Neutral Citation Number: [2018] EWHC 64 (Ch)

Case No: HC-2016-002493

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (Ch D)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/2018

Before :

EDWIN JOHNSON QC
(sitting as a Deputy Judge of the Chancery Division)

- -

Between :

RALPH KLINE LIMITED — **Claimant**

- and -

METROPOLITAN AND COUNTY HOLDINGS LIMITED — **Defendant**

- -
- -

Mr Tim Cowen (instructed by **Debenhams Ottaway LLP**) for the **Claimant**
Mr Gary Cowen (instructed by **Stepien Lake LLP**) for the **Defendant**

Hearing date: 25th October 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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EDWIN JOHNSON QC

MR EDWIN JOHNSON QC:

Introduction

1. This is a Part 8 action, seeking the determination of a point of construction on a lease. The point of construction concerns the extent of the premises demised by that lease.

2. The lease in question ("the Mobax Lease") is dated 21st May 1970 and was granted by the British Railways Board to Mobax Properties Limited ("Mobax") for a term of 120 years from 24th June 1969.

3. The premises demised by the Mobax Lease are described in the following terms, in clause 1 of the Mobax Lease (italics have been added to quotations in this Judgment).

> "*ALL THOSE ground floor shop premises known as Numbers 1 to 15 inclusive Frognal Parade the residential flats known as Numbers 1 to 12 and 14 to 45 Frognal Court Numbers 1 to 6 Warwick Court and Numbers 1 to 4 Midland Court (all numbers inclusive) and the commercial garage premises in the basement at Numbers 14 to 19 Frognal Court and the ground floor shop premises known as Number 160 Finchley Road and the residential flat thereover all at Hampstead in the London Borough of Camden together with the gardens and grounds appurtenant thereto as the same are delineated on the plan Number L.507 annexed to these presents and thereon verged blue (all such premises being hereinafter called "the demised premises" which expression shall where the context so admits include all additions or improvements hereafter made to the demised premises and all fences walls gates fixtures drains and other works now or hereafter thereon) TOGETHER with the free running and passing of water and soil gas and electricity over under or through any pipes wires drains water-courses or other conduits which are now in over or under any of the Board's adjoining properties with the right (so far as the Board can grant such right) to maintain the same and TOGETHER WITH a right of support by the platform and adjacent works of the Board for the buildings erected upon the parts of the demised premises hatched in blue on the said plan*"

4. I will use the neutral expression "the Mobax Premises" to refer to the premises demised by the Mobax Lease. I describe this as a neutral expression because its use is intended not to pre-judge the question of the actual extent of the premises demised by the Mobax Lease.

5. I will use the neutral expression "the Premises" to mean the entirety of the land and buildings, including airspace and subsoil, which lie within the blue edged line on the plan attached to the Mobax Lease. Again, the use of this expression in no way pre-judges the question of the actual extent of the premises demised by the Mobax Lease.

6. The essential issue between the parties to this action is whether the premises demised by the Mobax Lease, that is to say the Mobax Premises, include the airspace above

the buildings on the Premises, or are confined to an internal demise only of premises within the buildings on the Premises.

7. I will use the expression "the Buildings" to refer to the buildings on the Premises. For the avoidance of doubt, references to the Buildings include, where relevant, garages located in the basement of the relevant Building. Again, the use of this expression in no way pre-judges the question of the actual extent of the Buildings demised by the Mobax Lease.

The title structure of the Premises

8. The freehold interest in the Premises is now in the ownership of Network Rail Infrastructure Limited. Title to the freehold is registered under title number NGL797248.

9. Below the freehold interest in the Premises there is a relatively complicated leasehold structure, which is helpfully summarised in a table, showing the title structure, which has been included in the trial bundle.

10. For the purposes of my decision it is not necessary to set out the entirety of the leasehold structure. I need only identify the following leasehold interests, in addition to the Mobax Lease.

11. By a lease dated 29th November 2001 ("the Satco Lease") Railtrack plc (in railway administration) demised the following premises ("the Satco Premises") to Satco Investments Limited for a term of 999 years from 29th November 2001.

> *"the land and buildings known as 160B, C & D Finchley Road, 1-4 Midland Court, 1-16 Frognal Parade (158 Finchley Road), 1-12 Frognal Court, 14-45 Frognal Court, 1-6 Warwick House, and Garages under 14-29 Frognal Court, London NW3 in the London Borough of Camden demised by the Existing Lease as shown coloured blue and in part coloured blue hatched red on the Plan Provided that the Property does not include any land fixture or thing excluded from the premises demised by the Existing Lease as follows: the railway the tunnels covered ways retaining walls girders girdering platforms arches sewers drains and other works of the Landlord under the Property and so much of the subsoil as shall be necessary for the purpose of upholding maintaining repairing renewing and using the same"*

12. The Satco Lease was expressed to be granted subject to and with the benefit of the Existing Lease. The Existing Lease was defined to mean the Mobax Lease.

13. The Satco Lease was therefore granted reversionary upon the Mobax Lease, to the extent of the Mobax Premises.

14. By a lease ("the Airspace Lease") dated 4th November 2015 F&M (Investment Holdings) Limited, as tenant under the Satco Lease, demised certain areas of airspace

to the Claimant for a term of years from 4th November 2015 to 23rd June 2179. The premises demised by this lease ("the Airspace") were defined in the following terms.

> *"The Demised Premises" means the airspace above the Blocks rising one floor level only from the outer edge of the Blocks to a height of 8 metres."*

15. The Blocks were defined in the following terms in the Airspace Underlease.

> ""*The Blocks" means the existing two blocks of flats and garages constructed on the Property and known as blocks 1-4 Midland Court, 1-6 Warwick House, 1-12 Frognal Court, 14-29 and 30-45 Frognal Court and 160D Finchley Road, London NW3 shown edged red on the plan attached hereto*"

16. I should also mention that the Mobax Lease was subject to a deed of variation, dated 19th June 1972. References to the Mobax Lease in this Judgment mean the Mobax Lease as varied by this deed of variation.

17. The Mobax Lease is now vested in the Defendant. As I have said, the Airspace Lease was granted to the Claimant.

The dispute

18. This action was commenced by the Claimant by Part 8 claim form issued on 25th August 2016. The background to the dispute can be shortly stated.

19. Following the grant of the Airspace Lease the Claimant applied to the Land Registry for registration of the Airspace Lease. The Defendant has objected to that registration. The issue which arises is whether the Airspace Lease should be registered with or without a notice of the burden of the Mobax Lease.

20. This in turn depends upon the extent of the Mobax Premises, as demised by the Mobax Lease. If the Mobax Premises include the Airspace, then it follows that the Airspace Lease has been granted as a lease reversionary upon the Mobax Lease, and should be registered on this basis. If the Mobax Premises do not include the Airspace, then it follows that the Airspace Lease has not been granted as a lease reversionary upon the Mobax Lease, and falls to be registered free of the Mobax Lease.

21. I understand that the Land Registry has indicated that the dispute involves the question of who is entitled to possession of the Airspace and, as such, it is not suitable for referral to the First-tier Tribunal (Property Chamber) pursuant to Section 73(7) of the Land Registration Act 2002. It is in these circumstances that this action has been commenced, using the Part 8 procedure. I note that the dispute has in fact been referred to the First-tier Tribunal by the Land Registry, but that the proceedings in the First-tier Tribunal have been stayed, by an order of the First-tier Tribunal made on 18th October 2016, pending the outcome of this action.

22. The relief sought by the Claimant's claim form, together with claims for further or other relief and costs is as follows.

i) A claim for a declaration that the Claimant is entitled to the registration of the Airspace Lease unencumbered and without notice of the burden of the Mobax Lease.

ii) A claim for a declaration that the Defendant has no right to possession of any of the property demised by the Airspace Lease.

iii) A claim for an order under Schedule 4 to the Land Registration Act 2002 directing the Chief Land Registrar to register the leasehold title of the Airspace Lease at the Land Registry showing the Claimant as its registered proprietor and unencumbered as set out above.

23. In terms of evidence, the following witness statements were served in the action.

i) A witness statement of Norman Freed, made on behalf of the Claimant and dated 22nd August 2016. Mr. Freed is the estate manager of F&M (Investment Holdings) Limited, grantor of the Airspace Lease in its capacity as tenant under the Satco Lease.

ii) A witness statement of Martin Hay, dated 16th September 2016, in reply to Mr. Freed's first witness statement. Mr. Hay is a director of the Defendant.

iii) A second witness statement of Mr. Freed, dated 10th April 2017.

24. The action came before me for trial on 25th October 2017. Mr. Tim Cowen appeared as counsel on behalf of the Claimant. Mr. Gary Cowen appeared as counsel on behalf of the Defendant. I heard oral argument, and also had the benefit of the skeleton arguments prepared by counsel. Most helpfully, an agreed bundle of authorities had been prepared. I heard no oral evidence; none being necessary to resolve the issue of construction in the action.

25. I am indebted to both counsel for the assistance they have provided to me, both in their written and oral submissions, in making my decision on this action. As both counsel share the same surname, I shall, to avoid any confusion, refer to the rival arguments of counsel as, respectively, the arguments of the Claimant and the Defendant.

The issue to be decided

26. The issue which I have to decide can be shortly stated. The issue is whether the Mobax Premises, that is to say the premises demised by the Mobax Lease, do or do not include the Airspace. If they do not include the Airspace, the action succeeds, and the Claimant is entitled to the declaratory relief sought. If they do include the Airspace, the action fails, and falls to be dismissed.

Summary of the rival arguments

27. The Claimant's argument is that, as a matter of construction of the Mobax Lease, the Mobax Premises comprise only the internal parts of the Buildings. In particular, the Mobax Premises do not include the roofs of the Buildings. As such, so the Claimant contends, the Mobax Premises cannot include the Airspace. The Claimant's skeleton

argument makes specific reference to paragraph 7 of Mr. Freed's first witness statement, which summarises the Claimant's case in the following terms.

> "*The core of the disagreement about the meaning of the leases is relatively easy to summarise.*
>
> *7.1 The Claimant says that F&M's overriding lease, "the Satco Lease", is a lease of the whole of the buildings which comprise the Properties together with all the airspace above them and that the Mobax Lease is a lease only of the relevant interior parts of the buildings on the Properties. Prior to the grant of the Airspace Lease, F&M was therefore entitled to possession of the airspace above the buildings and was entitled to grant a lease and a right of immediate possession of the airspace to the Claimant.*
>
> *7.2 The Defendant says that the Mobax Lease is a lease of the whole of the buildings together with the airspace. It therefore denies F&M's right to grant a lease of the airspace to the Claimant and denies that the Claimant is entitled to be registered with leasehold title to the airspace at HMLR.*"

28. The Defendant's argument is that, as a matter of construction of the Mobax Lease, the Mobax Premises include the entirety of the Buildings including, in particular, the roofs of the Buildings. As such, so the Defendant contends, the Mobax Premises also include the Airspace.

A preliminary point on the extent of the Buildings

29. Before dealing with the issue which I have to decide, there is a preliminary point on the extent of the Buildings which I should mention.

30. I understand, from the description of the Premises given in paragraph 3 of the Defendant's skeleton argument, that the Buildings comprise the following.

    i) Retail premises, fronting on to the Finchley Road, now numbered 1 to 16 Frognal Parade.

    ii) Above the retail premises numbered 1 to 16 Frognal Parade, there are three blocks of flats known, respectively, as 1 to 12 Frognal Court, 1 to 6 Warwick Court (also referred to as Warwick House in some of the title documents which I have seen), and 1 to 4 Midland Court.

    iii) To the north of 16 Frognal Parade there is a further retail property known as 160 Finchley Road, with a residential flat above it.

    iv) To the rear of the Buildings which front on to the Finchley Road there are four additional blocks of flats comprising 14 to 45 Frognal Court. The blocks

comprising, respectively, 14 to 21 Frognal Court and 22 to 29 Frognal Court also include garages at basement level.

31. I have already set out the description of the Mobax Premises in the habendum clause (clause 1) of the Mobax Lease. It will be noted that the Buildings, as they are referred to in the habendum clause, are referred to as 1 to 15 Frognal Parade, 1 to 12 and 14 to 45 Frognal Court, 1 to 6 Warwick Court, 1 to 4 Midland Court, 160 Finchley Road, and the garages in the basement of 14 to 19 Frognal Court. This description omits 16 Frognal Parade and the garages in the basement of 20 to 29 Frognal Court.

32. The registered title to the Mobax Lease describes the Mobax Premises in the following terms.

> "*The Leasehold land shown edged with red on the plan of the above Title filed at the Registry and being 1 to 16 Frognal Parade, 1 to 12, Frognal Court, Finchley Road, London (NW3 5HL), 14 to 45 Frognal Court, Finchley Road (NW3 5HG), 1 to 6 Warwick House, Finchley Road, London (NW3 5HN), 1 to 4 Midland Court, Finchley Road, London (NW3 5HP), Garage premises in the basement, 14 to 29 Frognal Court and 160B, 160 C and 160 D Finchley Road, London (NW3 5HD)*."

33. The registered title plan for the Mobax Lease shows the Mobax Premises as having the same extent as on the plan attached to the Mobax Lease.

34. In paragraph 8 of his second witness statement Mr. Freed contends that the Mobax Premises do not include the following.

> "*8.1 The garages beneath 20-29 Frognal Court.*
>
> *8.2 16 Frognal Parade.*
>
> *8.3 The external fabric of the buildings containing the following flats and shops:-*
>
> *a. 1-4 Midland Court*
>
> *b. 1-6 Warwick Court*
>
> *c. 1-12, 14-29 and 30-45 Frognal Court*
>
> *d. 1-15 Frognal Parade*
>
> *e. The garages beneath 14-19 Frognal Court*
>
> *8.4 Hallways*
>
> *8.5 Lifts.*
>
> *8.6 Entrance Halls.*
>
> *8.7 Storage cupboards*."

35. The question of whether the Mobax Premises include the premises referred to by Mr. Freed in sub-paragraphs 8.3-8.7 of his second witness statement is effectively bound up in the question which I have to decide; namely whether or not the Mobax Premises include the Airspace.

36. The question of whether the premises now known as 16 Frognal Parade and the garages in the basement of 20 to 29 Frognal Court are excluded from the Mobax Premises is not necessarily critical to the question which I have to decide. It seems clear to me however, on the evidence of the registered title to the Mobax Lease, that the Mobax Premises did and do extend to the premises now known as 16 Frognal Parade and the garages in the basement of 20 to 29 Frognal Court. Putting the matter another way, it seems clear to me, and I so decide, that the Mobax Premises extended and extend to all the Buildings shown within (i) the blue verging on the plan attached to the Mobax Lease and (ii) the red edging on the registered title plan for the Mobax Lease.

37. It will be appreciated that I express this decision in terms of the Mobax Premises extending to all of the Buildings because this decision is not intended to pre-empt my decision on the extent of the Buildings themselves included within the Mobax Premises. If the Claimant is right, it is only the internal parts of each of the Buildings which are included in the Mobax Premises. If the Defendant is right, the entirety of each of the Buildings is included in the Mobax Premises.

38. For the sake of good order, I should also mention that I take the reference to 160B, 160C, and 160D Finchley Road, in the description of the Mobax Premises in the registered title to the Mobax Lease, as a reference to the same premises as are referred as the ground floor shop known as 160 Finchley Road and residential flat thereover in the habendum clause (clause 1) of the Mobax Lease. I also take the reference to Warwick House, in the description of the Mobax Premises in the registered title to the Mobax Lease, as a reference to the same premises as are referred to as Warwick Court in the habendum clause of the Mobax Lease. Again, I do so on the basis of the evidence of the registered title to the Mobax Lease. Again, this does not pre-empt my decision on whether or not it is only the internal parts of these particular premises which are included in the Mobax Premises.

Discussion – introduction

39. In considering the rival arguments of the parties, I find it convenient to divide my consideration into the following three parts.

    i) I start by considering the terms of the Mobax Lease, and reaching a preliminary conclusion on whether or not the Mobax Premises include the Airspace.

    ii) I next consider what, if any assistance I derive from the Satco Lease, in terms of my preliminary conclusion on the construction of the Mobax Lease.

    iii) Finally, I consider what, if any assistance I derive from the authorities cited to me, in terms of my preliminary conclusion on the construction of the Mobax Lease.

40. As I understood the position, there was no dispute before me as to the general principles which should govern my approach to the construction of the Mobax Lease. The Defendant's skeleton argument drew my attention to paragraphs 14 and 15 of the judgment of Lord Neuberger PSC in Arnold v Britton [2015] UKSC 36, which I set out for ease of reference.

> "*14 Over the past 45 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts in a number of cases starting with Prenn v Simmonds [1971] 1 WLR 1381 and culminating in Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900 .*
>
> *15 When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251 , para 8, per Lord Bingham, and the*

> *survey of more recent authorities in Rainy Sky , per Lord Clarke at paras 21-30.*"

41. My attention was also drawn by the Defendant to paragraph 14 of the judgment of Lord Hoffmann in Chartbrook v Persimmon [2009] UKHL 38, the speech of Lord Wilberforce in Prenn v Simmonds [1971] 1 WLR 1381, at 1384-1386, the speech of Lord Wilberforce in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989, at 995-997, paragraph 8 of the speech of Lord Bingham in BCCI v Ali [2001] UKHL 8, and paragraphs 21-30 of the judgment of Lord Clarke in Rainy Sky v Kookmin Bank [2011] UKSC 50.

42. In approaching the construction question in the present case, and while I have taken into account all of the guidance referred to in my previous paragraph, I find it most useful to keep prominently in mind, the guidance given by Lord Neuberger at points (i) to (vi) in paragraph 15 of his judgment in Arnold v Britton.

Discussion – the terms of the Mobax Lease

43. The starting point is the description of the Mobax Premises in clause 1 of the Mobax Lease. The Claimant's argument is that the wording of this description is not apt to include the entirety of the Buildings. Rather, so it is contended, the references to specific shop premises, specific flat premises, and specific garages all point to the demise made by the Mobax Lease being of the internal parts of the Buildings only.

44. While I take the point that the Mobax Premises are described, in clause 1 of the Mobax Lease, by reference to specific sets of premises, it seems to me that this description is not apt to confine the Mobax Premises to internal parts of the Buildings only. I say this for the following reasons.

    i) If the intention had been that the demise should be internal only, I would have expected to see this spelt out in the description of the Mobax Premises. There is however no wording which specifically excludes structural or external parts of the Buildings. In my view, the references to specific shop premises, specific flat premises and specific garages in the description of the Mobax Premises do not perform this function. Indeed, if the intention had been to confine the demise to internal parts of the Buildings only, the obvious question is what those internal parts were intended to comprise. Did those internal parts exclude all the parts referred to by Mr. Freed in sub-paragraphs 8.3-8.7 of his second witness statement, or only some of them and, if so, which parts? Clause 1 of the Mobax Lease does not answer these questions. The obvious explanation for this is that such questions do not arise, because the Mobax Premises include the entirety of the Buildings.

    ii) The demise was expressed to include what I take to be the open parts of the Premises, referred to as *"the gardens and grounds appurtenant thereto"*. It seems to me that it would have been very odd to demise the open parts of the Premises, without qualification, and then to confine the letting of the Buildings to internal parts only. The much more natural reading of the words of the demise is that they include the open parts of the Premises and the entirety of the Buildings.

    iii) The demise was expressed to include *"all additions and improvements hereafter made to the demised premises"*. On the Claimant's argument, and so far as the Buildings were concerned, such additions and improvements could only have been made to the internal parts of the Buildings. An addition could not have been made to a Building. This strikes me as a very odd result, given the unqualified nature of the reference to additions and improvements.

    iv) The demise was expressed to include *"all fences walls gates fixtures drains and other works now or hereafter thereon"*. While I take the point that these words did not include any references to the roofs of the Buildings, this wording seems to me inconsistent with the demise of the Buildings being an internal demise only.

    v) The description of the Mobax Premises includes the words *"as the same are delineated on the plan Number L.507 annexed to these presents and thereon edged blue"*. The blue edging on the plan attached to the Mobax Lease is

shown as enclosing all of the land and buildings which I am referring to as the Premises. I accept that the plan would not necessarily have been intended to show which parts of the Buildings were demised by the Mobax Lease, if the demise of the Buildings was limited to internal parts only. As against that, it strikes me as odd that *"the demised premises"*, as defined in clause 1 of the Mobax Lease, should be identified by reference to the blue edging on the plan, without further express qualification, if the intention was that the internal parts only of the Buildings were being demised.

45. In my judgment the wording of the description of the Mobax Premises in clause 1 of the Mobax Lease is much more apt to describe the entirety of the Premises, including the entirety of the Buildings, than it is to describe the internal parts of the Buildings and the open parts of the Premises only.

46. There are then the exceptions and reservations in clause 1 of the Mobax Lease, which are in the following terms.

> "*EXCEPT the mines and minerals in and under the demised premises and excluding any right of support from mines and minerals*
>
> *AND EXCEPTING AND RESERVING unto the Board and all persons claiming under them or permitted by them or any other person for the time being entitled to the same:-*
>
> *(a) the railway the tunnels covered ways retaining walls girders girdering platforms arches sewers drains and other works of the Board under the demised premises and so much of the subsoil as shall be necessary for the purpose of upholding maintaining repairing renewing and using the same*
>
> *(b) a right of way (in common with the Lessees and their sub-tenants and others authorised by them) at all times with or without vehicles over the part of the demised premises coloured brown on the said plan for the purpose of obtaining access to adjoining property but subject to the Board contributing to the cost of upkeep of such way as hereinafter provided*
>
> *(c) the free running and passing of water and soil gas and electricity coming from or passing to any other building or land in and through any sewer drain watercourse pipe cable or wire now on over or under the demised premises and the right to maintain the same and to connect thereto*
>
> *(d) the right from time to time and at all times during the term hereby created*

(i) *to fix construct place maintain and use over or under the demised premises any sewer drain watercourse or pipe which may be necessary or convenient*

(ii) *to erect fix maintain and use on over or under the demised premises any poles wires or cables which may be necessary or convenient and to attach the same to any part of the demised premises*

(iii) *to carry out (whether on or from the demised premises) any works which may in the opinion of the Board be necessary for the proper operation of the Board's undertaking the Board making good all damage caused and creating as little disturbance as possible and making reasonable compensation to the Lessees for any loss thereby occasioned*

(e) *the right at all reasonable times or in case of emergency at any time to enter on the demised premises for the purpose of inspecting any adjoining property of the Board and of exercising the rights reserved by paragraphs (c) and (d) hereof and of altering maintaining repairing and renewing the tunnels and works of the Board reserved by paragraph (a) hereof*

(f) *the power and liberty at any time hereafter to stop up or otherwise affect any railway sidings rights of way or other easements or privileges whether now in existence or not which the Lessees may at any time during the term hereby created be using or enjoying (other than by virtue of the express provisions of these presents or of any Grant or Licence in writing from the Board) over any adjoining land as appurtenant incident or belonging to the demised premises*

(g) *full right and liberty from time to time to use their adjoining and neighbouring lands in such manner as they may think fit and to build or execute works upon such lands notwithstanding that the access of light and air to the demised premises may be thereby affected*."

47. The following points seem to me to arise from the terms of these exceptions and reservations, in clause 1 of the Mobax Lease.

i) Mines and minerals are subject to a general exception. In the case of the Buildings, such an exception would not have been necessary if the demise was of the internal parts of the Buildings only.

ii) The Mobax Lease plan shows railway lines running under the Buildings. In sub-paragraph (a) of the exceptions and reservations there is an exception of those parts of the Premises which were, I assume, required for the use and maintenance of the railway operations of the British Railways Board. This exception would not have been necessary if the demise of the Buildings was limited to internal parts of the Building. It is true that this exception refers to areas *"under the demised premises"*, which might be said to mean that the relevant demised premises were confined to the internal parts of the Buildings, but this reading of these words does not seem to me to make good sense. Rather it seems to me that the words *"under the demised premises"* are used in a looser sense, to indicate that the areas below the surface of the Premises, as specified in paragraph (a), which would otherwise be included in the Mobax Premises, are excepted from the Mobax Premises.

iii) My analysis is the same in relation to paragraph (d) of the exceptions and reservations. Paragraph (d) reserves various rights *"over or under"* the demised premises. Again, these reservations would be unnecessary, in relation to those parts of the Premises comprising the Buildings, if the demise was limited to the internal parts only of the Buildings. Again, the point can be made that the rights are being reserved over or under the demised premises, so that they are not actually being reserved, in the case of the Buildings, over parts of the Premises which are included in the Mobax Premises. Again, this does not seem to me to make good sense. Again, it seems to me that the words *"over or under"* are used in a looser sense, to indicate the reservation of rights in respect of areas forming part of the Mobax Premises. There is also the point that, in the case of paragraph (d)(iii) of the exceptions and reservations, there is a reservation of the right to carry out works *"on or from the demised premises"*. This reservation does not make much sense if, so far as the Buildings are concerned, the Mobax Premises include only internal parts of the Buildings.

48. In summary therefore it seems to me that the provisions of clause 1 of the Mobax Lease make much better sense if the Mobax Premises, as described in clause 1, are taken to mean the entirety of the Premises, subject to the exceptions and reservations in clause 1. The provisions of clause 1 seem to me to be inconsistent with the argument that the Mobax Premises are confined to the open areas of the Premises and internal parts of the Buildings.

49. Further support for the Defendant's argument can be found in clause 2(8) and clause 2(9) of the Mobax Lease, which provide as follows.

> "*(8) To keep the demised premises in good and substantial repair and condition*
>
> *(9) To paint in every fifth year of the said term and also in the last year thereof in a good and workmanlike manner with three coats of good lead and oil or other*

> *good quality paint all such parts of the outside of the demised premises as have been or are usually painted and with every such outside painting to make good all stucco work (if any) and in every seventh year of the said term and also in the last year thereof in like manner to wash stop paint whitewash whiten paper and colour all the inside woodwork walls and ceilings of the demised premises and regrain and varnish all parts of the demised premises previously or usually grained and varnished.*"

50. Taken on its own, clause 2(8) can be seen as neutral. The general repairing obligation contained therein relates to *"the demised premises"*, which simply takes one back to the question of what premises were demised by the Mobax Lease.

51. Clause 2(8) does not however fall to be taken in isolation, for two reasons.

52. First, there is the painting and decorating covenant, in clause 2(9), which makes specific reference to *"the outside of the demised premises"*. This makes little sense if the demise of the Buildings is limited to their internal parts only. The Mobax Lease contains no express grant of a right to access the exterior parts of the Buildings in order to carry out the required work to the exterior of the Buildings. I find it hard to see why such a right should be implied into the Mobax Lease, when the much more obvious solution to this problem is to take the Mobax Premises as including the entirety of the Buildings.

53. Second, if the Mobax Premises include only the internal parts of the Buildings, there is a remarkable gap in the Mobax Lease. This is because, on this hypothesis, the Mobax Lease makes no provision for anyone to be responsible for the repair of those non-internal parts of the Buildings which are not included in the Mobax Premises. The Mobax Lease contains no landlord's covenant to this effect, and no tenant's covenant to this effect. I agree with the Defendant that, on this hypothesis, one would expect the Mobax Lease to provide for the landlord to be responsible for the repair of the non-internal parts of the Buildings, with the tenant being obliged to meet the cost of this work through a service charge provision. This is all the more so because the user and alienation covenants in the Mobax Lease, both as originally drafted and as subsequently varied, plainly contemplated that the individual retail and residential units within the Premises would be subject to individual underlettings. It would have made no commercial sense for Mobax to have taken the Mobax Lease with this gap in the scheme of repairing obligations. Indeed, as the Defendant pointed out in its argument, such a gap would create problems for anyone seeking to take an underlease of an individual unit with the assistance of mortgage finance. The gap might well have rendered the relevant unit unacceptable to a mortgage lender.

54. The Claimant argued that this gap in the repairing obligations could be filled by implying into the Mobax Lease a covenant, on the part of the landlord, to repair the non-internal parts of the Buildings. The Claimant relied upon <u>Barrett v Lounova</u> [1990] 1 Q.B. 348. In that case a dwelling house was let on a tenancy agreement which made no provision for external and structural repairs. The tenancy agreement was granted for a term of one year and thereafter from month to month. The dwelling

house fell into serious disrepair, and the tenant sought damages and an order for specific performance of what she claimed was the implied covenant of the landlord to keep the structure and exterior of the dwelling house in repair. The Court of Appeal decided that it was appropriate to imply a covenant into the tenancy agreement which required the landlord to keep the structure and exterior of the dwelling house in repair.

55. Barrett v Lounova was considered by the Court of Appeal in Adami v Lincoln Grange Management Limited (1998) 30 HLR 982. In this latter case the Court of Appeal declined to imply a covenant into a long lease of a maisonette which would have required the landlord to keep in repair the structure and exterior of the building in which the maisonette was located. The Court of Appeal specifically rejected the argument that there was any principle to the effect that such a covenant should be implied in a case where the relevant lease was silent on external and structural repairs. Sir John Vinelott stated his conclusion, with which the other members of the Court of Appeal agreed, in the following terms, at page 990.

> "*The decision of the Court of Appeal in Barrett v. Lounova is, of course, binding on this court. However, in my judgment it must be taken as decided upon the special facts of that case and no principle can be discerned which requires the implication of an obligation on the part of the lessor to keep the structure of the block in good repair. I would dismiss the appeal.*"

56. In the present case I can see no reason to imply a landlord's repairing covenant in order to fill the gap in the repairing obligations in the Mobax Lease which arises on the Claimant's argument. The obvious solution to the problem of the gap in the repairing obligations created by the Claimant's argument is to reject the Claimant's argument, and to read the references to *"the demised premises"* in clause 2(8) and 2(9) as including the entirety of the Buildings.

57. The second of the two reasons which I have identified above for not taking clause 2(8) of the Mobax Lease in isolation can be taken a little further. As I have said, the Mobax Lease contemplated individual underlettings of the retail and residential units within the Premises. In other words, it was contemplated that the Mobax Lease would end up as a headlease of the Mobax Premises. In such a case one would normally expect the person granting the underlettings to have an interest in, and to be responsible for the repair of the premises in which the retail and residential units were contained. One would not normally expect the grantor's interest, in this case the interest of the tenant under the Mobax Lease, to be confined to the individual units. With this in mind, it seems to me that it would be commercially odd to read the Mobax Lease as confining the Mobax Premises to internal parts only of the Buildings.

58. The Defendant has also pointed to the tenant's insuring covenant in the Mobax Lease, at clause 2(12), which contains an obligation on the part of the tenant to insure and to keep insured *"the demised premises"*. There is no obligation imposed on the landlord to insure anything. If therefore the Claimant's argument is correct, and the Mobax Premises, so far as they demise the Buildings, are limited to internal parts only of the Buildings, there is a gap in the insuring obligations. No one is, on this hypothesis, responsible for insuring the external parts of the Buildings. While I accept that the Mobax Lease could, in theory, contain such a gap in the insuring obligations, it seems

to me that it makes much better commercial sense if the reference to the demised premises in clause 2(12) is read as a reference to the entirety of the Buildings, so that the tenant's insuring obligation extends to the entirety of the Buildings. In that way there is no gap in the insuring obligations, and the covenant in clause 2(12) makes commercial sense.

59. Drawing together all of the above discussion, I arrive at the following preliminary conclusions, as a matter of construction of the Mobax Lease.

    i) As a matter of construction of clause 1 of the Mobax Lease, the Mobax Premises included, and include the entirety of the Buildings. It does not make sense, either in terms of the wording of clause 1 or in terms of commercial sense, to read clause 1 as confining the demise of the Buildings to internal parts only.

    ii) As a matter of construction of the Mobax Lease as a whole, it does not make sense, either in terms of the wording of the Mobax Lease or in terms of commercial sense, to read the demise of the Buildings in the Mobax Lease as being confined to internal parts only of the Buildings.

    iii) The Mobax Premises plainly included, and include the entirety of the Buildings.

60. If the preliminary conclusions which I have just expressed are correct, it seems to me that the Mobax Premises must also include the Airspace. If the Mobax Premises include the entirety of the Buildings it seems to me to follow that the Mobax Premises also include the Airspace. If, as I have decided, the premises demised by the Mobax Lease comprised the open parts of the Premises and the entirety of the Buildings, such a letting of land and buildings would normally also include so much of the airspace above the land and buildings as required for the ordinary use and enjoyment of the land and buildings, unless the airspace was specifically excepted from the demise.

61. The question which therefore arises is whether there is anything in the Mobax Premises which serves specifically to exclude the Airspace from the Mobax Premises.

62. I can find no provision in the Mobax Lease which provides for the exclusion of the Airspace from the Mobax Premises. There are the exceptions and reservations in clause 1 of the Mobax Lease. It seems to me however that the exceptions in clause 1 do not include any exception of the Airspace. It seems to me that paragraph (d) of clause 1 does reserve rights to the landlord over the Airspace, but those reservations serve to confirm the inclusion of the Airspace, subject to the rights reserved therein, in the Mobax Premises.

63. I therefore arrive at the preliminary conclusion that the Mobax Premises, that is to say the premises demised by the Mobax Lease, include the Airspace.

64. For the avoidance of doubt, and in case the point should matter, I should add that this preliminary conclusion includes the preliminary conclusion that the Mobax Premises include all of the airspace above the Buildings, and for that matter above the open parts of the Premises, which is required for the ordinary use and enjoyment of the Premises. I spell this point out, to avoid any confusion, because the Airspace, that is

to say the area of airspace demised by the Airspace Lease, is part only of the airspace of the Premises to which I have just referred.

65. I now turn to consider this preliminary conclusion by reference to the Satco Lease and the authorities cited to me.

Discussion – the Satco Lease

66. I have already set out the description of the Satco Premises in paragraph 1.5 of the Particulars to the Satco Lease. Both parties sought to rely on this description of the Satco Premises in support of their arguments.

67. The Claimant contended that the reference to *"the land and buildings"* in this description, and the list of specific exclusions from the demised premises in the last part of paragraph 1.5 served to differentiate this description of the demised premises from the description of the Mobax Premises in the Mobax Lease. This difference, so the Claimant contended, served to bring out the point that the Satco Lease demised the entirety of the Premises including the Airspace (subject to the specific exceptions in paragraph 1.5) in contrast to the more restricted demise made by the Mobax Lease.

68. The Defendant contended that the reference to the Existing Lease (the Mobax Lease) in paragraph 1.5 of the Particulars to the Satco Lease, and various other provisions in the Satco Lease made it clear that the Satco Premises were in fact intended to be the same premises as those demised by the Mobax Lease; that is to say the entirety of the Premises including the Airspace (subject to the specific exceptions made in the two leases).

69. In my view it is not appropriate for me to take account of the Satco Lease in construing the Mobax Lease. I say this for the following reasons.

70. The general rule of contract law is that a subsequent contract is inadmissible as an aid to the construction of a previous written contract. This is in itself merely one aspect of the general principle of contract law that, save in exceptional circumstances, the subsequent conduct of the parties cannot be looked at to interpret a contract; see paragraph 13 of the judgment of Flaux J. (as he then was) in Hyundai Merchant Marine Company Limited v Trafigura Beheer B.V. [2011] EWHC 3108 (Comm).

71. There is an exception to this general principle, which was explained by Carnwath LJ (as he then was) in the Court of Appeal decision in Ali v Lane [2006] EWCA Civ 1532. This exception relates to the construction of conveyances of land. After reviewing the authorities, Carnwath LJ explained the exception in the following terms, at paragraphs 36 and 37 of his judgment.

> "*36 The conclusion I would be inclined to draw from this review is that Watcham remains good law within the narrow limits of what it decided. In the context of a conveyance of land, where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent conduct, subject always to that evidence being of probative value in determining what the parties intended.*

> *37 The qualification is crucial. When one speaks of "probative value" it is important to be clear what needs to be proved. In this case the issue concerns the line of a boundary which was fixed not later than 1947. Evidence of physical features which were in existence in the 1970s is of no relevance to that unless there is some reason to think that they were in existence in 1947, or they are replacements of, or otherwise related, to physical features which were in existence in 1947. Similarly, evidence of Mr Attridge Senior's understanding of the position of the boundary, or actions by him apparently relating to that boundary, is of limited probative value, even if admissible. Such evidence begs the questions whether his understanding of the boundary was well-founded, and if so how strict he was in observing it, particularly having regard to the disused state of the disputed land during that period*."

72. Carnwath LJ then went on, at paragraph 38, to consider the extent to which evidence of the conduct of parties who were not parties to the original conveyance could be taken into account in construing the original conveyance.

> "*38 I would add that in principle reference to the intentions of the parties means the parties to the original conveyance. Thus in Watcham the user relied on by the Privy Council was that of the Watcham family, who were the beneficiaries of the original certificate. In none of the cases reviewed above was account taken of the conduct of subsequent owners. Megarry J [in Neilson v Poole] might possibly have been willing to go further. Where the evidence of the intentions of the original parties is unclear, long and unchallenged usage may, as he said, be*
>
> > *"... good reason for tending to construe the (original) conveyance as having done what the parties appear to have treated it as having done ..."*
>
> *I do not read that as necessarily confined to long usage by the original parties. We need not decide whether that is a permissible extension of the Watcham principle. It would only apply if there were evidence of a long period of acceptance of a specific boundary by a succession of parties on both sides of the boundary. That is not this case. The unilateral actions of the owner of one side (in this case Mr Attridge) could not be relied on as binding on the owner of the other*."

73. I do not think that this exception to the general rule that subsequent conduct cannot be relied upon in construing a contract applies in the present case. I say this for three reasons.

i) I do not regard the Mobax Lease as unclear or ambiguous as to the extent of the Mobax Premises. I refer back to the preliminary conclusion which I have reached as to the construction of the Mobax Lease. In my view it is clear, on reading the Mobax Lease, that the Mobax Premises comprise the entirety of the Premises including the Airspace, subject only to the exceptions contained in the Mobax Lease.

ii) The Satco Lease was granted some 31 years after the Mobax Lease. The parties to the Satco Lease, when it was granted, were not the same persons as the original parties to the Mobax Lease.

iii) I have serious doubts that it is appropriate to invoke the exception, which is essentially applicable to boundary disputes, in a case such as the present case, where the task is not to fix a boundary line, but rather to decide which parts of the Premises were intended to be included in the demise made by the Mobax Lease. Putting the matter another way, the task in the present case seems to me to be one of pure construction, relating to premises which were clearly identified as lying within the boundary line shown on the plan attached to the Mobax Lease. The task is not to identify the physical location of a particular boundary.

74. I therefore proceed on the basis that the Satco Lease is not available to me as an aid to the construction of the Mobax Lease. It follows that the Satco Lease does not affect my preliminary conclusion that the Mobax Lease includes the Airspace.

75. In case I am wrong in deciding that I should disregard the Satco Lease, and if I had thought it appropriate to take into account the Satco Lease, I should say that I prefer the argument of the Defendant on the Satco Lease. If it was appropriate to take into account the Satco Lease, it seems to me, on reading paragraph 1.5 of the Particulars to the Satco Lease, that the Satco Premises did include the Airspace, and were considered to be the same premises as the Mobax Premises. In other words it seems to me that the Satco Lease, if it could be taken into account, supports my preliminary conclusion that the Mobax Premises include the Airspace. This conclusion does not however form part of my reasoning in this Judgment, as I do not consider that I can rely on the Satco Lease as an aid to construction.

Discussion – the authorities

76. A number of authorities have been cited to me, which are said to bear on the question of construction which I have to decide.

77. The Defendant relies upon the case of Bernstein of Leigh (Baron) v Skyviews & General Limited [1978] 1 Q.B. 479 as authority for the proposition that the ownership of land carries with it the ownership of the airspace above the land, to such height as is necessary for the ordinary use and enjoyment of the land. So it is that a proprietor of land can prevent the erection of telegraph wires in the airspace above the land by an action in trespass; see Fry LJ in The Board of Works for the Wandsworth District v The United Telephone Company Limited (1883-1884) LR 13 QBD 904, at page 927.

78. I do not regard these authorities as being particularly helpful in the present case. It seems to me that Bernstein establishes that the Mobax Premises will include the

Airspace, if the premises demised by the Mobax Lease do comprise the entirety of the land and buildings shown within the blue edging on the plan attached to the Mobax Lease. On this hypothesis, and assuming no exception of the Airspace, Bernstein seems to me to establish, or confirm that the demised premises will include the airspace above the Buildings and the open parts of the Premises, to such height as is necessary for the ordinary use and enjoyment of the Buildings and the open parts of the Premises. That airspace would, as it seems to me, include the Airspace.

79. What I have said in my previous paragraph is however essentially a restatement of the question which I have to decide; namely whether, as a matter of construction of the Mobax Lease, the Mobax Premises include the Airspace. Indeed, it seems to me that Bernstein is necessarily of limited assistance in determining whether the premises demised by a particular lease includes airspace. This is because the question of whether such airspace is included necessarily depends heavily on the terms of the relevant lease and the nature of the demised premises. A lease of land and buildings may normally be expected to include the airspace above the land and buildings. A lease of premises such as a flat or other unit, comprised within a larger building, may or may not include airspace. All will depend upon the terms of the relevant lease and the location of the relevant flat or other unit.

80. This brings me on to those authorities cited to me which were specifically concerned with flats.

81. In Dorrington Belgravia Limited v McGlashan [2009] 1 EGLR 28 one of the questions which the Judge (His Honour Judge Dight sitting in the Central London County Court) had to decide was whether a demise of a maisonette which had been built with a flat roof incorporating circular skylights included the roof of the maisonette and the airspace above the roof. The Judge decided that both the roof and a reasonable amount of airspace above the roof were included in the demise. As the Judge was however at pains to point out, this decision turned upon the particular lease which the Judge had to construe, and the relevant factual matrix.

82. One of the authorities referred to by Judge Dight in Dorrington was the decision of the Court of Appeal in Davies v Yadegar [1990] 1 EGLR 71. In this case the question before the Court of Appeal was whether the letting of a top floor flat, which expressly included the roofspace and roof of the building in which the flat was contained, also included the airspace above the roof. The issue arose because the tenant wished to carry out a loft conversion which would alter the profile of the roof, principally by the installation of dormer windows. The landlord contended that this would constitute a trespass into the airspace above the roof. The Court of Appeal decided that the demise included the airspace above the roof. Woolf LJ (as he then was) expressed his reasoning in the following terms, at 72E-H.

> "*In my view, the answer to this argument by Mr. Bickford-Smith is capable of being shortly stated. On a demise of this sort of premises which includes the roof space and the roof, the demise includes the air space above the roof and, accordingly, there is no trespass involved in carrying out an alteration which alters the profile of the roof so as to protrude further into the air space above the existing roof. Mr. Bickford-Smith submits to the contrary that the air space above the roof is not*

> *included in the demise and he does so because he submits a different principle applies where one is dealing with a property which is divided into flats. He submits that, in a case where a property is so divided, all that is in fact included in the demise is the actual area occupied by the flat. The demise is restricted laterally by the extent of the flat. He accepts, and clearly rightly accepts, that, if this was not a demise of a flat but a demise of the whole building, it would have included the air space above the roof, but he submits a different situation exists because this was merely a demise of a flat.*
>
> *I can well see that, in a different situation where one is considering a block of flats containing a number of different premises occupied by different tenants where no tenant has included in his demise the roof, a position different from that which I have indicated could exist. However, in the situation that we are dealing with here of what was once a single residential unit which has been divided into two flats, in my view, Mr. Bickford-Smith's submission has no application. The roof space and the roof was included in the demise and the logical intent would be that the air space above should be included in that demise. Were the position otherwise one can easily see that all sorts of absurd results would follow: if the tenant of the upper flat wished to alter his chimney he would not be in a position to do so; if he wished to erect an aerial on the roof he would not be in a position to do so; if he wished to change the flow on the roof because of changes in building practices he would not be in a position to do so without the consent of the lessor, and the lessor would have a completely unfettered discretion to refuse that consent. Such a result would, in my view, be wholly contrary to the intent of section 19(2) of the 1927 Act which, read together with the clause dealing with the alterations in this lease, was intended to make the requirement of consent subject to the proviso that it should not be unreasonably withheld.*"

83. Davies v Yadegar may be said to lend some support to the Defendant's argument that, if the Mobax Premises include the roofs of the Buildings, then it should follow that Mobax Premises also include the airspace above those roofs. Equally this may be said to explain why the Claimant's argument is not that the Mobax Premises include the entirety of the Buildings, but not the Airspace, but rather that the Mobax Premises include only the internal parts of the Buildings. The Claimant's argument may be said implicitly to accept that if, contrary to the Claimant's argument, the Mobax Premises do include the entirety of the Buildings, it is difficult to see why the Mobax Premises would not also include the Airspace.

84. The Claimant has referred me to the decision of Mr. Nicholas Strauss QC, sitting as a Deputy Judge of the Chancery Division, in Rosebery Limited v Rocklee [2011] EWHC 2947 (Ch). In this case the issue before the Deputy Judge was whether the underlease of a roof terrace included certain airspace.

85. The Deputy Judge reviewed certain authorities, including Davies v Yadegar, and arrived at the following conclusion, at paragraph 43, in terms of whether a lease of premises which includes the roof of those premises includes the airspace above that roof.

> *"In my opinion, the authorities do not support the proposition advanced by Mr. Harpum that there is a presumption in any lease of, or including a roof that it extends upwards to the full height of the airspace available to the lessor. Davies v Yadegar was a case in which the demise included the whole of the top floor and the whole of the roof. The passage emphasised in the judgment of Woolf L.J. above suggests that, where the demise is of the roof of a small part of the building, in circumstances in which its use could affect tenants on other floors, no such presumption applies. I agree with Lewison on Interpretation of Contracts, 4th ed. at §11-12 that there are no clear presumptions relating to divisions of individual parts of a building."*

86. The present case may be said to be different to Rosebery, because the Buildings were not the subject of separate lettings of individual parts, such as one would find in a block of flats. Rather, the Mobax Lease demised, on the Claimant's case, all the relevant internal parts of the Buildings together or, on the Defendant's case, all of the Buildings together. Nevertheless it seems to me that if the Mobax Premises do include the roofs of the Buildings, I should not take Davies v Yadegar as establishing a presumption that the Mobax Premises will also include the Airspace. It seems to me that the question of whether the Airspace is included in the Mobax Premises remains a question of construction of the Mobax Lease. It follows that I do not regard Dorrington or Davies v Yadegar as providing any real support for the preliminary conclusion which I have reached as a matter of construction of the Mobax Lease. Equally, I do not see either authority as undermining that preliminary conclusion.

87. Of the authorities cited to me, this leaves Waites v Hambledon [2014] EWHC 651 (Ch). The case concerned a block of flats and two separate garage blocks. Each of the flats was let on a long lease, together with a garage. The freehold owner of the flats and garages granted a lease of the airspace above the garages to the claimant in the case. The claimant, a developer, wished to construct flats above the garages. The tenants objected to this development. Two of the issues which the Judge (Morgan J.) had to decide were (i) whether each lease of a flat and garage included the roof of the relevant garage and (ii) whether each lease included the airspace above the relevant garage.

88. The Judge concluded, as a matter of construction of the leases, that each lease did demise the roof of the relevant garage. This brought the Judge to the second issue. As the Judge pointed out (paragraph 41 of his judgment), if the demise did not include the roof of the garage, it could not extend to the airspace above that roof. If however the roof of the garage was included in the demise, it did not necessarily follow that the airspace above the roof was also included.

89. After reviewing a number of authorities on the question of whether airspace was included in a letting, including Davies v Yadegar and Rosebery, the Judge reached the following conclusion, at paragraph 50.

> "*50 Having considered these authorities, I conclude that there is nothing in them to prevent me giving effect to the provisional view I expressed in paragraph 45 above. Indeed, the authorities seem to me to provide support for that view. Whether one says that there is a presumption to be applied, I consider that where one is dealing with a demise of a building, where the wording of the demise is expressed by reference to a vertical division, and there is no wording expressing any horizontal division, it is natural to react to that wording by holding that there is no horizontal cut off which excludes the airspace above the building or, for that matter, the sub-soil below the building. My final view is that, in this case, the demise of a garage includes the airspace above the garage*."

90. I find this reasoning helpful in the present case. The present case is not one of horizontal division. The Buildings were not, by the Mobax Lease, the subject of separate lettings in horizontally divided parts. The Buildings were, by the Mobax Lease, the subject of a single letting, either as to internal parts only (the Claimant's argument), or in their entirety (the Defendant's argument).

91. Implicit in the Claimant's argument of course is the contention that the Buildings were effectively let in horizontally divided internal parts, because the demise made by the Mobax Lease was restricted to internal parts only of the Buildings. I have however reached the preliminary conclusion, as a matter of construction of the Mobax Lease, that this argument should be rejected. I have found nothing in the authorities cited to me which undermines or contradicts this preliminary conclusion.

92. If therefore the Mobax Premises do include the entirety of the Buildings, and if I may respectfully adopt the language of Morgan J., I find it natural to react to the wording of the Mobax Lease by holding that there is no horizontal cut off which excludes the Airspace from the Mobax Premises.

93. In summary, the effect of the authorities cited to me, in terms of my preliminary conclusions on the construction of the Mobax Lease, is as follows.

    i) I do not consider that any of the authorities cited to me provides any real support for my preliminary conclusion that the Mobax Premises include the entirety of the Buildings. Similarly, I do not think that those authorities undermine that preliminary conclusion in any way. It seems to me that this preliminary conclusion is one which depends upon construction of the Mobax Lease.

    ii) I consider that the relevant part of the decision in Hambledon, which I have identified above, does support my preliminary conclusion that, if I am right in concluding that the Mobax Premises include the entirety of the Buildings, the Mobax Premises also include the Airspace.

Discussion – my final conclusion

94. My preliminary conclusion, reached as a result of my construction of the Mobax Lease, was that the Mobax Premises, that is to say the premises demised by the Mobax Lease, include the Airspace.

95. Drawing together all of the above discussion I conclude that this preliminary conclusion is not undermined or disturbed either by the Satco Lease or by any of the authorities cited to me. My final conclusion is therefore that the Mobax Premises include the Airspace.

Overall conclusions

96. I therefore conclude as follows.

i) The Mobax Premises, that is to say the premises demised by the Mobax Lease, include the Airspace.

ii) Accordingly, the Airspace Lease was granted as a lease reversionary upon the Mobax Lease, and falls to be registered accordingly.

iii) Accordingly, the Claimant is not entitled to the relief sought in this action, and the action falls to be dismissed.