Neutral Citation Number: [2022] EWHC 3276 (Ch)

Case No: CH-2021-000138

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20/12/2022

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

DUNWARD PROPERTIES LIMITED **Appellant**

- and –

MR RICHARD ALEXANDER ISAAC **Respondent**

- -
- -

Nicholas Trompeter KC (instructed by **Freedmaan & Hilmi LLP**) for the **Appellant**
Gavin Bennison (instructed by **Streathers Solicitors LLP**) for the **Respondent**

Hearing dates: 15 June 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.30am on Tuesday 20 December 2022.

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Mr Justice Adam Johnson :

Introduction & background

1. In August 2015 Mr Isaac, the Respondent, bought a long lease of a first floor flat in Balham, South London. Below him at the time, on the ground floor, was a firm of estate agents. Above him was another flat in the same building.

2. In 2016, however, the estate agency on the ground floor moved out. In May 2017, an application for planning permission was made by a prospective new tenant, to permit a change of use to allow the ground floor premises to be used as a bar/restaurant. The change of use was approved. Thereafter, during July and August 2017, works were carried out to configure the ground floor as a bar/restaurant, and a bar/restaurant was then opened, known as "*Brick and Liquor*".

3. For Mr Isaac, this was a very different proposition. He was unhappy with the resultant noise and fumes which he said amounted to a nuisance. At the time he had a lodger, but she was also unhappy and moved out.

4. In the end, Mr Isaac sold his flat in May 2020 for some £470,000. He brought an action in the Central London County Court against his landlord, alleging they had been in breach of his lease by reason of the bar/restaurant having been opened. His case was that, had that not happened, and had the ground floor remained as an estate agency or similar, then his flat would have sold for £575,000. He also brought claims in nuisance, for breach of the express covenant of quiet enjoyment in cl. 5.1 of the lease, and for derogation from grant.

5. Mr Isaac claimed as damages for breach of the lease the difference between the sale value of the Flat and the value he said it would have had if it had remained as an estate agency. He also claimed damages for other consequential losses, including the loss of income from his lodger.

6. After a trial in the County Court, the Learned Judge, HH Judge Mark Raeside QC, allowed Mr Isaac's claim in part. He agreed the landlord was in breach of the terms of the lease by reason of the bar/restaurant having opened. He rejected the claims in nuisance, for breach of the covenant of quiet enjoyment and for derogation from grant.

7. The Judge awarded as damages a sum of £105,000, representing the difference between the actual value of Mr Isaac's flat in May 2020 and the value it would have had if there had been no breach. However, he refused to award any sums in respect of the other consequential losses claimed by Mr Isaac.

8. The Defendant landlord now seeks to appeal the Judge's finding that Mr Isaac was entitled to damages of £105,000. Mr Isaac seeks to uphold that finding, and seeks to cross-appeal the Judge's decision on damages for consequential loss.

Some more relevant detail

9. That is the case in a nutshell, but it is useful to set out a little more detail so that the issues in the appeal and cross-appeal may be properly understood.

10. Mr Isaac's flat was Flat 1, 47 Balham Hill, London ("*the Flat*"). The Flat was part of a building ("*the Building*") comprising commercial premises ("*the Commercial Premises*") on the ground floor and another flat ("*the Other Flat*") on the floor above the Flat.

11. In his expert report prepared on behalf of Mr Isaac, Mr Oliver French, a partner in Knight Frank LLP, gave the following information about the Flat and its location:

> "*4.1 The location is just off the southern corner of Clapham Common, in what can be described as a 'high street' situation*
>
> *…*
>
> *4.4 Balham Hill is a busy road, used by modern traffic travelling to and from the south/south east … Balham Hill comprises mixed use properties, with many retail outlets on the ground floor fronting the road … .*
>
> *5.1 The area is comprised of a mixture of property uses, with retail, leisure, and residential all within the immediate surroundings …*
>
> *5.2 Balham Hill is a popular location on the southern side of Clapham Common, an area considered to form part of prime outer London. It benefits from a range of local amenities that include local bars, restaurants and convenience stores*."

12. The freeholder of the Building is Dunward Properties Limited ("*DPL*"). DPL was the unsuccessful Defendant below and is the present Appellant.

13. DPL became freeholder of the Building in March 2012. On 14 May 2013, it granted a long lease of the Flat to a related company, Dunward Investments Limited ("*DIL*"). It is that long lease – I will refer to it as "*the Lease*" – which was later assigned to Mr Isaac.

14. DPL is a property investment company. Its sole director and shareholder is Mr Duncan Clement Watson. It owns a number of commercial properties in South London. Mr Watson is also the sole director of, and shareholder in, DIL.

15. Also in 2013, DPL undertook work to the Commercial Premises on the ground floor of the Building. This involved refurbishment in May 2013 for use as an estate agency – i.e., Class A2 use under the Schedule to the Town and Country Planning Act (Uses Classes) Order 1987.

16. Thus it came to be that the Commercial Unit was in use as an estate agency when the Lease of the Flat was assigned by DIL to Mr Isaac on 19 August 2015 for the sum of £574,950.

17. That was to change, however. In August 2016 the estate agency left. In May 2017 Mr David Layton, director of a company called SDTJ Limited, made an application via the Wandsworth Planning Portal for a change of use of the Commercial Unit. The application sought a change in the permitted use from Class A2 to Class A4, " *… to*

provide suitable premises for an independent neighbourhood cocktail bar and social eatery". Works were proposed which included construction of a new kitchen area, bar area and accessible WC.

18. On 6 July 2017, Wandsworth Council granted permission for the proposed development and change of use subject to conditions, and a few days later, on 14 July 2017, DPL granted a lease of the ground floor of the Building to SDTJ for a period of 10 years.

19. Thereafter, between 17 July and around 18 August 2017, the relevant works were carried out by SDTJ. The Judge described these (para. [76]) as "*structural and indeed non-structural though probably more of the latter*". The Judge found as a fact that Mr Watson, the principal of DPL, was aware of the works. After completion of the works, the Commercial Unit reopened as "*Brick and Liquor*".

20. Thereafter, Mr Isaac brought his proceedings. He brought (1) a claim for breach of contract, by reference to the terms of the Third Schedule to the Lease, paras 4 and 5, and (2) separate claims for nuisance, for breach of the covenant of quiet enjoyment, and for derogation from grant, relying on both excessive odours and noise emanating from "*Brick and Liquor*" while in operation.

21. Mr Isaac sought both (1) damages representing what he said was the diminution in value of the Flat, and (2) damages for consequential losses. His claimed consequential losses comprised: lost income from his lodger (i.e., lost rental income from the date of her moving out to the date of sale); wasted professional costs (i.e., the costs of selling the Flat); and certain additional costs (such as the costs of storing his property pending purchase of an alternative flat.)

The Judgment

Breach of terms of the Lease

22. It is convenient at this point to refer to the relevant terms of the Lease.

23. Mr Isaac's basic complaint, which the Judge upheld, was that the events surrounding the opening and operation of "*Brick and Liquor*" involved a breach of the terms of the Lease by DPL.

24. The terms relied on are in the Third Schedule to the Lease, at paras 4 and 5.

25. The Third Schedule sets out what are referred to as the "*Excepted Rights*". Their relevance in terms of the overall scheme of the Lease is apparent from para. 2 of the Lease. Under para. 2, the Lessor (DPL) demised the Flat to the Lessee (DIL, later Mr Isaac), together with certain "*Included Rights*", but:

> "***EXCEPTING AND RESERVING*** *unto the Lessor and the lessees of the other parts of the Building the Excepted Rights*".

26. Among the Excepted Rights in the Third Schedule are then the following, at paras 4 and 5 (my emphasis added):

> "*4. The right to carry out works to the structure of the Building or any part or parts thereof other than the Flat so as*
>
> *(a) to create one or more additional flats and/or*
>
> *(b) amend the extent of any of the Other Flat within the Building and/or*
>
> *(c) to carry out any development of whatever nature upon the Building*
>
> *Provided that such works do not lead to the diminution in value of the Flat".*
>
> *5. The right to carry out development of any other part of the Building or the Other Flat provided that such works do not lead to the diminution of value to the Flat*".

27. *"[T]he Building*" in these provisions is a reference to 47 Balham Hill London SW12, and "*the Other Flat*" is a reference to the flat above Mr Isaac's flat.

28. The Judge dealt with the central question of the proper interpretation of paras 4 and 5 of the Third Schedule in a section of his Judgment between [122] and [132]. As I read it, the critical findings he made were that:

    i) The steps taken which led to the opening of the "*Brick and Liquor*" bar involved both structural and non-structural "*works*" to the Building, and in any event amounted to a "*development*" within the meaning of para. 4(c) and para. 5.

    ii) Although the "*works*" had been carried out by the new tenant, SDTJ, DPL was aware of them and under the Lease was legally responsible for them.

    iii) The "*works*" and the "*development*" had led to a diminution in the value of the Flat, because after they were completed the Flat was worth less than it was before.

    iv) That gave rise to an actionable breach of the terms of the Lease. Damages were recoverable corresponding to the extent of the diminution in the value of the Flat.

    v) Given the finding at (ii) above, Mr Isaac's alternative argument as to an implied term (to fix DPL with responsibility for the "*works*", though carried out by SDTJ) did not have to be resolved (Judgment at [136]).

29. In assessing damages for breach, the Judge accepted the valuation evidence of Mr French, Mr Isaac's expert. Mr French in his Report had provided an assessment of what the value of the Flat would have been in May 2020 (when it was sold by Mr Isaac), had the Commercial Premises remained as an estate agents.

30. At one point in his Report (para. 6.2), Mr French described the "*central issue*" of his valuation as being "*the impact of a different type of commercial use*", and at para. 7.8

described his schedule of comparables as relying on the "*difference between the flats above quieter commercial units and those above 'loud' commercial units*." DPL relies on these statements as having particular relevance in the context of this appeal, and I will need to come back to them below.

31. Overall Mr French estimated the alternative sale value as £575,000, i.e. £105,000 more than Mr Isaac in fact sold it for.

32. The Judge expressed his overall conclusion on Mr Isaac's breach of contract case briefly, as follows (Judgment at [153]):

> *"The contractual claim under the express term of the Lease gives rise to a diminution in value of the Flat sustained by Mr Isaac which is actionable … I am satisfied in reliance on Mr Frenches [sic] report on which I rely that damages result in the sum of £105,000 … ."*

33. The Judge refused to award Mr Isaac damages for any consequential losses arising from the breach. In dealing with this issue at [154] of his Judgment, he said (referring to paras 4 and 5 of the Third Schedule):

> *"… all that was protected by these express terms was Mr Isaac's investment in the Flat but nothing more. Mr Isaac did not need to move out of the Flat as a result of that breach of contract and the nuisance, as such, from noise was not protected … ."*

Mr Isaac's other claims

34. Mr Isaac's claims in nuisance, for breach of the covenant of quiet enjoyment and for derogation from grant were dismissed as "*not sustainable*" (para. [152]).

35. The Judge approached these various claims on the same basis. His basic findings were that (1) the claims based on odours emanating from "*Brick & Liquor*" were not made out, because they were not supported by the evidence (para. [149]); (2) although on the face of it Mr Isaac had a legitimate complaint about excessive noise, at least during the period September 2017 to March 2018 (when the noise problem was resolved), he had not shown sufficiently clearly that DPL was legally responsible for the excess noise (see at para. [151]).

The Appeal and Cross-Appeal

The Appeal

36. DPL'S Grounds of Appeal may conveniently be grouped together as follows:

    i) Grounds 1-3: These are a challenge to the basic premise that paras 4 and 5 of the Third Schedule are in the nature of a covenant or contractual promise by DPL.

    ii) Ground 4, in particular 4A, 4B and 4C: The arguments under these grounds are all inter-related. Effectively, they are that paras 4 and 5 were only concerned with the effect of physical "*works*" to the Building, and so the Judge was wrong

> to have concluded there was a breach of contract by DPL, because the evidence before him was that the diminution in the value of the Flat was caused by the change of use (from estate agency to bar/restaurant), and not by the physical "*works*" carried out to the Commercial Premises.

37. In the event, Ground 4A, 4B and 4C were the real meat of the appeal. These were added in by way of amendment to the original Grounds. Sensibly, Mr Isaac did not object to them being introduced, subject to proper treatment of the associated costs in due course.

38. DPL's original Ground 5 was not pursued (this related to whether, in construing paras 4(c) and 5 as he did, the Judge had been motivated by a concern that Mr Isaac might otherwise have been left with no effective remedy). There was no appeal against the Judge's finding that DPL was liable for the "*works*", even though in practice they were carried out by SDTJ, and so the parties were agreed before me that no separate point about a possible implied term arose, even though the point was referenced as a possible further Ground of Appeal in some of the written submissions.

The Cross-Appeal

39. Mr Isaac made no appeal against the Judge's decision dismissing his claims in nuisance, and for breach of the covenant of quiet enjoyment and derogation from grant.

40. He did, however, seek permission to appeal the Judge's decision to award him damages for breach of the Lease corresponding only to the diminution in the sale or capital value of the Flat. Mr Isaac argues that since there was a breach of contract, he is entitled to damages representing all losses arising naturally from the breach or such as might be supposed to have been in the contemplation of the parties at the time of contracting: see Hadley v. Baxendale (1854) 9 Ex. 341 at 354, per Alderson B. He says that means he is entitled to damages for his consequential losses (see above at [21]).

The Appeal: Discussion and Conclusions

Grounds 1-3: Was there a contractual promise?

41. The question here is about the essential nature of the Excepted Rights and the provisos in paras 4(c) and 5 of the Third Schedule, looked at together. Although it seems that this question occupied a good deal of time in the proceedings below, by the time of oral argument in the present appeal it had lost much of its significance, and Mr Trompeter KC for DPL focused more of his attention on Ground 4, which is addressed in the next section of this Judgment.

42. The point which remains is, I think, a narrow one, and can be dealt with briefly.

43. As I understood it, the parties were agreed that the matters covered in paras 4 and 5 of the Third Schedule to the Lease were in the nature of exceptions rather than reservations (see Emmett & Farrand on Title, Vol 1, para. 19.039, and Lewison, The Interpretation of Contracts (7th Edn.), Ch 11, Section 14), meaning that the intended effect of paras 4 and 5 was the retention by DPL of pre-existing rights over the Building/Other Flat.

44. So far so good. The point of contention was about the provisos. DPL's argument was that their effect was to do no more than set a limit on the scope of the retained rights,

in a manner which was declaratory only, and which did not itself constitute a binding contractual obligation. To illustrate the concept by way of an example, the consequence would be that if "*works*" were carried out by DPL which were *outside* the scope of the rights retained by DPL, DPL would be acting without the protection of those rights, and would then be exposed to claims by the owner Flat under the general law (for example relating to nuisance, negligence or trespass), or under the other provisions of the Lease (for example for breach of the covenant of quiet enjoyment), to which it would have no defence based on the retained rights. To put it another way, the retained rights would be available as a form of defence so long as "*works*" were carried out within the declared perimeter of those rights (i.e., so long as there was no diminution in value of the Flat), but they would not be available as a defence if "*works*" were carried out outside the declared perimeter.

45. In developing this point, Mr Trompeter KC relied on a statement of Lord Esher MR as to the nature of provisos, in In Re Barker (1890) 25 QBD 185, at 292, where he said that " *... the ordinary and proper function of a proviso coming after a general enactment is to limit the general enactment in certain instances*."

46. I am afraid I find DPL's argument on this point quite artificial. Everyone was agreed that the point was essentially one of contractual construction. Starting from the premise that paras 4 and 5 (before the provisos) are in the nature of exceptions, i.e. retentions of existing rights, I think it entirely natural to construe the provisos as contractual promises not to exercise those existing rights in the circumstances set out – i.e., if the result would be a diminution in the value of the Flat.

47. I do not see anything in the statement of Lord Esher MR which undermines that conclusion. All he said was that the typical function of a proviso is to limit the general statement which precedes it. He did not say that the limitation has to be achieved in a particular way, and I do not think it inconsistent with his general principle to think the limitation might be achieved, in appropriate cases, by means of a contractual promise not to exercise rights which the promisor would otherwise be free to exercise. Neither do I think my conclusion inconsistent with the idea that in other types of case, a proviso might achieve desired its effect in a different way (see, e.g., Ideal Film Renting Company v. Nielsen [1921] 1 Ch 575, a case about a proviso that consent should not unreasonably be withheld). Context is everything, and in the present context it seems to me that the desired effect is most straightforwardly achieved by reading the provisos in the way I have suggested.

48. I think this analysis more obviously consistent with what I take to be the risk the provisos were intended to protect against, namely the risk of a fall in the value of the Flat. In cases where the provisos apply, DPL's construction would leave the Flat owner to pursue other remedies (e.g. a claim for nuisance) which might not so directly provide compensation for the fall in the sale value of the Flat. It is much more natural to think that the nature of the bargain was: *we promise not to exercise our rights in a way that results in a fall in the value of the Flat, and if we do, we will be responsible and will make up the difference*. That obvious commercial objective is achieved straightforwardly under Mr Isaac's construction.

49. For those reasons, I prefer Mr Isaac's case on Grounds 1-3, and therefore reject those Grounds of Appeal.

Was the contractual promise broken?

The central point

50. The Appellant's position has a number of strands, but they all relate to the same central point.

51. The basic proposition is that the only activity prohibited by the provisos to paras 4(c) and 5 is the carrying out of any physical *"works"* or "*development*" which cause a diminution in the value of the Flat. Here, however, DPL says the evidence did not support the view that the physical "*works*" or "*development*" had caused the diminution in value of the Flat. Instead, DPL argued that the diminution in value came about as a result of a change in *use*.

52. It is said that is apparent from the evidence relied on by Mr Isaac himself, because (as noted at [30] above) at para. 6.2 of his Report, Mr Isaac's expert Mr French described the "*central issue*" of his valuation as being "*the impact of a different type of commercial use*", and at para. 7.8 referred to the "*difference between the flats above quieter commercial units and those above 'loud' commercial units*."

The individual Grounds

53. This basic proposition underpins each of the different elements of DPL's Ground 4.

54. Ground 4: Ground 4 itself is directed to the idea of "*development*". As to this, DPL's position is that the concept of "*development*" in paras 4 and 5 is to be limited in just the same way it says the idea of "*works*" is to be limited – i.e., in the sense of referring solely to some form of physical change to the Building. Viewed in that sense, DPL says that although it is willing to accept the Judge's finding that "*works*" were carried out on the Commercial Premises which amounted to a "*development*", that matters not in terms of liability in this case. It would matter in a case where there was a diminution in value caused by the physical "*works*" or "*development*", but that is not this case, because here the diminution in value was caused by the change of *use*.

55. Ground 4A: That leads on to Ground 4A. Ground 4A is effectively that the Judge misconstrued the provisos in concluding that there was a breach. It is said he must have done so, because the evidence was to the effect that the cause of the diminution was the change of *use*, but the language of the provisos is not engaged where a diminution in value is caused by a change of *use*, only when it is caused by physical "*works*" or a "*development*" made up of physical "*works*". To put it another way, given the evidence available to him the Judge's conclusion must have been that there was a diminution in value caused by a mere change of *use*; but on their proper construction, that does not give rise to a breach of the restriction in the provisos to paras 4(c) and 5.

56. Ground 4B: As a corollary to this, DPL argues (Ground 4B) that in reaching the conclusion he did, the Judge answered the wrong question. Moreover, DPL argues, it was a question which was not raised in the case and thus was not one which DPL had had the opportunity of addressing. DPL says that the question raised on the pleadings was whether the physical "*works*" or "*development'* had caused the diminution in value of the Flat. It was not whether the diminution in value had been caused by any change of *use*. DPL points out that in fact, in his pleadings and submissions, Mr Isaac made

clear that he did not put his case on the basis of a mere change of use. Yet that must have been the very basis of the Judge's conclusion, and indeed was the only basis open to the Judge based on Mr French's evidence. But that was procedurally unfair to DPL, because in reaching the conclusion he did the Judge was answering a question which DPL never had a proper opportunity of addressing: see Al-Medenni v. Mars UK Ltd [2005] EWCA Civ. 1041.

57. Ground 4C: On the same theme, DPL also points to what it characterises as an inherent inconsistency in the Judge's approach. This is Ground 4C. The inconsistency arises because, although his main conclusion must have been that the diminution in the value of the Flat was caused by the change to the new "*loud*" user of the Commercial Unit (see the evidence of Mr French at [30] and [52] above), the Judge also concluded that Mr Isaac's claims in nuisance, and for breach of the covenant of quiet enjoyment, and for derogation from grant, were "*not sustainable*" (see at [152]). DPL argues that these conclusions are incompatible, because it makes no sense to say that there was no nuisance arising from the different and "*loud*" new user, but at the same time to award damages for loss of value arising essentially from that same user. So there is an internal inconsistency in the Judgment.

Analysis: Overview

58. I have come to the view that I cannot accept these criticisms. I think the Judge was correct in his analysis and that his decision on the breach of contract claims was correct.

59. The essential reason is that I do not think Mr Isaac's case was put on the basis that only physical "*works*" or "*development*" had caused he diminution in value of the Flat. Nor was Mr French's opinion that only the change of *use* had caused the diminution. The case put forward, both in the pleadings and in the evidence, depended on a combination of the physical changes carried out to the Commercial Premises, taken together with what those physical changes meant for its *use*, given their intended purpose and their actual effect – both of which were to develop the Commercial Premises for use as a bar/restaurant. The Judge's analysis involved his accepting that this combination of factors gave rise to liability under the provisos to paras 4(c) and 5, and in doing so he rejected DPL's case that only a diminution in value caused by physical works in the strict sense would engage liability. I think he was correct on both counts.

60. A good deal of time and effort was spent in the parties' submissions on seeking to discern the precise meanings of, and the precise nature of the inter-relationships between, the concepts of "*works*", "*development*" and "*use*." At points this gave rise to levels of abstraction which were almost metaphysical in their subtlety. Ultimately, however, I think the matter can be approached in a straightforward way.

61. The critical question to ask is whether, as a matter of contractual interpretation, the combination of factors which had arisen by August 2017 was of such a type as the parties must have intended would be actionable as a breach of contract. The Judge thought it did, and I agree.

62. I think it relevant to look at the commercial purpose of the paras 4(c) and 5, and the provisos, taken together. The Judge had some incisive comments to make on this topic at [130]-[132] of his Judgment, none of which were directly challenged in argument before me.

63. The Judge thought that the provisos had a limited but important purpose, which was to protect the value of the investment made by the owner of the Flat – i.e., Mr Isaac. That outcome, said the Judge, represented a compromise between the competing interests of the commercial landlord, DPL, and the interests of the owner of the Flat from time to time.

64. DPL was a property investment company, and its interest was in maximising its return from the Building in terms of profit (Judgment at [130]). Given the location and nature of the Building, with the Commercial Premises on the ground floor, it would obviously have wished to reserve to itself maximum flexibility to make a profit, including by changing the *use* to which the Commercial Premises were put. Although the Judge did not say so in terms, that must have included the possibility of the Commercial Premises being used (for example) as a bar, restaurant or convenience store, since those were typical uses made of commercial outlets in the area (see the quote from Mr French's Report at [11] above). For the Judge (see at [131]), this need to retain flexibility explained the wide range of the Excepted Rights, including in particular for present purposes the right to "*carry out works to the structure of the Building so as … to carry out any development of whatever nature*", and the right " *… to carry out development of any other part of the Building or the other Flat*."

65. From the point of view of the owner of the Flat, all this meant that they might have to put up with a degree of disturbance from time to time, and accept that the *status quo* might well change. There could be no complaint about change *per se*, because DPL's business was property development for profit and inherent in that was the risk of change as far as the owner of the Flat was concerned. But the compromise struck was that the owner *could* complain if any change brought about a diminution in the *value* of the Flat.

66. I agree with the broad thrust of the Judge's analysis, which to my mind makes good commercial sense. But if the purpose of the provisos was to give effect to this compromise, it seems to me it would subvert its essential nature to deny Mr Isaac compensation in the circumstances which have arisen, just because he cannot prove that the diminution in value was attributable *solely* to the physical aspects of the "*works*" and "*development*" which have been carried out. Such an approach would exclude liability in many cases where physical "*works*" are carried out for a particular purpose and to achieve a particular effect, and given that purpose and effect, have an impact on value which goes beyond the impact of the physical changes viewed in isolation.

67. The present is a good example. The physical changes were carried out in order to allow the Commercial Premises to operate as a bar/restaurant. That was their very purpose. So it is artificial to assess them merely by reference to their effect on the physical structure and fit-out of the Building. There is something else related to their purpose, beyond the merely physical impact of the "*works*" or "*development*", which needs to be taken into account as well.

68. It is easy to think of other examples. Mr Bennison had a graphic one. If physical works were carried out to the Commercial Premises with the intention of it being used as a brothel, and if the effect were to enable the Commercial Premises to be identifiable as a brothel, it would seem quite artificial to deny recovery on the basis that the underlying physical "*works*" or "*development*" (e.g., the installation of partitions and beds) did not in and of themselves cause the value of the Flat to decline. The physical "*works*" or

"*development*" embody something else, which is certainly real, even if intangible, and it certainly has an impact on value.

69. It seems to me this was just the nature of the complaint made by Mr Isaac. He was concerned not only with physical "*works*", but also with what they meant. Although not put, in terms, as a complaint about change of *use*, it is clear that that was the ultimate concern. In the language of the provisos, the pleadings refer to the "*development*" of the Commercial Premises. As I read it, the idea of "*development*" was not used by Mr Isaac simply to describe the net effect of the physical "*works*" without more, but instead was used to describe the fundamental change from estate agency to bar, of which the physical "*works*" were emblematic and which they effectively embodied.

70. That is, I think, a perfectly appropriate and correct construction of the phrase "*development*" as it is used in the provisos. I disagree with DPL's argument to the contrary. It is clear from the context that "*development*" is intended to have a broad meaning, because para. 4(c) refers to " *... any development of whatever nature ...*", and I do not see why the word "*development*" in para. 5 should be construed any more narrowly.

71. Mr Trompeter KC had an argument that it should be. He said one would expect "*development*" to have a uniform meaning within para. 5, and if that is so it must exclude anything concerning a potential change of *use*, because para. 5 refers not only to " *... development of any other part of the Building ...*", but also to "*development of ... the Other Flat*." The Other Flat, however, is subject to a restriction on change of use (see Lease cl 16.1, and the Fourth Schedule para. 1), and that being so, a uniform interpretation of "*development*" in the Third Schedule, para. 5 must exclude matters relating to a change of *use*.

72. I admire the ingenuity of this argument, but I am not persuaded by it. I do not see why the idea of "*development*" in the context of the Commercial Premises should not in practice be capable of a wider meaning than in the context of the Other Flat: the fact is that it *was* capable of "*development*" in a broader range of ways, including as to *use*. To my mind, it makes little sense to straitjacket the inherently flexible concept of "*development*" by reference to the limited available user of the Other Flat, when the potential user of the Commercial Premises was not so limited. A more natural reading of para. 5, and one consistent with the language of para. 4(c), is to say that the idea of "*development*" is a broad one, but in practice will be narrower in application as regards the Other Flat than as regards the Commercial Unit.

73. In any event, I think the position on the pleadings entirely clear. Mr Isaac's complaint obviously went beyond the impact on value of the simple physical "*works*", looked at in isolation, and was more about the fundamental change or "*development*" which the physical "*works*" represented and to which they gave rise.

74. One can see this from even a rudimentary analysis of the Amended Particulars of Claim ("*APOC*"). Thus, at para. 16, the APOC recite that the application for planning permission made on 3 May 2017, although directed to a change of use "*from estate agent (Class A2) to drinking establishment (Class A4)*", also specified that the proposed change of use would require:

> *" ... minimal structural changes, but will include the internal construction of a new kitchen area, bar area and an accessible WC ...".*

75. The plans and drawings submitted alongside the application gave more detail of the structural and non-structural "*works*" which would be necessary (APOC para, 17), and when planning permission was approved with conditions on 6 July 2017, the conditions included a requirement that details of noise insulation measures be submitted and approved and that a flue duct be installed for the purpose of extracting vapours from the new kitchen – i.e., a requirement for more "*works*" as a condition to the proposed change of *use*.

76. In APOC para. 20 the proposed physical "*works*" – including the modifications required by the planning authority – were defined as "*the Works.*"

77. Para. 22 then dealt with the overlap between "*the Works*", and the concept of "*development.*" This was expressed as follows (my emphasis):

> "*The Works, or alternatively substantively similar works, undertaken to the Building:*
>
> *(1) involved works to the structure of the Building other than the Flat, as well as to the non-structural parts of the Building; and*
>
> *(2) were undertaken so as to carry out development upon the Building, namely a development of the ground floor and basement premises in the Building as a bar/restaurant, where formerly the same had been used as an estate agency (under a different Use Class for planning purposes); and*
>
> (3) *further or alternatively, the Works themselves amounted to a 'development' of the Building*."

78. Para. 22 thus reflects the very close interconnection on Mr Isaac's case between the "*Works"* (as he uses that expression), and the associated "*development"* (as that phrase is used in the Third Schedule). In para. 22(2) that is done by reference to the purpose of the Works ("*so as to carry out ... a development of the ground floor and basement premises ... as a bar/restaurant*"), and in para. 22(3) by equating the two (" … *the Works themselves amounted to a 'development' … "*). Again, these seem to me entirely fair ways of characterising the activity carried out in relation to the Commercial Premises.

79. The same theme is continued in APOC para. 23, which stated as follows:

> *"The Works and associated development of the Building as set out at paragraph 22 above ('**the Development'**) therefore engaged both paragraphs 4 and 5 of the Third Schedule to the Lease set out above …".*

80. As I see it, this was an allegation that the *overall change* made to the Commercial Unit by means of "*the Works"*, given both their intended purpose and their actual effect, was within the scope of paragraphs 4 and 5 of the Third Schedule.

81. DPL's breach is then pleaded in APOC para. 25:

> *" ... the carrying out of the Works as set out at paragraph 22 above (and, further or alternatively, the carrying out of the Development so far as the same differs from the Works) has led to a diminution in the value of the Flat."*

82. Once more, this was not an allegation that the diminution in value of the Flat arose simply as a product of the physical alterations to the Commercial Premises. Rather, it was an allegation about what the physical alterations represented, which involved taking account of their purpose and effect. Their purpose and effect were the same: namely, to develop the Commercial Premises into a bar/restaurant.

83. DPL took a different view, which as I read it was essentially the same one now being advanced in this appeal. In responding to the allegation of breach in APOC para. 25, the Amended Defence at para. 18(d) said: " *... the carrying out of the Works have not in themselves caused any diminution in the value of the Flat*." This was an assertion that the provisos would be engaged *only* if any diminution in the value of the Flat was attributable *solely* to physical "*works*", and not otherwise.

Analysis: Ground 4B - Did the Judge Ask the Right Question?

84. Having made those general comments, one can now draw the threads together. I will do so in a slightly different order to the order in which the individual sub-Grounds of Ground 4 were presented by DPL, starting with ground 4B.

85. To begin with, I do not consider that the Judge addressed the wrong question (DPL's Ground 4B). I consider that he addressed the right question, which was the one fairly raised on the pleadings.

86. That question was whether DPL was right that there would be an actionable breach only if there was a diminution in value caused solely by physical "*works*", or whether Mr Isaac was right that the more nuanced combination of factors he relied on constituted an actionable breach – i.e., the "*Works*" carried out for a particular purpose and having a particular effect, namely "*development*" of the Commercial Premises for *use* as a bar/restaurant (which he called "*the Development*".)

87. The Judge thought Mr Isaac was right. I think that is clearly what he meant at [153] of his Judgment (see [32] above), when he expressed his overall conclusion on what he called *"[t]he contractual claim under the express term of the Lease ...".* What he was referring to was the "*contractual claim*" I have described, made out in Mr Isaac's pleaded case. That was the claim the Judge affirmed. It was a claim DPL had had proper notice of, and had the opportunity to respond to. Indeed, it had given its response (see [83] above), which the Judge rejected in affirming Mr Isaac's case.

88. I also think it clear that Mr French's opinion was given by reference to the combination of factors set out in Mr Isaac's pleaded case. I think it a mistake to say that he attributed

the diminution in the value of the Flat solely to the change of use, as DPL argues. Those were not his instructions. Instead, his instructions required him to compare the values of the Flat both with and without the effect of "*the Development*", and "*the Development*", as defined in the APOC, was the change of the Commercial Premises into a bar/restaurant which "*the Works*" either served to bring about or themselves comprised.

89. It is clear that that is just the exercise Mr French conducted, because at para. 1.5 of his Report, in identifying the issue he was seeking to address, he referred expressly to the letter of instruction, which stated as follows (at para. 12 - my emphasis):

> *"Please provide a valuation of what the open market value of the Flat would have been on that date had the Development (as defined in the Particulars of Claim) of the ground floor commercial premises not been undertaken, assuming that the ground floor commercial premises remained an A2 use class estate agent office and that the Flat's lease contained the prohibitions on which Mr Isaac relies barring any development of the Building that diminishes the Flat's value."*

90. This reflected Mr Isaac's pleaded case very precisely. I think there is no doubt what the basis of Mr French's opinion was. I thus agree with Mr Bennison that when Mr French later referred in his Report to "*the impact of a different type of commercial use*", and to the "*difference between … flats above quieter commercial units and those above 'loud' commercial units*" (see [30] and [52] above), he was not departing from his instructions but was merely using a convenient shorthand to refer to the overall effect of "*the Development*" as described by Mr Isaac in his pleaded case. Against the background as it was presented to Mr French, I think it quite artificial to construe the passing references DPL relies on as an opinion that the cause of the diminution in value was solely a change of *use* in the abstract sense, entirely divorced from Mr Isaac called "*the Works*" and "*the Development*."

Analysis: Grounds 4 and 4A - Was the Judge Correct in his Approach to Construction?

91. Ultimately, the question of law which arises is whether the Judge was correct to conclude that the "*works*" - or, to adopt Mr Isaac's terminology, "*the Works*" – "*led to*" the admitted diminution in the value of the Flat.

92. I think he was correct so to conclude. That is for the reasons already explained above (see at [58]-[83]). Either *"the Works*" (as Mr Isaac defined them) were carried out for the purpose of "*development*" of the Commercial Premises for use as a bar/restaurant, or "*the Works*" themselves amounted to a "*development*" in that sense. After "*the Works*" were done what had previously been an estate agency was immediately available for *use* as a bar/restaurant, and was so used. As a result, the Flat was worth less than before. Whichever way one looks at it, I think it fair to say that "*the Works*" therefore led to the diminution in value of the Flat.

93. Mr Trompeter KC challenged this approach. He made a number of inter-related arguments, as follows:

i) He argued that it reflected an incorrect approach to the language of the provisos, because it would require additional words to be inserted, along the following lines: " *... provided that such works [or the user facilitated by such works] do not lead to the diminution of value of the Flat*."

ii) He argued that such an approach would involve making DPL liable on too tenuous a basis, because it would mean it was liable for any *use* which was merely facilitated by the physical "*works*" carried out. He varied Mr Bennison's hypothetical, and gave the example of "*works*" designed to convert the Commercial Premises into a small hotel, including the building of a number of bedrooms; but where the operator of the hotel later decided to use the hotel as a brothel. The later use would no doubt diminish the value of the Flat, but it cannot have been intended that DPL would be liable for that diminution.

iii) Mr Trompeter KC also said that such a construction would subvert the common law rules of causation. He developed that point by reference to Quinn v. Burch Bros. (Builders) Ltd [1966] 2 QB 370. There, the defendant construction firm was held in breach of contract in failing to supply a sub-contractor with a step-ladder, but were held not to have caused his injury which came about from his decision to use a trestle table as a substitute: the breach merely provided the occasion for the accident, but did not cause it; it was caused by the plaintiff's own decision to use the trestle, which the defendant was not responsible for.

94. In oral argument Mr Trompeter KC made a slightly different point, by reference to a number of authorities dealing with the burden of proof, which support the proposition that where a loss has been suffered but only part is the responsibility of the Defendant, the Claimant is entitled to recover damages from the Defendant only for that part of the loss caused by the Defendant's breach; and if the Claimant cannot prove what that is, then it will recover only nominal damages. A good example is The "Panaghia Tinnou" [1986] 2 Lloyd's Rep. 586, in which damage to cargo was caused both by the Claimant charterers' own breach in failing to ensure that the cargo was properly stowed, and by the Respondent owner's breach in failing to prosecute the voyage with reasonable despatch. Since the Claimant could not show how much of the damage was attributable to the Respondent's breach alone, the claim failed except for nominal damages: the breach was proved, but not the quantum of loss flowing from it.

95. Mr Trompeter KC advanced an alternative argument relying on this principle, and said that even if it was right that Mr Isaac's overall loss flowed in part from matters which DPL was legally responsible for (the physical "*works*" or the "*development*"), it must also have flowed in part from matters DPL was not legally responsible for (change of *use*). Since Mr Isaac had never attempted to disaggregate the different contributing factors, he had not proved what part of his overall loss flowed from DPL's breach and what part did not. He should therefore be entitled only to nominal damages.

96. I am not persuaded by any of these arguments.

97. To start with, as regards the first group of points at [93] above, I do not see that either Mr Trompeter KC's brothel example, or the Quinn v. Burch Bros. case, are of any real assistance. The present is not, I think, a case in which there was only a loose causal connection between "*the Works*" (as Mr Isaac defined them) and the *use* of the Commercial Premises. That was the nub of Mr Isaac's case. His point was that the two

were very intimately connected, because the entire purpose "*the Works*" was to "*develop*" the Commercial Premises for different *use* as a bar/restaurant, and indeed one can fairly equate "*the Works*" with that "*development*" (or, as he referred to it, "*the Development*").

98. I agree. Given both the intended purpose and actual effect of "*the Works*", I think it a distortion to say they all they did was to create *the occasion* for the Commercial Premises to be used as a bar/restaurant (cp Quinn v. Burch Bros.). Once "*the Works*" were completed, anyone looking at the Commercial Premises would have said it was a bar/restaurant, and that is more or less the same as saying it had changed its *use*.

99. For essentially the same reasons, I do not think that on the facts of this case, the interpolation of any additional words is necessary (cp [93(i)] above), in order to justify the conclusion the Judge arrived at. It is a perfectly natural application of the words "*lead to*", to say that here "*the Works*" led to the diminution in value of the Flat, because their express purpose was to develop the Commercial Premises into a bar/restaurant; and when they were done on 18 August 2017, what was created was immediately identifiable as a bar/restaurant; and that is why the value of the Flat fell. Planning permission for change of use had been given some time before, on 6 July 2017, and so by then was a matter of historic fact. Nothing more remained to be done, and indeed the Commercial Premises started operating as a bar/restaurant immediately. In a very direct sense, therefore, "*the Works*" led to the diminution in value, because their completion was the act which brought about the ability for the Commercial Premises to be *used* as a bar/restaurant. For the reasons already set out above (see at [62]-[66]), it seems to me this is just the sort of circumstance the parties' compromise position, as reflected in the provisos to the Excepted Rights, was intended to cover. It would be very odd if it did not.

100. Moving on then to Mr Trompeter KC's separate point based on The "Panaghia Tinnou" and related authorities, I do not find the principle derived from such cases relevant here. The principle applies when there are elements of the Claimant's overall loss which flow from sources other than the Defendant's breach, and the Claimant cannot discharge the evidential burden of proving what loss the Defendant was responsible for.

101. I detect no such issue on the evidence of this case. Once Mr French's opinion is properly understood, it does not support the conclusion that there was some separate and additional factor (*use*) which DPL was not legally responsible for, above and beyond the "*Development*" (as Mr Isaac referred to it), which DPL *was* legally responsible for, which contributed to the diminution in the value of the Flat and therefore to Mr Isaac's loss. Mr French's opinion was that there was one cause, i.e. "*the Development*", and he attributed the entire fall in value to that cause. The being so, the Judge was perfectly well entitled to hold that Mr Isaac had proved that the whole of his loss arose from conduct that DPL was legally responsible for.

Analysis: Ground 4C - Was there an internal inconsistency in the Judge's analysis?

102. Finally, I do not think it correct that any inconsistency arises from the fact that while he accepted Mr Isaac's breach of contract case, the Judge rejected Mr Isaac's claim in nuisance, together with his claims for breach of the covenant of quiet enjoyment and for derogation from grant.

103. The reason is simple. The elements of the claims are different. The claim under paras 4(c) and 5 and the provisos depended only on showing that any "*works*" and/or associated "*development*" had led to a diminution in the value of the Flat. Liability was engaged so long as the value of the Flat fell. It was not dependent on any showing of (for example) an actionable nuisance, or on showing that the elements of a claim for breach of the covenant of quiet enjoyment or for derogation from grant were made out. All that was needed was the evidence, which Mr French provided, that the market valued the Flat differently *after* the "*works*" and the "*development*" than it did before.

104. To put it another way, I see no inconsistency in saying that on the one hand, the elements of Mr Isaac's alternative claims were not made out, but that on the other, the market nonetheless attributed a lower value to the Flat. There is no obvious or necessary correlation between the two. The factors driving market sentiment are likely to be much wider than those which determine whether such specific causes of action may or not be made out, and the contrary must also be true: i.e., one cannot necessarily infer from the fact of a lower market value that the elements of the causes of action must exist. That being so, Ground 4C must be rejected as well.

The Cross-Appeal: Discussion and Conclusions

The Issue

105. Mr Isaac seeks to challenge the Judge's decision to refuse to award him damages for breach of contract in respect of his claimed consequential losses, as identified at [21] above, *viz*. lost income from his lodger (i.e., lost rental income from the date of her moving out to the date of sale); wasted professional costs (i.e., the costs of selling the Flat); and certain additional costs (such as the costs of storing his property pending purchase of an alternative flat). Although technically Mr Isaac's challenge involved his applying for permission to appeal with the appeal to follow, the point was fully argued, and plainly had a real prospect of success, so I think it right to treat permission as having been granted and to express my view on the substance of Mr Isaac's appeal.

106. The Judge's reasoning on quantum is set out [154]-[155] of his Judgment. I have quoted briefly from [154] above, but it is worth setting out fuller extracts, as follows:

> *"154. ... Mr. Isaac's quiet enjoyment was not protected per se by DPL and they were entitled to carry out development of the Commercial Premises and all that was protected by these express terms was Mr. Isaac's investment in the Flat but nothing more. Mr. Isaac did not need to move out of his Flat as a result of that breach of contract and the nuisance, as such, from noise was not protected. Therefore, if he chose to move out of his Flat because he was not satisfied, understandably, with the effect this was having on his life, the noise, he had a right to do so but that would not have resulted or flowed from any breach of contract that I find of that express term but might have flowed from the other cause of action which I have found unsustainable against [DPL]. Accordingly, each and every one of his heads of special damages cannot be claimed, in my judgment, nor can any claim be made for general damages which would not flow in any event.*

> *The claim confuses damages for breach of a contractual right with an amenity right which has no protection for damages.*
>
> *155. Accordingly, I decline to give any special damages to Mr. Isaac and I decline to give him any general damages because this Lease did not have the intention of protecting his amenity value in the property as opposed to his investment value, and nothing more.*"

107. For Mr Isaac, Mr Bennison was critical of the Judge's reasoning. His basic argument was that the Judge's reliance on the difference between the "*investment value*" of the Flat and its "*amenity value*" was misguided. That is not a distinction known to the law in this area. The Judge had found there was a breach of the Lease, arising from the diminution in the value of the Flat; and having done so, Mr Isaac was entitled to all damages flowing from that breach, subject only to the usual rules of causation and remoteness (i.e., reasonable foreseeability.). As to causation and remoteness, Mr Isaac had been put to proof, but his evidence on causation given in his Witness Statement for trial at paras 44-48 had not been directly challenged, i.e., it had never been put to Mr Isaac that he would not have moved out of the Flat or bought a new flat but for the "*development*" of the Commercial Premises. Thus, it was not open to the Judge on the evidence to have found that Mr Isaac's decision to move out of the Flat "*would not have resulted in or flowed from any breach of contract*."

108. Mr Trompeter KC sought to defend the Judge's decision by reference to the reasoning of Lord Hoffmann and Lord Hope in Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2009] 1 AC 61, who held that a Claimant should not recover, even for losses that are not unlikely to occur in the ordinary course of things, if the Defendant cannot reasonably be regarded as having assumed responsibility for losses of the particular kind suffered. Mr Trompeter KC argued that here, DPL had not assumed responsibility for anything other than the diminution in the value of the Flat *per se*: that is what the language of the provisos says, and it goes no further. Mr Trompeter KC accepted that the Judge had not been referred to any authority on the point, including The Achilleas, but nonetheless submitted that the Judge's intuitive response was appropriate and correct. To the extent necessary, Mr Trompeter KC said he would seek permission to amend DPL's Defence to rely on what was ultimately only a point of law.

Discussion and Conclusion

109. The precise status of the reasoning of Lords Hoffmann and Hope in The Achilleas raises an interesting question, because there is some uncertainty about whether they were in a majority (with Lord Walker) or not. Mr Bennison said that theirs was a minority view only, and so the proper approach in this case required no more than an orthodox application of the well-known principles derived from Hadley v. Baxendale.

110. On examination, I do not think this is a question I need to resolve. That is because, as I see it, the Judge in fact did no more than approach his assessment based on well-understood principles of causation and loss, but he considered that even applying those principles, Mr Isaac's consequential losses were irrecoverable. I think he was correct to come to that view.

111. Mr Isaac's evidence in his trial Witness Statement at paras 44-48 is in fact rather equivocal as to what caused both his lodger to move out of the Flat and his own decision to sell. As to the position of the lodger, at para. 44 he said that he lost his lodger "*as a result of the nuisance caused by the development of the ground floor premises*", and dealing with his own position at para. 46 he referred to having to "*endure three years of inescapable nuisance … .*" These points are significant, because by the time he came to deal with the issue of quantum, the Judge had already rejected Mr Isaac's claim in nuisance, so he was not concerned with matters caused by any alleged nuisance.

112. He was only concerned with matters caused by the breach of contract, which arose from the diminution in the value of the Flat caused by what Mr Isaac called "*the Development*". What the Judge was concerned to address in dealing with quantum, and correctly so in my opinion, was what losses (if any) were caused by *that matter alone*. He was not concerned with the effect of any nuisance, and leaving that aside, he did not think the case for consequential losses having been caused by the breach of contract was made out.

113. I think this is what the Judge meant in para. [154] when he said the following (my emphasis):

> *"Mr. Isaac did not need to move out of his Flat as a result of that breach of contract and the nuisance, as such, from noise was not protected. Therefore, if he chose to move out of his Flat because he was not satisfied, understandably, with the effect this was having on his life, the noise, he had a right to do so <u>but that would not have resulted or flowed from any breach of contract that I find of that express term but might have flowed from the other cause of action which I have found unsustainable against [DPL]</u>."*

114. I think what the Judge was saying here was that the evidence on causation did not enable Mr Isaac to prove that his consequential losses were caused by the breach of contract (i.e., the diminution in the value of the Flat caused by "*the Development*"), as opposed to having been caused by the matters said to have constituted the failed claim for nuisance. I consider that was a finding that was open to the Judge on the evidence, because the evidence was at best equivocal, and in fact on one reading was more consistent with the idea that both the lodger and Mr Isaac had been motivated by the matters giving rise to the failed nuisance claim rather than by any fall in the value of the Flat caused by "*the Development*". In fact, in the case of both of them, it is rather counterintuitive to think they would have been motivated by a fall in value of the Flat as such: there is no obvious reason why a lodger would be motivated to move out for that reason, and as far as Mr Isaac is concerned, a fall in value is at least as likely (or perhaps more likely) to cause a flat owner to stay where he is rather then sell, to await a possible improvement in the market.

115. It follows that I disagree with Mr Bennison's point that the finding made by the Judge was not open to him. I also reject the suggestion that in resolving matters in the way he did, the Judge disallowed Mr Isaac's claims for consequential losses on a basis that was not open to him because it had not been canvassed in argument. I think that an unfair point, because it was always known that Mr Isaac would have to prove his losses, and all the Judge did was to say that the evidence on causation which appeared to

reference one of his claims which had failed (the claim in nuisance), was not sufficient to make out a case on causation in respect of another claim which had succeeded (the claim for breach of contract arising from a fall in value). I see nothing objectionable in that approach and certainly nothing unfair.

116. The result is that, although Mr Isaac has permission to appeal, I dismiss his cross-appeal on consequential loss.

Overall Conclusion and Disposition

117. I reject both the appeal and the cross-appeal. It follows that the original determinations of the Judge stand. I will need to hear from counsel as to consequential matters flowing from this Judgment, in particular as to costs.