been given by Mr. Guest to Mr. Turner as noted in paragraph 6 of his report.

72. Although the Recorder did not make an express finding as to the seriousness of this breach, given the context and the apparent lack of any acknowledgement on the part of Mr. Guest of the importance of complying with the law in relation to such activities at the Property, I have no doubt that this was a substantial continuing breach of the provisions in clause 23 of the Lease.

No insurance

73. Clause 7 of the Lease required Mr. Guest to keep the Property insured against loss or damage for the full reinstatement cost.

74. The Recorder found that, contrary to the evidence that Mr. Guest gave to the court to the effect that he had been insured throughout, Mr. Guest had failed to put any insurance into place until 1 August 2018. This was after the one-year term of the Lease had expired, and after he had received communications from Mr. Kent's solicitors in relation to the Section 25 Notice. The Recorder expressly found that this was "a very serious breach of covenant on [Mr. Guest's] part exposing, as it did, [Mr. Kent] to the risk of very substantial loss".

75. Mr. Moore did not challenge the finding that the Property had not been insured, but he submitted that this was not a serious breach and had been remedied by the date of the trial.

76. I consider that the Recorder was right to regard this as a serious breach of the covenant to insure. It was not a situation in which, for example, the Property had been insured for some part of the term of the Lease, but by an administrative error a renewal premium had not been paid and so cover had lapsed for a short period. The simple fact is that until Mr. Guest was challenged in correspondence, he had not bought any insurance for the Property at all, and he then lied about that fact to the court.

77. Moreover, although I accept that the breach had been remedied at the time of the trial, that of itself does not provide an answer to the question of whether the breach of the Lease that had occurred was substantial. It plainly was. As I see it, the question of whether Mr. Guest could be relied upon to insure the Property in the future in light of his previous conduct went to the question of discretion (see below).

<u>Ought a new lease to be granted?</u>

78. It follows from what I have indicated above, that the Recorder was correct to conclude that the grounds for opposition to a new lease were made out in relation to both Section 30(1)(a) and Section 30(1)(c). I therefore turn to the exercise of discretion under those two subsections.

Section 30(1)(a)

79. So far as the exercise of discretion under Section 30(1)(a) is concerned, I have summarised the Recorder's finding in paragraph 26 of his judgment that by reason of Mr. Guest's employment away from the Stables for significant periods and lack of any plan for his future at the Property, "my conclusion is that the [Property] will continue to deteriorate probably at a greater rate than in the past". There was no challenge to those findings.

80. I cannot see why those considerations as to whether the breaches of the covenant as to repair and maintenance would be likely to be remedied by Mr. Guest were inappropriate or irrelevant to the exercise of discretion under Section 30(1)(a). In my judgment, the breaches that had already been catalogued were extensive, and the

Recorder's assessment, having heard the evidence, that the condition of the Property would get worse cannot sensibly be challenged. In my view it would alone be sufficient reason why Mr. Kent ought not to be required to provide Mr. Guest with a new lease.

Section 30(1)(c)

81. As regards Section 30(1)(c), the Recorder's main concern appears to have been that rather than having racehorses on the Property connected with Mr. Guest's own business, Mr. Guest had told him at trial that the Stables would likely be used as a "Northern Annex" for the Newmarket stables by which Mr. Guest was employed. Although Mr. Moore attacks that finding as "speculative" I cannot see how that can be so if it was based on what Mr. Guest said at trial (which Mr. Moore did not dispute). Nor do I consider that it was irrelevant in the context of an established breach of the covenant against sharing occupation.

82. Mr. Moore also criticised the Recorder for not taking into account the fact that insurance had been put in place by the time of trial and that (he contended) the company selling turf from the Property had ceased to do so.

83. Given that Mr. Guest failed to acknowledge even the fact (never mind the seriousness) of the breach in relation to insurance in his evidence to the court, I do not consider that the fact that insurance was belatedly put in place when he was challenged on the subject provides any remotely satisfactory answer to the discretionary question for the court under Section 30(1)(c) as to whether (as Lewison LJ put it in Horne & Meredith Properties) it would be fair to Mr. Kent having regard to Mr. Guest's past behaviour to be compelled to re-enter into legal relations with Mr. Guest. Moreover, as I have indicated above, the evidence of Mr. Guest appeared to be that even if shared occupation by the turf company might have ceased, shared occupation with the Newmarket stables was in prospect.

84. In the circumstances I cannot see how the value judgment by the Recorder that Mr. Guest ought not to be granted a new lease under section 30(1)(c) can be challenged as wrong or outside the range of acceptable decisions open to the judge. In my judgment it was plainly the right decision.

The combined effect of Sections 30(1)(a) and 30(1)(c)

85. Although I have indicated that I would consider the exercise of discretion separately under subsections (a) and (c), it follows that if the breaches that engaged both subsections can be considered together in the exercise of an overall discretion under Section 30(1), I have no doubt whatever that the decision of the Recorder to refuse a new lease to Mr. Guest was correct.

The construction question

86. As I have upheld the Recorder's decision to refuse a new lease to Mr. Guest, it is not necessary for me to express any concluded view on whether the Recorder was also right to indicate that had he been required to decide the question, he would have held that the house which has been constructed by the Kents on the Property should be excluded from the Lease.

87. Given the Recorder's view of the evidence that the parties had always intended and agreed that the house would be built and occupied by Mr. and Mrs. Kent, and his rejection of Mr. Guest's evidence to the contrary as dishonest, the justice of the Recorder's view in this regard can hardly be doubted.

88. However, although the Recorder set out at length the law on interpretation of documents, he did not explain how he reconciled the agreement that he found the parties had reached with the express wording of the Lease. That simply defined the Property which was subject to the Lease to be,

> "The land and stables at Igmanthorpe Racing Stables shown edged red on the attached plan. "

There was, however, no separate red edging around the area where the house was, at the time of the Lease, being built by the Kents.

89. One linguistic reconciliation of the wording of the Lease and the agreement that the Recorder found had been reached between the parties might be that the subject of the demise was "the land and stables" identified at the time that the Lease was granted under the name "Igmanthorpe Racing Stables", but not the completed house that would subsequently stand on part of the land and be called something else. That distinction might make sense to the average person in the street. It would not, however, make as much sense to a lawyer, who would understand that a house built upon land, and not capable of being removed other than by demolition, becomes part of the land: see Elitestone v Morris [1997] UKHL 15. There would also remain numerous unanswered questions, e.g. as to how access to that house across the land was to be provided.

90. Suffice to say, therefore, that I would have had considerable difficulty in reaching the obviously just conclusion in the same manner as did the Recorder in the absence of any claim for rectification of the Lease, some argument based upon estoppel, or some discretion as to the property to be subjected to a new lease under the 1954 Act (no such arguments being raised at trial).

91. As it is, however, and for the reasons that I have indicated, the appeal against the refusal to grant a new lease must be dismissed, so the construction issue does not need to be determined.

Conclusion

92. The appeal shall be dismissed. I shall hear argument on costs and consequential matters when I hand down this judgment.