St Margaret's Lodge Hotel Limited v Elivo Pires
Royal Court
8th September, 2015

JUDGMENT 44/2015

Eviction action concerning hotel premises.

Approved Text
08.09.2015

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between: **ST MARGARET'S LODGE HOTEL LIMITED** **Plaintiff**

-and-

Defendant

ELVIO PIRES

Hearing dates: 26th & 27th August 2015
Judgment handed down: 8th September 2015

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Plaintiff: Advocate N J Barnes
Advocate for the Defendant: Advocate P T R Ferbrache

Cases, texts & legislation referred to:

The Royal Court (Reform) (Guernsey) Law, 2008
The Housing (Control of Occupation) (Guernsey) Law, 1994
The Food and Drugs (Guernsey) Law, 1970
The Tourist (Guernsey) Laws, 1948 to 1998
Loi relative aux Preuves of 1865
Sheppard v C.I. Fire & Security (Guernsey) Limited (unreported, 29 July 2009)
The Inntrepreneur Pub Company (GL) v East Crown Limited (unreported, 28 July 2000)
The Misrepresentation Act 1967
Chitty on Contracts, 31st ed.
Mann v Nunn (1874) 30 LT 526
City and Westminster Properties (1934) Ltd v Mudd [1959] Ch 129
In re William Porter & Co. Ltd [1937] 2 All ER 361
Cairncross v Lorimer (1860) 3 LT 130
Brikom Investments Ltd v Carr [1979] QB 467
Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130
Hughes v Metropolitan Railway Co. (1877) 2 App Cas 439
Bank of Australasia v Palmer [1897] AC 540
Henderson v Arthur [1907] 1 KB 10
Evans v Roe (1872) LR 7 CP 138

Introduction

1. This is an eviction action concerning premises now known as Forest Park Hotel. The Plaintiff, St Margaret's Lodge Hotel Limited, is the landlord. The tenant, Elvio Pires, is the Defendant. The ground on which the Plaintiff claims to be entitled to evict the Defendant is his failure to pay rent and other sums due under the terms of a three-year lease of the premises. As at 30 April 2015, the arrears were said to be £74,626.43. The Defendant resists the making of an eviction order on the basis that he is not indebted to the Plaintiff in respect of any of this amount. The question for the Court is whether, on the facts found, the Plaintiff has established a legal entitlement to an eviction order. As will become apparent, this is an unusual case and far from the run-of-the-mill scenario where a tenant is alleged to have fallen into arrears with his rent.

2. The parties elected that the Court be constituted by me sitting unaccompanied by Jurats, as they are entitled to do pursuant to section 13 of the Royal Court (Reform) (Guernsey) Law, 2008. In addition to deciding questions of law, I have, therefore, been responsible for finding the facts on the usual civil standard of the balance of probabilities.

Background

3. Forest Park Hotel used to be known as St Margaret's Lodge Hotel. Whilst perhaps not among the premier hotels on the Island, it was an establishment of some quality. Had that not been the case, I doubt that it would have been the venue for the first two work-related Christmas dinners I attended following my arrival in Guernsey. Sadly, its reputation suffered with the passing of the years. It faced considerable problems a few years ago. The owner knew that something needed to be done and turned to the Defendant to assist. Initially, this approach was made through the hotel's then general manager, Carlo Stefani, in late 2012.

4. At that time, the Defendant was running Smugglers Bar and Restaurant in St Peter Port. He had incorporated a company, Smugglers Restaurant Limited. He was a director and eventually became the sole owner of that company. He had had involvement in other Guernsey companies. The Defendant could see an opportunity to run the restaurant and bar at St Margaret's Lodge Hotel. The concept was for him to run those aspects of the business at the hotel premises under a separate agreement from the running of the accommodation aspects of the hotel's business. One of the motivating factors was that accommodation for him and his wife would be available at St Margaret's Lodge Hotel. The Defendant and his wife do not have residential qualifications under the Housing (Control of Occupation) (Guernsey) Law, 1994. They were faced with a choice of leaving the Island at around that time, or obtaining suitable housing for themselves on the open market. Under the arrangements discussed, they were able to move into St Margaret's Lodge Hotel at the beginning of 2013, thereby solving their housing difficulties.

5. Although the Plaintiff owns the site, the business at St Margaret's Lodge Hotel was run by SML Limited. Angus Perfitt is now the sole director of both the Plaintiff and SML Limited. Until January 2015, there was a second director of both companies. From early in 2013, most of the day-to-day contact with the Defendant was undertaken by Miles Bishop-White, a self-employed consultant who did work on behalf of Mr Perfitt's accountancy business and, by extension, on behalf of the two companies involved with St Margaret's Lodge Hotel. At all material times, the beneficial owner of both these companies has been Dr Sena Yaddehige. The beneficial owner's wider business interests are operated with the assistance of his England-based accountant, Mandy Larcombe. Another locally-based representative of the beneficial owner is Nicola Le Pelley.

6. By a letter dated 18 April 2013, addressed to the Company Secretary of SML Limited, copied to the Company Secretary of the Plaintiff and to the new manager at the hotel, Paul Curson, an Environmental Health Officer, served 14 Improvement Notices pursuant to section 14 of the Food and Drugs (Guernsey) Law, 1970, as amended. They required a considerable amount of work to be undertaken at the hotel within the timeframes specified in them. I am

satisfied that the Defendant saw copies of these Notices at around this time. It is more likely than not that he saw them before signing an agreement dated 24 May 2013. However, it is inevitable that, if he had not seen them by then, he saw them before he met with the Environmental Health Officer on 23 July 2013.

7. By a letter dated 7 May 2013 from the Minister of the Commerce and Employment Department of the States of Guernsey addressed to SML Limited and Mr Stefani, SML Limited was informed that the Commerce and Employment Department was considering rejecting that company's application for a boarding permit pursuant to the Tourist (Guernsey) Laws, 1948 to 1998. That letter set out a long list of failings identified through inspection at the premises. It cross-referred *inter alia* to the 14 Improvement Notices. I am similarly satisfied that the Defendant saw a copy of this letter at around this time.

8. An agreement between the Plaintiff, described as "the Proprietor", Smugglers Restaurant Limited, described as "the Occupier", and the Defendant, described as "the Guarantor", was executed dated 24 May 2013. SML Limited, described as "The Hotel", was included on the cover sheet and, at the very end, indicated through Mr Perfitt's signature, in the presence of Mr Bishop-White, that it "*Acknowledges the Agreement and agrees to it, therefore, allows joint tenancy of the areas designated in blue on the attached plan*". By this Agreement, the Plaintiff permitted the Occupier to use "*all the food and beverage area at ST MARGARET'S LODGE HOTEL, consisting of the actual bar, residents restaurant, lounge, functions room and bar attached, kitchen, conservatory, the exterior BBQ and surrounding ground, public toilets, free use of the car park and a room or such other accommodation shall be from time to time agreed for Mr and Mrs Pires private accommodation*". It was for a three-year term, which was capable of being extended through mutual agreement. The rent was £20,000 per annum payable monthly in advance, with additional living accommodation of between two and four rooms being available for staff members at £100 per week for each such room. I understand that no rent was actually paid under the agreement. In reality, the arrangement set out in this Agreement did not take effect and was superseded by other events, principally through the Defendant being appointed by SML Limited as the General Manager (Acting) of St Margaret's Lodge Hotel with effect from 1 July 2013.

9. During the summer of 2013, the Defendant caused workmen answerable to him to carry out work at St Margaret's Lodge Hotel. The workmen's time was charged out at £15 per hour. The work was undertaken to correct the deficiencies identified in the Improvement Notices and also in order to bring the hotel premises up to the standard required to obtain the boarding permit it needed, which had been revoked by the Commerce and Employment Department. The Defendant rendered a series of invoices in respect of this work. Each invoice is addressed to Mr Perfitt, in his capacity as director. The invoices did not specify any company by which they were payable, simply being addressed to "St Margaret's Lodge Hotel". The first is dated 24 June 2013. The fifth and sixth are both dated 27 August 2013 and refer to services provided at the hotel up to 15 August 2013 and 26 August 2013 respectively. The final invoice, dated 25 September 2013, refers to equipment provided at the hotel up to 1 September 2013. Each invoice has used a template the Defendant had on his computer and is headed "Smugglers". The first three all state at the foot: "*Make all checks payable to* ***Smugglers***" and give the Defendant as the person to contact if any questions concerning the invoice arise.

10. Due to the revocation of the boarding permit, the Defendant and his wife could no longer live at the hotel. The Housing Department informed them of this by letter dated 4 July 2013. Arrangements were made to rent an open market property, 5 Rozel Terrace, at which they and others could live. The rent on this property was £4,000 per month. It was not paid by the Defendant, but rather on his behalf, because his occupancy of these premises was part of his overall remuneration package as General Manager whilst the refurbishment of the hotel took place.

11. The re-launch of the hotel as Forest Park Hotel happened in October 2013. Dr Yaddehige attended. The Defendant understood that Dr Yaddehige was pleased with the transformation of the hotel. The Defendant was invited to make his position as General Manager permanent, in which case the Agreement of 24 May 2013 would be forgotten. The Defendant was told that the monies he had expended on the hotel during its refurbishment would be reimbursed to him, with the details being sorted out by "*them*", a reference the Defendant understood to be to Mr Perfitt and Mr Bishop-White. The Defendant agreed to become the permanent General Manager without finalising the details relating to this reimbursement.

12. At the Defendant's request, a document was prepared by Mr Bishop-White for Mr Perfitt's signature dated 27 December 2013, which states:

> "*This letter is to confirm that Mr Elvio Pires is owed the sum of £91,464.09 by SML Limited. It is the intention to repay this loan account as soon as the trading of Forest Park Hotel allows. Repayments are scheduled to commence the week beginning 13 January 2014.*"

13. This figure was calculated by aggregating the seven invoices that had been rendered, adding some further expenses incurred by the Defendant of £1,770 and the salary as General Manager (Acting) to which he was entitled for June to September 2013 of £7,045.86 but which went unpaid, before deducting amounts SML Limited had paid on behalf of the Defendant in the latter part of 2013, ie, social insurance and ETI payments in respect of the Defendant's Smugglers business and £3,000 in respect of furniture. The document is headed "*SML Limited t/a Forest Park Hotel*".

14. During the Defendant's tenure as General Manager of Forest Park Hotel, things still did not improve in quite the way he would have liked. He has complained about a lack of investment from the beneficial owner. Staff salaries were not always paid on time. In the Spring of 2014, he experienced some difficulties processing credit card payments. It now transpires that the bank account of SML Limited with HSBC was being closed by that bank. This occurred on 17 April 2014, when the balance was provided by way of a cheque, which was then paid into the bank account of the Plaintiff with RBS International, being credited on 1 May 2014. Since that time, SML Limited has not had a bank account. The closing bank statement shows that SML Limited was trading as St Margaret's Lodge Hotel, whereas the Plaintiff's RBS bank statements at that time show it trading as Forest Park Hotel.

15. Despite these problems, the Defendant believed he could make a real difference to the hotel and wished to see a return on the investment he had made when arranging for work to be carried out in 2013 and in respect of which he was still owed money. In May 2014, the beneficial owner had dinner at the hotel and discussed matters with the Defendant. Although the Defendant could not recall whether he had suggested taking over the running of the hotel or whether it was a proposal put to him, the idea of him taking a lease of the entire hotel and running it for himself took shape. The Defendant was attracted to the idea of others, ie, Mr Perfitt, Mr Bishop-White and Ms Le Pelley, no longer taking decisions in respect of the hotel. Initially, the Defendant believed he would be assuming control from the end of May. When nothing had come about, he sent an e-mail to Dr Yaddehige on 4 June 2014 enquiring about progress, to which the response was that the drafting of the lease rested with Advocate Barnes.

16. Thereafter, the Defendant entered into e-mail exchanges with Advocate Barnes, during which he sought updates about progress because the situation at the hotel was difficult and might have led to its closure. It is apparent from these exchanges that the Defendant was fully aware that Dr Yaddehige was giving instructions to Advocate Barnes about the terms under which the premises could be leased to the Defendant. On 16 June 2014, the Defendant indicated that he wished the lease to be in the name of Smugglers Restaurant Limited and that, because he was owed money, it could be credited against rents. Advocate Barnes' response within the hour was that his instructions were for the lease to be taken by the

Defendant personally rather than in a company's name and that the rent needed to be paid without deductions.

17. In the light of that answer, the Defendant began corresponding by e-mail with Dr Yaddehige. He wanted the lease in the name of the company so that he could give shares to staff. He indicated he had no working capital, but was content to use the equipment "*Worth £43.000*" as a guarantee, although he still wanted to be able to set off the amount owed to him against future rental payments. Dr Yaddehige's response on 16 June 2014 was clear: "*No Elvio, it has to be on your name. You can give your staff a profit share of the business. No disputed money or any other consideration will be set against the rent. If you have legitimate claims over what was agreed, it can only be considered once your rental at least covers the monthly interest costs.*" The exchanges that followed were only minutes apart. Dr Yaddehige suggested that if there were no lease then there might be no alternative but to close the hotel. The possibility of the Defendant looking for a buyer for the hotel was raised and he indicated he would do his best to find such a buyer, enquiring as to what the asking price would be. On 17 June 2014, the Defendant stated: "*In the meantime we need to proceed with the lease, I talked to my wife and we are happy to use only the wages that I'm owed against the rent, if you are happy with that, then we can go ahead with it.*" Dr Yaddehige rejected this suggestion. He presented the Defendant with the ultimatum of taking the lease as drafted by Advocate Barnes or rejecting it, pointing out that he had offered the Defendant "*an opportunity to make a place to live, make a living and a future*" and that the Defendant really should not have been on a salary when the agreement to rent a house in which he and his wife could live was only a temporary measure.

18. Following a further request from the Defendant for an updated statement of the acknowledged level of indebtedness to him, Mr Bishop-White prepared a further document for Mr Perfitt to sign dated 30 June 2014, which states:

> "*This letter is to confirm that Mr Elvio Pires is owed the following amounts by the above named companies:-*
> *1) The sum of £73,201.69 by SML Limited.*
> *2) The sum of £10,946.00 by St Margarets Lodge Hotel Limited.*"

19. Mr Bishop-White has explained that he carried out a further analysis of the invoices submitted by the Defendant and that he had decided to apportion the costs incurred between the two companies depending on whether the services provided were really leasehold improvements or to do with the infrastructure of the building. In addition to referring to SML Limited t/a Forest Park Hotel, this document also has in its heading "*St Margarets Lodge Hotel Limited*" and Mr Perfitt expressly signed in his capacity as a director of both companies. The aggregate of these two amounts again reflects the total of the seven invoices as the starting point, from which three repayments totalling £6,700 made to the Defendant account for most of the difference between this and the previous amount recorded, although other amounts, though not always the same amounts, have been deducted as well.

20. In the latter part of June 2014, the Defendant says that he switched his attentions away from Dr Yaddehige and started discussing matters directly with Mr Bishop-White. During a meeting at Mr Bishop-White's office, the Defendant claims that an agreement was reached by which the Defendant would pay the first month's rent in full to alleviate the cash flow problems being experienced and that the balance owed to him could be applied against future rent. He says that they agreed to meet at the end of each month to discuss and then agree what the amount payable should be. The Defendant further claims that they agreed that the first month's rent would be used to meet the unpaid wages of the staff, including the Defendant's wages.

21. The Defendant signed copies of the lease on 4 July 2014. Dr Yaddehige also signed copies at around that time, although the resolution of the Plaintiff which permitted him to do so was delayed for several weeks, with the Plaintiff's board of directors meeting on 1 August 2014. The other documents being executed at the time were the formal cancellation of the

Agreement dated 24 May 2013 and the agreement giving the Plaintiff security over the equipment in case of default by the Defendant of any of his obligations under the lease. The delay raised concerns for the Defendant because, as he put it, without a signed lease he was having problems dealing with the staff, who did not know for whom they were working, and with various parts of the States of Guernsey and was also experiencing difficulties opening a bank account and dealing with credit card providers.

22. Mr Bishop-White informed the Defendant on the morning of 5 August 2014 that he understood that the transaction was to be finalised that day, and provided details of where the rent in respect of July should be paid. When the Defendant tried unsuccessfully to make the transfer required, Mr Bishop-White spotted that an additional digit had appeared in the account number originally supplied, corrected that and the payment of rent of £8,000 was duly completed by the Defendant. However, the Defendant was unhappy that he was told by Mr Bishop-White that there were insufficient funds to pay all the creditors and that the unpaid wage bill might not be settled.

23. The lease dated 4 July 2014 between the Plaintiff and the Defendant contains the following material provisions:

> "*1* ***Definitions and Interpretation***
> *In this Lease:*
> *1.1* *"Property" means the building, car park and land shown for the purposes of identification only edged blue on the plan annexed to this Lease including:*
> - *any building or other structure that is now on the Property or that is erected there during the Term ("Building")*
> - *the surrounding fences and walls*
> - *the plant and fittings installed by the Landlord*
> - *all pipes cables drains and other conducting media in on under or over the Property*
> - *all additions and improvements*
> - *all fixtures (whether or not fixed at the beginning of the Term) except any installed by the Tenant that can be removed without defacing the Property*
>
> *1.2* *"Rent" means £96,000.00 for the first year of the term, £120,000 for the second year and £144,000 for the third year*
> *2* ***Letting Rights and Exceptions***
> *The Landlord lets the Property to the Tenant for the period of three years beginning on or the period beginning on 4th July 2014 and ending on 3rd July 2017 ("the Term")*
> *3* ***Rent***
> *The Tenant covenants with the Landlord to pay the Rent without any deduction or set off by equal monthly payments in arrears on the last day of each month and the first payment for the period beginning on 4th July 2014 and ending on the 30th July 2014 before the next quarter day must be paid on 30th July 2014*
> *4* ***Repair cleansing and decoration***
> *The Tenant covenants with the Landlord:*
> *4.2* *to replace any fixtures or plant that become beyond repair during the Term*
> *12* ***Forfeiture***
> *12.1* *A "Forfeiting Event" is any of the following:*
> *12.1.1* *any Rent or sum regarded as rent for the purposes of this Lease is outstanding for twenty-one days after becoming due whether formally demanded or not unless through banker's error in which case it shall not constitute a forfeiting event until seven days after the Tenant has notice of the error …*
> *12.3* *Whenever a Forfeiting Event exists the Landlord may enter the Property (or any part of it) at any time even if a previous right of re-entry has been waived and then the Term will end but without affecting any rights that either party may have against the other*
> *13* ***Miscellaneous***
> *13.1* *Representations*

> *The Tenant has not entered into this Lease in reliance on any representation made by or on behalf of the Landlord*".

24. As can be seen, there are some redundant words in clauses 2 and 3 but the meaning of the provisions is sufficiently clear if those words are simply ignored. The lease also dealt with insurance in clause 11, specifying what the Plaintiff had to insure and making provision for the suspension of Rent if "*Insured Damage*", as defined in clause 11.3.1 occurred making the Property, or a part of it, unfit for use. There has been no suggestion in the present case that these provisions operate.

25. On 19 September 2014, Mr Bishop-White proposed a repayment plan to the Defendant. In doing so, he was also attempting to secure the Defendant's agreement to the allocation of receipts and expenses between SML Limited and the Defendant in respect of the transitional period created by the new lease. Because of the agreement to use the equipment previously sold to the hotel being reversed, so that ownership would revert to the Defendant, the amount payable under the final invoice rendered, subject to an adjustment for double-counting of labour costs, was deducted from the amount owed to the Defendant. Mr Bishop-White also allocated a Guernsey Water bill in respect of 5 Rozel Terrace to the Defendant. The result was that the debt owed to the Defendant was further reduced to £42,834.37. No attempt was made to split this between the Plaintiff and SML Limited. In relation to the transitional balancing of amounts passing each way, Mr Bishop-White calculated that an amount of £4,037.81 was due from the Defendant to SML Limited. Having given the Defendant credit for unpaid salary for May and June 2014 and for monies received in respect of future business, he then required payment from the Defendant for utilities, room and bar trade on 1, 2 and 3 July 2014 and in respect of stock and cash held in the business as at the close of 3 July 2014. Mr Bishop-White proposed that the sum of £42,834.37 could be repaid to the Defendant by an initial payment of £2,834.37 on 30 September 2014, thereby reducing the amount owed by the Defendant to SML Limited to £1,203.44 payable by him the following week, and by 20 quarterly payments of £2,000 starting on 31 December 2014. The Defendant rejected this proposal.

26. On 23 September 2014, Mr Bishop-White offered an amended schedule and payment plan to the Defendant. The amounts in respect of the liquor licence, stock and cash said to be due to SML Limited were removed, with the consequence that the amount acknowledged to be owed to the Defendant rose to £45,296.56. It was proposed to repay this amount over the following three years with quarterly payments commencing on 3 January 2015. Approximately one-third of the debt would be paid by 3 July 2015 with eight further equal quarterly payments thereafter of £3,750 each covering the balance. On 1 October 2014, the Defendant did not accept this proposal. His reply ended: "*Against my advocate advice, I'll propose to pay £4000 to help you and meet tomorrow to negotiate another payment plan that's more suitable for both. If you agree with that, I'll send payment now.*" Mr Bishop-White requested that £4,000 be sent immediately. The Defendant paid £4,000 by cheque.

27. At a meeting with Mr Bishop-White, the Defendant pointed out that credit card payments were not being received by the Defendant because he had been unable to make arrangements yet for that to happen, and so were still being received by the Plaintiff. It was agreed that credit should be given for these. Accordingly, when taken with the payment of £4,000, the shortfall on the rent due in respect of September was £2,122.98. This figure was confirmed in a letter dated 11 February 2015 sent by Mr Perfitt as a director of the Plaintiff to the Defendant.

28. The situation went from bad to worse on 16 October 2014. The only functioning boiler at the hotel stopped working. It flooded the boiler room. Because there was no hot water supply to the hotel, the Defendant had no choice but to vacate the guests that were staying at the hotel at that time. He contacted a plumber. Lee Carré attended and told the Defendant that the boiler could not be repaired but had to be replaced. He subsequently provided a written quotation for a replacement boiler dated 4 November 2014. The cost of the boiler was £6,680.88, with fitting to cost £850, although Mr Carré suggested allowing a further £450 for contingencies.

This quotation did not include any electrical work that would need doing. In round terms, therefore, the anticipated cost of replacing the boiler would be approximately £8,000 plus however much an electrician charged. The Defendant sought a second quotation and was told orally that it would cost £12-16,000. Because this was significantly higher than Mr Carré's quotation, the Defendant did not ask for this second quotation to be put in writing.

29. At the time the boiler broke down, Mr Bishop-White was on holiday. He returned to the Island on 21 October 2014. The Defendant had not contacted any other representative of the Plaintiff prior to this. The Defendant asked Mr Bishop-White to arrange for the boiler to be fixed but, because Mr Bishop-White did not have any authority, he needed to speak to others. He accepts it took a long time to get any decision about this. Mr Bishop-White was uncertain as to whose responsibility it was to replace the boiler. He and Mr Perfitt were subsequently informed by Ms Larcombe that the lease indicated that this was the Defendant's responsibility. Mr Perfitt accepted that the Defendant was not informed about this at the time and did not have any explanation as to why this had not been done.

30. The Defendant obtained an electrical boiler on 22 October 2014, which meant that he could keep the kitchen and restaurant open. It cost £2,500 and the Defendant paid for this. The Defendant also made a claim on the insurance but was informed by letter dated 4 December 2014 that the failure was a result of corrosion, which was a specific exclusion under the terms of the policy.

31. The Defendant says that he made regular contact with Mr Bishop-White at this time putting as much pressure as he could on him to resolve the situation. He further states that when he informed Mr Bishop-White that he took the view that because the boiler was broken he was not responsible for the Rent until it was repaired, Mr Bishop-White replied "ok". This happened on three occasions. Mr Bishop-White has strongly refuted that allegation. This is one of the principal differences in the evidence I have to resolve.

32. The Defendant made four payments to the Plaintiff totalling £1,700 in November and December 2014. He says he did this because he knew the Plaintiff was in financial difficulty and he wanted to be able to work with the company. The payments were made on 11 and 27 November 2014 (with two payments being made on the latter of those dates) and 12 December 2014. The Defendant spoke to Mr Bishop-White on 19 December 2014 but, despite indicating that he would call back, Mr Bishop-White did not do so.

33. In January 2015, Ms Larcombe and Ms Le Pelley visited the hotel. The Defendant was told that an approach would be made to Dr Yaddehige to see if he would provide the requisite funding to enable the boiler to be replaced. In response to a request for the Defendant to pay something to help with the company's creditors, he replied that he was not financially able to do so. Ms Le Pelley arranged for another plumber to provide a quotation for a replacement boiler. On 27 January 2015, Richard Ozanne quoted £11,222 to replace the existing (oil fired) unvented hot water cylinder installation with two new indirect heated unvented hot water cylinders, with a further £1,330 being in respect of carrying out remedial work for the existing Pathfinder boilers. The Defendant forwarded a copy of this quotation to Ms Le Pelley on 29 January 2015.

34. By a letter dated 11 February 2015, to which I have already referred, Mr Perfitt drew the Defendant's attention to arrears of rent that had accumulated, running from the balance of £2,122.98 in respect of September 2014 and covering the four months following. Eviction proceedings were threatened unless payment of the arrears was received within seven days. No reference was made to the four payments made by the Defendant totalling £1,700 or to any accrued interest. The Defendant responded by letter dated 12 February 2014. He expressed his surprise at receiving Mr Perfitt's letter pointing out that very little had been done to help them and claiming that the boiler is the landlord's responsibility. As well as recounting his version of what had happened since the boiler broke, he further noted that he was "*owed quite a lot of money for a long time and [he] never took legal action*".

35. Following receipt of a further letter from Mr Perfitt dated 23 February 2015 repeating the Plaintiff's intention to seek an eviction order, the Defendant attended a meeting with Mr Bishop-White and Ms Le Pelley on 11 March 2015. They discussed possible solutions including the possibility of selling the hotel. Mr Bishop-White sought information from the Defendant as to future bookings. The Defendant provided him with some information. Mr Bishop-White then sent a further proposal to the Defendant on 17 March 2015 explaining how much the Defendant owed. He attached a document headed "*Account between E Pires and SML Limited*". He has accepted that this document contains errors. The first page deals with the position before the lease. It contains the same information as previously, ending with the position that SML Limited owed £42,834.37 to the Defendant. There followed adjustments to be made upon the Defendant taking up his lease of the hotel. Again, this was largely the same as before, but with the addition of an amount of £554.67 in respect of stock and £10,000 in respect of rent at 5 Rozel Terrace. (The Defendant accepted that he and his wife lived there until the end of September 2014 before returning to live at the hotel. The Defendant made two payments of £1,000 towards the rent. Mr Bishop-White has credited those payments against the final three months of rent paid on behalf of the Defendant after the commencement of the lease of the hotel.) Finally, £500 for rates and cleaning at 5 Rozel Terrace has been added. The second page deals with the unpaid rent and includes interest payments said to be due, and the insurance premiums payable by the Defendant under the terms of the lease. Included within the costs attributed to the Defendant are amounts relating to fees, which Mr Bishop-White acknowledged were his estimates of what would need to be spent by the Plaintiff. No attempt was made to distinguish between SML Limited and the Plaintiff, to which these amounts of unpaid rent and insurance premiums were due.

36. On 19 March 2015, Advocate Ferbrache wrote to Mr Perfitt on behalf of the Defendant. Whilst explicitly stating that "*this letter is no more than a brief outline of our client's position*", the letter pointed out that the hotel "*is suffering from a considerable lack of investment*" and that the Defendant had been misled because it was always his belief "*that the monies he advanced of over £91,000 were secured by St Margaret's Lodge Hotel Limited*". The letter further explained that the Defendant "*had been unable to pay the rent that would otherwise be due because of the appalling state and condition of the property*". No reply was sent on behalf of the Plaintiff.

37. Following the meeting, on 26 March 2015, Mr Bishop-White sent a letter signed by Mr Perfitt, but incorrectly dated 26 February 2015, to the Defendant. In it, reference was made to the difficulties quantifying what was owed because of the Defendant's unwillingness to agree the amount. Reference was also made to the possibility of the rights under the security arrangement with respect to the equipment being exercised so as to reduce the debt owed. The letter proposed a new arrangement between the parties, under which the equipment would become the assets of the Plaintiff, thereby extinguishing the debt owed to it, and a new three-year lease would be signed at an increased rent, with the rent becoming payable monthly in advance, together with payment of a deposit of three months' rent. The alternative proposal on behalf of the Plaintiff was for the Defendant to vacate the hotel voluntarily with the equipment being transferred to settle the outstanding debt of accrued arrears of payments. These proposals were not acceptable to the Defendant.

38. In response to the Defendant telephoning Mr Bishop-White on 1 April 2015, the latter sent the Defendant an e-mail on 2 April 2015 in which he suggested that some form of percentage-based rent might be agreeable to the beneficial owner, provided it was likely to generate a similar amount of rental income as under the terms of the lease. In relation to the boiler, Mr Bishop-White indicated that the probable cost of replacement was approximately £12,000, adding "*this is obviously a problem !!!*", explaining that Ms Le Pelley was "*investigating finance options but this is going to be difficult*". Mr Bishop-White enquired of the Defendant whether he had any suggestions.

39. A meeting between Mr Bishop-White and the Defendant took place on 10 April 2015. They discussed what arrangements might operate in the future. Mr Bishop-White followed this up by e-mail on 21 April 2015, to which he attached a revised schedule setting out the debt

position. Again, the schedule does not distinguish between what the position was between SML Limited and the Defendant and what it was between the Plaintiff and the Defendant. Indeed, Mr Bishop-White stated that the "*balance due under the terms of the lease. £71,114.18 due to SML Limited*", which is plainly wrong. His conclusion was that the Defendant owed SML Limited £38,817.62, which could be resolved through the transfer of ownership of the equipment, as provided for under the security agreement. Moving forwards, payments of 12.5% as turnover commission could be made each Monday in respect of the week ending the previous Friday. Pending any agreement about a new lease, the hotel would be marketed for sale and rental. The Defendant responded that this did not reflect what had been discussed at the meeting.

40. During the course of the e-mail exchanges that followed, the Defendant wrote seeking confirmation that Mr Bishop-White had told him at the meeting "*that the hot water boiler is to be replaced around the 15th of May*", so that he could fully respond to the proposal. Mr Bishop-White replied, in a message timed at 15.38 on 22 April 2015:

> "*Sorry no reference was made to the boiler in my emails.*
> *This is because we consider, under the lease that you signed dated 4/7/2014 that the boiler is your responsibility.*
> *The fact that you tried to claim the cost of under your insurance policy would indicate that you agree with our view.*
> *However, whilst we do not feel that is our responsibility we can see no alternative but to organise the replacement ASAP, due to your precarious financial situation.*
> *As to who would ultimately pay for it – that has not been established yet. I can confirm that it is currently scheduled to be replaced in the second week of May.*"

41. It was accepted by Mr Perfitt and Mr Bishop-White that this was the first occasion when the Defendant was told in writing that the view was that the replacement of the failed boiler was the Defendant's responsibility under the terms of the lease. It is also common ground that the broken boiler has still not been replaced.

42. A further meeting took place between Mr Bishop-White and the Defendant before the Defendant responded to this latest e-mail on 30 April 2015. The Defendant indicated that he still believed in the project and wished to proceed with a new lease under which a daily commission and fixed monthly amount would be paid.

43. The Defendant received the Summons in this action on 21 May 2015. Advocate Ferbrache wrote to Advocate Barnes on 3 June 2015. He indicated that the content of the letter was "*not meant to be a belt and braces statement of our client's position*", and quite properly proposed further discussions with a view to resolving matters without troubling the Court. The letter states that the Defendant "*believes that he does not owe any monies at all. He was seriously misled as to the state of the property. He took no independent advice when the lease was entered into.*" The Defendant disputes that he is in breach of the terms of the lease: "*He had been made many promises, for example that works would be carried out to repair boilers, etc, etc. Indeed because there is no hot water, for many months now it has been impossible to operate the rooms. Thus the only income is limited and comes from the food and beverage side of the business.*" Complaint was also made that there had been "*a complete lack of support by or on behalf of*" the Plaintiff.

44. A letter dated 8 June 2015 from the Chief Officer of the Commerce and Employment Department notes that the hotel is not providing accommodation because of the boiler being out of commission, with the consequence that its permit might be in jeopardy and also its status as being on the Open Market Register. These matters are of particular concern to the Defendant because any change in status would affect the entitlement he and his wife have to live lawfully in Guernsey.

Discussion

45. If this case turned solely on construing the terms of the written lease dated 4 July 2014, the position would be clear. The Defendant has agreed to pay rent of £8,000 monthly in arrears. He admits that he has not paid the rent, save for the four small payments totalling £1,700, which have been applied to the shortfall in the September 2014 rent, in respect of October 2014 onwards. Accordingly, pursuant to clause 12, a Forfeiting Event has occurred and the Plaintiff would, in those circumstances, be entitled to obtain an eviction order against the Defendant. However, the Defendant has advanced two reasons why the strict terms of the lease do not apply. First, he alleges that there was a separate agreement reached between him and the Plaintiff acting through Mr Perfitt and/or Mr Bishop-White that, despite the clear wording in clause 3, the Defendant was permitted to set off against the rent payable under the lease the amount he was owed pursuant to the acknowledgement of debt signed by Mr Perfitt. Secondly, he alleges that the Plaintiff, acting through Mr Bishop-White, agreed that until the broken boiler was replaced, the Defendant was not obliged to pay any rent in respect of the hotel. Because the boiler has still not been replaced, the suspension of the obligation to pay rent continues and there are no grounds on which the Plaintiff can seek an eviction order.

Legal position

46. Before turning to consider whether either or both of these alleged agreements has been established by the Defendant, I will briefly consider what the legal position is if the facts are as the Defendant asserts.

47. Article 35 of the *Loi relative aux Preuves* of 1865, as amended, provides:

> "*Lorsqu'il s'agit d'une convention par écrit il n'est reçu aucune prevue par témoins contre ou outre le contenu de la pièce excepté dans les cas speciaux reconnus par la loi.*"

The effect of Article 35 and the parol evidence rule was considered by this Court in *Sheppard v C.I. Fire & Security (Guernsey) Limited* (unreported, 29 July 2009, at para. 6):

> "*The Jurats were directed as follows (substantially based on the principles set out in Chitty on Contracts, 28th edition, vol 1, paras 12.094 – 12.097):*
> *(i) The parol evidence rule, as set out in the cases cited on behalf of P was described;*
> *(ii) However, it is and has long been subject to a number of exceptions. In the words of Chitty, "In particular, since the nineteenth century, the courts have been prepared to admit extrinsic evidence of terms additional to those contained in the written document if it is shown that the document was not intended to express the entire agreement between the parties. So, for example, if the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement." Chitty continues (para 12-095):*
> *"It cannot therefore be asserted that, in modern times, the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms not included expressly or by reference to the document.";*
> *(iii) it is always open to a party to adduce extrinsic evidence to prove that the document is not a complete record of the Contract. The Law Commission in 1986 stated (para 12-097):*
> *"… there is no rule of law that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete contract. Whether it is a complete contract depends on the intention of the parties, objectively judged, and not on any rule of law."*

It was noted in passing, that the Guernsey authority, the Hougue Fouque CASE (Supra) permitted extrinsic evidence;

(iv) however, the burden lies on D in this case, on the balance of probabilities, to show that any further contractual terms were agreed outside the written terms of the document."

48. Article 35 of the 1865 Law has now been amended to refer expressly to the special cases recognised by the law being an exception to the general rule. This statement of the approach to be taken demonstrates one of those special cases. Further, there has been no objection from Advocate Barnes to the admission of the Defendant's evidence, although on behalf of the Plaintiff he argues that no parol agreement has been formed or is effective.

49. Advocate Ferbrache has also highlighted that the lease does not contain an entire agreement clause, referring to the description given by Lightman J of the effect of such a clause in *The Inntrepreneur Pub Company (GL) v East Crown Limited* (unreported, 28 July 2000). I am satisfied that there is no entire agreement clause of the type referred to in paragraph 7 of that judgment on the face of the lease between the parties. Accordingly, there is nothing of that nature denuding what could otherwise constitute a collateral warranty of legal effect. The absence of an entire agreement provision means there is no bar to the Defendant relying on terms not recorded in the written document. Advocate Barnes, however, has pointed out that paragraph 8 refers also to the possibility that the agreement contains a provision designed to exclude liability for misrepresentation. However, such a provision would be subject in England and Wales to the reasonableness test under the Misrepresentation Act 1967. Because that Act does not apply in Guernsey, clause 13.1 of the lease operates to prevent the Defendant relying on anything that might have been misrepresented to him. Before leaving that case, I have had regard to what was said at paragraph 10:

"*The relevant legal principles regarding the recognition of pre-contractual promises or assurances as collateral warranties may be stated as follows:*

(1) a pre-contractual statement will only be treated as having contractual effect if the evidence shows that parties intended this to be the case. Intention is a question of fact to be decided by looking at the totality of the evidence;

(2) the test is the ordinary objective test for the formation of a contract: what is relevant is not the subjective thought of one party but what a reasonable outside observer would infer from all the circumstances;

(3) in deciding the question of intention, one important consideration will be whether the statement is followed by further negotiations and a written contract not containing any term corresponding to the statement. In such a case, it will be harder to infer that the statement was intended to have contractual effect because the prima facie assumption will be that the written contract includes all the terms the parties wanted to be binding between them;

(4) a further important factor will be the lapse of time between the statement and the making of the formal contract. The longer the interval, the greater the presumption must be that the parties did not intend the statement to have contractual effect in relation to a subsequent deal;

(5) a representation is much more likely intended to have contractual effect than a statement of future fact or a future forecast."

50. In relation to the alleged existence of a collateral contract, Advocate Ferbrache has relied on two passages from *Chitty on Contracts*, 31st ed. The first is para. 12-103, giving the reason why extrinsic evidence is admitted as being that "*the parol agreement neither alters nor adds to the written one, but is an independent agreement*" (citing *Mann v Nunn* (1874) 30 LT 526 as the authority for that statement). The paragraph continues:

"*Such evidence is certainly admissible in respect of a matter on which the written contract is silent. In a number of older cases it was stated that evidence of such a contract or warranty must not contradict the express terms of the written contract.*

> *However, more recently, the courts have admitted evidence to prove an overriding oral warranty or to prove an oral promise that the written contract will not be enforced in accordance with its terms.*"

The second passage is para. 12-004:

> "*It may be difficult to treat a statement made in the course of negotiations for a contract as a term of the contract itself, either because the statement was clearly prior to or outside the contract or because the existence of the parol evidence rule prevents its inclusion. Nevertheless, the courts are prepared in some circumstances to treat a statement intended to have contractual effect as a separate contract or warranty, collateral to the main transaction. In particular, they will do so where one party refuses to enter into the contract unless the other gives him an assurance on a certain point or unless the other promises not to enforce a term of the written agreement.*"

51. One of the authorities to which reference is made in both passages is *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, in which the prospective tenant objected to the inclusion in a draft lease presented to him of a covenant that the premises would be used only as business premises and not as sleeping quarters. The tenant was given an oral assurance on behalf of the landlord that, if he signed the lease, it would not enforce the covenant against him. The landlord subsequently sought to forfeit the lease for breach of this covenant. Harman J declined to permit the landlord to resile from the promise not to enforce the covenant against the tenant personally. He rejected the defence advanced on the basis of waiver and addressed the question of estoppel (at page 145), describing it as a "*misnomer*", treating it rather as a clear contract acted upon to the detriment of the defendant. His Lordship stated (at page 146):

> "*The promise was that so long as the defendant personally was tenant, so long would the landlords forbear to exercise the rights which they would have if he signed the lease. He did sign the lease on this promise and is therefore entitled to rely on it so long as he is personally in occupation of the shop.*"

52. In doing so, Harman J cited with approval the judgment of Simonds J in *In re William Porter & Co. Ltd* [1937] 2 All ER 361, which in turn had applied a rule stated in the Scottish case of *Cairncross v Lorimer* (1860) 3 LT 130 by Lord Campbell LC:

> "*… if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct.*"

53. Reference has also been made to another of the cases cited, *Brikom Investments Ltd v Carr* [1979] QB 467, in which the managing director of the landlord gave to the chairman of the residents' association at a block of flats an oral assurance that, unless planning permission were granted, the landlord would, at its own expense, repair the roofs in the summer of 1972 and would not seek to claim contributions for the cost of those particular repairs from the lessees under the covenant in the various leases. The assurance was communicated in a letter sent to all the flats. Although the work was not done that summer, the oral assurance was repeated in January 1973 and the work eventually undertaken in 1974. The works cost £15,000. In 1976 the landlord made claims against a number of tenants including the apportioned costs of these roof repairs. The landlord did not pursue anyone who had actually received the assurance in writing. The Court of Appeal distinguished between the position of an original lessee, to whom the oral assurance had been given directly before she entered into her lease and assignees of leases. The former could rely on an oral collateral contract that the landlord would not thereafter seek to enforce its strict legal rights under the lease against her. The latter could not rely on such a collateral contract but could rely on what constituted a

plain waiver by the landlord of its right to claim contributions under the lease. Lord Denning MR reached this outcome by reference to the doctrine of promissory estoppel he had expounded in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, although the majority rejected that approach. Roskill LJ, with whom Cumming-Bruce LJ agreed, preferred the approach derived from the line of authority commencing with *Hughes v Metropolitan Railway Co.* (1877) 2 App Cas 439. His Lordship summarised the position as follows (at page 489E):

> "*… where parties have made a contract which provides one thing and where, by a subsequent course of dealing, the parties have worked that contract out in such a way that one party leads the other to believe that the strict rights under that contract will not be adhered to, the courts will not allow that party who has led the other to think the strict rights will not be adhered to, suddenly to seek to enforce those strict rights against him.*"

54. Relying on these principles, Advocate Ferbrache submits that there was an enforceable collateral contract between the parties permitting the debt owed to the Defendant to be set off against the rent or, as an alternative, that the terms of the written lease were varied following the failure of the boiler so that rent was not payable until the boiler was repaired or replaced and that such repair or replacement would be effected by the Plaintiff rather than the Defendant. As a result of the assurances provided by the Plaintiff and the subsequent conduct of the parties, the Plaintiff is now estopped from seeking to rely on the express wording of clauses 3, 4.1 and 4.2 of the lease. Whether or not any of this should properly be regarded as a collateral contract, an estoppel or a waiver was of little concern to the Defendant. To the extent that the question of consideration for any enforceable promise is needed, Advocate Ferbrache relies on passages from *Chitty on Contracts*, especially paragraph 22-044, which states that "*A waiver is distinguishable from a variation of a contract in that there is no consideration for the forbearance moving from the party to whom it is given. … Although consideration need not be proved, certain other requirements must be satisfied for such an estoppel to be effective: first, it must be clear and unequivocal; secondly, the other party must have altered his position in reliance on it, or at least acted on it.*"

55. In response to these submissions, Advocate Barnes has drawn attention to the commentary on the admissibility of extrinsic evidence contained in *Cross and Tapper on Evidence*, 12th ed. In doing so, he relies on the position set out by Lord Morris in *Bank of Australasia v Palmer* [1897] AC 540, 545:

> "*Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract*"

although the commentary continues that "*Such evidence is always admissible if tendered to establish the existence of a contract collateral to the writing*". He further relies on a passage on page 682 dealing with the cases of *Henderson v Arthur* [1907] 1 KB 10 and *Evans v Roe* (1872) LR 7 CP 138, which:

> "*… primarily turned on the question of whether extrinsic evidence could be received of terms contradicting those of a written agreement. In the former, a lease having been executed under which a rent was payable in advance, the lessee was not allowed to give evidence of a prior undertaking by the lessor to accept rent in arrears; in the latter, evidence of a contemporaneous oral agreement that a written contract of service from week to week was to last for a year was rejected. Cases where a person has signed an agreement as 'owner', or 'proprietor', have excluded evidence that he was acting as agent for an undisclosed principal as contradicting the unambiguous statement in the agreement.*"

Accordingly, his primary submission is that there is no room in the present case to depart from the terms of the lease, particularly by reference to clause 13.1 as it affects anything said before it was executed.

56. In relation to the alleged suspension of rent whilst the boiler is inoperative, Advocate Barnes suggests that no consideration has been given by the Defendant for the alleged promises made varying the terms of the contract. As such, no collateral contract can exist. To the extent that there is a waiver by estoppel not requiring consideration, he highlights the final sentence of para. 22-044 of *Chitty on Contracts*, arguing that neither condition has been satisfied. In doing so, he has drawn attention to the explanation given in para. 3-090 of *Chitty* (using the 30th ed., although I have checked that the text has not changed in the latest edition):

> "*The promise or representation must be "clear" or "unequivocal," or "precise and unambiguous." This requirement seems to have originated in the law relating to estoppel by representation; and it is now frequently stated in relation to "waiver" and "promissory estoppel." It does not mean that the promise or representation must be express; it may equally well be implied. For example, in Hughes v Metropolitan Ry. itself the landlord made no express promise that he would not enforce his right to forfeit the lease; but an implication of such a promise arose from the course of negotiations between the parties. There is some support for the view that the promise must have the same degree of certainty as would be needed to give it contractual effect if it were supported by consideration. Thus if the statement could not have had contractual force because it was too vague, or if it was insufficiently precise to amount to an offer, or if it did not amount to an unqualified acceptance, it will not bring the equitable doctrine into operation.*"

57. Advocate Barnes invited me to read the paragraphs that follow, and I have done so, but without feeling the need to quote anything further.

58. The starting point in this case must, in my view, be the terms agreed between the parties in their formal written lease. Article 35 of the 1865 Law, as amended, enables me to adopt and apply the principles to which I have referred permitting reference to extrinsic evidence. In this case, the Defendant is asserting that, despite the express wording in the lease, he was made different promises on behalf of the Plaintiff about the availability of set off of the acknowledged debt owed to him. The amount of rent due at the end of each month would be adjusted through discussions between him and Mr Bishop-White. In effect, he is asserting that a collateral contract exists from which the Plaintiff cannot now resile. The terms of this collateral contract are such that, at the time when the proceedings commenced, there were no arrears of rent. His alternative approach is that the Plaintiff has varied the express terms of the contract in such a way that the responsibility for replacing the broken boiler lies with the Plaintiff and not the Defendant and that, until the boiler has been replaced, no rent is due from the Defendant to the Plaintiff. In both cases, nothing has been recorded in writing. Instead, the Defendant alleges that these promises were made to him orally and are supported by the course of dealings between the parties. Although it is possible in law to establish a form of collateral agreement (however labelled) varying the express terms of a written agreement, or agreeing not to enforce its terms strictly, it is apparent from the cases to which I have referred that this will be difficult. The payment of rent is the central element of a tenant's performance of his obligations, so to suggest that the requirement for payment has been suspended, ie, that the landlord will forbear to enforce the terms of the lease, necessarily requires most careful scrutiny. If the Defendant is right in respect of either of his contentions, the action would fall to be dismissed. Subject to an assessment of whether the right of set-off, if that were the only promise found proved, results in no rent being owed on which to base the Plaintiff's claim to be entitled to an eviction order, the legal position to apply is that which I have set out derived from reference to the position under English law. If the Defendant were to establish that he has surmounted all the hurdles over which he must pass to establish such a promise from the Plaintiff, it would be unconscionable to permit the Plaintiff to disregard its promises and to allow it to proceed to evict the Defendant. Whether or not either basis of defending the action succeeds largely turns on my assessment of the evidence.

Set-off of debt against rent

59. Clause 3 of the lease is quite explicit that the monthly rent of £8,000 is payable "*without any deduction or set off*". I find that those words were included at the insistence of Dr Yaddehige. I further find that the Defendant understood and appreciated that, when it came to significant decisions about the hotel, Dr Yaddehige was involved directly with the Defendant. This is borne out by the Defendant's own evidence. It was Dr Yaddehige who proposed that the Defendant become the permanent General Manager of the hotel (and so continue his employment with SML Limited) and that the original proposal for the Defendant to take a lease of the food and beverage area be shelved. It was Dr Yaddehige who discussed with him the possibility of the Defendant taking a lease of the entire hotel. It was Dr Yaddehige who explained in no uncertain terms to the Defendant that nothing could be set off against the rent. When the Defendant modified his position and sought payment of his unpaid wages by means of a set-off arrangement, this was still rejected by Dr Yaddehige. The Defendant was presented with the option of agreeing the draft lease that had been prepared by Advocate Barnes or rejecting it. He chose to accept it as shown by him executing its terms without anything further being recorded in writing.

60. I am further satisfied that the Defendant understood the different roles undertaken by Messrs Perfitt and Bishop-White and by Dr Yaddehige. He had experience of Guernsey companies. He understood that the director or directors of a company could authorise action on behalf of the company but that, in the absence of proper authorisation of someone else, that other person could not commit a company to a particular outcome. I find his attempt to draw Mr Perfitt into this alleged arrangement unconvincing. It was apparent to me that Mr Perfitt was rather indifferent to the lease being offered. He was not involved in the negotiations and had left those matters to Dr Yaddehige. He did not authorise Mr Bishop-White to conclude any collateral agreement in respect of the terms of the lease. In particular, there was no authorisation to Mr Bishop-White to agree any arrangement in respect of rent other than what was on the face of the lease. That is why I accept the evidence of Messrs Perfitt and Bishop-White and reject the evidence of the Defendant on this issue. The Defendant has not discharged the burden of satisfying me that the discussions he claims to have had in the latter part of June 2014, ie, before the execution of the lease, actually took place.

61. I find support for that conclusion from what happened thereafter. The proposed repayment plan presented to the Defendant by Mr Bishop-White on 19 September 2014 strongly suggests that there had been no discussion resulting in an agreement that the debt owed to the Defendant could be set off against rent due after payment of the first month's rent in full. Had such an agreement been reached, Mr Bishop-White would have had no cause to make proposals as to how the Defendant was to be repaid for the simple reason that there was already in place a way of dealing with it. Further, had there been such an agreement, I am sure that the Defendant's response to this proposal would have been to mention that agreement rather than just rejecting it.

62. Although no evidence was given as to what happened in respect of the August rent payment so as to lend support to the Defendant's contention that this oral collateral agreement existed, the position in respect of the September rent is, in my view, telling. It followed a revised schedule of what was said to be the balance owed to the Defendant and an enhanced repayment plan, which the Defendant had also rejected. However, the Defendant did pay £4,000 by cheque at that time rather than the full rent of £8,000. It was accepted by both parties that account needed to be taken of credit card receipts that should have gone to the Defendant having been paid to the Plaintiff. Mr Bishop-White calculated that this resulted in a shortfall on the rent of £2,122.98. There was, however, no suggestion from the Defendant at the time that this was the amount to be treated as a repayment to him under the terms that had been agreed. Further, the four payments made by the Defendant in November and December 2014 totalling £1,700 also point away from there being the type of arrangement the Defendant has asserted. There was no suggestion from him that, consistent with the arrangement he claims, he had sat down with Mr Bishop-White following the end of October 2014 to discuss what needed to be paid and how much could be regarded as being set off.

Tendering these four payments as he did leads me to conclude that the Defendant understood that he had an ongoing obligation to make payments to the Plaintiff. Again, this supports the conclusion that the Defendant's version of events in late June or early July 2014 is not believable.

63. Having concluded on the facts that the Defendant has failed to establish any collateral agreement of a type that would permit him to set off the debt owed to him (or any part of it) against his ongoing obligation to pay the rent pursuant to the terms of the lease, I do not really need to address any of the other issues arising in relation to this contention. However, I will briefly set out what the position would be if I had reached a different conclusion about the pre-execution discussions.

64. In my judgment, clause 13.1 of the lease poses problems for the Defendant. The Defendant had sight of a draft of the lease before the time he says his discussions with Mr Bishop-White and/or Mr Perfitt took place once he had failed to persuade Dr Yaddehige to permit any form of set-off. The effect of clause 13.1 is that anything said, ie, any representation made, that has not found its way into the written agreement and which, as is the case here, directly contradicts the express terms recorded, has been accepted as not having induced the Defendant to enter into the lease. The position is, therefore, different from that set out in para. 12-004 of *Chitty* and in *City and Westminster Properties (1934) Ltd v Mudd* (*supra*). It is also different from the position of the original lessee in *Brikom Investments Ltd v Carr* (*supra*). The position of the Defendant was that he desperately wanted to enter into the lease of the hotel because it secured for him and his wife accommodation they could occupy lawfully under the 1994 Housing Law. It was clear to me that this was one of the significant motivating factors in him wishing to lease the entire property. The business opportunity that came with it was attractive because it meant that he no longer needed to refer every decision to others, but regularising his housing position was, in my view, of more significance to the Defendant than securing a return on the monies previously expended by him. If repayment of the debt had been uppermost in his mind, he could have taken steps to secure his position better than he did. In these circumstances, had I needed to do so, I would have found that clause 13.1 prevented the Defendant claiming that he had relied on the representation made as the reason for entering into the lease, thereby giving consideration for any collateral contract permitting set-off.

65. Further, and in any event, I would find that the debt owed to the Defendant was not entirely a debt owed by the Plaintiff. I reject the evidence of the Defendant that he thought SML Limited was just another name for the proprietor of the hotel from which he was leasing the premises. I find that assertion of his unbelievable. Although the Defendant is not a lawyer and English is not his first language, I have formed the impression that he is sufficiently well-versed in commercial matters, especially as regards the hospitality industry, to understand from reading the Agreement dated 24 May 2013, that SML Limited was a distinct entity from the Plaintiff. The reference in that document to there being a joint tenancy of the areas covered by the Agreement is something that the Defendant must, I find, have understood and appreciated to mean that the trading company was distinct from the property-owning company. If "SML Limited" were being used as an abbreviation of the name of the Plaintiff, as shown on that Agreement it would have been "SMLH Limited" anyway. Shortly thereafter, he became an employee at the hotel. Although I was not shown any written terms and conditions of employment, as he was required to have received, I imagine that they would have specified that it was SML Limited employing him. The wage slips in 2013 were in the name of that company. The e-mail of 5 July 2013 announcing his appointment, of which he was one of the recipients, explains that it was "*The Board of SML Limited*", and not of the Plaintiff, that was pleased to inform everyone about this development. Accordingly, when the Defendant was arranging for work to be carried out at the hotel in the summer of 2013, and in respect of which he raised the six invoices he did, plus the seventh invoice in relation to the supply of equipment, although he did not specify a particular company from which payment was sought, I am satisfied that he understood that the services being rendered were not necessarily being rendered to the Plaintiff and his claim now that they were is a convenient, but misguided, stance for him to take.

66. Although there is no written contract specifying who was contracting with whom, it is clear that there must have been some agreement, whether oral or through a course of dealing, under which work was being carried out at the hotel. It is apparent that, although the two entities had common directors, they undertook their distinct roles. The work being undertaken was generally of a nature to assist the trading company because it would bring the hotel back to a standard required to operate under a boarding permit. In part, the work was required to make the areas covered by the Agreement of 24 May 2013 usable by the Defendant. The work was being undertaken to rectify the problems identified in the Improvement Notices. The Defendant had seen copies of the Improvement Notices before he rendered any invoices and those Notices were directed at SML Limited. Against all this background, I am not persuaded by the Defendant's evidence that he was only prepared to undertake this work on behalf of the property-owning company. Everything points to this work, or at least the bulk of it, being undertaken at the request of SML Limited. The personnel carrying out the work were, I understand, employees of Smugglers Restaurant Limited, in circumstances where the Defendant chose to deploy them on tasks at the hotel instead of at that restaurant. Accordingly, if I needed to do so, I would find that the contract (or, if more than one, each of the contracts) for the provision of these services was between SML Limited and Smugglers Restaurant Limited, although certain elements may have benefited the Plaintiff, as shown by Mr Bishop-White's analysis of them and splitting of the amounts due. Similarly, the equipment appears to me to have been owned by the company and not personally by the Defendant and it was supplied to the trading company, SML Limited, to assist it with the hotel operation and not to the Plaintiff.

67. I also take the view that this position was understood at the time by the Defendant despite his evidence to the contrary. When he received the written confirmation dated 27 December 2013 of the debt arising from the unpaid invoices being owed by SML Limited, he did not query it but, more particularly, when he received the revised confirmation dated 30 June 2014, ie, just a few days before signing the lease, he did not question why the debt had been split between the two companies in the way it had. If, as the Defendant claims, he had only ever, in his own mind, contracted with the Plaintiff, the receipt of these documents should have rung alarm bells. Even if he had previously been sufficiently naïve as to think that SML Limited and the Plaintiff was one and the same company, the fact that he saw two separate companies referred to on the second of those documents should have led to some enquiry on his part. It did not and I take the view that this is because he knew all along that the work that was undertaken in 2013 and the supply of equipment was to the separate trading company, ie, to SML Limited.

68. The consequence, therefore, is that the level of debt owed by the Plaintiff to the Defendant is small by comparison to the rental payments that the Defendant should have made and has not. Subject to dealing with his alternative argument about the suspension of the rent whilst the boiler has been inoperative, even if I were wrong to find that there was no collateral contract for set-off, the amount that could be set-off against the accrual of arrears of rent due to the Plaintiff would be exhausted well before the present proceedings were issued. Consequently, the only basis on which the Defendant could claim to set off against the rent owed pursuant to a collateral agreement would be if SML Limited were also a party to those arrangements.

69. In this respect, I think that Mr Bishop-White and Mr Perfitt have not assisted in the Defendant's understanding of the position. Rather than clarifying for his benefit early on that different amounts were owed by the different companies, the approach appears to have been to portray a degree of fluidity between them. I find that the Defendant did have explained to him that the rent due under the lease would go to the Plaintiff, which in turn would use it to meet interest payments and to assist SML Limited to pay its creditors. Those creditors included its former employees such as the Defendant and his wife. This was important to the Defendant, which is why he enquired after having made the first rent payment of £8,000 on 5 August 2014 as to whether it would be used as previously indicated to pay staff members. The situation was not helped later on when Mr Bishop-White produced documents that suggested everything due from the Defendant was owed to SML Limited. I regard the confusion as sloppy and unhelpful but that in itself does not, in my opinion, affect the legal

position. It does not avail the Defendant to point to the fact that he did not know in which capacity Mr Perfitt or Mr Bishop-White were acting, because when it comes to rent and any suggestion that the Plaintiff would forgo rent or permit any monies at all to be set off against the rent, the parties to such an agreement are clear: they are the landlord and the tenant, ie, the parties to the lease.

70. Finally on this first issue of set-off, even if there had somehow been an agreement that the entire debt due to the Defendant could be set off against rent due under the lease, there remains the question of how much the debt was at the start of the lease. The Defendant accepted that the reversal of the equipment ownership arrangement meant that there had to be a corresponding reduction in the amount owed to him. Mr Bishop-White simply deducted the entire amount set out in the final invoice, subject to the removal of the double-counted labour charges, thereby deducting £41,195. Although the Defendant had placed a value on the equipment of £43,000 in his June 2014 exchange with Dr Yaddehige, he has now suggested that some account should be made for depreciation. I understand that the value could have been written down by 20% annually for tax purposes. Because the period involved is less than a calendar year, I incline to the view that a smaller discount should be applied to reach an approximate figure. Accordingly, rather than use the full amount, the reversal of the equipment might have resulted in a reduction on the overall debt of, say, £35,000. This would mean, in rounded terms, that the total debt owed to the Defendant by the Plaintiff and SML Limited immediately prior to the lease being executed was £49,000. I should stress that I am not attempting to declare what the debt was. If that is required, it will need a separate hearing, during which closer analysis of the invoice entries would be required. What I am doing is considering, even on the Defendant's best case on set-off, where that leaves the parties.

71. Against that working figure of £49,000, I am satisfied that the Plaintiff and/or SML Limited is entitled to recoup certain monies from the Defendant. For example, there need to be adjustments made in respect of the Defendant's unpaid wages for May and June 2014 and sorting out the receipts in respect of the hotel business at the beginning of July 2014. The costs of the various utilities need to be apportioned between the Defendant and SML Limited. In addition, I am satisfied that it would be appropriate for the rent on 5 Rozel Terrace from July to September 2014 to fall to the Defendant's account rather than being an ongoing obligation of SML Limited (or even of the Plaintiff). I take that view because the provision of accommodation to the Defendant was part of his remuneration package. It may also have been an element of the remuneration packages of other staff. However, as soon as the Defendant became the tenant at the hotel, the entirety of the hotel business became his responsibility. He was no longer an employee of SML Limited. Any other staff were probably also no longer working for SML Limited. In those circumstances, the rent of £10,000, the rates and the cleaning costs all became the Defendant's responsibility. Any fees for professional services, however, fall outside of this calculation and I specifically reject Mr Bishop-White's inclusion of them in his schedules of indebtedness. This means that, again in rounded terms, a further adjustment needs to be made to the level of indebtedness of £8,000 (and not £10,537.81 or even the figure of £12,942.81 shown on the schedule attached to Mr Bishop-White's second witness statement). Accordingly, the amount of debt, on the Defendant's case, that could potentially be set off against rent is approximately £41,000.

72. The schedule of unpaid rent starts with the balance for September 2014 of £2,122.98. The Defendant then paid £1,700 in total to the Plaintiff, reducing the balance to £422.98. The monthly rent thereafter went unpaid. This is £8,000 in respect of October, November, December, January and February. Accordingly, at the end of February 2015, the amount of debt not already set-off would have reduced to a few hundred pounds. Further, the terms of the lease require the Defendant to pay as rent the insurance premiums. Although Mr Perfitt's letter of 11 February 2015 made no reference to insurance premiums, it is clear from this analysis of the debt and the rent due, that when the rent for March 2015 fell due at the end of that month and went unpaid, there was nothing further "banked" by the Defendant and available to set off to satisfy all of the rent payment due at that time. Consequently, when the rent went unpaid for 21 days thereafter, there was a Forfeiting Event. This means that, by the

time the proceedings were issued, even on the best case that can be advanced on behalf of the Defendant on set-off, I would still have found that this did not provide a valid defence against the Plaintiff's action. In those circumstances, I do not need to consider further whether the arrears arose after the issue of proceedings but before the trial because I am satisfied that arrears had arisen prior to the commencement of proceedings.

73. To summarise on the question of set-off, I find that the Defendant has failed to establish that there was any agreement enforceable by him to permit any form of set-off against the rent due. However, even if I were wrong on the facts and the Defendant had persuaded me that the parties had agreed that the entirety of what was owed to him could be applied to discharge any unpaid rent under the lease, the figures do not work out for him. By the end of March 2015, the amount available to set off against all payments due would have been extinguished in full and some amount would then have been owed by the Defendant to the Plaintiff. The defence based on set-off, therefore, fails and the only basis on which the Plaintiff's action could be dismissed is if the obligation to pay rent has been suspended.

Suspension of rent whilst boiler inoperative

74. However one looks at matters, the simple fact that Forest Park Hotel has not been operating as a hotel since mid-October 2014 all because the broken boiler has not been replaced is astonishing. Had Mr Carré's quotation been accepted, the necessary work could have been completed in November 2014 at a cost of little more than one month's worth of rent under the lease. Another way of looking at it is that the cost would have been no more than the amount acknowledged to have been owed by the Plaintiff to the Defendant as set out in the document dated 30 June 2014. Instead of the parties endeavouring to reach a pragmatic solution, which would probably have been commercially sensible and have enabled both sides to make some money in the meantime, positions have become so entrenched that the present impasse has been reached.

75. The lease makes the Defendant responsible for replacing any fixtures or plant that become beyond repair during the Term (clause 4.2). The Defendant was informed by Mr Carré before he even turned to Mr Bishop-White that the broken boiler was beyond repair. The fact that the Defendant took the initiative to make enquiries on his own behalf at this time points towards him recognising that he had the responsibility to take action. Mr Bishop-White, being more concerned with the financial aspects of the hotel rather than its day-to-day running, did not immediately know who had responsibility to do anything. To an extent, that is understandable, but I regard it as poor that as soon as the lease was reviewed and the position clarified in the minds of those on the Plaintiff's side, this was not spelt out to the Defendant. It would have been a simple matter to put into writing chapter and verse on where the parties stood and that should have been done, if only to avoid any further misunderstanding, well before the end of 2014. To have left putting the Plaintiff's position clearly until 22 April 2015 was unhelpful, to say the least.

76. The Defendant, however, has not helped himself in this regard. The steps he took in mid-October 2014 when the boiler failed satisfy me that he understood that the first steps had to be undertaken by him. That was one of the consequences of having taken a lease of the entire premises. Instead of having an employer to whom to turn to resolve problems, which had been the position when he managed the hotel on behalf of SML Limited, as leaseholder he was now the proprietor. The fact that he chose to purchase an electrical boiler on 22 October 2014 is indicative of his understanding that he was responsible for doing something. I believe the Defendant would not have done anything at this time if he took the view that there was any ambiguity about whose responsibility it was to find a solution. His approach to the insurer confirms that he had incurred the expense on his own account and so was seeking to recover these monies from the insurers. I accept from his evidence that the Defendant did not have ready access to the money to pay for a replacement boiler but, rather than spend £2,500, it would have been better to have got the boiler replaced by Mr Carré and spent around three times as much and been up and running trading with the minimum of delay. Had he done so and declined to pay the next month's rent (and possibly any further amount owing when the

rent fell due in the month following), on the basis that he was claiming he was off-setting the costs against the amount already acknowledged to be due from the Plaintiff, thereafter resuming paying the rent in full, I doubt that the Plaintiff could have complained at that. The difficulties have largely, I believe, resulted from problems relating to cash flow for both parties.

77. Instead of getting the boiler replaced, the Defendant now says that Mr Bishop-White agreed, by saying "ok" on three occasions during the latter part of 2014, that no rent would be payable until the boiler situation was fixed. This is an allegation that Mr Bishop-White refutes. Having considered the way in which both Mr Bishop-White and the Defendant gave their evidence, I prefer that of Mr Bishop-White. I take account of the fact that Mr Bishop-White was placed in an uncomfortable position when cross-examined by Advocate Ferbrache. He was forced to acknowledge shortcomings in the documents he had prepared. That is not easy for a professional person. However, his honesty in making those acknowledgements leads me to believe him when he robustly denied that the conversations the Defendant alleges took place happened. Accordingly, I do not find that Mr Bishop-White gave any indication to the Defendant that there would be any cessation in the Defendant's obligation to pay rent under the lease. The impression I got was that Mr Bishop-White was very keen on behalf of the companies, and indirectly on behalf of Dr Yaddehige, to ensure that there was an income stream out of which the liabilities of the companies could be satisfied. It was Mr Bishop-White's job to balance the books as best as he could. He was simply in no position to make this type of promise to the Defendant because it would mean that the rental income on which the Plaintiff and thereafter SML Limited depended would dry up. Further, Mr Bishop-White was not given authority by the Plaintiff, ie, by its director, Mr Perfitt, to enter into such an arrangement with, or even to make such a promise to, the Defendant and I am satisfied that the Defendant understood that. As a director of Smugglers Restaurant Limited, he knew that he could authorise others to act on behalf of that company. The same applies to the Plaintiff and Mr Perfitt. I am satisfied that it was never suggested to the Defendant that Mr Bishop-White had the extent of authority that would be required to agree that the obligation to pay rent be suspended. I am similarly satisfied that Mr Bishop-White did not have the authority to agree to vary the lease so that the obligation to replace the boiler became the Plaintiff's rather than the Defendant's.

78. Because any promise of this nature would be of such significance to the Defendant, I believe that he would have referred to it in his ongoing correspondence with the representatives of the Plaintiff. In his letter dated 12 February 2015, he simply wrote "*The Boiler is the Landlord responsibility*", having earlier referred to him sourcing the electrical boiler at a cost of more than £2,500. There appears to be an inconsistency between these two parts of the letter. If the Defendant genuinely believed on his reading of the lease he had for the hotel that the replacement of the boiler was something for which the Plaintiff was responsible, I am sure he would have demanded reimbursement of the costs of the electrical boiler. He did not do so. However, if his reference to the boiler being the landlord's responsibility was intended to point out that the express term in the lease had been modified through his discussions with Mr Bishop-White, I believe that he would have explained that more fully at this time. I take that view because the point he made immediately before mentioning the responsibility of the landlord is that "*Very little or nothing has been done to help us*". I think it is permissible for me to infer from that statement that what he was looking for was assistance, because he was not able financially to get back on his feet, rather than asserting that there had been a promise that the responsibility for replacing the boiler had become the Plaintiff's. The Defendant appears to have forgotten that it was his choice to place others outside the decision-making circle so that he could run the hotel for his own account. That was one of the factors in him agreeing to lease the hotel. It is somewhat surprising, therefore, that, at the first sign of problems, he was looking to Mr Bishop-White to engineer a solution. The benefit of being his own boss is accompanied by the burdens that follow from that position. Further, the Defendant's reference to being owed money demonstrates that his real complaint was that he could not afford to do anything until such time as he was paid what he was owed. That is quite a different position from asserting that the replacement of the boiler was something the Plaintiff had agreed and that until it was replaced there was no rent payable. Had he been

explicit that he was demanding that the debt acknowledged to be due to him be paid to him, or an amount equivalent to the cost of a replacement boiler be used to rectify the problems, I expect that a mutually-acceptable solution would have been considered.

79. The fact that no mention is made in this letter from the Defendant about the suspension of the rent payments is also, in my view, significant. If, as he now suggests, the Plaintiff had committed itself to replacing the boiler and had agreed that, in the interim, no rent was payable, ie, no steps would be taken to enforce the terms of the lease until the boiler had been replaced by the Plaintiff, this was the time at which that should have been stated. The tenor of the Defendant's letter in February 2015 is, therefore, inconsistent with the promises he now alleges had been made towards the end of 2014 on behalf of the Plaintiff.

80. Similarly, in March 2015, Mr Bishop-White was putting various options to the Defendant which were also inconsistent with there having been any discussions between them about the rent being suspended for the time being. Mr Bishop-White sought the Defendant's response to the schedule he had put together which included entries relating to non-payment of rent. The implication of this document is that the parties were discussing how, even making allowance for the debt owed to the Defendant, payments due from the Defendant would be made. The Defendant's response on 20 March 2015 was that he had provided what Mr Bishop-White had requested about future bookings and the effect of cancellations, and that he would look at a proposal for how to progress matters when it was ready to be put to him. However, he was silent, once again, about any promise having been made not to insist on any rent being paid. This was a further opportunity for the Defendant to have pointed out that Mr Bishop-White's insistence on settling the details of what was due was premature because they had agreed that none of the rent listed as owing could be relied on by the Plaintiff anyway whilst the boiler remained inoperative. Further, when it was suggested that one option was to market the hotel for rent by someone else, or for sale, the Defendant did not point out that this would be inappropriate whilst he remained the lessee of the hotel, which he would continue to be without having to pay any rent if, as he claims, there had been such an agreement. Indeed, these exchanges in March 2015 and continuing into the following month firmly point away from there having been any such promises made on behalf of the Plaintiff. I am satisfied, therefore, that the Defendant has failed to establish that there was any promise relating to the boiler replacement and the suspension of rent in the interim on which he can now rely to resist the making of an eviction order.

81. Even if I should not have reached that conclusion on the facts, the Defendant would still face similar problems to those I have set out in respect of the alleged agreement on set-off. As the Defendant put it, he made the suggestion to Mr Bishop-White that, until the boiler was replaced, he should not have to meet the rent payments and Mr Bishop-White responded "ok". There is an element of vagueness about this. Accepting for a moment that it is possible for there to be an agreement for the reversal of the burden of responsibility for the replacement of unrepairable fixtures or plant and also to agree that rent is not required to be paid, or perhaps more accurately, than if it went unpaid there would be no enforcement proceedings, the principles set out in *Chitty* make it clear that such a promise must be clear or unequivocal or precise and unambiguous. In my judgment, the context in which the Defendant alleges that Mr Bishop-White responded with no more than an "ok" does not qualify in the manner required as being clear as to what exactly the Defendant was proposing and it would not be precise and unambiguous. The way it is put by the Defendant is effectively that he should be relieved from the burdens set out in his lease. This is despite it being his responsibility to arrange for the necessary works to be undertaken. The Defendant was making no promise at all to the Plaintiff. Instead, it seems that he was inviting the Plaintiff to make an offer to him, to which he would then agree. There needed to be something more concrete by way of an oral assurance being made on behalf of the Plaintiff before it could, in my view, be of a type to create a promise from which the Plaintiff cannot now resile. In any event, there appears to be no suggestion that there was any consideration to support any such promise. In those circumstances, I take the view that the highest the Defendant can put his position is that there has been a waiver by the Plaintiff to require the lease to be performed according to its terms.

82. As I have already stated, Mr Bishop-White was not given any authority by the Plaintiff to make a promise of this type. The course of conduct between the parties, with which the Defendant was familiar, is that significant decisions about the hotel engage Dr Yaddehige's attention. This is further borne out by Mr Perfitt's letter in March 2015 indicating in relation to the possibility of terminating the existing lease by mutual agreement and replacing it with a new lease on different terms that this was something that Dr Yaddehige might accept. Accordingly, I am satisfied that the Defendant knew, or at least realised, that Mr Bishop-White could not make any promises on behalf of the Plaintiff without first involving others. There was no evidence that the alleged waiver had been agreed formally or even informally by those responsible for reaching decisions on behalf of the Plaintiff, eg, by way of a minute of the board of directors.

83. A further problem I have identified is that the terms of the waiver advanced by the Defendant are open-ended. The period of time during which the requirement to pay rent is suspended is said to be until the boiler is replaced. If, as the Defendant says, the Plaintiff has assumed the responsibility to carry out this work, the Defendant would not have known at any one time when the obligation to pay rent might re-commence. As he explained to the Court, running a hotel requires forward-planning to ensure that bookings are being made for the relevant times. This requires targeted marketing, which was not been undertaken at any time in late 2014 or into 2015. It would not really have assisted the Defendant to have had to resume paying rent at a time when there were no, or very few, bookings in the pipeline. Quite how he would have managed in those circumstances, where he said he was unable to afford the full replacement boiler but sourced a smaller electrical one costing approximately £6,000 less than what he had been quoted by Mr Carré, remains a mystery. I am satisfied that this is a further reason why the promises the Defendant claims were made to him cannot be relied on by him.

84. I have also struggled to understand the commerciality underlying the positions both parties have taken. If, as the Defendant has claimed, the Plaintiff has agreed that clause 4.2 will not be enforced because it will arrange for a replacement boiler, after which the full rent becomes payable once again, the cost of doing that has been put at around £12,000. The timing of this alleged promise is the last couple of months of 2014. However, the closest the Defendant comes to showing that the Plaintiff will install a new boiler is in April 2015, when he enquired whether the boiler was still going to be fitted in the middle of May. Mr Bishop-White's response was that this decision had been taken but the question of who would have to pay for this remained unresolved. I do not regard that response as confirming that the Plaintiff as landlord had agreed to take responsibility for replacing the boiler, but rather reach the opposite conclusion because this was being said only in conjunction with the assertion that the responsibility lay with the Defendant. Moreover, the Plaintiff has been without the rental income in respect of the hotel for nearly a year now. Because the cost involved equates to one and a half month's rent, if there had been a promise as the Defendant alleges, the Plaintiff's inactivity in this regard, even up to April or May 2015 and certainly to date makes absolutely no commercial sense. This again points towards there being too much vagueness surrounding what the Defendant says was been promised. There simply was no promise that could be regarded as sufficiently clear or unequivocal on which the Defendant can rely.

85. Further, even if there were a promise of that kind, it is difficult to identify what the Defendant has done to alter his position in reliance on it. Admittedly, he has not paid any rent and, instead of complying with his obligation under clause 4.2 of the lease, he has sat back and waited for the Plaintiff to progress matters. During this time, though, he has been able to operate a small area of the hotel for food and drink and he has done so rent-free. Whilst it may not be as extensive a business as he had in mind when agreeing to pay £20,000 per annum as rent under the Agreement dated 24 May 2013, he and his wife have also been able to live at the hotel and, it seems, generate sufficient income for their needs. The position, therefore, is different from that in the ***Mudd*** and ***Brikom*** cases because the alleged promise in this case arises during the course of the tenancy rather than before it comes into existence. There is no suggestion here that the promise induced the Defendant to enter into the lease when he would otherwise have not done so. There is also no suggestion that the Defendant has remained committed to the lease in circumstances where he could, under its terms, have

vacated the hotel without ongoing obligations. There is no detriment to the Defendant that I can identify in the arrangements he says the parties agreed.

86. One final point in relation to the possibility of there having been a waiver is that the clear indication given on behalf of the Plaintiff on 22 April 2015 that it viewed the responsibility for the replacement of the boiler as resting with the Defendant is that this appears to amount to a withdrawal of any concession previously made. Because I cannot identify any consideration, meaning there has been no formal variation of the terms of the lease through an enforceable agreement, I am satisfied that it would be open to a party to give notice of an intention to rely once again on the strict wording of the lease. Because of the inter-linking on the Defendant's case of the issues of who would replace the boiler and when rental obligations would resume, if I needed to do so, I would have been minded to regard this indication on 22 April 2015 as bringing to an end any waiver relating to the enforceability of the terms of the lease. Because the payment of rent was a monthly obligation, any waiver of that obligation might well be viewed as being something that was needed each time the obligation to pay arose. I am not suggesting that there had to be anything said each time, because I accept that the forbearance may have arisen from conduct rather than words. However, I may well have concluded that the waiver could not be generally prospective as Advocate Ferbrache sought to argue it was. To my mind, that would be asking too much and would have necessitated there being an enforceable agreement to vary as distinct from a mere waiver. What I take to be the waiver being advanced on behalf of the Defendant is a waiver as to performance by him of his obligations as expressed in the lease. Accordingly, even if there had been some promise, which I do not find to have been the case, on which the Defendant could rely up to April 2015, I would have decided that this was then withdrawn. The consequence would have been that the obligation to pay rent resumed at the end of April 2015. The eviction proceedings were commenced on 21 May 2015, which is the date of the Forfeiting Event arising from the non-payment of the April 2015 rent.

87. In respect of this alternative approach advanced on behalf of the Defendant, I find that he has failed to establish that there was any promise enforceable by him by which the Plaintiff agreed to replace the boiler at the hotel and also agreed that until it was replaced the obligations to make payments due under the lease were suspended. In any event, even if I were wrong on the facts and the Defendant had persuaded me that there was such a promise, it could not be enforced by him against the Plaintiff on the principles derived from the English cases relating to certainty and reliance. Further, even if the promise did not offend against those principles, as a form of waiver by estoppel attaching to the Defendant's obligations to perform the terms of the lease, I would have treated that waiver as coming to an end in April 2015 at the very latest, so the Plaintiff's eviction proceedings have still validly been brought. Accordingly, the Defendant has failed to satisfy me that he has valid grounds to resist the making of an eviction order against him.

Conclusion

88. For the reasons I have given, I am satisfied that the Plaintiff has proved that it is entitled to obtain an eviction order against the Plaintiff for non-payment of rent. In doing so, I do not need to find that the Plaintiff has proved that the amount of arrears are as pleaded. All I need to be satisfied about is that there are arrears of rent as at the date the proceedings were commenced or, in the wording in the lease, that a Forfeiting Event had arisen. As it turns out, whilst I am genuinely perplexed as to why the parties have allowed the property to continue for so long without a properly functioning boiler serving the entire premises, the Defendant has not offered any valid reason why he has not paid the rent and other charges treated as if rent under the terms of the lease since last autumn. Further, as I have sought to explain, even taking the Defendant's positions at their best, it still seems to me that the Plaintiff is entitled to evict the Defendant.

89. In reaching the conclusion that an eviction order is warranted, I recognise that the lease of the hotel is primarily a commercial letting, but cannot overlook that the hotel is also the home of the Defendant and his wife. I do not consider that the making of an eviction order, which is

the extent of the present decision, amounts to an unlawful interference with their rights, individually and collectively, to respect for their home under Article 8 of the European Convention on Human Rights. On the facts as I have found them, the Defendant has fallen into serious arrears with the rent owed to the Plaintiff under the terms of the lease. The making of an eviction order in those circumstances properly balances the competing Convention rights of the parties.

90. The relief sought by the Plaintiff in its Cause is, therefore, duly granted and the Plaintiff has leave to employ the services of Her Majesty's Sheriff to evict the Defendant from the premises now known as Forest Park Hotel.