Neutral Citation Number: [2024] EWHC 539 (Ch)

Appeal Reference: CH-2020-000306

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
On appeal from the order of His Honour Judge Monty KC made on 11th December 2020 in the County Court at Central London

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

11th March 2024

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA

Appellant

and

MELLCRAFT LIMITED

Respondent

- -
- -

Gerard van Tonder (instructed by the Director of Law, Bi-Borough Shared Legal Services, Royal Borough of Kensington and Chelsea) for the Appellant
Daniel Gatty (instructed by Pittalis LLP) for the Respondent

Hearing date: 1st March 2024

JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.30am on 11th March 2024 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

Introduction

1. This is an appeal against an order of His Honour Judge Monty KC made in the Central London County Court on 11th December 2020. By that order (**"the Order"**), Judge Monty determined two preliminary issues in the action. The first determination was that the Respondent occupied the certain property for the purposes, or partly for the purposes of its business at the date of expiry of the contractual term of the Respondent's lease of that property. The second determination was that the Appellant had failed to satisfy the ground of opposition in paragraph (g) of Section 30(1) of the Landlord and Tenant Act 1954 (**"the Act"**).

2. The overall result of these determinations was that the Respondent was entitled to a new lease of the property, pursuant to the provisions for the renewal of business tenancies in Part II of the Act.

3. The Appellant, which was the Defendant in the proceedings before Judge Monty, appeals against these determinations. Permission to appeal was granted by Mann J on 9th March 2021. For reasons which are unclear, it has taken an inordinate amount of time for the appeal to come to hearing.

4. The Order was made following the trial of the preliminary issues, which came before Judge Monty on 16th and 17th November 2020. The Judge reserved his judgment on the trial of the preliminary issues. The judgment (**"the Judgment"**) is dated December 2020. I assume that the Judgment was handed down on or shortly before the date of the Order (11th December 2020), which was made consequential upon the Judgment.

5. The Appellant's case is that the Judge went wrong in his decision on both preliminary issues. The eight grounds of appeal assert that the Judge made errors of law and errors in dealing with the evidence which caused him to reach the wrong conclusion on both preliminary issues. The Appellant seeks to have the Order set aside and seeks:
   (1) An order which determines that the Respondent did not occupy the relevant property for the purposes, or partly for the purposes of its business at the date of expiry of the contractual term of the Respondent's lease of the property.
   (2) An order which determines that the Appellant had satisfied the ground of opposition in paragraph (g) of Section 30(1) of the Act.
   (3) An order for possession of the property.
   (4) A reversal of the costs order made by Judge Monty and the reversal of a costs order made on the trial of an earlier preliminary issue in the same action.

6. At the hearing of the appeal the Appellant was represented by Gerard van Tonder, counsel. The Respondent was represented by Daniel Gatty, counsel. I am grateful to both counsel for their assistance, by their written and oral submissions, at the hearing of the appeal.

The conventions of this judgment

7. References to Paragraphs in this Judgment are, unless otherwise indicated, references to the paragraphs of the Judgment. References to Sections are, unless otherwise indicated, references to the Sections of Part II of the Act. I will refer to His Honour Judge Monty

KC as **"the Judge"**. I will refer to paragraph (g) of Section 30(1) as **"Paragraph (g)"**. The expressions *"lease"* and *"tenancy"* are used interchangeably, with no difference in meaning. Italics have been added to quotations.

The factual background

8. The factual background to the action is set out in the Judgment. For the purposes of this judgment, it is only necessary to give a short account of this background, for which I am principally indebted to the Judge.

9. The Respondent, which is the Claimant in the action, was incorporated on 29th May 2012. Since 30th May 2012 Mr Amir Moaven has been the sole director of the Respondent. There is one issued share in the Respondent which was, at the date of the trial of the preliminary issues, held by Mr Moaven's mother, Mrs Shokouh Nazemi. By a written declaration of trust dated 25th November 2015 made by Mrs Nazemi, to which Mr Moaven was also a signatory, Mrs Nazemi declared that she held 50% of the shares in all current and future companies in England and Wales of which she was the legal owner on trust for Mr Moaven. Clause 2 of the declaration of trust provided that Mrs Nazemi would accept and carry out to the best of her ability all reasonable and proper instructions of Mr Moaven *"in accordance with all requirements of Statute By-laws or Regulations made thereunder"*. I should mention that this was the position at the trial of the preliminary issues. Since then, Mrs Nazemi has, sadly, died. I have been told that the single share in the Respondent is now held outright by Mr Moaven.

10. The property with which the action is concerned comprises premises on the first and second floors at 269 Portobello Road, London W11 1LR. In common with the Judge I will refer to these premises as **"the flat"**. I will refer to 269 Portobello Road, meaning the whole of this property, as **"the Property"**. The freehold owner of the Property is and has at all material times been the Appellant, which is the Defendant in the action.

11. In 2009 the flat was in a poor condition. Mr Moaven applied to take a lease of the Property, saying that the intended use was to be *"mixed use"*. Mr Moaven had some plans drawn up for his proposed refurbishment of the flat, which showed that one of the rooms was to be an office. In the event a lease was not granted until 2012. This lease (**"the Lease"**) was granted by the Appellant on 14th September 2012, as landlord, for a term of five years from 14th September 2012. The property demised by the Lease was the flat. The contractual term date of the Lease was 13th September 2017. The permitted use of the flat was stated in the Lease to be *"A single tenancy dwelling"*. The Lease was granted to the Respondent. At the same time the Respondent took five other leases of premises from the Appellant.

12. On 25th July 2013 the Appellant granted a lease of the ground floor of the Property to a company called Santitos Limited (**"Santitos"**), of which Mr Moaven is also the director. Santitos runs a coffee shop from these premises. I understand that Santitos has made a claim for a new lease of the ground floor premises. I also understand that this separate action is not as far advanced as the action in relation to the flat. There is a preliminary issue listed for hearing this month (March 2024), in the action commenced by Santitos.

13. Mr Moaven spent £110,000 refurbishing the flat. The Lease provided for a 12 month rent free period, which I assume reflected the condition of the flat and the need for

refurbishment works. For a time the Respondent let out one room in the flat to a builder. Following completion of the works the builder departed and, since then, the flat has been occupied by Mr Moaven and his partner Ms Reshad and their young daughter as their main residence. The Respondent granted a six month assured shorthold tenancy to Mr Moaven and Ms Reshad on 10th January 2014. A tenancy was also granted to Ms Reshad on 3rd June 2014. Further particulars of these tenancies are not given in the Judgment, and I assume that both had come to an end at some time before the Lease reached its contractual term date.

14. On 31st May 2017 the Appellant served a notice on the Respondent pursuant to Section 25 of the Act. The Section 25 notice specified 1st December 2017 as the date of termination of the Lease and stated that the Appellant would oppose a claim for a new lease on the basis of Paragraph (g). For ease of reference I set out Paragraph (g) at this stage:

> *"(g) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."*

15. In the Appellant's skeleton argument for the trial of the preliminary issues, before the Judge, it is stated that the section 25 notice was served without prejudice to the Appellant's primary position, which was that the Lease did not enjoy the protection of Part II of the Act because it had been contracted out of Sections 24-28. In response to the Section 25 notice the Respondent commenced this action.

The action

16. The Respondent commenced this action by Claim Form issued on 23rd November 2017. In the Particulars of Claim the Respondent claimed a new lease of the flat pursuant to the provisions of Part II of the Act, on the terms specified in the Particulars of Claim.

17. The Appellant's case in response to the claim for a new lease, as set out in its Defence dated 11th April 2018, can be summarised as follows:
    (1) The Appellant reiterated its contention that the Lease was contracted out of the protection of Part II of the Act.
    (2) The Appellant put the Respondent to proof that the Respondent was in business occupation of the flat at the contractual term date of the Lease.
    (3) If the Lease was protected as a business tenancy and if there was business occupation at contractual term date of the Lease, the Appellant opposed the grant of a new lease, on the basis of Paragraph (g). The Appellant's case was that it intended to occupy the flat, within the meaning of Paragraph (g), for the purposes of providing temporary accommodation to homeless families.
    (4) If, contrary to the Appellant's case, the Respondent was entitled to a new lease of the flat, the Appellant set out its proposals for the terms of the new lease.

18. By order made on 19th February 2019 District Judge Lightman directed a preliminary issue on the question of whether or not the Lease was contracted out of the provisions of Sections 24-28. This preliminary issue came on for trial before Her Honour Judge Baucher on 31st July 2019. Judge Baucher decided that the Lease had not been contracted out of the provisions of Section 24-28. By her order on the preliminary issue, dated 1st August 2019, Judge Baucher, in addition to her determination of the

preliminary issue, directed that there should be a trial of two further preliminary issues, in the following terms:

> *"4. There be a further preliminary issue trial to determine whether:*
>
> *(1) the Claimant occupied the Premises for the purposes, or partly for the purposes, of its business at the date of the expiry of the contractual term of the Lease, and*
>
> (2) *the Defendant satisfies the ground of opposition contained in Section 30(1)(g) of the Act."*

19. It was these two preliminary issues which came before the Judge for trial on 16th and 17th November 2020. On the Respondent's side the Judge heard evidence from Mr Moaven. Mrs Nazemi was also to have given evidence, but she was unable to attend the trial. A hearsay notice was served in respect of her evidence in her witness statement. The Judge read the witness statement, but concluded that it did not assist him in his decision on the preliminary issues. On the Appellant's side the Judge heard evidence from Ms Yemisi Felix-Adewale, a chartered surveyor employed by the Appellant as Investment Lead. Ms Felix-Adewale's responsibilities included overseeing the management of all commercial property owned by the Appellant.

20. The Judgment was handed down in December 2020. I do not have the precise date when the Judgment was handed down but, as I have said, I assume that the Judgment was handed down on or shortly before the date on which the Order was made; namely 11th December 2020.

The Judgment

21. The Judge commenced by setting out the background facts, which were not in dispute. The judge then set out Section 23, which identifies those tenancies to which the Act applies. For ease of reference, and in order to provide the necessary context, I set out subsections (1), (1A), (1B) and (2) of Section 23:

> *"(1) Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.*
>
> *(1A) Occupation or the carrying on of a business–*
>
> *(a) by a company in which the tenant has a controlling interest; or*
>
> *(b) where the tenant is a company, by a person with a controlling interest in the company, shall be treated for the purposes of this section as equivalent to occupation or, as the case may be, the carrying on of a business by the tenant.*
>
> *(1B) Accordingly references (however expressed) in this Part of this Act to the business of, or to use, occupation or enjoyment by, the tenant shall be construed as including references to the business of, or to use, occupation or enjoyment by, a company falling within subsection (1A)(a) above or a person falling within subsection (1A)(b) above.*
>
> *(2) In this Part of this Act the expression "business" includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate."*

22. The Judge then proceeded to deal with a late application by the Respondent to amend the Claim Form, in order to rely on Section 23(1A). The Respondent's case was that

Mr Moaven had a controlling interest in the Company and, as such, the Respondent could rely on Mr Moaven's alleged business occupation of the flat as the business occupation of the Respondent. The Judge allowed this late amendment, for the reasons set out in Paragraph 10. As the Judge observed, this meant that there were two strands to the Respondent's case on the preliminary issue of business occupation. The Respondent relied upon its own alleged business occupation or, pursuant to Section 23(1A), the Respondent relied upon the alleged business occupation of Mr Moaven, as a person with an alleged controlling interest in the Respondent.

23. The Judge then proceeded to his decision on the two strands of the Respondent's case on the first preliminary issue. The Judge dealt first with the question of whether the Respondent itself was in business occupation of the flat on the contractual term date. Mr Moaven claimed that he conducted the Respondent's business from the flat, as director of the Respondent and as the person who ran the Respondent, and that the Respondent had no other office.

24. The Judge found Mr Moaven's evidence on this question to be *"somewhat unsatisfactory"*. I should set out in full the Judge's description of that evidence, in Paragraph 14:

> *"14. As Mr van Tonder observed, there was no documentation from any third party with the Claimant which demonstrated that the Claimant conducted business from the flat (OVO Energy would simply have written to the name and address provided), and in any event, the precise nature and extent of the Claimant's business is unclear. The headed notepaper states, under the name of the Claimant, "Commercial Property Management". In cross-examination, Mr Moaven explained that the Claimant's business was to undertake the responsibilities of various other companies, of which Mr Moaven was also a director, under leases in the names of those other companies. He explained that the business model was that a company other than the Claimant would take the lease of a property, refurbish it, let it to a tenant, collect the rent from that tenant and pay it to the superior landlord. There are 17 such companies which are listed at Companies House as being active. However, each of those 17 companies file dormant accounts; all the business is run through the Claimant. Mr Moaven said that the Claimant effectively took over the responsibilities of those other companies, not as agent for those other companies, but standing in the shoes of those companies, being responsible for collecting rent, paying it to the superior landlord, and dealing with tenant problems as they arose. The Claimant's filed accounts (which were produced in these proceedings by the Defendant, and not by the Claimant) show that as of 31 May 2017 (4 months before the term date of the Lease), the Claimant had net assets valued at £58,927 which decreased to £17 by 31 May 2018 and increased to £74,532 by 31 May 2019; debtors for those three dates were respectively £183,328, £246,077 and £301,255; and trade creditors were £35,002, £176,174 and £208,174. Mr Moaven's explanation for those figures was confused at first, but he said that the debtors were the superior landlords and the creditors were the tenants (he had first said, in cross-examination, that it was the other way round), and in each case the superior landlords and the tenants were pursuant to leases by the other companies. There was no other evidence provided by the Claimant in relation to these*

arrangements. For example, there were no copies of any agreements between the companies and the Claimant under which the Claimant undertook all of this work."

25. The Judge set out his findings on this evidence at Paragraphs 15-17:

> *"15. It seems to me that either the Claimant is carrying out all of this work for the other companies, pursuant to some inter-corporate agency arrangement the details of which were not set out in the Claimant's evidence and have not been disclosed, emerging only in Mr Moaven's evidence in cross-examination, or the Claimant is not carrying out this work but for accounting or tax purposes, which are unclear and unexplained, all the money is going through the Claimant's accounts, and none through any of the other companies (which are treated as dormant).*
>
> *16. I have to say that I found the arrangements described by Mr Moaven extremely odd and difficult to follow. He stressed several times that the Claimant was not acting as agent for the other companies, but I fail to see what other arrangement it could properly be; each company would have responsibilities under the lease (to pay rent to the superior lessor, for example) as well as a sub-tenant whose obligation it is to pay rent to the company. I cannot understand how a company in that position can properly be dormant (that is, not doing business – Companies House defines a dormant company as one that has had no significant accounting transactions during the accounting period) when it is in fact contracting out what plainly in law is indeed its business entirely to another company; that is still conducting business, but through an agent; the agent should be charging for its work, and the true position ought to be reflected properly in the respective company accounts.*
>
> *17. My overall conclusion on Mr Moaven's evidence about these arrangements is that the Claimant has not satisfied me – on the evidence I have seen and heard – that it is actually carrying on this business on behalf of the other companies at all; I do not accept that Mr Moaven's description of the position is anything other than an accounting or taxation exercise."*

26. In terms of the first preliminary issue however, the Judge was prepared to accept that the Respondent was carrying on business in respect of the five leases which it held from the Appellant. The Judge considered that this was sufficient to constitute the required business occupation of the Flat by the Respondent. The Judge expressed these findings and this conclusion in Paragraph 18:

> *"18. Nonetheless, and despite the paucity of evidence in relation to precisely what work the Claimant is in fact doing, I find myself driven to accept Mr Moaven's evidence that the Claimant is carrying on business in respect of the 5 leases which it itself owns. In respect of those leases (as with the business model for the other 17 companies which I have described above) the Claimant collects rents from its sub-lessees and pays them to the superior landlord (the Defendant). That, in my view, is sufficient to establish that the Claimant is carrying on business for the purposes of section 23(1) of the 1954 Act, and I think that Mr Gatty is right when he says that a company can occupy a property through a manager: see for example Pegler v Craven [1952] 2 QB 69 at 74. The occupation need not*

be of the whole of the premises, nor need the business be the whole purpose of the occupation: see the wording of section 23(1) of the 1954 Act."

27. At Paragraph 19 the Judge recorded the argument of Mr van Tonder that this was just an example of a home office, or a company director taking work home. The Judge was not persuaded:

> *"19. Mr van Tonder says that the position is no different from that of anyone with a "home office" or where a company director takes work home. However, it seems to me that where a company has no other office premises but the flat, and where any business of that company is conducted by its director from the flat, where all the company's documents are stored, the facts of this case are four-square with the second illustration given by Lord Denning MR in Cheryl Investments Ltd v Saldhana [1978] 1 WLR 1329 at 133 (the italicised words are in the reported judgment):*
>
> > *"Second, take the case where a professional man takes a tenancy of one house for the very purpose of carrying on his profession in one room and of residing in the rest of the house with his family, like the doctor who has a consulting room in his house. He has not then a 'regulated tenancy' at all. His tenancy is a 'business tenancy' and nothing else. He is clearly occupying part of the house 'for the purpose of' his profession, as one purpose; and the other part for the purpose of his dwelling as another purpose. Each purpose is significant. Neither is merely incidental to the other."*

28. The Judge therefore concluded on the first preliminary issue, at Paragraph 19, that the Respondent satisfied the requirements of Section 23(1).

29. The Judge went on to consider the question of whether the Respondent could rely on Section 23(1A)(b), on the basis that Mr Moaven had a controlling interest in the Respondent and was himself in business occupation of the flat. The Judge rejected this argument on the basis that Mr Moaven (as matters stood at the trial of the preliminary issues) was not a person with a controlling interest in the Respondent because, by virtue of the declaration of trust with his mother, Mr Moaven could claim no more than a 50% interest in the single share in the Respondent. There is no appeal against this decision of the Judge. As the Judge had already decided that the Respondent was in business occupation of the Flat in its own capacity, the decision that Section 23(1A)(b) was not available to the Respondent did not affect the Judge's decision on the first preliminary issue.

30. This left the second preliminary issue and Paragraph (g). The Judge commenced by reminding himself, at Paragraph 32, of what the Appellant had to demonstrate:

> *"32. There is no dispute that the burden here is on the Defendant to show a (subjectively) firm and settled intention, not likely to be changed, to occupy the flat for the purpose of its business, and (objectively) a reasonable prospect of being able to bring about that subjective intention. See, for example, Dolgellau Golf Club v Hett (1998) 76 P & CR 526 at 531 per Auld LJ."*

31. The Judge then set out and reviewed the evidence of Ms Felix-Adewale, at Paragraphs 34 and 35. As the Judge recorded, at Paragraph 37, it was common ground that the

letting of *"the property"* (I take this to be a reference to the flat) by the Appellant as temporary accommodation would be a business activity of the Appellant.

32. The Judge then proceeded to consider the arguments of counsel. The Judge rejected the first argument of Mr Gatty, which was that the Appellant would not be able to occupy the flat within a reasonable time of the Lease coming to an end, because it needed to obtain possession of the ground floor premises in the Property, which would take at least a further year. This left the second argument of Mr Gatty, which was that the Appellant could not itself satisfy the requirement of intention to occupy the flat, because the intention was to let the flat out to tenants who would have exclusive possession of the flat. On that basis there would be no occupation of the flat by the Appellant.

33. A number of authorities were cited to the Judge by Mr Gatty, in support of this second argument, which the Judge reviewed at Paragraphs 44-50. The Judge summarised the arguments of counsel in the following terms, at Paragraphs 51-52:

> *"51. In reliance on these authorities, Mr Gatty submits that save in exceptional circumstances, for example as in the Lee-Verhulst case where there was real control retained and exercised, the landlord does not occupy the premises; the tenant does. The evidence from the Defendant is that the flat will be let on a standard tenancy granted pursuant to the Defendant's homelessness function under Part VII of the Housing Act 1996 (which is not a secure tenancy: see Housing Act 1985 Schedule 1, para 4), under which the tenants would be the exclusive occupiers. The flat would not therefore be occupied by the Defendant (other perhaps than temporarily whilst refurbishment works were carried out, but that would not be enough for occupation: see Jones v Jenkins, paragraph 47 above).*
>
> *52. Mr van Tonder accepted that on the authorities whether the Defendant would be in occupation was a question of control. He submitted that in accordance with the Defendant's statutory duty, it intends to grant tenancies with exclusive possession, which are not secure tenancies, but because it is temporary accommodation, control remains with the Defendant."*

34. The Judge summarised his approach to finding the answer to the question before him in the following terms, at Paragraph 53:

> *"53. In my view, the answer to this question is to be found by considering the duty on local authorities, such as the Defendant, to provide temporary accommodation, and the nature of that accommodation, and by considering the evidence upon which the Defendant actually relies."*

35. At Paragraph 54 the Judge recorded that he had received further submissions from counsel on the relevant duty of local authorities under the Housing Act 1996. The Judge considered those submissions at Paragraphs 55-61. At Paragraphs 62-63, the Judge made the following findings on the evidence of Ms Felix-Adewale:

> *"62. Had the evidence been otherwise, and had the Defendant's intention been to grant licences of temporary accommodation in fulfilment of its interim or relief duty, I think the position would have been that the Defendant might be said to retain a sufficient degree of control over the premises it lets or licences for use as temporary accommodation; the premises remain part of*

the Defendant's resources to fulfil its statutory obligations, and the occupation of the applicant is no more than temporary and precarious with no rights under the 1977 Act because it is not treated as being their dwelling; all of the control in relation to the applicant's occupation remains with the Defendant. I might therefore have concluded that the flat would be "occupied" by the Defendant for the purposes of section 30(1)(g).

63. However, the evidence before me, from Ms Felix-Adewale in cross-examination, was that the temporary accommodation would be granted pursuant to a tenancy and not a licence. That seems to me to take it out of the situation where the Defendant retains any control over the flat."

36. At Paragraphs 65-66 the Judge came to his conclusions on the question of the degree of control the Appellant would have over the flat, if the flat was used for temporary accommodation:

"65. In my judgment, on the basis of the evidence before me, I conclude that the Defendant is not intending to use the flat for interim or relief accommodation, but for temporary accommodation pursuant to its main housing duty. Had the Defendant intended to mean interim or relief accommodation, it would have been on licence, not under a tenancy: see above. Since the evidence is that there would be a tenancy, it cannot be envisaged that it would be accommodation under the interim duty or the relief duty. It must therefore be temporary accommodation which is to be provided under the main housing duty until that duty comes to an end.

66. I have therefore formed the view, on the evidence, that the Defendant will not retain any degree of control over the flat, which would be occupied exclusively by a tenant, and on the authorities cited by Mr Gatty which I have summarised above, the Defendant would not occupy the flat for the purposes of section 30(1)(g)."

37. The Judge therefore reached the following conclusions on the two preliminary issues, at Paragraph 67:

"67. For the reasons set out above, my conclusions in relation to the two preliminary issues are as follows:

(1) The Claimant did occupy the flat for the purposes, or partly for the purposes, of its business at the date of the expiry of the contractual term of the Lease.

(2) The Defendant has not satisfied the ground of opposition contained in section 30(1)(g) of the 1954 Act."

38. These conclusions were embodied in paragraphs 1 and 2 of the Order. Under the terms of the Order, the Appellant was also ordered to pay the costs of the action to the date of the Order, with an interim payment to be made on account of those costs. The Order also contained directions for the determination of the terms of the new lease of the flat to which, by virtue of the Judge's decision on the preliminary issues, the Respondent is entitled.

<u>The grounds of appeal</u>

39. The Appellant seeks to have the Order set aside. In place of the Order the Appellant seeks, from this court, an order in the terms set out earlier in this judgment. For ease of reference I repeat the terms of the order sought on this appeal:

(1) An order which determines that the Respondent did not occupy the flat for the purposes, or partly for the purposes of its business at the date of expiry of the contractual term of the Lease.
(2) An order which determines that the Appellant had satisfied the ground of opposition in Paragraph (g).
(3) An order for possession of the flat.
(4) A reversal of the costs order made by Judge Monty and the reversal of a costs order made on the trial of the earlier preliminary issue in the action.

40. There are eight grounds of appeal. I will refer to these grounds of appeal, using the same numbers as in the grounds of appeal attached to the appellant's notice, as **"Ground One"** and so on. Grounds One to Five challenge the decision of the Judge on the first preliminary issue. Grounds Six to Eight challenge the decision of the Judge on the second preliminary issue.

41. Grounds One to Five engage with the findings of fact made by the Judge in relation to the first preliminary issue. In these circumstances it is important to have in mind the guidance given in the case law, on the question of when an appeal court can and should interfere with findings of fact made by the first instance court. I will therefore summarise this guidance, as set out in the authorities cited to me, before coming to my analysis of the individual Grounds. In doing so, I should make it clear that I do not prejudge the question of whether the Grounds, when properly analysed, do actually engage this guidance.

Appeals against findings of fact, evaluations of facts and inferences to be drawn from facts – the correct approach

42. The authority which is usually referred to in this context is Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5. The relevant extract from the judgment of Lewison LJ, at [114], is much cited and very well-known, but bears repeating.

43. In the main part of [114] Lewison LJ explained that the warnings given to appellant courts not to interfere with findings of fact by trial judges, unless compelled to do so, are not confined simply to findings of fact. The warnings extend to the evaluation of facts and to the inferences to be drawn from them:

> *"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court."*

44. Lewison LJ then set out the reasons for this approach:

> *"i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
> *ii) The trial is not a dress rehearsal. It is the first and last night of the show.*

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

45. Further specific guidance on the test to apply, in terms of interference with primary findings of fact, evaluation of those facts and inferences to be drawn from them can be found in the judgment of Hamblen LJ in *Haringey LBC v Ahmed* [2017] EWCA Civ 1861 [2018] HLR 9. After making reference to *Fage* and to *Grizzly Business Ltd v Stena Drilling Ltd & Anor* [2017] EWCA Civ 94, Hamblen LJ said this, at [31]:

> *"31. In summary, such interference will only be justified where a critical finding of fact is unsupported by the evidence or where the decision is one which no reasonable judge could have reached."*

46. My attention has also been drawn to the speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360 HL. After making reference to the correct approach on an appeal against the exercise of a judicial discretion, as identified in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, Lord Hoffmann went on to say this, at 1372D-H:

> *"First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc. v. Medeva Pic. [1997] R.P.C. 1, 45:*
>
> > *"The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance . . . of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."*
>
> *The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the district judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself. The reason why I have taken some time to deal with the Court of Appeal's assertion*

that the judge did not realise that she was entitled to exercise her own discretion is that I think it illustrates the dangers of this approach. The same is true of the claim that the district judge "wholly failed" to carry out the statutory exercise of ascertaining the husband's needs."

47. With this guidance in mind, if and to the extent that it may be relevant, I turn to my analysis of the Grounds. I will take the Grounds in turn, as dealt with in the written and oral submissions of counsel.

Ground One – analysis

48. The Appellant asserts, in Ground One, that the Judge erred in law in concluding that the Respondent occupied the flat for the purposes of its business or partly for those purposes at the contractual term date of the Lease. The Appellant's case is that the Judge erred in law by holding that Mr Moaven's activities in the flat were sufficient to satisfy the requirements of Section 23(1), in circumstances where the Judge held Mr Moaven's evidence to be *"somewhat unsatisfactory"*, and where the Respondent failed to adduce any or any sufficient corroborating and/or supporting evidence.

49. The essential difficulty with Ground One seems to me to be that I can find no error of law in the Judge's decision on the first preliminary issue. As explained in his oral submissions Mr van Tonder's case was that the Judge must have applied the wrong test because, if the correct test was applied, the evidence could not support a decision that the Respondent was in business occupation of the flat.

50. For the purposes of this submission Mr van Tonder relied principally upon the decision of the Court of Appeal in *Cheryl Investments Ltd v Saldanha* [1978] 1 WLR 1329. In this case the question before the Court of Appeal, in two appeals which were heard together, was the status of the tenants of two properties. The question was whether the tenant of each property held a regulated tenancy protected by the Rent Acts, or a business tenancy protected by the Act. In order to decide this question Lord Denning MR provided, in his judgment, a series of illustrations to show how Section 23(1) operated. For the purposes of this appeal the first two illustrations, at page 1333F-H of the report, are the most relevant:

"First, take the case where a professional man is the tenant of two premises: one his office where he works, the other his flat, conveniently near, where he has his home. He has then a " business tenancy " of his office and a " regulated tenancy " of his home. This remains the situation even though he takes papers home and works on them at evenings or weekends and occasionally sees a client at home. He cannot in such a case be said to be occupying his flat " for the purpose of " his profession. He is occupying it for the purpose of his home, even though he incidentally does some work there: see Sweet v. Parsley [1970] A.C. 132, 155 per Lord Morris of Borth-y-Gest.

Second, take the case where a professional man takes a tenancy of one house for the very purpose of carrying on his profession in one room and of residing in the rest of the house with his family, like the doctor who has a consulting room in his house. He has not then a " regulated tenancy " at all. His tenancy is a " business tenancy " and nothing else. He is clearly occupying part of the house " for the purpose of " his profession, as one purpose; and the other part for the purpose of his dwelling as another purpose. Each purpose is significant. Neither is merely incidental to the other."

51. In the second of the two appeals (*Royal Life Saving Society v Page*) Lord Denning had no doubt that the judge at first instance had been right to decide that the tenant was a regulated tenant. As his Lordship explained, at 1334H-1335A:

> *"On those facts it is quite clear that no. 14, Devonshire Street was let as a separate dwelling and occupied by Dr. Page as a separate dwelling. There was only one significant purpose for which he occupied it. It was for his home. He carried on his profession elsewhere in Harley Street. His purpose is evidenced by his actual use of it. Such user as he made in Devonshire Street for his profession was not a significant user. It was only incidental to his use of it as his home. He comes within my first illustration. He is, therefore, protected by the Rent Acts as a " regulated tenancy."*

52. In the first of the two appeals (*Cheryl Investments Ltd v Saldanha*) Lord Denning disagreed with the judge at first instance, who had rejected the landlord's argument that Mr Saldanha was a business tenant. The factual position was summarised by Lord Denning in the following terms, at 1335H-1336B:

> *"On this point the evidence was that Mr. Saldanha is an accountant by profession and a partner in a firm called Best Marine Enterprises. They carry on the business of importing sea foods from India and processing them in Scotland. The firm has no trade premises. The two partners carry on the business from their own homes. The other partner works at his home at Basildon. Mr. Saldanha works at the flat in Beaufort Gardens: and goes from there out to visit clients. When he went into the flat, he had a telephone specially installed for his own use, with the number 589 0232. He put a table in the hall. He had a typewriter there, files and lots of paper: " The usual office equipment," said the manageress. He had frequent visitors carrying brief cases. He had notepaper printed: " Best Marine Enterprises. Importers of Quality Sea-foods. Telephone 589 0232 "—that is the number I have just mentioned—" P.O. Box 211, Knightsbridge, London, S.W.3."*
>
> *He issued business statements on that very notepaper. A copy of one was found by the maid in a wastepaper basket showing that the firm had imported goods at a total cost of □ 49,903-30 and sold them for □ 58,152-35. The maid (whose evidence the judge explicitly accepted in preference to Mr. Saldanha's) said: " I presumed Mr. Saldanha conducted business there."*

53. Lord Denning's analysis of this evidence was in the following terms, at 1336C-E:

> *"On that evidence I should have thought it plain that Mr. Saldanha was occupying the flat, not only as his dwelling, but also for the purposes of a business carried on by him in partnership with another. When he took the flat it was, no doubt, let to him as a separate dwelling. It was obviously a residential flat with just one large room with twin beds in it. No one can doubt that it was constructed for use as a dwelling and let to him as such within the test in Wolfe v. Hogan [1949] 2 K.B. 194, 204. But as soon as he equipped it for the purposes of his business of importing sea foods—with telephone, table and printed notepaper —and afterwards used it by receiving business calls there, seeing customers there and issuing business statements from there—it is plain that he was occupying it "for the purposes of a business carried on by him." This was a significant purpose for which he was occupying the flat, as well as a dwelling. It was his only home,*

and he was carrying on his business from it. It comes within my second illustration."

54. Lord Denning accepted that it might be seen as odd that a tenant could surreptitiously, as had happened in the case of Mr Saldanha, change his tenancy to a business tenancy by the introduction of business use, but his Lordship explained that this was the effect of the wording in Section 23(1). In disagreeing with the judge at first instance, Lord Denning also stressed the following, at 1336H-1337C:

> *"The judge took a different view. He said:*
>
> > *" I think [Mr. Saldanha] is carrying on some business on the premises, but of a nominal kind, and not worth even considering. It is, in my view, de minimis. It amounts to having a few files at home and making a few telephone calls at home."*
>
> *It is to be noticed that the judge is there speaking of the actual " use " made of the premises: whereas the statute requires us to look at " the purpose " for which he is occupying it. A professional man may occupy premises for the " purpose" of seeing clients, but he may make little " use " of them because no clients come to see him. On the evidence it seems to me that Mr. Saldanha is in the same position as the man in my second illustration. He has only one home—the flat in Beaufort Gardens —and he is occupying it, not only for the purpose of his home, but also for the purpose of a business carried on by him; and that was a significant purpose. It cannot be dismissed by invoking the maxim de minimis non curat lex. That maxim must not be too easily invoked. A man cannot excuse himself from a breach of contract by saying that it did no damage. Nor is it permissible for a man sued in tort to say: " It was only a little wrong and did only a little damage." So here, I do not think the " purpose " of Mr. Saldanha can be excused by saying: " It was only little used."*

55. As can be seen, *Cheryl Investments* provides a very useful guide, in relation to the question of whether use of residential premises for a business purpose is sufficient to bring the tenancy of those premises within the Act. As Mr van Tonder stressed, basing himself upon Lord Denning's second illustration, the relevant business use must not be merely incidental to the residential use of the relevant premises.

56. Returning to the Judgment, it is clear that the Judge had the guidance in *Cheryl Investments* well in mind. For ease of reference, I repeat Paragraph 19:

> *"19. Mr van Tonder says that the position is no different from that of anyone with a "home office" or where a company director takes work home. However, it seems to me that where a company has no other office premises but the flat, and where any business of that company is conducted by its director from the flat, where all the company's documents are stored, the facts of this case are four-square with the second illustration given by Lord Denning MR in Cheryl Investments Ltd v Saldhana [1978] 1 WLR 1329 at 133 (the italicised words are in the reported judgment):*
>
> > *"Second, take the case where a professional man takes a tenancy of one house for the very purpose of carrying on his profession in one room and of residing in the rest of the house with his family, like the doctor who has a consulting room in his house. He has not then a 'regulated tenancy' at all. His tenancy is a 'business tenancy' and nothing else. He is clearly occupying part of the house 'for the*

> *purpose of" his profession, as one purpose; and the other part for the purpose of his dwelling as another purpose. Each purpose is significant. Neither is merely incidental to the other."*

57. Although the Judge had already reached, in Paragraph 18, his conclusion on whether there was business occupation, within the meaning of Section 23(1), it is clear the Judge had well in mind Lord Denning's second illustration. It is also clear that the Judge had well in mind Mr van Tonder's submission that the Respondent's use of the flat fell within Lord Denning's first illustration, as use merely incidental to the residential use of the flat.

58. In these circumstances, it is not obvious that the Judge made any error of law in his approach to the first preliminary issue. The Judge directed himself, correctly, by reference to the guidance in *Cheryl Investments*. There is no evidence that the Judge applied any different test to that which emerges from *Cheryl Investments*.

59. As I have said, Mr van Tonder's case was that the Judge must have applied the wrong test because, if the correct test was applied, the evidence could not support a decision that the Respondent was in business occupation of the flat. This however assumes that the Judge was wrong to decide, on the evidence, that the Respondent's use of the flat was sufficient to constitute business occupation of the flat.

60. I can see no basis on which I can interfere with the Judge's evaluation of the evidence in Paragraphs 18 and 19. The Judge found that the Respondent was carrying on a business, namely the management of the five leases held by the Respondent, from the flat. The Judge's evaluation of the evidence was that this business use of the flat was sufficient to fall within the terms of Section 23(1). This evaluation of the evidence was pre-eminently a matter for the Judge. I am no position to interfere with that evaluation. The Judge saw and heard the oral evidence of Mr Moaven. I have not heard any of that oral evidence, nor do I have any transcript of that oral evidence. The authorities cited in the previous section of this judgment make it quite clear that I should not interfere with an evaluation of this kind without very good reason. In the present case it is clear that there is no such reason.

61. As Mr Gatty pointed out in his oral submissions, by reference to Lewison LJ's memorable phrase in *Fage*, the present case is one where I do not even have the ability to go *"island hopping"* in *"the sea of evidence"* which was before the Judge at the trial of the preliminary issues. I accept this submission, which was well-made. As Mr Gatty also explained, and as is apparent from looking at Mr Moaven's second witness statement, the Judge clearly placed considerable reliance upon Mr Moaven's evidence in cross examination. To the best of counsels' recollection, that cross examination lasted for some two hours, with the result that the Judge had a considerable quantity of oral evidence from Mr Moaven. Without a transcript of that evidence, I accept that I am not even in a position to go island hopping, independent of the point that, by reference to *Fage*, island hopping is to be avoided.

62. Mr van Tonder drew my attention to the Judge's description of Mr Moaven's evidence as *"somewhat unsatisfactory"*, in Paragraph 13. This however only points up the difficulty with this part of the appeal. Paragraph 13 introduces a section of the Judgment which ends, at Paragraph 17, with the overall conclusion that the Respondent

had not demonstrated that it was actually carrying on business on behalf of other companies at all.

63. As at Paragraph 17 therefore the position, so far as the fortunes of the Appellant's case were concerned, might have been described as *"so far, so good"*. The conclusion in Paragraph 17 did not however settle the question of whether the Respondent was carrying on business on its own behalf from the flat. The Judge turned to that specific question at Paragraph 18, where the Judge made his findings (i) that the Respondent was carrying on business on its own behalf from the flat, and (ii) that this business occupation was sufficient to satisfy Section 23(1). Indeed, Paragraphs 13-17 seem to me to strengthen the Judge's evaluation of the Respondent's evidence in Paragraphs 18 and 19. The Judge clearly brought a critical eye to bear on the evidence of Mr Moaven. The Judge was however still persuaded that this evidence was sufficient to establish business occupation within the meaning of Section 23(1).

64. Ground One also asserts that the Respondent had failed to adduce any or any sufficient corroborating and/or supporting evidence for his conclusion that the Respondent's occupation of the flat was sufficient to satisfy the requirements of Section 23(1). This assertion seems to me to be wrong. It is clear from Paragraph 18 that the Judge did consider that there was sufficient evidence to support his finding that the Respondent was carrying on business from the flat, and that this was sufficient to qualify as business occupation which satisfied the requirements of Section 23(1). It is also clear from the authorities cited in the previous section of this judgment that the Judge was not required to enumerate individually every piece of evidence on which he was relying for his conclusions in Paragraph 18.

65. In his submissions on the first preliminary issue Mr van Tonder stressed the point that the Respondent's pleaded case in the action, as set out in the prescribed form Particulars of Claim in the Claim Form, included the following, at paragraph 6:

> *"6. The nature of the business carried on at the property is a single tenancy dwelling"*

66. The first line of paragraph 6, as quoted above, comprised part of the pre-printed text of the prescribed form Particulars of Claim. The second line (*"a single tenancy dwelling"*) was typed in by the person responsible for completing the Particulars of Claim on behalf of the Respondent.

67. The essential point made by Mr van Tonder in this context was that this pleaded case was at odds with the Respondent's case that it had, by the Lease, a business tenancy of the flat. I take this point, as I also take the point that the permitted use of the flat, under the terms of the Lease, was as *"A single tenancy dwelling"*. The problem with these points seems to me to be that they beg the question which the Judge had to answer on the first preliminary issue. As I understand the position, it was not in dispute before the Judge that the flat had been let as a single residential dwelling, and remained a residential dwelling. The question was whether the Respondent's use of the flat for its own business purposes had been sufficient to bring the Respondent's occupation of the flat within the terms of Section 23(1). It is clear from *Cheryl Investments* that a lease of residential premises such as a flat or a house can be brought within the terms of the Act, if there is sufficient business use of the relevant flat or house, notwithstanding the

residential character of the relevant flat or house. In the present case the Judge decided that the business use was sufficient for this purpose.

68. I take the point that the business use identified in paragraph 6 of the Particulars of Claim was not only not a business use, but also bore no relation to the actual business use of the flat which was established by Mr Moaven. It looks to me as though paragraph 6 of the Particulars of Claim was completed on a misconceived basis, without a proper understanding of what was required by this part of the prescribed form. Whether that is right or wrong, it was a matter for the Judge to decide what weight to give to this pleading of the Respondent's case. So far as I am aware, there was no pleading point taken at trial in relation to paragraph 6 of the Particulars of Claim. What I mean by this is that, so far as I am aware, it was not argued, or at least was not argued successfully, that the Respondent could not, by virtue of its pleaded case, rely on Mr Moaven's evidence as to the business use which was being made of the flat by the Respondent. In these circumstances I cannot see how the Judge went wrong in accepting the evidence of Mr Moaven as to the business use being made of the flat by the Respondent.

69. There is a further difficulty with the Appellant's case on the first preliminary issue, which the Appellant's case did not properly address. As I have already noted, the orders sought on the appeal include the reversal of the Judge's determination of the first preliminary issue. In other words, I am asked to determine that the Respondent was not occupying the flat for the purposes of its business or partly for those purposes, on the contractual term date of the Lease. Even if there existed grounds for disagreement with the Judge's conclusion on this question, and in my view there do not, I do not see how I could make any evaluation of the evidence. I accept the point made by Mr van Tonder that there are cases where an appeal court has sufficient knowledge of the relevant evidence to allow the appeal court to overturn the decision at first instance, notwithstanding that the appeal engages issues on the evidence. *Cheryl Investments* may be said to be an example of such a case. In *Cheryl Investments* however the judge at first instance had gone wrong in his approach to the evidence. It was not necessary to revisit the evidence itself, which was sufficiently set out in the first instance judgment. This is not the situation in the present case. In the present case, if there was any merit in the appeal on the first preliminary issue, it seems to me that a remission of the first preliminary issue to the Central London County Court would have been required, for the evidence to be re-evaluated. It would have required a very compelling case for me to be persuaded that the parties should be put to the delay and expense of a remission of the first preliminary issue.

70. In summary, drawing together all of the above analysis and returning specifically to Ground One, I can detect no error of law in the Judge's conclusion that the Respondent occupied the flat for the purposes of its business or partly for those purposes at the contractual term date of the Lease. All this leaves, by way of potential target for a challenge to the Judge's decision on the first preliminary issue, is the Judge's evaluation of the evidence, which resulted in his conclusion that there was business occupation. This evaluation was clearly for the Judge. There are no grounds upon which I could possibly interfere with this evaluation.

71. I therefore conclude that Ground One fails.

Ground Two – analysis

72. The Appellant asserts, in Ground Two, that the Judge failed to have any or any sufficient regard to the incidence of the burden of proof on the Respondent, when concluding that the Respondent had satisfied the requirements of Section 23(1).

73. At the trial of the preliminary issues, and in contrast to Paragraph (g), the burden was on the Respondent to establish that it was in business occupation of the flat, on the contractual term date of the Lease, for the purposes of Section 23(1).

74. There is nothing to suggest that the Judge did not understand this. It seems to me that it was not necessary for the Judge to state, in terms, that the burden of proof was on the Respondent. This is clearly something which can and should be assumed, in the absence of any evidence that the Judge went wrong in this respect; see the extract from the speech of Lord Hoffmann in *Piglowska v Piglowski* which I have quoted earlier in this judgment. Independent of this however, it is clear that the Judge did have clearly in mind that the burden of proof was on the Respondent. At Paragraph 32, when the Judge turned to the second preliminary issue, the Judge noted where the burden of proof lay (underlining also added):

> *"32. There is no dispute that the burden <u>here</u> is on the Defendant to show a (subjectively) firm and settled intention, not likely to be changed, to occupy the flat for the purpose of its business, and (objectively) a reasonable prospect of being able to bring about that subjective intention. See, for example, Dolgellau Golf Club v Hett (1998) 76 P & CR 526 at 531 per Auld LJ."*

75. It is clear from this language that the Judge was noting that the burden of proof had moved, as between the two preliminary issues, from the Respondent to the Appellant.

76. Equally there is nothing to suggest that the Judge failed to have sufficient regard to the incidence of the burden of proof in his evaluation of the evidence in relation to the first preliminary issue.

77. Accordingly, it seems to me that Ground Two fails, whether treated as a free-standing Ground, or as part of Grounds One to Five.

Ground Three - analysis

78. The Appellant asserts, in Ground Three, that the Judge failed to have any or any sufficient regard for the fact that Mr Moaven was using the flat as a home for himself and his family and that any work he carried out for the Respondent was no more than his working from the flat on an occasional and irregular basis.

79. It seems to me that there is a confusion in Ground Three. The Respondent has corporate personality. As such, it has no ability directly to conduct business or to occupy premises. It can only act by its officers and agents, which essentially means Mr Moaven, as its sole director. It follows from this uncontroversial proposition that if Mr Moaven was occupying the flat for the purposes of transacting the business of the Respondent, this was capable of qualifying as the business occupation of the flat by the Respondent.

80. The question which then arises is whether the Judge should have found that, because the flat was being occupied by Mr Moaven and his family as their family residence, the Respondent's use of the flat was insufficient to satisfy the requirements of Section 23(1). So far as that question is concerned, the Judge plainly had well in mind that the flat was used as the residence of Mr Moaven and his family. This fact is recorded in Paragraph 6. It is also clear that the Judge had this fact in mind in his reasoning in Paragraphs 18 and 19. It was for this reason that the guidance given in *Cheryl Investments* was particularly relevant.

81. This therefore brings one back to the question of whether the Judge was wrong to find that the Respondent was in occupation of the flat for the purposes of its business and that this business occupation was sufficient to satisfy the requirements of Section 23(1), notwithstanding the residential use of the flat. For the reasons which I have set out in my analysis of Ground One, I have already concluded that the Judge was not wrong to make these findings.

82. Accordingly, it seems to me that Ground Three fails, whether treated as a free-standing Ground, or as part of Grounds One to Five.

Ground Four - analysis

83. The Appellant asserts, in Ground Four, that the Judge went wrong in finding that the Respondent occupied the flat, despite accepting that there was *"minimal evidence"* to support the Respondent's case for such occupation. The reference to *"minimal evidence"* is taken from the end of the Judgment, where the Judge set out his reasons for refusing the Respondent permission to appeal. At Paragraph 84, the Judge said this:

> *"84. In respect of the first issue, I accept that there was minimal evidence to support the Claimant's case on whether the property was occupied by the company, but I was satisfied on that evidence that it was. I have already indicated that I have now changed my initial view on "controlling interest"."*

84. I cannot see that Ground Four adds anything to the arguments in support of the appeal. The Judge acknowledged that there was minimal evidence to support the Respondent's case on business occupation, but the Judge decided that this evidence was sufficient. This was pre-eminently a matter for the Judge, based on his evaluation of all the evidence he had received. There is no error of law in deciding that evidence, although minimal, is sufficient to establish a particular case. The decision is one for the relevant judge to make, on the relevant evidence. In the present case, and for the reasons which I have already explained in relation to Ground One, there are no grounds to interfere with the Judge's evaluation of the evidence.

85. Accordingly, it seems to me that Ground Four fails, whether treated as a free-standing Ground, or as part of Grounds One to Five.

Ground Five - analysis

86. The Appellant asserts, in Ground Five, that the Judge went wrong in equating the occupation of the flat by Mr Moaven to that of a manager, when the Respondent's case was actually that it occupied the flat for the purposes of its business or partly for the business.

87. It seems to me that Ground Five is misconceived. In the relevant part of Paragraph 18, which I repeat for ease of reference, the Judge said this:

> *"18. Nonetheless, and despite the paucity of evidence in relation to precisely what work the Claimant is in fact doing, I find myself driven to accept Mr Moaven's evidence that the Claimant is carrying on business in respect of the 5 leases which it itself owns. In respect of those leases (as with the business model for the other 17 companies which I have described above) the Claimant collects rents from its sub-lessees and pays them to the superior landlord (the Defendant). That, in my view, is sufficient to establish that the Claimant is carrying on business for the purposes of section 23(1) of the 1954 Act, and I think that Mr Gatty is right when he says that a company can occupy a property through a manager: see for example Pegler v Craven [1952] 2 QB 69 at 74."*

88. I can see nothing wrong with the Judge's reference to *Pegler v Craven* [1952] 2 QB 69. The case was concerned with premises comprising living accommodation and a bookshop. The plaintiff, Mr Pegler, was the tenant of the premises pursuant to a lease granted by the defendant, Mrs Craven. The business of the bookshop was conducted and owned by a company. The company occupied the bookshop premises pursuant to what was described by the judge at first instance as a gratuitous licence. The plaintiff was the majority shareholder in the company, and also managed the business on behalf of the company. The plaintiff applied for a new lease of the premises under what was then the Leasehold Property (Temporary Provisions) Act 1951; a predecessor to the Act in providing protection for business tenants. In order to be entitled to claim the new lease, the plaintiff, as tenant under the existing lease, needed to be *"the occupier of a shop under a tenancy"*. The judge at first instance decided that the plaintiff was the occupier of the bookshop premises. This decision was however overturned by the Court of Appeal, on the basis that the occupier of the bookshop premises was the company, not the plaintiff. As such the plaintiff was not entitled to a new lease. The plaintiff was the tenant of the bookshop premises, but the occupier was the company.

89. At page 74 of the report Jenkins LJ explained why the plaintiff could not be considered to be in occupation of the bookshop premises, in the following terms:

> *"The case is one on which I, for my part, have felt some difficulty, but I have reached a different conclusion from that of the judge. I quite agree that the conception of "occupation" is not necessarily and in all circumstances confined to the actual personal occupation of the person termed the occupier himself. In certain contexts and for certain purposes it obviously extends to vicarious occupation by a caretaker or other servant or by an agent. Clearly the tenant of a retail shop who through persons in his employment carries on business there for his own benefit under a tenancy with respect to which he was tenant, would properly be described as the occupier of the shop and the person carrying on business there, though not himself in actual personal occupation of it. But I cannot regard the words " the occupier " of a shop " in section 10 (1) of this Act as going so far as to include as occupier, within the meaning of the subsection, a tenant who is not himself carrying on business on the premises in question at all either personally or by a servant or agent, but who is tenant of premises, the shop portion of which is in fact wholly taken up with the stock and the business of a limited company, that is, of an entirely distinct and different legal person."*

90. The facts of *Pegler v Craven* were not on all fours with the present case. In *Pegler*, the problem confronting the plaintiff was that while he was the tenant, the person running the bookshop premises and occupying the bookshop premises for that purpose was the company, which was not the tenant. In the present case this problem did not exist. The relevant business which, as the Judge found, the Respondent operated from the flat was the business of the Respondent. The Respondent was also the tenant of the flat pursuant to the Lease. There was therefore an identity between the person operating the relevant business and the person who was the tenant of the flat. As such, the Respondent was capable of satisfying Section 23(1) if its business occupation of the flat was, on the evidence, sufficient to meet the requirements of Section 23(1), as those requirements have been explained in the relevant case law and, in particular, in *Cheryl Investments*.

91. The submission of Mr Gatty, which the Judge recorded in Paragraph 18, seems to me to have been uncontroversial. As Jenkins LJ confirmed, in the extract from his judgment quoted above, the tenant of a shop can properly be described as the occupier of the shop even though the tenant carries on the actual business of the shop through servants or agents. In the case of a company it can only act, as a corporate person, and can only occupy premises through its officers or servants or agents. The Judge was therefore correct to accept that a company may occupy premises through a manager.

92. It seems to me that the only point the Judge was making, at Paragraph 18, was that the Respondent could claim to occupy the flat by reason of the occupation of Mr Moaven, the sole director of the Respondent and, as the Judge recorded at Paragraph 19, the person who conducted the Respondent's business from the flat. It seems to me that this was an uncontroversial proposition, given the Judge's findings, on the evidence, that Mr Moaven was the person, in his capacity as sole director of the Respondent, who conducted the Respondent's business from the flat. If authority was required for the general proposition that a person may be in business occupation of premises through the occupation of a servant or agent who operates the business on behalf of such person, it could be found in *Pegler*.

93. In these circumstances I find it very difficult to understand the argument in Ground Five. It seems to me that Mr Gatty was right to submit that a company could occupy a property through a manager, on the authority of *Pegler*, and that the Judge was right to accept this submission. Nor was there any inconsistency between this submission and the Respondent's case. The Respondent's case was that it occupied the flat for the purposes of its business or partly for the purposes of that business. As a corporate person the Respondent could not itself physically occupy the flat for the purposes of its business. It could only do so through the medium of an officer or servant or agent of the Respondent, who conducted the business of the Respondent from the flat. Mr Moaven, as a director of the Respondent, fitted into this category of persons. If one was being strictly analytical, I suppose that one might say that Mr Moaven's occupation of the flat on behalf of the Respondent, as an officer of the Respondent, was not strictly the same as the vicarious occupation of a manager or other employee, but this theoretical distinction seems to me to be irrelevant in the present case. The Respondent was entitled to rely on the occupation of the flat by Mr Moaven as its own occupation of the flat. The hole into which the plaintiff fell in *Pegler* did not exist in the present case, because the Respondent was both the person which operated the business from the flat and the tenant of the Flat.

94. Accordingly, it seems to me that Ground Five fails, whether treated as a free-standing Ground, or as part of Grounds One to Five.

Grounds Six to Eight – analysis

95. I now turn to the appeal against the Judge's decision on the second preliminary issue. I can take the three Grounds collectively because, as Mr van Tonder explained his case in his oral submissions, there is a single argument advanced in support of this part of the appeal. I start by summarising that argument.

96. Mr van Tonder drew my attention to Section 79 of the Housing Act 1985 and paragraph 4 of Schedule 1 to the Housing Act 1985. His point was that the tenancies of the flat which the Appellant intended to grant to homeless persons, housed in the flat by way of temporary accommodation, would not be secure tenancies and would not have any security of tenure. On the expiration of each such tenancy, the relevant tenant would have to vacate the flat.

97. Mr van Tonder then drew my attention to Section 189B(2) of the Housing Act 1996. This subsection provides that a local housing authority must take reasonable steps to help an applicant for housing, where the local authority is satisfied that the applicant is homeless and eligible for assistance, to secure that suitable accommodation becomes available for the occupation of the applicant for at least six months or such longer period not exceeding 12 months as may be prescribed. Mr van Tonder submitted that this meant that the tenancies of the flat which the Appellant intended to grant would be short term (between six and twelve months), in addition to having no security of tenure.

98. Mr van Tonder's argument in support of this part of the appeal was that the use of the flat for such a series of temporary lettings would constitute a situation where the Appellant retained a sufficient degree of control over the flat to be able to say that it would be in occupation of the Flat, within the meaning of Paragraph (g).

99. I understood this argument to be essentially the same argument as was put to the Judge, as recorded in Paragraph 52:

> *"52. Mr van Tonder accepted that on the authorities whether the Defendant would be in occupation was a question of control. He submitted that in accordance with the Defendant's statutory duty, it intends to grant tenancies with exclusive possession, which are not secure tenancies, but because it is temporary accommodation, control remains with the Defendant."*

100. The Judge rejected this argument. His key findings were recorded at Paragraphs 62 and 63, which I repeat for ease of reference:

> *"62. Had the evidence been otherwise, and had the Defendant's intention been to grant licences of temporary accommodation in fulfilment of its interim or relief duty, I think the position would have been that the Defendant might be said to retain a sufficient degree of control over the premises it lets or licences for use as temporary accommodation; the premises remain part of the Defendant's resources to fulfil its statutory obligations, and the occupation of the applicant is no more than temporary and precarious with no rights under the 1977 Act because it is not treated as being their dwelling; all of the control in relation to the applicant's occupation*

remains with the Defendant. I might therefore have concluded that the flat would be "occupied" by the Defendant for the purposes of section 30(1)(g).

63. However, the evidence before me, from Ms Felix-Adewale in cross-examination, was that the temporary accommodation would be granted pursuant to a tenancy and not a licence. That seems to me to take it out of the situation where the Defendant retains any control over the flat."

101. The Judge's ultimate conclusions on the second preliminary issue, following on from these findings, can be found in Paragraphs 65 and 66, which I again repeat, for ease of reference:

"65. In my judgment, on the basis of the evidence before me, I conclude that the Defendant is not intending to use the flat for interim or relief accommodation, but for temporary accommodation pursuant to its main housing duty. Had the Defendant intended to mean interim or relief accommodation, it would have been on licence, not under a tenancy: see above. Since the evidence is that there would be a tenancy, it cannot be envisaged that it would be accommodation under the interim duty or the relief duty. It must therefore be temporary accommodation which is to be provided under the main housing duty until that duty comes to an end.

66. I have therefore formed the view, on the evidence, that the Defendant will not retain any degree of control over the flat, which would be occupied exclusively by a tenant, and on the authorities cited by Mr Gatty which I have summarised above, the Defendant would not occupy the flat for the purposes of section 30(1)(g)."

102. The answer to Mr van Tonder's argument in support of the appeal, and confirmation that the Judge was correct in his decision on the second preliminary issue can be found in the decision of the House of Lords in *Graysim Holdings Ltd v P&O Property Holdings Ltd* [1996] AC 326 HL. This case was concerned with an enclosed market hall which comprised common areas and individual market stalls. The market hall was demised to the tenant (the respondent in the appeal to the House of Lords), Graysim Holdings Ltd (**"Graysim"**). The market stalls were sublet to individual stallholders. Graysim applied for a new lease of the market hall, on the basis that its lease of the market hall was protected by the Act as a business tenancy. On the hearing of preliminary issues in the action, it was determined (i) that Graysim did not have a business tenancy of the market hall, (ii) that there was no *"holding"* for the purposes of the Act, and (iii) that the freehold owners of the market stall (P&O Property Holdings Ltd) would have been entitled to oppose the grant of a new lease pursuant to paragraph (f) of Section 30(1). Graysim gave up possession of the market hall following this decision, but appealed to the Court of Appeal against the first and second of these determinations. The reason for this was that if Graysim's lease had been a business tenancy, Graysim would have been entitled to compensation on giving up possession of the market hall, while the amount of that compensation was affected by extent of the holding.

103. At this point I should explain that *"the holding"*, for the purposes of the Act, is defined by Section 23(3) to mean the premises demised by the relevant tenancy, except any part of the demised premises not occupied by the tenant or employees of the tenant. I should also explain the relevance, to Paragraph (g), of *Graysim* and the other authorities referred to by the Judge in relation to the second preliminary issue. These authorities

were all concerned with what constitutes business occupation sufficient to satisfy the requirements of Section 23(1). They are however relevant to Paragraph (g) because Paragraph (g) also requires, unless intended residential occupation is relied upon, an intention to occupy the relevant holding for the purposes, or partly for the purposes of a business to be carried on by the landlord in the holding.

104. Returning specifically to *Graysim*, the Court of Appeal reversed the decision of the judge at first instance. The Court of Appeal decided that Graysim's lease had been a business tenancy protected by the Act, and that the holding had comprised the whole of the market hall. The freehold owners of the market hall appealed to the House of Lords. For the reasons given in the speech of Lord Nicholls, with which the other members of the House of Lords agreed, the appeal was allowed. Their Lordships decided that there had been no holding for the purposes of the Act, and no business tenancy. The essential reason for this was that the stalls were sublet. In these circumstances it was not possible for Graysim to say that it was in business occupation of the stalls. The stalls were in the business occupation of the stallholders, to whom the stalls were sublet. Graysim could not be in business occupation of the stalls, for the purposes of the Act, at the same time. In these circumstances Graysim could not claim to have been in business occupation of any part of the market hall, because its business effectively comprised the taking of rent from the stalls, which were not in its occupation. As such, Graysim's lease had not been a business tenancy, and there had been no holding for the purposes of the Act.

105. In his speech Lord Nicholls reviewed the case law on business occupation, particularly in the context of whether a tenant can claim to be in business occupation of premises where the tenant's business comprises the subletting or licensing of those premises to third parties. Lord Nicholls explained the problem in the following terms, at 335G-336A:

> *"A further element is introduced into the problem when the business of one person consists of permitting others to use his property for their business purposes, so that in the result both exercise rights over the same property for the purposes of their own separate businesses. In some Q circumstances the landowner will remain in occupation of the whole even though his business consists of permitting others to come onto the property and use it temporarily for their business purposes. Instances are an hotel company which provides rooms and facilities once a month for an antiques fair, or a farmer who permits his fields to be used periodically for a car boot sale. At the other extreme are cases where the landowner permits another to enter and carry on his business there to the exclusion " of the landowner. An instance would be a person who carries on a business of letting office accommodation. He acquires a lease of property, which he sublets. Under the sublease he has the usual right as landlord to enter the sublet property for various purposes, and he derives financial profit from the property in the form of rent, but plainly he would not occupy the property."*

106. As Lord Nicholls observed, to look for a clear line between the examples which he gave was to seek the non-existent. The difference was one of degree, not kind. As Lord Nicholls explained, at 336B-C:

> *"To look for a clear line between these instances would be to seek the non-existent. The difference between the two extremes is a difference of degree, not of kind. When a landowner permits another to use his property for business*

purposes, the question whether the landowner is sufficiently excluded, and the other is sufficiently present, for the latter to be regarded as the occupier in place of the former is a question of degree. "It is, moreover, a question of fact in the sense that the answer depends upon the facts of the particular case. The circumstances of two cases are never identical, and seldom close enough to make comparisons of much value. The types of property, and the possible uses of property, vary so widely that there can be no hard and fast rules. The degree of presence and exclusion required to constitute occupation, and the acts needed to evince presence and exclusion, must always depend upon the nature of the premises, the use to which they are being put, and the rights enjoyed or exercised by the persons in question."

107. In terms of how to draw the line, Lord Nicholls gave the following guidance at 336D-F:

"Since the question is one of degree, inevitably there will be doubt and difficulty over cases in the grey area. Where the permission takes the form of the grant of a tenancy, there will usually be little difficulty. Ordinarily the tenant, entitled to exclusive possession of the offices or factory or shop, will be the occupier, not the landlord. This will be so even though the lease reserves to the landlord the usual rights to enter and inspect and repair, and even though the lease contains a user covenant, strictly limiting the use which the tenant may make of the demised property. In such cases the property is occupied by the tenant because he has a degree of sole use of the property sufficient to enable him to carry on his business there to the exclusion of everyone else. Although there will usually be little difficulty in landlord and tenant cases, this may not always be so. I would not rule out the possibility that, exceptionally, the rights reserved by a landlord might be so extensive that he would remain in occupation of the demised property. Where the permission takes the form of a licence there will often be more room for debate. The rights granted by a licence tend to be less extensive than those comprised in a tenancy. In the nature of things, therefore, a licensor may have an easier task in establishing that he still occupies. This should occasion no surprise. The Act itself draws a distinction between tenants and licensees, protecting the former but not the latter."

108. As this guidance makes clear, a tenant will not normally be able to claim that it is in business occupation of premises which it has sublet. Lord Nicholls accepted the possibility that the rights reserved by the tenant, under the relevant sublease, might be so extensive as to allow the tenant to say that it was in business occupation of the relevant premises, but his Lordship clearly saw such a situation as exceptional.

109. Returning to the Judgment, the Judge reviewed the relevant case law, including *Graysim*, in some detail in Paragraphs 45-50. In Paragraph 51 the Judge recorded the following submission of Mr Gatty:

"51. In reliance on these authorities, Mr Gatty submits that save in exceptional circumstances, for example as in the Lee-Verhulst case where there was real control retained and exercised, the landlord does not occupy the premises; the tenant does. The evidence from the Defendant is that the flat will be let on a standard tenancy granted pursuant to the Defendant's homelessness function under Part VII of the Housing Act 1996 (which is not a secure tenancy: see Housing Act 1985 Schedule 1, para 4), under which the tenants would be the exclusive occupiers. The flat would not therefore

be occupied by the Defendant (other perhaps than temporarily whilst refurbishment works were carried out, but that would not be enough for occupation: see Jones v Jenkins, paragraph 47 above)."

110. It seems to me, on the basis of *Graysim* and on the basis of the other authorities cited to the Judge, that Mr Gatty's submission was a correct summary of the law in this area. The question was essentially one of control. I note that this was accepted by Mr van Tonder before the Judge, as recorded in Paragraph 52:

> *"52. Mr van Tonder accepted that on the authorities whether the Defendant would be in occupation was a question of control. He submitted that in accordance with the Defendant's statutory duty, it intends to grant tenancies with exclusive possession, which are not secure tenancies, but because it is temporary accommodation, control remains with the Defendant."*

111. Returning to the appeal on the second preliminary issue, the Appellant's difficulty was, and remains that the Appellant's witness, Ms Felix-Adewale, gave evidence that the Appellant intended to grant tenancies of the flat, by way of temporary accommodation for homeless persons, rather than licences; see Paragraph 63. On the basis of that evidence it seems to me that the Judge was quite entitled to decide, indeed one might say bound to decide that the intended letting of the flat by the Appellant, by way of temporary accommodation for homeless persons, would not qualify as occupation of the flat by the Appellant for the purposes of Paragraph (g).

112. I can see that things might have been different in the present case if the evidence had been different. The evidence of Ms Felix-Adewale might have been that the Appellant only intended to grant licences, and that the terms of such licences would have meant that the Appellant retained a degree of control over the flat such as to render the Appellant as being in business occupation of the flat. This was not however the evidence of Ms Felix-Adewale. The Appellant might have produced a version of the form of tenancy which it intended to grant to homeless persons, and might have contended that the extent of the rights reserved to the Appellant by that tenancy was such as to bring the Appellant within the exceptional circumstances contemplated by Lord Nicholls in *Graysim*, such as to render the Appellant as being in business occupation of the flat. I understand however that the Appellant did not produce any form of tenancy to the Judge, let alone one which might have brought the Appellant within the exceptional circumstances contemplated by Lord Nicholls. In this context I refer to Paragraph 43, where the Judge recorded that Mr Gatty had said, in closing submissions to the Judge, that the Respondent had asked the Appellant to provide a sample tenancy agreement, but none had been provided.

113. In these circumstances, one is left with Mr van Tonder's argument in the appeal, to the effect that the intended lettings of the flat by the Appellant, by reason of their non-secured and short term nature, left the Appellant with a sufficient degree of control over the flat to mean that the Appellant would be in occupation of the flat, while engaging in the business of these lettings, within the meaning of Paragraph (g). It seems to me, applying *Graysim* and the other authorities cited to the Judge, that this argument is clearly wrong. On the evidence of Ms Felix-Adewale, the Appellant did not intend to occupy the flat for the purposes, or partly for the purposes, of a business to be carried on by the Appellant at the flat, within the meaning of Paragraph (g).

114. What I have said above deals with Ground Eight, by which the Appellant asserts that the Judge went wrong in concluding that the Appellant's intention to grant a tenancy rather than a licence of the flat resulted in the Appellant not occupying the flat for the purposes of Paragraph (g). For the reasons which I have given, the Judge did not go wrong in this conclusion.

115. Ground Six is in the following terms:

> *"6. The learned judge erred in law in concluding that the Defendant failed to establish its ground of opposition under s.30(1)(g) by resting that conclusion on the nature of the arrangements between the individuals whom the Defendant intended to let into possession of the Property in the discharge of a statutory duty under Part VII of the Housing Act 1996 to provide temporary accommodation rather than having any or any sufficient regard to the fact that the Defendant's business included the discharge of that statutory duty."*

116. Ground Six seems to me to be misconceived. The Judge proceeded on the basis that the provision of temporary accommodation for homeless persons by the Appellant was a business activity. Given the wide definition of business in Section 23(2), this was clearly correct. The Judge clearly also had well in mind that the Appellant engaged in this business activity in the discharge of its statutory duties. The Judge asked for, and received further submissions on the Appellant's duties under the relevant provisions of the Housing Act 1996, and devoted a substantial part of the Judgment to analysing and considering those statutory duties. Accordingly, it seems to me that the assertion that the Judge failed to have any or any sufficient regard to the fact that the Appellant's business included the discharge of a statutory duty under Part VII of the Housing Act 1996 is simply wrong.

117. Equally, the Judge was quite entitled to rest his conclusion that the Appellant had failed to satisfy Paragraph (g) on the nature of the arrangements between the individuals whom the Defendant intended to let into possession of the flat in the discharge of its statutory duty to provide temporary accommodation. Those arrangements, on the evidence of Ms Felix-Adewale, were intended to comprise the grant of tenancies, not licences. In those circumstances, and for the reasons which I have already set out, the Appellant was unable to demonstrate that it would be occupying the flat for the purposes of its business or partly for those purposes, within the meaning of Paragraph (g).

118. By Ground Seven the Appellant asserts that the Judge went wrong in law in failing to have any or any sufficient regard to the provisions of Section 188 of the Housing Act 1996 with regard to the circumstances under which the Appellant's duty to provide accommodation came to an end. This Ground, which was not developed by Mr van Tonder in his oral submissions, seems to me also to be misconceived. The Judge made specific reference to Section 188 in Paragraph 57. The Judge also made reference to the circumstances in which the interim duty under Section 188 comes to an end; see Paragraphs 57-61 and Paragraph 64. I note that the Appellant accepts, in paragraph 25 of the skeleton argument in support of the appeal that *"the learned judge correctly summarised the position as regards RBKC's statutory duties in respect of homelessness"*. This position was confirmed by the oral submissions of Mr van

Tonder, in which Mr van Tonder did not suggest that the Judge had gone wrong in his analysis of the nature of the Appellant's statutory duties under Part VII of the Housing Act 1996.

119. In these circumstances I cannot see how it can be said that the Judge failed to have any or any sufficient regard to the provisions of Section 188 of the Housing Act 1996, either with regard to the circumstances under which the Appellant's duty to provide accommodation came to an end or otherwise. It is clear from the Judgment that the Judge paid ample regard to these matters. The Judge concluded, on the basis of Ms Felix-Adewale's evidence, that the Appellant would be granting tenancies of the flat, and that the Appellant would be using the flat for temporary accommodation pursuant to what the Judge referred to as the Appellant's main duty. Mr van Tonder did not suggest that the Judge should have found that the Appellant would be granting licences of the flat. On the evidence of Ms Felix-Adewale, this argument was not open to him. The question thus became whether, in circumstances where the Appellant intended to grant such tenancies, the Appellant would be occupying the flat for the purposes of its business or partly for those purposes, within the meaning of Paragraph (g). The answer to that question was no, for the reasons which I have already set out.

120. I therefore conclude that Grounds Six to Eight fail, both individually and collectively.

Conclusion

121. For the reasons set out in this judgment I conclude that the appeal fails, both in respect of the Judge's decision on the first preliminary issue and in respect of the Judge's decision on the second preliminary issue.

122. It follows that the appeal falls to be dismissed.