JUDGMENT

General Form of Judgment or Order

In the County Court at Brighton sitting at Havant Justice Centre	
Claim Number	**H00BN161-164**
Date	**10 January 2022**

1) ANDREW JOHN MORTIMER (2) FIONA JANE MORTIMER (3) REGINALD ALBERT PRESSNEY (4) SUSAN PRESSNEY (5) JEREMY JOHN OATES (6) NICOLAS RICHARD ARTHUR DOWLER	**The Claimants HMB.155723-2**
ECO CHIC LIMITED (Company No. 05343564)	**The Defendant Ref HAF/37585.0013**

BEFORE Judge Tildesley OBE, sitting as a Judge of the County Court at Havant Justice Centre, Elmleigh Road, Havant PO9 2AL on 20 and 21 October 2021.

UPON hearing from Adam Rosenthal of Queen's Counsel for the Claimants and Philip Rainey of Queen's Counsel and Ellodie Gibbons of Counsel for the Defendant, and on reserving judgment.

AND UPON handing down judgment on 10 January 2022.

IT IS ORDERED AND DECLARED THAT:

1. Andrew John Mortimer and Fiona Jane Mortimer are entitled to acquire the freehold of the house and premises at Plot 120 Howells Mere, Lower Mill Estate, Mill Lane, Somerford Keynes, Cirencester in accordance with the provisions of Part 1 of the Leasehold Reform Act 1967 and made under section 20(2)(a) of the said Act.

2. Reginald Albert Pressney and Susan Pressney are entitled to acquire the freehold of the house and premises at Plot 41, Lower Mill Estate, Mill Lane, Somerford Keynes, Cirencester GL7 6DU in accordance with the provisions of

Part 1 of the Leasehold Reform Act 1967 and made under section 20(2)(a) of the said Act.

3. Jeremy John Oates is entitled to acquire the freehold of the house and premises at Plot 61 Howells Mere, Lower Mill Estate, Mill Lane, Somerford Keynes, Cirencester in accordance with the provisions of Part 1 of the Leasehold Reform Act 1967 and made under section 20(2)(a) of the said Act.

4. Nicholas Richard Arthur Dowler is entitled to acquire the freehold of the house and premises at West Villa, Clearwater, Lower Mill Lane, Somerford Keynes, Cirencester GL7 6FJ in accordance with the provisions of Part 1 of the Leasehold Reform Act 1967 and made under section 20(2)(a) of the said Act.

5. The Defendant shall pay the Claimants' costs of action on the standard basis, to be assessed on a detailed assessment if not agreed.

6. The Defendant shall pay to the Claimants costs on account in the sum of £50,766.72 inclusive of VAT within 14 days from the date of the Order.

Dated 10 January 2022

REASONS

The Issue

1. The Claimants seek to acquire the freehold of their respective properties which they hold on leases of various dates but are all for terms of 999 years from 1 January 1999 in accordance with Part 1 of the Leasehold Reform Act 1967 ("the 1967 Act"). The Claimants' leasehold titles of their respective properties are registered at HM Land Registry under title numbers GR360177, GR311224, GR323878, and GR270450. The Defendant is the landlord of the Claimants' properties and the freehold title is registered under title no. GR398718. The Lower Mill Estate Limited have the benefit of a yearly rentcharge registered at HM Land Registry under Title Number GR412794.

2. The Claimants' tenancies of their respective properties do not satisfy the low rent test in section 4 and section 4A of the 1967 Act. They are, however, not excluded tenancies for the purposes of section 1AA(3) of the 1967 Act, and are not shared ownership leases within section 622 of the Housing Act 1985. The Claimants' claims for the freehold of their respective properties are, therefore, based on section 1AA of the 1967 Act.

3. On various dates the Claimants gave notice of their desire to acquire the freehold of their respective properties to the Defendant in accordance with section 5 of the 1967 Act. The Defendant refused to accept the validity of the Claimants' rights to acquire the freehold of their respective properties on the ground that the properties were not houses within the meaning of section 2(1) of the 1967 Act, which defines a house as follows:

> "For purposes of this Part of this Act, "house" includes any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes; and—
>
> (a) where a building is divided horizontally, the flats or other units into which it is so divided are not separate "houses", though the building as a whole may be; and
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> (b) where a building is divided vertically the building as a whole is not a "house" though any of the units into which it is divided may be"

4. The question of whether the respective properties are houses within the meaning of section 2(1) of the 1967 Act is the sole issue between the parties. Although on the face of it the statutory definition of "house" would appear to be relatively straightforward, it has been subject to much judicial consideration having been considered four times by the House of Lords and once by the Supreme Court. The most recent decision is the one of the Supreme Court in the conjoined appeals of *Hosebay Limited v Day; Lexgorge Limited v Howard de Walden Estates* [2012] 1WLR 2884 (SC). Lord Carnwath gave the

leading judgment and after considering the statutory definition in section 2(1) of the 1967 Act he said this at [8] and [9]:

> "We are concerned with the main part of the definition, which raises two separate but overlapping questions: (i) is the building one " designed or adapted for living in" ? (ii) is it a "house . . . reasonably so called" ? Both questions remain live in *Hosebay*; in *Lexgorge* the first has been conceded in favour of the lessees.
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> The two parts of the definition are in a sense belt and braces: complementary and overlapping, but both needing to be satisfied. The first looks to the identity or function of the building based on its physical characteristics. The second ties the definition to the primary meaning of house as a single residence, as opposed to say a hostel or a block of flats; but that in turn is qualified by the specific provision relating to houses divided horizontally. Both parts need to be read in the context of a statute which is about houses as places to live in, not about houses as pieces of architecture, or features in a street scene, or names in an address book".

5. Counsel for the parties contended that the facts of the Claims raised a novel issue concerning the definition of a house. The circumstances giving rise to this proposition revolved around the facts that the leases of and the planning permissions for the properties restricted the Claimants' use of them to private holiday residences, and in two of the four leases also prohibited occupation of the properties between 6 January and 5 February each year. According to Counsel, these circumstances had not been previously considered by the higher courts on whether they met the definition of house within section 2(1) of the 1967 Act. Mr Rainey QC stated that there did not appear to be any enfranchisement case which had dealt with holiday accommodation. Mr Rainey QC indicated that a search of the on-line version of *Hague on Leasehold Enfranchisement* on *Westlaw* had found that the very word "holiday" only appeared four times in the seventh edition, in irrelevant contexts. This Court was, therefore, faced with the challenge *to do its best to apply the law to the facts as found and decide whether the property in question is or is not a house, with the benefit of its own evaluation* (per McCombe LJ at [78] *Grosvenor (Mayfair) Estate v Merix International Ventures Limited* [2017] L&TR 18 (CA))."

6. Mr Rosenthal QC distilled the Claimants' case in the form of a "simple exam question". He prefaced the question with the rhetorical statement that "if the four properties were the Claimants' primary residences there could be no argument that the properties would clearly fall within the definition of a house in section 2(1) of the 1967 Act". Mr Rosenthal QC then posed the question which was: "did the terms of user covenant, the planning condition or the fact that the Claimants did not occupy the properties as their principal or main residence take the properties outside the statutory definition of house". Mr Rosenthal QC submitted that the correct answer was "No".

7. In support of his proposition Mr Rosenthal QC relied on the Claimants' evidence of the physical characteristics of the properties which demonstrated, in Mr Rosenthal QC's view, that the properties were designed for living in.

8. Mr Rosenthal QC after considering the authorities questioned the weight placed by the Defendant on the restrictions imposed by the "User" covenant and planning agreements. Mr Rosenthal QC, nevertheless, accepted that the restrictions were relevant to the factual matrix of the case. Mr Rosenthal QC argued that the restrictions, when construed, were designed to prevent the Claimants from living in the properties as their principal homes or residences. Further the restrictions did not prohibit residential use or put a constraint on the extent of the property that could be applied to residential use. Mr Rosenthal QC described the restrictions in the User covenant and planning agreements as "temporal" which had the effect of limiting the amount of time that the properties could be occupied by the Claimants as residences. Mr Rosenthal insisted that the limitations did not make the properties commercial or industrial, and that they were totally different from "the self-catering hotel" in *Hosebay*.

9. Mr Rosenthal QC argued that the abolition of the residence test for the enfranchisement of houses brought about by amendments to the 1967 Act by the Commonhold and Leasehold Reform Act 2002 was significant for this case. This was because it represented a marked policy shift from residence to ownership, and as acknowledged by the Supreme Court in *Hosebay* the policy shift allowed long leaseholders of second homes to benefit from the enfranchisement provisions.

10. Mr Rosenthal QC submitted that the only bar to regarding these properties as houses was the fact that they were not the principal or main residences of the Claimants. Mr Rosenthal QC concluded that it, therefore, followed with the abolition of the residence test the answer to the issue in this case was simple: it is reasonable to call these properties houses within the meaning of section 2(1) of the 1967 Act.

11. Mr Rainey QC reminded the Court of the words of Mummery LJ in *Henley v Cohen* [2013] 2 P&CR 10 (CA) that the question for decision *was a precise statutory one: are the Premises "a house reasonably so called" within the scope of s.2(1) of the 1967 Act? That is not the same as a more direct non-statutory inquiry as to whether the Premises are a house*. Mr Rainey QC disagreed with the approach of reducing the issue to an exam question which implied to him that it was all very technical. Mr Rainey QC asserted that there was nothing unreal about the facts in this case. Mr Rainey QC stated that the authorities on the definition of house had one thing in common: the application of the legal principles turned on relatively small crucial points. Mr Rainey QC also disagreed with the formulation of the issue by Mr Rosenthal QC of "if the property had been occupied as primary residences ...." which in his view was tantamount to saying if the crucial facts had been different. According to Mr Rainey QC the correct approach was to apply the principles

from the authorities to the material facts of the case which was a question of law.

12. Mr Rainey QC placed weight on the "User" covenant in the lease which not only required the lessee to use the property as a private holiday residence but to comply with the terms of the planning consent. The latter stipulated that the holiday units shall be occupied for holiday accommodation and not as permanent unrestricted residential accommodation or as principal or primary places of residence. Mr Rainey QC argued that the properties were designed to comply with the planning consent for holiday use, which was reinforced by their location in a holiday park. Mr Rainey QC contended the fact that the properties were substantial buildings and capable of being lived in was not the test. The correct test was what were the properties designed for and in this case they were clearly designed for holiday use. Mr Rainey QC said that in any event the Claimants did not live in the properties, and that they all gave evidence of a settled pattern of use for holidays which was consistent with the "User" covenant restricting the properties for holiday residences. Mr Rainey QC submitted that after taking all these factors into account, the design, the location, the settled use, the "User" covenant, and the planning restrictions the properties were holiday units. In Mr Rainey QC's view it was not reasonable to call a holiday unit a house within the meaning of section 2(1) of the 1967 Act.

13. Mr Rainey QC challenged the importance placed by Mr Rosenthal QC on the abolition of the residence test. Mr Rainey QC acknowledged that this case would not have happened if the residence test had been in place but it did not follow from its abolition that properties were more likely to qualify for enfranchisement. In his view the effect of the abolition meant that greater focus would be given to the definition of a house under section 2(1) of the 1967 Act. Mr Rainey QC pointed out that the statutory definition of house under the 1967 Act had remained unaltered since its enactment. In this regard he relied on the judgment of HHJ Marshall QC in *Cadogan v Magnohard*, 16/11/11, (Unreported) where she said at [121] "*I remind myself the meaning of the term (house[1]) was fixed in 1967, when the statute was originally enacted, and its context at that date, was with the focus was on the tenant who resided in the building in question as his home*".

14. The preceding paragraphs have set the scene, by identifying the issue to be decided and summarising the arguments on behalf of the parties. The summaries are simply a guide and do not represent the depth of the submissions presented.

15. The case was heard on 20 and 21 October 2021 at Havant Justice Centre. Ms Helen Michelle Bell of Mayo Wynne Baxter LLP, the Claimants' solicitor, supplied a witness statement for each claim setting out the procedural history and exhibiting office copies of the relevant title deeds, leases, and deeds of variation. The Claimants, Mr Andrew John Mortimer, Mr Reginald Albert Pressney, Mr Jeremy Oates and Mr Nicolas Richard Arthur Dowler each provided a witness statement to support their respective claims. Mr Daniel

[1] Court's italics.

Jonathan Dodman of Goodman Derrick LLP, the Defendant's solicitor, supplied the witness statement for the Defendant. Mr Dodman exhibited copies of the various planning consents for the development and eight planning agreements which were noted at schedule 3 of the leases, copies of the grants and easements granted to the Claimants, copies of the deed of assignment of the rent charge, and of the deed dealing with the novation and copies of plans and photographs of the subject properties and the estate.

16. The parties agreed that the evidence was not contentious. The Defendant indicated that it had no reason to dispute the Claimants' evidence as to how they used the properties; the physical nature of the properties and that the lease terms were a matter of documentary and photographic record. The parties decided not to call the witnesses. In those circumstances the Court agreed that it was not necessary for the witnesses to confirm their statements orally at the hearing. The Court, however, requested Mr Rosenthal QC, and Mr Rainey QC to indicate which parts of the evidence they were relying upon and to specify differences of emphases on the relevant evidence. References in the decision to documents in the hearing bundle are in [ ].

17. The Court proceeded to hear the submissions of Mr Rosenthal QC for the Claimant and Mr Rainey QC and Ms Ellodie Gibbons for the Defendant which were supported by skeleton arguments. The Court reserved its judgment at the end of the hearing.

The Evidence

18. Ms Bell gave the following dates for the Notices to Acquire the Freehold served by the Claimants on the Defendant: 24 January 2020 (Mr and Mrs Mortimer); 17 September 2019 (Mr and Mrs Pressney); 4 September 2019 (Mr Oates); and 9 September 2019 (Mr Dowler).

19. Mr Mortimer said in his witness statement dated 10 June 2021 [1330-1335] that he and his wife (Mrs Mortimer) decided to purchase a plot of land at Lower Mill in 2011 and commissioned the Landlord's subsidiary company (CBL) to build the property for them. Mr Mortimer stated that on 29 July 2011 The Lower Mill Estate Limited granted them a lease of the property, known as plot no.120 Howells Mere for a term of 999 years from 1 January 1999.

20. Mr Mortimer said that they modified the basic house design supplied by CBL to fit with their requirements, and moved into the property in late August 2012. Mr Mortimer stated that the property is a detached house over three floors consisting of a living room, kitchen, five bedrooms and three bathrooms. Photographs of the property are exhibited at [1290] and [1291] which confirm that the property is a substantial detached structure of concrete block and steel frame construction with a sloping roof with Rheinzinc covering and balconies on the first and second floors at both ends of the building. The specification for the building prepared by Richard Reid and Associates dated 1 April 2010 referred to House Type D2A and exhibited at [1292] and [1293]. The building is covered by Buildmark insurance issued by the NHBC [1397].

21. Mr Mortimer said that since they purchased the property it has only been used by them, extended family and friends. Mr Mortimer asserted that it had never been rented out. Mr Mortimer stated that it was an ordinary house designed for living in and that was what was done in it. Mr Mortimer said that they effectively split their living between this property and their primary residence. Mr Mortimer said that he had not kept records of the exact dates that they had spent at the property. In a typical year they had spent one or two weekends a month, two further weeks in the summer and typically in addition the Xmas and New Year period. The property had also been used by their adult daughter. Mr Mortimer said that during the Pandemic the property had been used less because of the restrictions on travel. According to Mr Mortimer, the typical use of the property would be between 70 to 100 days per year. Mr Mortimer produced copies of the Annual Audit Questionnaire for the periods up to 14 August 2019 and 11 September 2020 in which they declared occupation of the property for 150 days in the 12 months leading up to each submission. The questionnaire was completed for the benefit of Cotswold District Council to ensure that the freeholder complied with the planning consent and agreements.

22. Mr Mortimer said that the property like any home was full of their furniture, their clothes, their cooking utensils and there was always food in the cupboards and freezer. Mr Mortimer stated that the utilities were in their name and that they also visited the property during the day to undertake repairs and meet contractors. Mr Mortimer asserted that the house was built and sold to them as a second home for living in.

23. Mr Pressney said in his witness statement dated 11 June 2021 [1417-1422] that on 16 August 2007 The Lower Mill Estate Limited granted his wife (Mrs Pressney) and him a lease of the property, known as plot no. 41 Howells Mere for a term of 999 years from 1 January 1999.

24. Mr Pressney stated that it took some time for the house to be constructed and they only started to occupy the property in August 2009. Mr Pressney said since then they and their adult children and family had spent on average approximately 80 days a year at the property. Mr Pressney explained that it was a requirement for each owner to complete a return each year stating roughly how many days a year they have used the property. Mr Pressney said that he had not been able to find copies of all of the returns but the ones retained by him showed that they occupied for 100 days in the 12 months up to 9 October 2015; 70 days in the 12 months up to 17 October 2016 and 60 days in the 12 months up to September 2020 which was restricted by the Pandemic due to lockdown and travel restrictions being in place. Mr Pressney stated that they had never sublet the property.

25. Mr Pressney said that the property is a detached house over two floors consisting of an open plan living, dining and kitchen area, three bedrooms, two bathrooms (one en-suite) and separate toilet facilities. Photographs of the property are exhibited at [1281-82] which confirm that the property is a large detached structure of block and frame construction cladded on the front with

"Cotswold" yellow brick with a pitched roof and balconies on the ground and first floors at the rear of the building. The drawings for the building prepared by Richard Reid and Associates dated 20 June 2007 referred to House Type B1A are exhibited at [1283-84].

26. Mr Pressney asserted that they and their family lived in the property. Mr Pressney pointed to the facts that the property was full of their furniture, their clothes, their cooking utensils and food. Mr Pressney said that they had all the normal running costs of a house, for example, maintenance, upkeep, utilities, cable Wifi and they had to insure both the building and its contents. Mr Pressney stated they also had to pay the annual Council Tax and that they had voted in the local Cotswold elections.

27. Mr Pressney said that on 21 November 2019 they entered into a Deed of Variation which altered the terms of the lease for a premium of £15,000 by deleting the prohibition on occupation from 6 January until 5 February in any one year.

28. Mr Oates said in his witness statement dated 11 June 2021 [1428-1433] that on 20 June 2008 The Lower Mill Estate Limited granted him a lease of the property, known as plot no. 61 Howells Mere for a term of 999 years from 1 January 1999.

29. Mr Oates said that the property is a detached house over three floors consisting of two large living rooms, one of which incorporates a dining area, a kitchen, six bedrooms of which one is currently used as a study, four bathrooms and an individual toilet. Photographs of the property are exhibited at [1287-88] which confirm that the property is a substantial detached structure of concrete block and steel frame construction with a sloping roof with Rheinzinc covering and balconies on the first and second floors at both ends of the building. Mr Oates produced further photographs of the interior of the property at [1436-1441] which showed that it was furnished to a high standard.

30. Mr Oates said since he purchased the property it had been occupied by him and his immediate family for about two to three weeks a year on average. Mr Oates said that he had not been able to find copies of all of the completed Audit Questionnaire returns but the ones retained by him showed that they occupied for 20 days in the 12 months up to 18 November 2018 and approximately 20 days in the 12 months up to 28 December 2019. Mr Oates stated that he had never sublet the property.

31. Mr Oates asserted that the property was an ordinary house designed for living in and that was what was done in it. Mr Oates said the property was full of their furniture, their clothes, their cooking utensils and was serviced by utilities in his name.

32. Mr Oates said that on 21 November 2019 he entered into a Deed of Variation which altered the terms of the lease for a premium of £15,000 by deleting the prohibition on occupation from 6 January until 5 February in any one year.

33. Mr Dowler said in his witness statement dated 12 June 2021 [1444-1449] that on 27 February 2004 The Lower Mill Estate Limited granted him a lease of the property, known as plot no. 16 West Villa, Clearwater for a term of 999 years from 1 January 1999.

34. Mr Dowler said that the property is a detached house over two floors consisting of three bedrooms, and two bathrooms downstairs and upstairs a combined living room and kitchen with an utility area and toilet. Photographs of the property are exhibited at [1299-1302] which confirm that the property is a large detached structure of block and frame construction, timber cladded on the front with a pitched roof and balconies on the ground and first floors at the rear of the building. Mr Dowler produced further photographs of the interior of the property at [1452-1456] which showed that it was furnished to a high standard and stocked with personal items including photographs, Toby jugs, miniature spirit bottles and CDs.

35. Mr Dowler stated that the lease allowed him to underlet the Property but he had never done so. Mr Dowler said since he purchased the Property, it had been used by himself and his immediate family as a home for weekends and sometimes during the week. Mr Dowler stated it was a requirement for each owner to complete a return each year stating roughly how many days a year he and his family had used the property. Mr Dowler had not been able to find copies of all the returns but he exhibited copies of those which he had retained. Those showed that he and his family had occupied the property for 80 days in the 12 months up to 19 November 2018, 75 days in the 12 months up to 14 August 2019 and 75 days in the 12 months up to 14 September 2020. He estimated for the other years that they had lived in the property approximately 75 days per year - typically for one week at Easter, ten days at Christmas and weekends.

36. Mr Dowler asserted that he kept personal belongings in the property all year round, it was full of their furniture, clothes and cooking utensils. He paid for the utilities and was responsible for the maintenance of the property. Mr Dowler insisted that they lived in the property and treated it as their second home.

37. Mr Dodman said in his witness statement dated 22 April 2021 [1054-1061] that on 19 November 2015 the Defendant acquired the freehold title from its predecessor Lower Mill Estate Limited. The latter company remains the owner of the common parts over which the Claimants enjoyed the benefit of easements and other rights. Mr Dodman stated that the Defendant and Lower Mill Estate Limited are associated companies and share the same registered office and boards of directors, and are subsidiary companies of Habitat First Group.

38. Mr Dodman stated that the subject properties are located on The Lower Mill Estate holiday development ("the Estate"), which comprises holiday homes, a restaurant, pizza shack, shop and leisure and spa facilities set around seven lakes and three rivers across 450 acres. Mr Dodman added that there are 358 properties on the Estate, the majority of which are holiday homes and Barns on the Estate held on 999 year leases.

39. Mr Dodman produced a Planning Guide published in November 2020 entitled "Lower Mill" [1305-1329] which he said outlined and illustrated the scope and extent of the Estate, its history and the facilities provided to lessees. The document described the Ethos behind Habitat First which is to create private vacation home communities that share a love for mother nature. The document also included details of approved "house designs" for construction on the Estate.

40. Mr Rainey QC referred the Court to the Map of Lower Mill [1312] which he said showed that the properties were located in a holiday estate surrounded by eight lakes and at some distance from local facilities. I observed from the map a significant development of detached properties located on individual plots around various lakes supported by an infrastructure of roads and walkways. There was a larger construction in the centre of the map which presumably housed the facilities for the development. The map had notes about the various lakes which gave details of fishing and water sports and about the nature reserves.

41. Mr Rosenthal QC referred the Court to a promotional brochure issued by the Landlord which was exhibited to Mr Mortimer's statement at [1338]. Mr Rosenthal QC contended that as the Defendant was relying on the planning permission to determine whether the property was designed for living in, it was equally permissible for the Claimant to rely on the Landlord's representations on the proposed design in the brochure. In this regard Mr Rosenthal identified various references where the Landlord described the property as "homes"; "the house is designed for year round living"; and "vacation homes". Mr Rainey QC retorted that the evidence of the brochure was a "non-statutory" enquiry, and, therefore, irrelevant to the question to be decided by the Court.

The Leases

42. The evidence included copies of the leases for each property together with copies of deeds of variation. Each lease demised to the Tenant the Demised Premises which was identified as the plot of land and the dwelling constructed on it together with various rights including the right to use leisure facilities and the Spa. The lease defined building as the dwelling to be constructed on and to form part of the Demised Premises.

43. Each lease is held on a term of 999 years subject to payment of rent and service charge. The rent is reviewed each year in accordance with the Retail Prices Index. The rent provisions in the leases for the four properties have been varied by deed dated 11 August 2016. Counsel did not consider the substance of the variations in respect of rent relevant to the present dispute.

44. Counsel drew the Court's attention to the following clauses which were common to the leases of the four properties[2]:

[2] "Please note that the clause numbers in the other leases differ: in the lease owned by Mr Dowler, 6.10 User and 6.14 Town and Country Planning; in the leases owned by Mr and Mrs Pressney and Mr Oates the covenants against alienation referred to begin at 6.23. In all the other leases Clause 6.24 as set out

User: Clause 6.11: "not to carry on any trade or business (which expression shall not include subletting of the Demised Premises for holiday use) on the Demised Premises but to use any building which may from time to time be erected thereon and occupy the same only as a private holiday residence and to use the Parking Spaces only for the purpose of parking thereon roadworthy private motor vehicles and to comply [in all respects] with the terms of the Planning Consent [(and in particular the condition requiring non occupation of the Demised Premises from 6 January until 5 February inclusive in each year)]in so far as they relate to the Demised Premises (including any buildings from time to time forming part of the same) and their use and occupation".

Town & Country Planning: Clause 6.15: "not to do or permit or suffer to be done or omitted any act matter or thing on or in respect of the Demised premises which might contravene the Agreements or the provisions of the Planning Acts and to indemnify and keep the landlord indemnified against all claims demands actions costs expenses and liability arising out of any contravention of the same".

Alienation: Clause 6.22: "not to underlet the Demised Premises (other than to the family and friends of the Tenant at no charge) without first serving on the Landlord a notice that the Tenant wishes to underlet the demised premises. The Landlord may within two months from the receipt of the notice from the Tenant require the Tenant to underlet the Demised Premises to a person or person nominated by the Landlord or its letting agent at a reasonable market rental (to be specified by the Landlord acting reasonably) and on such terms as the Landlord may, acting reasonably, specify (but which shall not be inconsistent with the terms of this lease). If the Landlord fails within such period of two months to make any such nomination the Tenant may underlet the Demised premise without a fine or premium and at a rent not less than the open market rent of the Demised Premises.

Alienation: Clause 6.23: "in the event of the underletting of the Demised Premise to a person or persons nominated by the Landlord under clause 6.22 hereof to pay to the Landlord a fee of 10 per cent of the gross rent payable under that underlease.

Alienation: Clause 6.24: "not to assign transfer underlet or part with possession or occupation of the Demised Premises without the consent in writing of the Landlord (such consent not to be unreasonably withheld)".

Alienation: Clause 6.25: "not to allow the devolution transmission assignment or transfer or underlease (for a term of more than one year) of the Demised Premises without ensuring that the person thereby becoming owner or undertenant of the Demised premises shall enter into a direct covenant by deed with the Landlord to pay the Rent the Service Charge and all other sums payable under the lease and to observe and perform all the covenants on the part of the Tenant contained in this lease in the same manner and to the same extent as if the person who becomes the owner or undertenant of the Demised Premises was the original Tenant contained in this lease in the same manner and to the same extent as if the person who becomes the owner or the undertenant of the Demised Premises was the original tenant named herein and to pay the Landlord's reasonable costs in approving the same and completing such deed".

below does not appear and therefore Clause 6.25 set out below is at 6.24 in the lease owned by Mr Dowler."

45. Counsel drew the Court's attention to the deeds of variation dated 21 November 2019 in connection with the leases held by Mr and Mrs Pressney [400] and Mr Oates [664] which amended the User covenant by removing the restriction on occupation:

> **User: Clause 6.11 as amended**: "not to carry on any trade or business (which expression shall not include subletting of the Demised Premises for holiday use) on the Demised Premises but to use any building which may from time to time be erected thereon and occupy the same only as a private holiday residence and to use the Parking Spaces only for the purpose of parking thereon roadworthy private motor vehicles and to comply with the terms of the Planning Consent in so far as they relate to the Demised Premises (including any buildings from time to time forming part of the same) and their use and occupation".

46. Mr Rosenthal QC drew the Court's attention to the Deeds of Variation dated 4 and 25 February 2011 in connection with the leases held by Mr and Mrs Pressney, Mr Oates and Mr Dowler [409] [683] [948][3]. Mr Rosenthal QC considered the insertion of Clause 7.12 was worthy of note. Clause 7.12 states:

> "The Landlord and the Tenant hereby expressly agree and declare for so long as the Demised Premises shall continue to be regarded as a Dwelling as defined by section 38 of the Landlord and Tenant Act 1985 (which the parties understand to be the case as at the date of this deed), sections 18-30B of the Landlord and Tenant Act 1985 shall apply. The Tenant shall therefore have all the rights and enjoy all the protections which are conferred by those provisions for so long as they continue to apply".

Planning Consents and Agreements

47. Mr Rainey QC drew the Court's attention to the Decision Notice dated 4 February 1999 of Cotswold District Council granting outline planning permission for 395 holiday units, a country club, the use of lakes for recreational activity and associated leisure facilities at Lower Mill Farm, Somerford Keynes, Gloucestershire [1096]. Counsel referred to conditions 16, 17 and 18 which stated:

> **Condition 16**: "Notwithstanding Classes C2 and C3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 the holiday units to be erected as part of the development shall be occupied for holiday accommodation only and for the avoidance of doubt shall not be occupied as permanent unrestricted residential accommodation or as principal or primary places of residence. **Reason**: To control the occupancy of the holiday units in an area where unrestricted residential accommodation would not normally be granted".
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> **Condition 17**: "The holiday units to be erected as part of the development will not be occupied from Sixth January until Fifth February inclusive in each year. **Reason:** To control the occupancy of the holiday units in an area where unrestricted residential accommodation would not normally be granted".
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> **Condition 18**: "If at any time hereafter any holiday unit is let out by the developer or sub-let by a leaseholder the lease or sub-lease shall contain a covenant on the part of

[3] The service charge provisions in the lease held by Mr and Mrs Mortimer reflected those in the Deeds of Variation dated February 2011.

the leaseholder or sub leaseholder to comply with the conditions 16 and 17 above the wording of such covenant to have been previously submitted to and approved in writing by the Council's solicitor such approval not unreasonably withheld. **Reason**: to ensure that the restrictions on the occupancy of the unit is strictly controlled in an area where unrestricted residential accommodation would not normally be granted".

48. The Court noted that a list of eight planning agreements pursuant to 106 of the Town and Country Planning Act 1990 were recorded in schedule 3 of the leases. The agreements were registered as local land charges, and therefore, binding on successive owners and occupiers of the land.

49. Counsel referred the Court to the following clauses which were common to the eight agreements. By way of example Counsel cited the relevant clauses of the Planning Agreement between Cotswold District Council and The Lower Mill Estate Limited dated 8 October 2002 [1142]:

Clause 5.1: "That notwithstanding Classes C2 and C3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 the holiday units to be erected upon the Land as part of the Development (Holiday Units) shall be Occupied for holiday accommodation only and for the avoidance of doubt shall not be Occupied as permanent unrestricted residential accommodation or as principal or primary places of residence."

Clause 5.2: "That the Holiday Units to be erected as part of the Development will not be occupied from the 6 January until 5 February inclusive in each year".

Clause 5.3: "That if at any time hereafter any Holiday Unit is let out by the Developer or sublet by a leaseholder, the lease or sublease shall contain a covenant on the part of the leaseholder or sub-leaseholder to comply with covenants 5.1 and 5.2 above the wording of such covenant to have been previously submitted to and approved in writing by the Council's solicitors, such approval not to be unreasonably withheld".

Clause 5.4: "That if any time hereafter the Developer shall dispose of its freehold interest in the Land or any holiday unit is sold on a long lease (over twenty one years) the Developer will provide the Council with the full name(s) and address of the purchaser, lessee or person to whom the freehold interest of the Unit has been disposed to within one month of the date of the sale, lease or disposition".

Clause 5.5: "That as from the date any Holiday Unit is first occupied the Developer will at all times thereafter:

A) undertake an annual audit of all its lessees by the thirtieth day of November of every year to ascertain that the units are being occupied for holiday purposes and not as principal or primary pieces of residence:

B) remedy the situation in the event that there are any detected breaches of the occupancy restriction: and

C) report all breaches immediately to the Council".

50. Mr Rainey QC also drew the Court's attention to the report of Mr Adrian Walker, Planning Officer who dealt with the variation of the Planning Condition [1227-1230]. The variation removed the prohibition on occupation

of the holiday units from 6 January to 5 February for specific units which enabled all year round occupation of those units.

51. Mr Rainey QC said that Mr Walker's report explained the interaction between the two planning restrictions and why the seasonal occupancy restriction was considered both unnecessary and potentially unhelpful to the local economy. Mr Walker's ground for saying it was unnecessary was because variation of the condition would not change the use of the lodge and it would still be restricted to holiday occupancy only and could not be lived in as a permanent or primary place of residence. Mr Walker also stated that the lodges were not temporary in their nature, unlike caravans, and there was no environmental reason why they could not be used as holiday accommodation in January/February. Mr Walker added that the removal of the condition would have a very small benefit to the local economy during the quieter period after Christmas and before the February half term.

52. Mr Rainey QC also said that the report gave the rationale for why holiday occupancy was the only permitted use, namely, to ensure there was less pressure on local services that would be the case with permanent residential occupation.

Other documentation

53. Mr Rosenthal QC referred to the Deed dated 21 July 2012 between The Lower Mill Estate Limited and BBC Pension Trust Limited which assigned the benefit of the covenant to pay the Rents given by the Tenants in the Leases, and the right to demand and recover the Rents and all its rights to payment and receipt of Rents and VAT thereon and Interest.

54. Mr Rosenthal QC identified Clause 3.17 headed *"Where a Tenant Acquires the Freehold Reversion to a lease through enfranchisement"*, which in his view recognised the Tenant's right to enfranchise the property. Mr Rainey QC observed that the reference to the right to enfranchise was subject to the qualification in 3.17 *"and the Assignor is reasonably satisfied that the Tenant is entitled to acquire the freehold by virtue of the relevant statutory provision"*.

Consideration

55. The question for the Court is whether the four properties meet the definition of a house within the meaning of section 2(1) of the 1967 Act. The dispute in this case is narrowed to the first part of the definition, namely, "a house includes any building designed or adapted for living in and reasonably so called".

56. The question to be decided is a precise statutory one:

> "Are the Premises a house reasonably so called within the scope of s.2(1) of the 1967 Act? That is not the same as a more direct non-statutory inquiry as to whether the Premises are a house. Answering the specific statutory question

> involves a full exploration of the Premises from a number of different aspects and angles followed by an overall assessment of the entire situation. The various matters must be considered in the round before deciding whether it is reasonable to call the Premises a house" (per Mummery LJ at [53] *Henley v Cohen* [2013] EWCA 480).

57. It follows that the question to be decided is one of law and not purely one of fact. The difficulty with this case, as Counsel have identified, is that the subject properties are not of a type exactly similar to ones previously characterised by the higher courts. The preponderance of the decisions by the higher courts relate to mixed use premises so there is no blue print for applying the higher courts' legal analysis of particular types of properties to the facts of this case. Given those circumstances I, therefore, adopt the approach advocated by McCombe LJ in *Grosvenor (Mayfair) Estate v Merix International Ventures Limited* [2017] EWCA Civ 190 at [78]:

> "Where the trial court is faced with a property of a type not exactly similar to one previously characterised by the higher courts, it must surely do its best to apply the law to the facts as found and decide whether the property in question is or is not a house, with the benefit of its own evaluation".

58. The danger with this case is that the Court falls into the trap of believing it is dealing with a novel issue (a new type of property), and abandons the rigour of a statutory inquiry. The properties were variously described during the hearing as "second homes", "holiday accommodation" and "holiday units". The use of these labels is understandable as a means of emphasising particular lines of argument but their use does not do justice to the depth and scope of the arguments presented and divert attention from the critical question of whether these four properties are houses within the meaning of section 2(1) of the 1967 Act.

59. The starting point of the statutory enquiry is to establish the legal principles as derived from the authorities that are applicable to the circumstances of the case. I do not intend to deal with the authorities in chronological fashion and select various passages from them. Instead I will endeavour to identify those principles most pertinent to the circumstances of this case and analyse their form and relevance against the arguments presented by Counsel.

60. The focus of the enquiry must be the statutory definition of house which "includes any building designed or adapted for living in and reasonably so called".

61. Lord Denning MR claimed authorship of the statutory definition in *Lake v Bennett* [1970] 1 QB 663 (CA). At [670D] he highlighted that the 1967 Act was the first Statute in which Parliament had endeavoured to give a definition of a house and then at [670G & H] Lord Denning explained the derivation of the definition:

> "In the Housing Acts there was no definition of a " house," but we considered it in *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government* [1965] 1 W.L.R. 1320. I ventured to suggest that " a 'house' in the Act"—that is, the Housing Act—"means a building which is constructed or adapted for use as,

> or for the purposes of, a dwelling." It would appear that in the Leasehold Reform Act, 1967, Parliament adopted these words, but added the limitation "reasonably so called."
>
> It is quite plain that this building was a " house" within all these earlier statutes. The point is: what is the limitation conveyed by the words "reasonably so called"? I would not pretend on this occasion to attempt to define the limitation. But it may be useful to give an illustration. I do not think that a tower block of flats would reasonably be called a " house." But I think a four-storied building like the present one is reasonably called a "house". Take it in stages. First, if the tenant occupied the building entirely by himself, using the ground floor for his shop premises, that would plainly be a "house" reasonably so called. Second, if the tenant, instead of using the ground floor himself for business purposes, sublets it, that does not alter the character of the building. It is still a "house reasonably so called".

62. Lord Denning's formulation of the statutory definition has stood the test of time. He identified that it consists of two separate but linked questions ("designed or adapted for living in"; and "reasonably so called") and that the second question "reasonably so called" acts by way of limitation.

63. Lord Millett in *Malekshad v Howard de Walden Estates* [2003] 1AC 1013 at [51] elaborated upon Lord Denning's construction of the second question:

> "This is that the words "which may reasonably be called a house" are words of limitation. They serve to exclude from the statutory definition of a "house" premises which would otherwise fall within it but which could not reasonably be called a house".

64. In *Magnohard v Cadogan* [2013] 1 WLR 24 Lewison LJ also confirmed and further clarified the principle of limitation associated with the second question. He said at [9]:

> "It is clear from all the authorities that the words reasonably so called are intended to be words of limitation ..... Their purpose is to exclude buildings that would otherwise come within the other parts of the definition. The mere fact that a building might be called something other than a house is not sufficient to trigger the exclusion ..... Whether a building can reasonably be called a house or can only reasonably be called something else is a question of appellation. I agree with the judge that the question is not whether it is possible to call a building a house; the question is whether it is reasonable to do so".

65. Lord Denning's formulation of the first question which is set out more fully in *Ashbridge Investments Ltd* as *"a building which is constructed or adapted for use as, or for the purposes of, a dwelling. It need not actually be dwelt in but it must be constructed or adapted for use as a dwelling, or for the purposes of a dwelling"* was adopted by Lord Carnwath in the conjoined appeals of *Hosebay v Day* and *Lexgorge v Howard de Walden* [2012] 1WLR 2884. At [35] Lord Carnwath said:

> "I find myself drawn back to a reading which accords more closely to what I have suggested was in Lord Denning MR's mind in *Ashbridge* [1965] 1 WLR 1320, that is a simple way of defining the present identity or function of a

building as a house, by reference to its current physical character, whether derived from its original design or from subsequent adaptation".

66. Lord Carnwath elaborated upon the two questions of the statutory definition of house at [8 & 9] in *Hosebay and Lexgorge:*

> "8.....We are concerned with the main part of the definition, which raises two separate but overlapping questions: (i) is the building one designed or adapted for living in ? (ii) is it a house . . . reasonably so called? Both questions remain live in *Hosebay*; in *Lexgorge* the first has been conceded in favour of the lessees.
>
> 9. The two parts of the definition are in a sense belt and braces: complementary and overlapping, but both needing to be satisfied. The first looks to the identity or function of the building based on its physical characteristics. The second ties the definition to the primary meaning of house as a single residence, as opposed to say a hostel or a block of flats; but that in turn is qualified by the specific provision relating to houses divided horizontally. Both parts need to be read in the context of a statute which is about houses as places to live in, not about houses as pieces of architecture, or features in a street scene, or names in an address book".

67. Counsel placed different emphases on Lord Carnwath's articulation of the two separate but overlapping questions. Mr Rosenthal QC submitted that it supported his proposition that the Court should make findings on both parts of the definition. Further he argued that determination of the first question was confined to the physical characteristics of the building. In this regard he also relied upon Lord Neuberger's statement at [17] of *Boss Holdings Ltd v Grosvenor West Properties Ltd and another* [2008] 1WLR 289:

> "While I accept that for present purposes one is largely concerned with the physical state of the property ....".

68. Mr Rainey QC highlighted Lord Carnwath's focus in the first question on the role of "current physical character" in determining present identity or function of the building as a house. Mr Rainey QC, however, was more interested in the second question and stressed its importance in keeping the ambit of properties that are "a house" within reasonable bounds. In this regard he emphasised Lord Carnwath's depiction of the limiting nature of the second question in tying the statutory definition to the primary meaning of "house" as a single residence which Mr Rainey QC described as the "house paradigm".

69. Mr Rainey QC argued that the use and application of the second question may obviate the need for the Court to determine factual issues in connection with the first question. In support of his proposition Mr Rainey QC placed reliance on the Supreme Court's disposal of the appeal in *Hosebay*. Lord Carnwath found it unnecessary to reach a concluded view on the application of the first part of the definition because *"the fact that the building might look like houses, and might be referred to as houses for some purposes, is not in my view sufficient to displace the fact their use was entirely commercial"* [43] *Hosebay*. At [44] Lord Carnwath added "*In these circumstances I find it unnecessary to reach a concluded view on the application of the first part of the definition in this appeal. I agree with the appellants (and the judge) that*

living in means something more settled than staying in ; and that the present use does not qualify as such. Lord Carnwath concluded for good measure: *"One of the values of the two-part definition is that it becomes unnecessary to resolve such narrow factual issues"*.

70. Mr Rainey QC also highlighted that the determinative factor in both appeals (*Hosebay and Lexgorge*) was the actual use of the building. Mr Rainey pointed to the judgment in *Lexgorge*: "*a building wholly used for offices whatever its original design or current appearance, is not a house reasonably so called. The fact that it was designed as a house and is still described as a house for many purposes including in architectural histories, is beside the point* [45]".

71. The Court of Appeal in *Prospect Estates Limited v Grosvenor Estate Belgravia* [2008] EWCA Civ 121 which was a judgment given prior to the Supreme Court decision in *Hosebay* adopted a similar approach to Lord Carnwath in respect of a building in which 88.5 per cent of the floor space was used as offices by a number of sub-tenants under short-term commercial leases. Mummery LJ in allowing the Appeal said at [20]

> "The original design and the unchanged external and internal appearance of the building featured too prominently in the judge's reasons. If he had given due weight to the prescriptive terms of the lease, the actual uses of the building and the relative proportions of the mixed use at the relevant date, he could only have come to one conclusion: that it was no longer reasonable to call the building a house within the 1967 Act".

72. Goldring LJ in agreeing with the lead judgment of Mummery LJ said pithily: *"I would only add this. As Mr Gallagher accepted in argument, his submission can be encapsulated in the following proposition. This building can reasonably be called a house although no-one can lawfully live in virtually 90 per cent of it. As it seems to me that cannot be right"*.

73. Mr Rosenthal QC contended Mr Rainey's submissions were derived from the specific facts of *Hosebay* which he said were a "million miles away from the facts of this case". Mr Rosenthal QC cautioned the Court about the application of the phrase "staying in" which he said did not form part of the statutory definition. In his view it was obiter and judicial gloss on the specific facts of *Hosebay*.

74. Mr Rosenthal QC reminded the Court of the facts of *Hosebay* set out at [10] and [13]:

> "10 The first case (Hosebay) concerns three properties, 29, 31, and 39 Rosary Gardens, South Kensington, London SW7. They were originally built as separate houses as part of a late Victorian terrace forming the west side of Rosary Gardens. The current leases of Nos 29 and 39 were granted in 1966 for terms expiring in December 2020, subject to covenants for their use as 16 high class self-contained private residential flatlets. The current lease for No 31 was granted in 1971 for a term expiring in December 2030, subject to a covenant restricting its use to that of a single family residence or a high class furnished property for accommodating not more than 20 persons. It was common ground

> that the current use, which had begun some time before 1981, was not in accordance with the covenants".
>
> 13.Judge Marshall QC found that the three properties were at the relevant date being used together to provide short term accommodation for tourists and other visitors to London, or what she described as a self-catering hotel: paras 8, 19. Each of the three properties had been fully adapted to provide individual rooms for letting out , with the exception of two rooms in No 31, one of which was used for office and reception purposes, and the other for storage. The great majority of the rooms could be described as rooms with self-catering facilities. Each room had between one and four beds, furniture, and limited storage space, cooking facilities, and small wet rooms with shower, basin and WC. Fresh bed linen and room cleaning, but no other services, were provided to those staying in the rooms".

75. Mr Rosenthal QC insisted that commercial use was not a feature of the facts of this case, and, therefore, did not fit with the circumstances in *Prospect Estates* or *Hosebay* and *Lexgorge*.

76. The issue of use of the property highlighted another difference between the parties which concerned the evidential weight placed on the "User" covenant and the planning restrictions which applied to the subject properties.

77. Mr Rainey QC went as far as to propose that lawfulness of use both in lease terms and in planning terms was highly relevant if not determinative of the issue of whether these properties were houses within the meaning of section 2(1) of the 1967 Act. Mr Rainey QC also said that lease terms as to user were highly relevant, if not as major a factor, as actual use.

78. Mr Rainey QC cited two authorities in support of his submission. Mr Rainey QC referred to Mummery LJ's judgment in *Prospect Estates* where he said at [19] and [20]:

> "The Judge paid insufficient attention to the peculiar, even exceptional circumstances of prescribed and predominant office use in compliance with the lease. That circumstance is in my view, the overwhelming and decisive feature of this case"
>
> "If he (*the Judge*) had given due weight to the prescriptive terms of the lease, the actual uses of the building and the relative proportions of the mixed use at the relevant date, he could only have come to one conclusion: that it was no longer reasonable to call the building a house within the 1967 Act".

79. Mr Rainey QC turned next to the Supreme Court decision in *Sequent Nominees v Hautford Limited* [2020] AC 28 (SC) to support his contention that compliance with planning conditions was a very important factor in determining whether a property is a house reasonably so called. Mr Rainey built his submission on the statement by Lord Briggs at [14] that *"the trial judge found that if (as he thought likely) the respondent were to obtain planning permission for a change of the use of the first and second floor to residential this would, in his words, substantially enhance the respondent's prospect of obtaining enfranchisement*".

80. Mr Rosenthal QC disagreed with Mr Rainey QC's submission that the user restriction in the lease and the planning conditions should be accorded significant weight. Mr Rosenthal QC's principal argument was that Lord Carnwath had ruled in *Hosebay* at [41] that in *Prospect "the terms of the lease should not have been treated as the major factor"*.

81. Mr Rosenthal QC's second line of argument was that the test in section 2(1) of the 1967 Act was about the physical identity of the house which was more than simply the appearance of the building and embraced physical factors such as "actual use". Mr Rosenthal acknowledged that the enquiry under section 2(1) should consider the terms of the lease, and planning conditions but they should not be given great weight, and were certainly not determinative of the issue. Mr Rosenthal QC reinforced his submission with the proposition that the terms of the lease constituted a separate enquiry under section 3 of the 1967 Act. Finally Mr Rosenthal QC argued that no reliance should be placed on the Supreme Court decision in *Sequent Nominees* because it dealt with an entirely different legal issue, namely: whether the landlord's refusal to consent to the tenant applying for planning permission was reasonable, which had no bearing upon the definition of house under section 2(1) of the 1967 Act.

82. I pause at this point and identify what I consider to be the applicable principles of law derived from the conflicting arguments put forward by Counsel. I am satisfied that Counsel agree with Lord Carnwath's depiction that the two parts of the definition in section 2(1) are in a sense ""belt and braces": complementary and overlapping but both needing to be satisfied". They are also agreed that the first question "designed or adapted for living in" is determined by the building's current physical characteristics. Finally they agree that actual use is an important factor in deciding the second question, "house reasonably so called".

83. The main differences between Counsel are (1) whether actual use of the subject properties is determinative of the question of their status a houses within the meaning of section 2(1) of the 1967 Act which if it is, I am not required to address the factual issues posed by the first question, (2) the evidential weight to be afforded to the terms of the lease and planning conditions, and (3) the application of the "living in" and "staying in" construct to the facts of the case.

84. I consider the challenge posed by the contrasting submissions of Counsel on differences (1) and (2) is aimed primarily at the approach I should adopt when evaluating the factual matrix of the case. In my view it would be premature to adopt a legal principle that actual use and the terms of the leases and planning condition are determinative of the issue until I have made findings of fact.

85. I have already indicated that I intend to follow the approach of Mummery LJ in *Henley* of fully exploring the properties from a number of different aspects and angles, considering the various matters in the round followed by an overall assessment of the entire situation. In short I am not able to make an assessment of the weight given to specific aspects of the evidence until I have evaluated the evidence as a whole and then assessed that evidence in the round. In this regard I consider that my findings should address both questions of

section 2(1) of the 1967 Act, and include consideration of the lease terms and the planning conditions.

86. I am satisfied that Mr Rosenthal QC was not suggesting that I should ignore the lease terms and planning conditions. His principal submission was that I should not give them undue weight. Equally I consider Lord Carnwath's comments in *Hosebay* on the relevance of the terms of lease were about the weight to be attached to them as assessed in the overall circumstances of the case. This is supported by Lord Carnwath's phrasing that the lease terms should not be treated as a major factor. In this respect it is also significant that Lord Carnwath was unwilling to limit the ratio of the decision in *Prospect* as suggested by Lord Neuberger and that he endorsed Mummery LJ's treatment of the use of the building rather than its physical appearance as determinative of the statutory question. In my view the decision on use in *Prospect* incorporated the prescriptive terms of the lease.

87. I agree with Mr Rosenthal QC that the decision in *Sequent Nominees* does not assist with the question of whether the properties are a house within the meaning of section 2(1) of the 1967 Act. However, in this case the planning conditions are inextricably linked with terms of the lease, and as the lease terms are relevant to the factual matrix so must be the planning conditions.

88. I accept Mr Rosenthal QC's submission that the phrase "staying in" forms no part of the statutory definition, and that the decision I have to make on the first question is whether the properties are designed or adapted for living in. Also I consider the concept of staying in should be read in the context of the *Hosebay* decision. However, I accept that "staying in" may assist as an aid to comprehend the factual matrix for the finding on "designed for living in".

89. It is necessary to mention two further cases on actual use. The first is the House of Lord's decision in *Boss Holdings Ltd v Grosvenor West Properties Limited and another* [2008] 1WLR 289 in which the House of Lords decided that a mixed use building where the residential use of the upper floors had been discontinued and they had become dilapidated and incapable of being used as a residence nevertheless met the test of designed or adapted for living in. Mr Rosenthal QC relied on this case to cast doubt on the prominence given to actual use in weighing up whether a property is a "house reasonably so called". Although Lord Carnwath in *Hosebay* [36] did not call into question the actual decision in *Boss Holdings,* he noted that it was enough that the building was partially adapted for living in and it was unnecessary to look beyond that. Lord Carnwath said that *Boss Holdings* had no application to the circumstances of the conjoined appeals of *Hosebay and Lexgorge*. I also note that *Boss Holdings* was concerned solely with the first question, because there was no dispute between the parties that the building qualified as a house reasonably so called. It is for those reasons I do not consider the decision in *Boss Holdings* helpful in answering the second question of a "house reasonably so called".

90. The second case is *Earl Cadogan and Another v Magnohard Limited* [2012] EWCA Civ 594. The building in question was a mansion block of eight flats with three small retail units on the ground floor. HHJ Marshall QC decided at first instance that the building was not a house reasonably so called because it was

a block of flats. The Court of Appeal upheld her decision. Mr Rainey QC pointed out that the user of the building was more than 90 per cent residential. Mr Rainey QC relied on this case for the proposition that user is not the only basis for saying that a building is not reasonably called a house. I do not share Mr Rainey's interpretation of the ratio of this case. In my view it was a restatement of the principle first established by Lord Denning in *Lake v Bennett* that a block of flats could not be a house reasonably so called.

91. Mr Rosenthal QC placed great importance on the shift in the policy of the legislature connoted by the abolition of the residence test in 2002 which he said worked in favour of the Claimants. Mr Rosenthal QC contended that the properties were for all intents and purposes the Claimants' homes except they could not be occupied as their principal residences. Mr Rosenthal submitted that following the abolition of the residence test the subject properties fell squarely within the type of properties, the leaseholders of which Parliament intended to confer the right to acquire the freehold at its market value. Mr Rosenthal QC emphasised that the Court should consider the policy existing at the date of the Notices of Claim in respect of the subject properties.

92. Mr Rosenthal QC made good his proposition by reference first to Mummery LJ's statement at [21] in *Prospect Estates:*

> "I should add that the effect of the residence requirement in this 1967 Act, as originally enacted, was that the building would not have fallen within it or its policy of enabling a tenant of a long lease of residential property compulsorily to acquire the freehold. I do not, however, think that that policy has continuing relevance to this case. The non-exhaustive definition of a house has remained the same, but other amendments, particularly the abolition of the residence test, have enlarged the scope of the 1967 Act and significantly changed the direction of its original policy."

93. Mr Rosenthal QC then turned to Lord Carnwath's exposition of the policy in *Hosebay & Lexgrove* at [3] to [6]:

> "3 The thinking behind the 2002 legislation is apparent from the preceding Draft Bill and Consultation Paper Commonhold and Leasehold Reform (Cm 4843), published by the Lord Chancellor in 2000…….The first paragraph of the introduction leaves no doubt that its purpose was to address perceived flaws in the residential leasehold system (p 107), not in the leasehold system more generally.
>
> 4 In relation to flats, the government's view was that the residence tests under the 1993 Act were too restrictive, for example, in excluding someone subletting a flat, or occupying a flat as a second home. The residence requirement would therefore be abolished; but, to "restrict the scope for short-term speculative gains", it would be replaced by a rule requiring the qualifying tenant to have held the lease for at least two years: pp 155—156.
>
> 5 A similar approach was proposed for leases of houses under the 1967 Act:
>
> > "This would bring the residence test for houses in line with the proposals for flats. It would allow long leaseholders of second homes to benefit and would also enable leaseholders who lease houses through a

> company to enfranchise. Furthermore, as in the case of flats, it would restrict the scope for short-term speculative gains: p 189".
>
> There is no evidence then or thereafter of any ministerial or parliamentary intention to extend the scope of the Act more generally, or in particular to confer statutory rights on lessees of buildings used for purely non-residential purposes.
>
> 6 Although the 1967 Act like the 1993 Act is in a sense expropriatory, in that it confers rights on lessees to acquire rights compulsorily from their lessors, this has been held not to give rise to any interpretative presumption in favour of the latter. As Millett LJ said of the 1993 Act:
>
> > "It would, in my opinion, be wrong to disregard the fact that, while the Act may to some extent be regarded as expropriatory of the landlord's interest, nevertheless it was passed for the benefit of tenants. It is the duty of the court to construe the 1993 Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy. (Cadogan v McGirk [1996] 4 All ER 643, 648.)"
>
> By the same token, the court should avoid as far as possible an interpretation which has the effect of conferring rights going beyond those which Parliament intended".

94. In contrast Mr Rainey QC considered the Claimants' reliance on the policy change exaggerated. In his view the abolition of the residence test simply expanded the categories of properties that might be eligible for enfranchisement but more importantly it shifted the focus to the statutory definition of house under section 2(1) of the 1967 Act. Mr Rainey QC pointed out that the statutory definition of house had remained unaltered since the enactment of the 1967 Act. Mr Rainey QC cited in support the observation of HHJ Marshall QC at [121] of her judgment at first instance in *Magnohard:*

> "I remind myself the meaning of the term (*house*) was fixed in 1967, when the statute was originally enacted, and its context at that date, was with the focus was on the tenant who resided in the building in question as his home".

95. Mr Rainey QC asserted that at the forefront of the policy of the 1967 Act is that its benefits and privileges should be conferred on the residential tenant of a house. Mr Rainey QC reminded the Court of Lord Justice Millett's refrain that "the court should avoid as far as possible an interpretation which has the effect of conferring rights going beyond those which Parliament intended".

96. Mr Rainey QC also placed reliance on Lord Carnwath's restriction of the statutory definition to the primary meaning of house as a single residence. And to be read in the context of a statute which is about houses as places to live in, not about houses as pieces of architecture or features in a street scene or names in an address book. Mr Rainey QC described this as the "house paradigm".

97. Mr Rainey QC submitted that Lord Carnwath's judgment in *Hosebay* was consistent with the decision of the House of Lords in *Tandon v Trustees of*

Spurgeon Homes [1982] AC 755 (HL). Mr Rainey QC referred to Lord Roskill's statement at [p 765 C.D]:

> "The definition clearly contemplates some mixed user but leaves it to the court to determine whether a particular premises fall within or without the definition bearing in mind that it is the residential tenant of a house as defined for whom the benefits and privileges of the statute are intended".

Mr Rosenthal QC pointed out that *Tandon* was decided prior to the abolition of the residence test.

98. My starting point is to highlight the principal changes to the legislation arising from the abolition of the residence test. Both Counsel made reference to the fact of abolition but did not identify the specific changes to the wording of the 1967 Act.

99. Section 138 of the Commonhold and Leasehold Reform Act which is headed "Abolition of Residence Test" amended the 1967 Act by omitting references to "occupying the house as his residence" in section 1(1) of the Act and by deleting section 1(2) which defined residence.

100. The relevant parts of section 1 of the 1967 Act prior to the amendments by the 2002 Act read as follows:

> "1(1) This Part of this Act shall have effect to confer on a tenant of a leasehold house, occupying the house as his residence, a right to acquire on fair terms the freehold or an extended lease of the house and premises where:
>
> > (b) at the relevant time (that is to say, at the time when he gives notice in accordance with this Act of his desire to have the freehold or to have an extended lease, as the case may be) he has been tenant of the house under a long tenancy at a low rent, and occupying it as his residence, for the last three years or for periods amounting to three years in the last ten years;
>
> 1(2) In this Part of this Act references, in relation to any tenancy, to the tenant occupying a house as his residence shall be construed as applying where, but only where, the tenant is, in right of the tenancy, occupying it as his only or main residence (whether or not he uses it also for other purposes)".

101. Following the amendments made by the 2002 Act and further amendments section 1(1) now reads as follows:

> "This Part of this Act shall have effect to confer on a tenant of a leasehold house a right to acquire on fair terms the freehold or an extended lease of the house and premises where:
>
> > (b) at the relevant time (that is to say, at the time when he gives notice in accordance with this Act of his desire to have the freehold or to have an extended lease, as the case may be) he has–

> (i) in the case of a right to acquire the freehold, been tenant of the house under a long tenancy for the last two years";

102. As can be seen from the legislation prior to the 2002 amendments the residence test incorporated three distinct elements: (1) of occupying the house as his/her residence; (2) the occupation had to be for a length of time; and (3) the residence had to be "only or main residence". Following the 2002 amendments these three elements have now been dispensed with as eligibility requirements for the enfranchisement of a house, and have been replaced with an ownership requirement.

103. The next issue is what is the effect of the changes to the eligibility requirements to the statutory definition of a house in section 2(1) of 1967 Act. Lord Neuberger in *Boss Holdings* considered that the changes would have no effect on the construction of section at section 2(1). He said this at [23]:

> "I have referred to, and relied on, the residence requirements in section 1(1) in its original form. In the Court of Appeal, at para 25, Carnwath LJ said that he was inclined to think that no assistance could be gathered from provisions in the 1967 Act as originally enacted, because one should construe the 1967 Act in its current form. Consequently, he considered that no help in construing section 2(1) could be gathered from the residence requirement of every enfranchisement claim originally contained in section 1(1). I do not agree. In *Suffolk County Council v Mason* [1979] AC 705, 714E Lord Diplock said that certain "provisions . . .have since been amended by the Countryside Act 1968: but this cannot affect the construction of the Act of 1949 as it was originally enacted". There are earlier observations to similar effect from Bramwell and Brett LJJ in *Attorney General v Lamplough* (1878) 3 Ex D 214, 227, 229. In my opinion, the legislature cannot have intended the meaning of a subsection to change as a result of amendments to other provisions of the same statute, when no amendments were made to that subsection, unless, of course, the effect of one of the amendments was, for instance, to change the definition of an expression used in the subsection".

104. Mummery LJ in *Prospect Estates* at [5] repeated the message that the non-exhaustive definition of a house in section 2 of the 1967 Act had remained the same despite the abolition of the residence requirement.

105. Lord Carnwath, however, in *Hosebay and Lexgorge* advocated a construction of a house in section 2(1) of 1967 which took account of the policy of the legislation at the time of the date of the Tenant's Notice of Claim. At first blush this would appear to compromise the principle of construction identified by Lord Neuberger.

106. I find the judgment of Patten LJ in *Jewelcraft v Pressland* [2015] HLR 48 helpful in resolving this dilemma. I start with Patten LJ's analysis of why policy considerations in relation to the purpose of the 1967 Act play a significant role in the construction of section 2 of the 1967 Act. Patten LJ identified three reasons at [20] to [22]:

> "20 We can start our analysis of the authorities with a few general observations. The first is that the question whether a particular property is a house within the meaning of s.2 has been authoritatively recognised to be a question of law and not a purely factual issue for the judge. There is therefore only one correct answer to the question. These are not cases where this court is concerned to decide whether the decision was one reasonably open to the judge on the evidence he was presented with.
>
> 21.The second point (which follows from the first) is that, in relation to a statutory right to enfranchise, one might assume that Parliament intended to include (or not) certain recognisable types of property. Consistently with this, it seems surprising that the grant of a right to enfranchise to the lessees of property within such categories should depend on particular physical characteristics such as whether the various parts of the premises were linked internally or externally. One would expect the policy of the 1967 Act to be fashioned by broader questions of entitlement.
>
> 22. The third point is that if the correct interpretation of section 2(1) to particular types of property is driven by policy considerations then it ought to be possible (and it is certainly desirable) that the application of the policy of the Act should promote consistency of treatment."

107. At [18] Lord Justice Patten explains the mechanism by which the Courts incorporate policy considerations in its decision on whether a particular property is a house within the meaning of section 2 of the 1967 Act:

> "The court's task in all the decided cases has been to set limits to the right to enfranchise in a way which recognises and gives effect to the policy of the Act. This is most evident in the decision of the majority of the House of Lords in *Tandon* and was recognised by Lord Carnwath in *Hosebay* at [27]–[28]. But the limits of the statutory right to enfranchise, although dictated by policy, fall to be established through a mechanism ("reasonably so called") which requires some kind of objective evaluation by the court and the central part of the debate has concerned the identification of the criteria on which this exercise should be based".

108. I conclude that the non-exhaustive nature of the statutory definition of house, and the degree of flexibility afforded by the criterion of a house "reasonably so called" enables the Court to take account of the current legislative policy without offending the principles associated with construction as identified by Lord Neuberger.

109. I am now faced with the question of what precisely is the policy that I should be applying to the circumstances of this case. Counsel accepted that the circumstances did not match a "house type" previously considered by the higher courts. Mr Rosenthal QC urged me to evaluate this case through the prism of the policy associated with the abolition of the residence test.

110. My reading of Lord Carnwath's judgment in *Hosebay and Lexgorge* is that the policy associated with the abolition of the residence test should not be viewed in isolation but in the context of the overall policy for the enactment

of the Act in 1967. This is clear from Lord Carnwath's opening words in *Hosebay*: *"The Leasehold Reform Act 1967 is on its face a statute about houses not commercial buildings"*. It is also clear from Lord Carnwath's judgment that his intention was to rein in the definition of house to one that aligned more closely to the original purpose of the 1967 Act. This is demonstrated by his rebuttal of Lord Neuberger's concern that he had to apply in the Court of Appeal below the "unintended consequence of the amendments made by the 2002 Act" ("*the abolition of the residence test"*).

111. I conclude from my review of the authorities that in terms of policy I stay true to the original policy objectives for the 1967 Act which is about houses as places to live in. This in turn ties the statutory definition to the primary meaning of "house" as a single residence. However, my adherence to the original policy objectives is not a licence for re-introducing the residence test through the back door. I am satisfied that the policy for the Act has evolved and needs to reflect the changes brought about by the 2002 Act within the umbrella of houses as places to live in. Thus concepts of minimum periods of residence and "only or main residence" form no part of the policy landscape for determining whether the subject properties are a house "reasonably so called".

112. Mr Rosenthal QC and Mr Rainey QC referred me to several authorities involving holiday or temporary accommodation under different aspects of Landlord and Tenant Act legislation.

113. Mr Rosenthal cited two Upper Tribunal decisions (Lands Chamber) (*King v Udlaw* [2008] L & TR 28; and *JLK Ltd v Ezekwe* [2017] L & TR 29 and a High Court decision (*Phillips v Francis* [2010] L & TR 28), which concerned the question of whether statutory protection for tenants in relation to service charges in the Landlord and Tenant Act 1985 should extend to lessees of "holiday homes".

114. Mr Rainey QC referred me to the judgment of the Supreme Court *R(N) v Lewisham LBC; R(H) v Newham LBC*[2014] UKSC62; [2015] AC 1259 which was about whether the Protection from Eviction Act 1977 applied to accommodation occupied by homeless families accommodated temporarily by a local housing authority. Mr Rainey QC also made reference to the Rent Acts.

115. The cases cited dealt with the meaning of "dwelling" under the different legislative contexts, and its application to holiday accommodation. Counsel accepted that these decisions were of no real assistance in answering the question posed by the specific statutory enquiry under section 2(1) of the 1967 Act but they might offer me some comfort.

116. I derived no comfort either way from the respective authorities cited by Counsel. They had no relationship to the specific issues in this case. Their only relationship appeared to be one of nomenclature in that they were described as "holiday accommodation". I also note that the subject properties had been declared by deed as "dwellings" for the purpose of protection afforded by sections 18 to 30 Landlord and Tenant Act 1985 in

connection with the levying of service charges. Although this was part of the factual matrix, Mr Rosenthal QC had indicated earlier that the Claimants did not rely upon this fact to support their claims under the 1967 Act.

117. Mr Rosenthal QC in his closing submissions produced two additional authorities, *The Lower Mill Estate Limited v The Commissioners for HMRC* dated 22 December 2010, and *Herling Limited v HMRC* 2009 WL 33998688. The first was a decision of the Upper Tribunal (Tax and Chancery Chamber) and was significant, in the view of Mr Rosenthal QC, because it involved the previous freeholder of the Lower Mill Estate upon which the subject properties were located. Mr Rosenthal QC relied on the Tribunal's description of the 575 residential homes as holiday or second homes for VAT purposes. The second was a decision of the First-tier Tribunal (Tax), and concerned whether supplies for new holiday accommodation was zero or standard rated. The decision included a comment that the concept of holiday accommodation envisaged accommodation which was not a principal residence, albeit that its use may be sufficiently substantial to make it a secondary residence. Mr Rainey QC questioned the relevance of these decisions to the facts and issues in this case. I agree with Mr Rainey QC.

Summary of the Legal Principles

118. I summarise the legal principles identified from the analysis of the authorities which I consider pertinent to the circumstances of this case:

a) The question whether a particular property is a house within the meaning of section 2 of the 1967 Act has been authoritatively recognised to be a question of law and not a purely factual issue for the judge. There is, therefore only one correct answer to the question.

b) The test is not one of ordinary parlance; it is a test which is a precise specific enquiry for the purposes of the 1967 Act.

c) As part of the statutory enquiry the Court should wherever possible follow the decisions of the higher courts in respect of particular categories of properties so as to promote consistency of treatment.

d) In this case there is no decision of the higher courts that relate to the specific circumstances of the subject properties. In those circumstances the Court must do its best to apply the law to the facts as found and decide whether the property in question is or is not a house, with the benefit of its own evaluation.

e) Answering the specific statutory question involves a full exploration of the properties from a number of different aspects and angles followed by an overall assessment of the entire situation. The various matters must be considered in the round before deciding whether it is reasonable to call the subject properties a house.

f) The main part of the statutory definition, raises two separate but overlapping questions which are (i) is the building one designed or adapted for living in? (ii) is it a house reasonably so called?

g) The two parts of the definition are in a sense belt and braces: complementary and overlapping, but both needing to be satisfied. The first looks to the identity or function of the building based on its current physical characteristics. The second ties the definition to the primary meaning of house as a single residence, as opposed to say a hostel or a block of flats.

h) The first question is decided on the current physical characteristics of the property, and in this case directed at whether the properties are designed for living in. The concept of "staying in" is not part of the statutory test and should be read in the context of the *Hosebay* decision. The concept of "staying in" may, however, assist as an aid to comprehend the factual matrix in respect of the finding on "designed for living in".

i) The second question "a house reasonably so called" are words of limitation. They serve to exclude from the statutory definition of a "house" properties which would otherwise fall within it but which could not reasonably be called a house".

j) Actual use of the subject property is an important factor and may be decisive particularly if the use of the property is commercial.

k) Terms of the lease and planning conditions are relevant facts for the statutory enquiry but the weight to be attached to them depends upon the particular circumstances of the case taken as a whole.

l) Through the mechanism of the "house so reasonably called" the Court's task is to set limits to the right to enfranchise in a way which recognises and gives effect to the policy of the 1967 Act.

m) The policy landscape at the time the Notices of Claim were made in respect of the four properties remains true to the original policy objectives for the 1967 Act which is about houses as places to live in but without the trappings of the now abolished residence test which incorporated requirements of minimum periods of residence and sole or main residence.

n) The application of other Landlord and Tenant legislation to "holiday accommodation" is of no assistance in answering the specific statutory enquiry under section 2 of the 1967 Act.

The Findings on the Facts

119. I was presented with a document bundle of 1512 pages. Counsel advised me that the evidence was not contentious. Mr Rainey QC and Ms Gibbons in their skeleton conceded on behalf of the Defendant that it had no reason to dispute the Claimants' evidence on how they used the "Units", the physical nature of the "Units" and that the lease terms were a matter of documentary record. Counsel for the Defendant helpfully supplied an Appendix entitled "Evidence Schedule" which in their view summarised the relevant evidence in two pages. Mr Rosenthal QC commenced his opening with a brief overview of the parties' evidence, of the user terms in the lease and of the restrictions on occupation in the planning permissions and agreements terms but in his reply he resorted to a detailed exposition of these issues.

120. Although the evidence itself might not have been contentious, the interpretation of the evidence and the weight to be attached was a matter of significant dispute between the parties. My role as Trial Judge is to ensure that my findings on the facts are clear and substantiated by the evidence.

121. I make a preliminary observation on a matter that I discovered after the hearing. The terms of the leases for the four properties were materially the same except that the leases for 41 and 61 Howells Mere owned respectively by Mr and Mrs Pressney and Mr Oates had the restriction on occupation removed by deeds of variation which were each dated 19 November 2019. The Notices of Claim to acquire the freehold were served on the Defendant on 4 September 2019 in respect of Mr Oates, and on 17 September 2019 in respect of Mr and Mrs Pressney. The touchstone for determining whether a Tenant is entitled to acquire the freehold is the circumstances existing at the date of the service of the Notice of Claim. It would appear that I am not entitled to take into account the fact that the leases for 41 and 61 Howells Mere were unencumbered by the occupation restriction because that restriction was not removed until after the respective Notices of Claim were served on the Defendant. In one respect it makes my task easier because I can treat the terms of the four leases as being the same in all material respects.

122. My findings are as follows:

a) The subject properties had been designed and built as substantial detached residential buildings of permanent construction and suitable for all year round living. Their layout comprised living rooms, dining rooms, bedrooms, kitchens and bathrooms. The properties were all planned as single residences. There had been no adaptations to the buildings since they were constructed, and the physical characteristics of the properties have not changed since their construction.

b) The subject properties were located on individual plots in an established and large residential development of similar properties on a self contained estate. The development had been constructed on a site of former mineral workings. The estate for the development comprised seven lakes and three rivers and nature

reserves which provided a focus for leisure activities including fishing, water sports, bird watching and walking. The estate also offered leisure facilities including a spa, restaurant, and swimming pools. The ethos for the development was to create "*private vacation home communities that share a love for mother nature*".

c) The Claimants are the original leaseholders of the four properties and were involved in the design of the buildings. Throughout their ownership spanning from 2004, 2008, 2009 and 2012 the properties had been used exclusively by the Claimants, members of their families and close friends. The Claimants had not sublet the properties since their purchase of their respective leaseholds, although they were entitled to do so under the terms of the leases. Three of the four Claimants estimated they spent between 70 to 100 days a year at their respective properties. The remaining Claimant, Mr Oates, spent about 20 days a year at his property.

d) The Claimants had furnished their properties and had kept their personal belongings and accoutrements in the properties all year round. The Claimants were responsible for maintaining the properties and for payment of the running costs including upkeep, utilities, council tax and insurance for buildings and contents. Throughout their ownership of the properties the Claimants had used them for residential purposes. There was no evidence of commercial use of the properties by the Claimants. The Claimants accepted that the properties were not their principal or main residences.

e) The Claimants held the properties on leases for terms of 999 years subject to the payment of rent and service charges. The provisions of the leases for the four properties were materially the same[4]. "Building" was defined by the lease as "the dwelling to be constructed on and to form part of the Demised premises".

f) The Claimants' use of their properties was restricted by covenants under the leases. They were a "User" covenant and a "Town and country planning" covenant not to do anything which might contravene the planning agreements entered into by the Landlord with the Local Planning Authority.

g) The "User" and "Town and country planning" covenants have to be construed alongside the planning agreements entered into by the Landlord with the Local Planning Authority.

h) The terms of the two covenants and of the planning agreements are relevant factors in the determination of this case.

[4] Except for the removal of the restriction on occupation [45]. Note this is not relevant to the facts of this case [121].

i) I make separate findings in respect of the construction of the "User", and "Town and country planning" covenants, and the planning agreements.

Construction of the User and Town & Country Planning Covenants, and Planning Agreements

123. Mr Rainey QC considered significant the opening words of the "User" covenant and in particular the words in brackets, namely: *"not to carry on any trade or business (which expression shall not include subletting of the Demised Premises for holiday use) on the Demised Premises"*. Mr Rainey QC submitted that the words in brackets recognised that the business of holiday letting was a trade but if a leaseholder chose to do this s/he would not be in breach of the covenant against carrying on any trade or business at the Demised premises.

124. Mr Rainey QC submitted that the construction of the "User" covenant comprised three distinct elements: (1) restricted occupation to use only as a private holiday residence; (2) compliance in full with the terms of the Planning consents for the development; and (3) prohibition on occupation of the properties from 6 January until 5 February inclusive in each year.

125. Mr Rainey QC stated that it was important to note that there was a separate covenant to ensure adherence by the Tenants to the planning agreements made by the Landlord. This separate covenant reinforced the Tenants' compliance with the "User" covenant and ensured that the Local Planning Authority was involved in any proposed changes.

126. Mr Rainey QC pointed out that the Town and Country Planning section 106 agreements were binding on the Tenants, and on any subsequent purchaser of the freeholds. Mr Rainey QC stated that the Planning Agreements repeated the requirement that the properties should be occupied only for holiday accommodation and applied the restriction on occupation during the period the 6 January to 5 February. Mr Rainey pointed to the additional requirement in the Planning Agreements that the property should not be occupied as permanent unrestricted residential accommodation or as principal or primary places of residence.

127. Finally Mr Rainey QC relied on the report of Mr Walker, Planning Officer, to explain the rationale behind the restrictions. Mr Walker explained that the two principal restrictions: occupation solely as a main residence, and non-occupation between 6 January and 5 February inclusive had the same purpose and were not mutually exclusive. Mr Walker stated that the shared purpose for the two restrictions was to prevent the properties being lived in as permanent or primary places of residence. Finally Mr Walker said the rationale for imposing these restrictions was to ensure that there was less pressure on local services than would be the case with permanent residential accommodation.

128. Mr Rosenthal QC argued that it was important to identify precisely the extent of the restrictions imposed by the "User" covenant and the Town and Country Planning agreements. Mr Rosenthal QC started with the proposition that they did not restrict the Claimants from occupying the properties for residential use. Mr Rosenthal QC contended that the "User" covenant had to be construed together with the Town and Country Planning agreements which demonstrated that the prohibition on occupation was on occupying the properties as their main or principal residence. According to Mr Rosenthal QC, the Claimants were entitled to reside at their properties for as long as they wanted provided they did not occupy them as their principal and main residences, and they observed the restriction on occupation during the period 6 January to 5 February.

129. Mr Rosenthal QC characterised the restrictions imposed by the "User" and "Town and country planning" covenants and the Planning Agreements as temporal restrictions on the use of the properties for residential purposes. Mr Rosenthal QC emphasised that the restrictions did not prohibit residential use of the respective properties.

130. Mr Rosenthal QC challenged the potential inference of Mr Rainey QC's construction of the words in brackets in the "User" covenant that the Tenants were carrying on a trade if the properties were let. Mr Rosenthal QC pointed out that the Claimants had never sub-let the properties, and as such the question of them sub-letting was not part of the factual matrix for this case.

131. Mr Rosenthal QC nevertheless proceeded to deal with the issue posed by the words in bracket by taking the Court to the Alienation clauses in the respective leases at [6.21 – 6.27]. Mr Rosenthal explained that under [6.22] a Tenant had to give notice to the Landlord of his/her intention to underlet the property. The Landlord was then given two months to nominate a person to take the under-letting on terms not inconsistent with the lease. If after two months the Landlord had not found a suitable person the Tenant may then underlet the property at a market rent on terms not inconsistent with the terms of the lease [6.22 & 6.26].

132. Mr Rosenthal QC then referred to [6.25] which dealt with assignments and transfer of the lease, and underleases of more than 12 months. In this situation the Tenant had to ensure the new owner or undertenant of the demised premises entered into a direct covenant with the Landlord to observe all the terms of the lease.

133. Mr Rosenthal QC submitted that the purpose of his analysis of the "User" clause and the Alienation clauses was to show that short-term transient leases/licences of the properties were not permitted under the lease. In Mr Rosenthal QC's view, the "User" and "Town and country planning" covenants and the Planning Agreements allowed long term use of the properties including use as second homes provided it did not cross the line of principal or main residences.

My Construction of the User and Town and Country Planning Clauses and the Planning Agreements

134. The "User" clause prohibits the Tenant from carrying out a trade or business on the Demised premises. The Tenant is permitted to sub-let the Demised premises for holiday use but that is strictly controlled by the alienation clauses at [6.21-6.27]. The effect of the controls is to ensure that the actual use of the Demised premises conforms with the terms of the lease which prevents short-term transient use of the properties. The question of sub-letting is not a feature of this case, and plays no part in the determination.

135. The "User" clause requires the Tenant to occupy the Demised premises as a private holiday residence. I construe "residence" as "home", and "private" as "for the Tenant's exclusive use". My construction is also supported by the use of word "Dwelling" as part of the definition in the lease for "Building". The Tenant is not entitled to occupy the Demised premises all the year round, and is specifically prohibited from occupying the Demised premises for the period 6 January to 5 February in any one year.

136. The "User" clause specifically incorporates compliance in all respects with the terms of the planning agreements. The terms of the "User" clause should be construed in accordance with the terms of the agreements. The planning agreements specify that the purpose of imposing a holiday accommodation occupancy requirement is to ensure that the Demised premises are not occupied as permanent unrestricted accommodation or as principal or primary places of residence.

137. The "Town and country planning" covenant has a different emphasis from the "User" covenant in that it is directed at protecting the Landlord's plans for developing the site, and providing an indemnity to the Landlord for any potential breaches of the planning agreements by a Tenant.

138. I agree with Mr Rosenthal QC's characterisation of the restrictions imposed by the "User" and "Town and country planning" covenants and the Planning Agreements as temporal restrictions on the use of the properties for residential purposes. The restrictions do not prohibit the Tenant's occupation of the Demised premises for residential purposes. The restrictions are directed at preventing the Tenant from occupying the Demised premises as permanent unrestricted residential accommodation or as principal or primary places of residence. The restrictions specify no specific time limit for the occupation of the properties except that a Tenant cannot occupy the Demised Premises in the period 6 January to 5 February in any one year.

The Application of the Legal Principles to the Facts

139. The first question I am required to answer is whether the properties are buildings designed for living in by reference to their current physical characteristics.

140. Mr Rainey QC contended that the design of the properties had to comply with planning conditions which specified holiday accommodation. The properties formed part of an estate which was, in his view, a dedicated holiday park or holiday village. Mr Rainey QC contended that it, therefore, followed that the properties were designed for people "to stay in" for holidays. In Mr Rainey QC's view, none of the properties could have been designed to be "lived in" as a home because such use would have contravened planning law, and been unlawful.

141. Mr Rainey QC relied on the terms of the planning agreements which stipulated that the properties should be occupied for holiday accommodation only. I have construed this holiday accommodation requirement as placing restrictions on the time spent by the Tenants at their respective properties for residential purposes. Mr Rainey QC did not direct me to evidence of the planning permission restricting the design of the buildings so that they could only be for holiday accommodation. On the contrary, the evidence supplied by the Defendant in the form of the "Planning Guide" [1310] indicated that "House Designs" were the approved design for buildings on the Estate under the requisite planning permission.

142. I am bemused by the origin of the reference to dedicated "holiday park" or "holiday village", which to me conjures up images of "Butlins" and "Centre Parcs". I note that Mr Dodman for the Defendant described "the estate" in his witness statement as a "Holiday Development" which, in my view, gives a better sense of the established and enduring nature of the estate.

143. Mr Rosenthal QC argued that Mr Rainey QC's submissions on compliance with planning permission had nothing to do with the first question of the statutory definition. Mr Rosenthal pointed out that the question about whether the properties had been designed for living in was determined by evaluating the physical characteristics of the respective properties which included the physical layout and appearance and possibly the Claimants' actual use of their properties.

144. I agree with Mr Rosenthal QC's interpretation of the role played by physical characteristics in the determination of the first question. I consider that in order for Mr Rainey QC to succeed on his argument he would have to demonstrate on the evidence a connection between the planning permission and the physical characteristics of the building. In my view, Mr Rainey QC's submission on design comprised a series of propositions and the truth of those propositions depended upon logic rather than upon the evidence of physical characteristics. Thus, according to Mr Rainey QC, the planning permission is for holiday accommodation, the developer is required to comply with the planning permission, the building must be holiday accommodation, and by that very fact the building is designed for staying in.

145. I turn to my findings on the physical characteristics and appearance of the properties. I found that the subject properties had been designed and built as substantial detached residential buildings of permanent construction and suitable for all year round living. Their layout comprised living rooms,

dining rooms, bedrooms, kitchens and bathrooms. The properties were all planned as single residences which had not been adapted since their construction. I am satisfied on these facts that the properties are buildings designed for living in.

146. My conclusion that the properties are buildings designed to be lived in is not undermined by their location on an established and large residential development of similar properties described by the Landlord as "a private vacation home communities that shared a love for mother nature".

147. I identified under "legal principles" that actual use of the property is a critical factor in deciding whether or not a building is a house reasonably so called and may be decisive particularly if the use of the property is commercial.

148. This case did not share the factual matrix of *Hosebay and Lexgorge* in which the commercial use of the buildings conflicted with the residential user clauses in the respective leases. In contrast the Claimants' use of the subject properties complied with the "User" clause of the leases to occupy them as private holiday residences. In this regard I accept Mr Rainey QC's submission that the terms of the "User" covenant and of the planning agreements are highly relevant to the determination of the dispute in this case because they define the parameters for how the properties are to be used by the Claimants.

149. The Defendant did not challenge the Claimants' evidence on use of their properties. I found that the properties had been used exclusively by the Claimants, members of their families and close friends. The Claimants had not sublet the properties. The Claimants used their properties for residential purposes only. The Claimants had furnished their properties and kept their personal belongings and accoutrements in the properties all year round. The Claimants maintained the properties and paid the running costs including upkeep, utilities, council tax and insurance for buildings and contents. Three of the four Claimants estimated they spent between 70 to 100 days a year at their respective properties. The remaining Claimant, Mr Oates, spent about 20 days a year at his property. The Claimants owned a principal or main residence elsewhere.

150. The Claimants asserted that their properties were ordinary houses designed for living in, and that was what they did in their properties. Mr Rosenthal QC submitted that the evidence showed that the properties were houses on the outside, and that when the front doors were opened they were houses that were lived in. In Mr Rosenthal QC's view, the properties had all the features of a second home.

151. Mr Rainey QC asserted that the Claimants did not live in their properties and that the evidence amounted to a settled pattern of use for holidays. Mr Rainey QC stated that the restrictions were such that the properties could only be used for "staying in" rather than "living in".

152. In my view Mr Rainey QC's statement on "staying in" is an evidential matter, and should not be confused with the policy of whether a property with restrictions on use by virtue of the terms of the leases and planning agreements is a "house reasonably so called".

153. I have identified under the legal principles that the concept of "staying in" is not part of the statutory test and should be read in the context of the *Hosebay* decision. I added that it may assist as an aid to comprehend the factual matrix in respect of the finding on "designed for living in".

154. I accept that I am engaged upon a statutory enquiry but that is not a reason for abdicating my responsibility to make findings of fact on key aspects of the case in order to form an overall assessment of the entire situation.

155. I remind myself that Lord Carnwath's adoption of the phrase "staying in" was based on HHJ Marshall QC's description of the property in *Hosebay* as a "self-catering hotel" which in turn was derived from HHJ Marshall QC's detailed findings as to the use and layout of the property.

156. I consider the concept of "staying in" encompassed the following features of HHJ Marshall QC's findings: commercial use; short term accommodation for tourists and other visitors, the property comprised individual rooms adapted for letting out with self catering facilities, and the provision of some services.

157. My findings on the Claimants' use of their properties bore no resemblance to the findings of HHJ Marshall QC in *Hosebay*. The Claimants kept the properties for their own use. There was no commercial use. The Claimants did not let out the properties. The properties were equipped with their furniture and personal belongings. The Claimants were responsible for maintenance, upkeep and running costs of the properties throughout the year regardless of the amount of time they spent at the property.

158. I conclude that

    a) The Claimants' use of the properties had none of the features of "staying in" as identified in *Hosebay*.

    b) The Claimants did not occupy the properties on a temporary basis as a visitor or guest.

    c) The Claimants used their properties exclusively for residential purposes.

    d) The Claimants regarded the property as one of their homes.

    e) The facts that the Claimants were not allowed to occupy the properties all year round, and that they had another property as their principal residence which limited the time spent in the subject properties did not detract from the overall assessment that they treated the subject properties as one of their homes.

159. I am, therefore, satisfied that the Claimants were living in their respective properties at the time of their Notices of Claim albeit they did not live in the properties all year round and they had other properties as their principal residences.

160. I consider next whether a house which could only be occupied as a private holiday residence and which could not be lived in all year round met the policy objective for the 1967 Act. In this regard Mr Rainey QC argued that it was not reasonable to call a property which could only be used as a private holiday residence a house for the purposes of the Act regardless of its house-like physical characteristics. In support of his argument Mr Rainey QC invoked the policy objective for the 1967 Act which he said was about houses as places to live in as a single residence. Underlying Mr Rainey QC's argument is the proposition that houses which could only be used as holiday accommodation should as a matter of policy fall outside the statutory definition of house so as to keep the ambit of properties which are a house within reasonable bounds.

161. Mr Rosenthal QC relied on his construction of the restrictions in the "User" covenant and in the planning agreements which he described as temporal and, in his view, designed to prevent the Claimants from occupying the properties as their main or principal residences. Mr Rosenthal QC postulated that the position of the subject properties on a scale of residential use from transient (holiday) to permanent (principal home) was very close to permanent and could properly be described as "second homes". Given those circumstances Mr Rosenthal QC asserted that the properties are houses so reasonably called.

162. I concluded from my review of the authorities that in terms of policy I stay true to the original policy objective for the 1967 Act which is about houses as places to live in. This in turn ties the statutory definition to the primary meaning of "house" as a single residence. However, I decided that my adherence to the original policy objective is not a licence for re-introducing the residence test through the back door. Further I am satisfied that the policy for the 1967 Act has evolved and should reflect the changes brought about by the 2002 Act within the umbrella of houses as places to live in. Thus concepts of minimum periods of residence and "only or main residence" form no part of the policy landscape for determining whether the subject properties are a house "reasonably so called".

163. I return to my principal findings and construction of the "User" covenant and restrictions in order to decide whether the subject properties meet the policy objectives for the 1967 Act. I found:

a) The properties were planned as single residences and have not been adapted since their construction.

b) The properties were buildings designed for living in.

c) The Claimants used the properties exclusively for residential purposes.

d) The Claimants were living in their respective properties at the time of their Notices of Claim, albeit they did not live in the properties all year round and they had other properties as their principal residences.

e) I construed private holiday residence as a home for the exclusive use of the Tenant which could not be occupied all year round, with a specific prohibition on occupation for the period 6 January to 5 February in any one year.

f) I construed the restrictions on the use of the properties by the Claimants as temporal restrictions on the use of the properties for residential purposes. The restrictions did not prohibit the occupation of the properties for residential purposes. The restrictions were directed at preventing the Claimants from occupying the properties as permanent unrestricted residential accommodation or as principal or primary places of residence.

164. I am satisfied that the properties are houses as places to live in. Further the restrictions on the use of the properties preventing them from being the principal or main residences, and from being occupied all the year round are aligned to the residence test which is no longer part of the policy landscape for the 1967 Act. I remind myself that the policy for the 1967 Act has evolved and should reflect the changes brought about by the 2002 Act within the umbrella of houses as places to live in. Concepts of minimum periods of residence and "only or main residence" form no part of the policy landscape for determining whether the subject properties are a house "reasonably so called".

165. I, therefore, decide that the subject properties are houses so reasonably called. I give judgment in favour of the Claimants.