Case No: A3/2005/0645

**Neutral Citation Number: [2005] EWCA Civ 1171**
**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM Mr Justice Blackburne**
**In the High Court Chancery Division**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 7th October 2005

**Before :**

**LORD JUSTICE CHADWICK**
**LORD JUSTICE JONATHAN PARKER**
and
**MR JUSTICE ETHERTON**

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**Between :**

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| **Mount Cook Land Limited** | **Appellant** |
| **- and -** | |
| **Joint London Holdings Limited** | **Respondent** |
| **Market Place Investments Limited** | |

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(Transcript of the Handed Down Judgment of
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**Mr Jonathan Small** (instructed by **Stephenson Harwood**) for the **Appellant**
**Mr Jeremy Cousins Q.C. and Mr Philip Kremen** (instructed by **Brecher Abram**) for the **Respondent**

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# Judgment

**Mr Justice Etherton :**

## Introduction

1. These proceedings concern the meaning of a tenant's covenant in clause II(7) of a lease dated 18 September 1950 ("the Lease") prohibiting the carrying on of the business of a "victualler" or "coffee house keeper". Mr Justice Blackburne delivered judgment on 2 March 2005. The Defendant, who is also a Part 20 Claimant, has appealed with permission of the Judge. The Claimant, who is also a Part 20 Defendant, and the other Part 20 Defendant have cross-appealed.

2. The premises comprised in the Lease are situated at 41 and 42 Eastcastle Street and 2 and 3 Market Place, London, W1 ("the Property"). The Appellant, Mount Cook Land Limited ("Mount Cook") is the freeholder. One of the two Respondents, Joint London Holdings Limited ("JLHL"), is the tenant in occupation. The other Respondent to the appeal, Market Place Investments Limited ("MPIL"), is an intermediate tenant holding under the terms of a concurrent lease ("the Concurrent Lease").

3. The litigation between the parties was prompted by the wish of JLHL to sublet the Property to Pret à Manger Limited ("Pret à Manger") for use as one of its typical outlets selling pre-prepared food, and hot and cold drinks, primarily for consumption off the Property, but also to some extent on the Property.

4. Blackburne J granted a declaration that use of the Property "as a shop for the sale of pre-prepared sandwiches, croissants, hot and cold non-alcoholic drinks and ancillary products exclusively for consumption off the premises would not constitute a breach of clause II(7)". He granted further declarations that use of the Property as a shop for the sale of such food and drinks and ancillary products for consumption on the Property would be a breach clause II(7), and would also be a breach of the Concurrent Lease.

5. Mount Cook appeals against the first of those declarations. JLHL and MPIL cross-appeal against the other declarations.

## Background

6. When the site of the Property was first developed in the 1720s it formed part of the Cavendish-Harley Estate, which, as its ownership changed, became known as the Portland Estate and then the Howard de Walden Estate (together "the Estate"). In 1925 the Property, together with other parts of the Estate, was purchased by Sir John Reeves Ellerman, the shipping magnate.

7. The Lease was granted by Sir John Ellerman and three trust companies, as Lessors, to the Duke Family Trust Limited. The Lease was for a term of 125 years from 5 July 1950 at an annual rent of £400 throughout the term.

8. By Clause II(7) of the lease, the lessee covenanted:

> "That (without the previous written consent which may be temporary or permanent, revocable or irrevocable or otherwise howsoever framed or qualified by the Lessors) there shall not

> be carried on or exercised in or upon any part of the said premises the trade business or calling of a Butcher Purveyor of Meat Slaughterman Fishmonger Tallow Chandler Melter of Tallow Soap Maker Tobacco Pipe Maker or Burner Smith Sugar Baker Fellmonger Dyer Distiller Farrier Blacksmith Common Brewer Coppersmith Working Brazier Pewterer Tinplate or Iron Plate Worker Cooper Tripe Boiler Tripe Seller Fried Fish Shop Coal Shed Keeper or Vendor of Coals Marine Store Dealer Rag or Fat Merchant Beater of Flax Auctioneer Victualler Vintner Tavern Keeper Vendor of Malt Liquor Restaurant or Coffee House Keeper Nursing Home Keeper Laundry Keeper Railway Parcel Booking Office Manufacturer of or Dealer in Motors or motor vehicles or hirer out or keeper of motors or motor vehicles Massage Manicure or other Medical or Surgical or quasi-Medical or quasi-Surgical Establishment or any of them or any noisome noisy or offensive trade or business or calling whatsoever or any trade or business involving the storage of electricity or oil or inflammable or explosive substances or any trade or business by reason whereof the annual premium for insurance of the said premises against loss or damage by fire according to the covenant for Insurance hereinbefore contained shall exceed Ten shillings and sixpence per centum or the rate of premium on any Policy of Insurance of any other premises of the Lessors may be liable to be increased and that the said premises shall not nor shall any part thereof at any time be used as a Brothel or disorderly house or for any illegal or immoral purpose or for any public exhibition or entertainment and that no sale by auction shall be held thereon."

9. On 16 January 1991 Mount Cook's then predecessor in title, Priest Marians (Langham Estate) Limited, granted the Concurrent Lease to MPIL for a term of 150 years from 25 December 1990. MPIL is an associated company of JLHL. The effect of the Concurrent Lease is that MPIL is interposed as intermediate tenant between Mount Cook as freeholder and JLHL as tenant until the expiry of the Lease in 2075.

10. By clause 5.4 of the Concurrent Lease MPIL covenanted:

> "At all times during the Term to use the Demised Premises in accordance with the provisions for user in the Particulars and not to use the same or any part for any other purpose."

11. Paragraph 12 of the Particulars of the Concurrent Lease specifies the user as:

> "Offices (other than as a betting office) and/or showrooms with ancillary stockrooms, storage and car parking in the basement".

12. Clause 2.3 of the Concurrent Lease provides that:

> "Where any act is prohibited the Tenant shall not allow or suffer such act to be done".

13. By letter dated 17 October 2003 from Brecher Abram, JLHL's solicitors, to Stephenson Harwood, Mount Cook's solicitors, notice was given of the intention of JLHL to grant an underlease of the Property to Pret à Manger for occupation in the course of its business.

14. It is common ground that, as recorded in paragraph 2 of Mr Justice Blackburne's judgment, Pret à Manger operates retail outlets where pre-prepared and packaged sandwiches, snacks, salads and similar cold food, together with a variety of non-alcoholic drinks, including coffee, are displayed for sale, primary for consumption off the premises, but with limited facilities for consumption on the premises. Those outlets are self-service establishments, designed for a fast turnover of customers.

15. Mount Cook, in due course, through Stephenson Harwood, notified JLHL that it considered that the business conducted by Pret à Manger would be prohibited by Clause II (7) of the Lease and that it would object to the proposed user if the underletting to Pret à Manger were to take place.

16. On 3 June 2004 JLHL issued a Part 8 Claim Form claiming the following declarations:

> "(i) the use of premises at 41 & 42 Eastcastle Street and 2 & 3 Market Place, London W1 ("the Premises") as a shop for the sale of pre-prepared sandwiches, croissants, hot and cold drinks and ancillary products for consumption off the Premises would not constitute a breach of clause II(7) of the lease of the Premises made on 18th September 1950;
>
> (ii) the use of premises at 41 & 42 Eastcastle Street and 2 & 3 Market Place, London W1 ("the Premises") as a shop for the sale of pre-prepared sandwiches, croissants hot and cold drinks and ancillary products for consumption off the premises, and for ancillary consumption on the Premises would not constitute a breach of clause II(7) of the lease of the Premises made on 18th September 1950."

17. It is to be noted that those declarations do not refer expressly to to Pret à Manger or the use of the Property as one of its outlets.

18. On 11 August 2004 Mount Cook issued a Claim Form under CPR Part 20 against JLHL and MPIL claiming against both of them a declaration that the use of the Property as a shop for the sale of pre-prepared sandwiches, croissants, hot and cold drinks and ancillary products for consumption on or off the Property would constitute a breach of Clause II (7) of the Lease, and, against MPIL, a declaration that such use would constitute a breach of clause 5.4 (read together with clause 2.3) of the Concurrent Lease.

19. It is common ground, as the Judge noted in his judgment, that, if use of the Property by Pret à Manger is not prohibited by clause II(7), such use would not be a breach of the Concurrent Lease; but if such use is prohibited by clause II(7), it would also be a breach of clause 5.4 of the Concurrent Lease (read together with clause 2.3)

## The Trial

20. Witness statements by Harold Pasha, a director of JLHL, and Lucy Sarah Chester, a solicitor employed by Stephenson Harwood, Mount Cook's solicitors, were adduced in evidence at the trial. They were not called to give oral evidence.

21. Permission was given by Deputy Master Bartlett for each party to call oral expert evidence "as to the development of the phrase "Victualler Vintner Tavern Keeper Vendor of Malt Liquor Restaurant or Coffee House Keeper" and its meaning in 1950". Pursuant to that permission, evidence was given by way of written statements and oral evidence by Mr Victor Richard Belcher, an architectural and building historian, for JLHL, and by Mr Paul John Drury, a chartered surveyor, a Fellow of the Society of Antiquaries and a member of the Institute of Historic Building Conservation, on behalf of Mount Cook. Among many other facets of their distinguished careers, they have both served in senior positions with the London Region of English Heritage, Mr Belcher having served from 1986 to 1993 as a Principal Officer with English Heritage as head of the branch of the London Region with responsibility for building research and analysis, and Mr Drury having served as Director of the London Region of English Heritage between 1993 and 1997.

## The Judgment

22. Simplifying greatly the detailed and careful analysis of the Judge, the principal strands of his reasoning may be summarised as follows.

23. The Judge noted that the gist of the evidence of Mr Belcher and Mr Drury was to the effect that from the 1790s onwards there was a progressive build-up of restrictions contained in the standard form of leases used on the great London estates. In particular, this was so in the case of the standard form of lease used on the Estate, with a prohibition against use as a victualler, vintner, tavern keeper and coffee house keeper having been included from the 1790s, a prohibition against acting as a vendor of malt liquors from the second half of the 19th century, and a prohibition against using premises as a restaurant first appearing shortly after the First World War.

24. He further observed that it is difficult to resist the conclusion that the parties to the Lease were content to adopt, as clause II(7), a form of clause which, with minor updating, had been in general use on the Estate over many years before the sale to Sir John Ellerman, and which contained restrictions representing, as the experts agreed, the accretion over very many years of specific activities considered to be unsuitable for premises of the kind in question.

25. Interesting as that historical background was, the question the Judge considered he had to determine was how in 1950 the expressions "victualler" and "coffee house keeper" in clause II(7) of the Lease were understood, viewed in the context of the other restrictions contained in the covenant when set against the circumstances in which the Lease was granted.

26. Having expressed a doubt whether the evidence of the two experts on the meaning of "victualler" in 1950 was admissible, or, if admissible, of much value, the Judge said he had little doubt that the ordinary or common understanding of persons in 1950,

whether the ordinary man in the street or the parties to the Lease, would have been to confine "victualler" to a licensed victualler, that is to say, a publican.

27. In addition, he considered that there are two contextual indications in clause II(7) that the words bear that ordinary meaning. First, the word "victualler" appears immediately before "Vintner Tavern Keeper Vendor of Malt Liquor", all of which are concerned with the sale of alcoholic beverages. Second, if the words have the wide meaning for which Mount Cook contends, namely, someone who supplies consumable goods, especially prepared consumable goods, including drinks, both alcoholic and non-alcoholic, it would render redundant the specific references in clause II(7) to particular kinds of food, such as purveyor of meat, fishmonger and tripe seller.

28. Accordingly, the Judge concluded that use of the Property as a shop for the sale of pre-prepared sandwiches, croissants, hot and cold drinks and ancillary products, either for consumption wholly off the Property or for consumption off the Property with ancillary consumption on the Property, would not be use of the Property as a victualler within the meaning of that expression in clause II(7) of the Lease.

29. The Judge found support for his conclusion in the unreported judgment of Mr Justice Rattee on 26 March 1997 in *Mortimer Investments Limited –v- Mount Eden Land Limited*. The issue in that case was whether there was a breach of a covenant in a lease of premises in Great Portland Street, London, W1, in almost identical wording to clause II(7), by virtue of the use of the ground floor of the premises by a sub-tenant as a sandwich bar serving ready prepared food, including cooked food, to take away and also to consume on the premises. There is only an agreed solicitors' note of the judgment. In relation to the meaning of "victualler", Rattee J is recorded as saying:

> "I accept that victualler in its strict sense does not necessarily connote alcohol. It is also clear however that victualler can, in context, include that connotation. It is clear from the Oxford English dictionary and various 19th century statutes. I accept Mr Brock's submissions that the use of victualler to mean any food and drink is wholly inapt in this case because of the specific prohibitions in the remainder of the covenant. I also accept there is some significance in the collocation of the words indicating the view of the draftsman and the parties' intention to connote liquor. Construing the covenant as a whole, it seems to me that victualler does connote alcoholic liquor. That the sandwich bar does not sell. So the Master was right in his conclusion that there is no breach of covenant."

30. As regards the expression "coffee house keeper" in clause II(7), Mr Justice Blackburne considered it reasonably clear that the "coffee house" there referred to was not the type of coffee house introduced into England in the middle of the 17th century and which, it was common ground, flourished for 150 years or so and then fell into decline.

31. He described that type of coffee house as follows:

> "Traditionally, places which were open from early morning to late at night, entry to which was in return for a penny fee and where patrons were served beverages, principally coffee and, to a lesser extent, food, coffee houses in those days were places to which people, almost exclusively men, resorted to converse, to engage in the display of wit and clever discourse, to exchange views on the topics of the day and to deposit and collect letters. In time, alcohol came to be served, with the result that by the end of the 18th century, the distinction between coffee houses and taverns had become blurred. In his reference book on coffee houses entitled "London Coffee Houses" published in 1963, Mr Bryant Littlewhite described (at page 26) how:
>
> > "… by the early years of the 19th century, the coffee-houses were mostly in the hands of vintners and coffee drinking but a minor attraction. Although many maintain the description of coffee-house, their character varied with the ebb and flow and custom, the mode of the time, or perhaps the licensing laws. Changes noted are from inn to tavern, tavern and coffee-house, thence to coffee-house, to coffee-house, tavern and hotel, and lastly to hotel. Others changed from coffee-house to subscription house, paving the way for clubs. With the approaching end of the coffee-house vogue, some reverted to tavern, wine house or similar. By 1858, a new type of refreshment house came into being under the description of Coffee Rooms".

32. The Judge considered particularly significant the linking of restaurant with coffee house in the words "restaurant or coffee house keeper" in clause II(7). That linkage, he said, indicated that the mischief to which those words were directed, and what was thereby contemplated by the parties to the Lease, was the use of the Property as a place to which members of the public can resort for the consumption of food and drink, whether alcoholic or non alcoholic. In his judgment, the expression "coffee house keeper" in clause II(7) was apt to include a café or snack bar, tea shop or the like.

33. The Judge considered that he was fortified in that conclusion by the approach of the Court of Appeal in *Fitz v Iles* [1893] Ch. 77, in which the Court of Appeal held that the defendant lessees, who, in addition to using the demised premises for their grocer's business, supplied their customers with tea and coffee and light refreshments for consumption on the premises, were in breach of a covenant in the lease prohibiting the use of the premises as a coffee house.

34. The Judge concluded, accordingly, that, in so far as the proposed use of the Property would involve consumption on the Property of prepared food, it would be caught by the restriction even if sale for consumption on the Property was ancillary to the sale of pre-prepared and pre-packaged food and drink for consumption off the Property.

35. He found support, once again, for his conclusion that the expression "coffee house" was capable in 1950 of extending to what these days would be referred to as a snack bar, where food is consumed on the premises, in the unreported decision of Mr Justice Rattee in *Mortimer Investments Limited.*

36. Mr Justice Rattee is recorded in the agreed solicitors' note of the judgment as saying, in relation to the expression "coffee house keeper":

> "It is clear from *Fitz v Iles* that coffee house is not limited to the 17th and 18th century meanings. The Court of Appeal in that case referred to "a new fashioned coffee house" which amounted to food and drink consumption on the premises. I fail to see the distinction between a shop providing those on a self-service basis with waitress service insofar as it applies to a coffee house. There is no evidence in *Fitz v Iles* that the Court of Appeal though that the point was significant. In my judgment, just as in 1892, so in the present time, provision of light refreshments for consumption on or off the premises is reasonably within the covenant. A sandwich bar is engaged in that business. Accordingly, it is a breach of covenant as a coffee house."

37. Mr Justice Blackburne further concluded, however, that the covenant in clause II(7) did not prevent the sale of pre-prepared and pre-packaged food and drink for consumption exclusively off the Property. He reasoned that such an activity is no more caught by the restrictions in clause II(7) than running a grocery involving the sale of articles of food in packaged or bulk form is within the mischief of keeping a restaurant or coffee house.

38. He rejected the submission, on behalf of Mount Cook, that the judgment of Mr Justice Rattee in *Mortimer Investments Ltd* is also authority for the proposition that the sale of prepared cold food, exclusively for consumption off the Property, would be caught by the restriction.

**The Appeal: "Victualler**"

39. Mr Jonathan Small, counsel for Mount Cook, as he had been before Mr Justice Blackburne, submitted that the Judge was wrong to conclude that the word "victualler" in clause II(7) of the Lease means a licensed victualler.

40. His starting point is the definition of the word in standard dictionaries. Referring to Dr Johnson's dictionary of 1785, the current Shorter Oxford English Dictionary and also the Full Oxford English Dictionary, he submitted that in 1950, as now, victualler had two relevant meanings: first, a supplier of victuals, being a person whose business is the provision of food and drink; and, second, a licensed victualler. Mount Cook's case is that the word "victualler" in clause II(7) has the wider meaning and is not restricted to licensed victualler.

41. He observed, by reference to the dictionary definitions, as well as the judgment of Lord Tenderden in *R v Hodgkinson* (1829) 10 B&C 74 and observations of Wills J in *R v Surrey Justices* (1888) 52 JP 423, that "victuals" has always meant food or

sustenance including drink, and "victualler" has always meant anyone who sells victuals.

42. Mr Small submitted that the Judge was correct to disregard the evidence of Mr Belcher and Mr Drury as to the meaning of the word "victualler" in 1950 since they are not lexicographers or etymologists.

43. He criticised, however, as being a matter of mere conjecture, the view of the Judge that, if anyone had any notion of what a victualler was in 1950, they would have associated the word with the running of a public house. So far as concerns the meaning of the word in 1950, there was no material before the Judge, he said, to displace the two meanings attributed to the word in the standard dictionaries.

44. Mr Small submitted that the wording of the Lease itself provides the context and the basis for concluding that the parties to the Lease did not intend the word "victualler" in clause II(7) to bear the restrictive meaning of licensed victualler. In particular, Mr Small advanced the following propositions in his written and oral submissions. First, the parties did not stipulate "licensed victualler", which would have been appropriate if that is what they intended. Second, the word "victualler" appears at the beginning of the phrase "Victualler Vintner Tavern Keeper Vendor of Malt Liquor Restaurant or Coffee House Keeper", and is most appropriately treated as an umbrella term which encompasses the various species of victualling which follow. Third, it is possible to detect in the list beginning with "Victualler" an intention to encapsulate the sale of all food and drink, at least for immediate consumption, and not just alcoholic drinks; if it is necessary to provide a rationale for the continued existence of references elsewhere in clause II(7) to other specific types of food provision, such as tripe seller and fried fish shop, such inclusion is best seen as reflecting a concern at the particular nuisance inherent in those specific vendors of food. Fourth, if the parties had intended to refer only to a "licensed victualler", the words immediately following "Victualler", namely "Vintner Tavern Keeper Vendor of Malt Liquor" would be redundant since they are simply specific examples of licensed victuallers.

45. This is a short point of interpretation, but, as the Judge recognised when giving permission to appeal, one which is not free from difficulty.

46. In my judgment, contrary to the view of the Judge, the word "victualler" in clause II(7) bears its wider meaning of a person who supplies food and drink and is not restricted to a licensed victualler.

47. I agree entirely with the Judge on the general approach to the interpretation of the expression in clause II(7). Notwithstanding that the presence of the word in that clause can be traced back to restrictions in the standard Estate lease from the 1790s, the question is what meaning the parties to the Lease intended it to bear in 1950. Unless the context indicates otherwise, and bearing in mind that the Lease was not in fact granted by the Estate, the starting point must be the ordinary meaning or meanings of the word in 1950.

48. I agree with the view of the Judge that no account should be taken of the opinion evidence of Mr. Belcher and Mr. Drury as to the ordinary meaning of "victualler" in 1950. Neither of them had the necessary expertise to give relevant opinion evidence on that issue.

49. As I have mentioned earlier, the Judge said that he had little doubt that the ordinary or common understanding of persons in 1950, whether the ordinary man in the street or the parties to the Lease, would have been to confine "victualler" to licensed victualler. He said that, if they had any notion of what a victualler was, they would have associated it with the running of a public house.

50. This was a critical finding, but there seems to have been no admissible and relevant evidence before the Judge leading to that conclusion.

51. The only evidence before the Judge as to the ordinary meaning of "victualler" in 1950 was in the standard dictionaries. It is common ground that the relevant dictionary definitions of "victualler", "licensed victualler" and "victuals" have not changed between 1950 and the present time.

52. In the Shorter Oxford English Dictionary ("the OED"), the entry for "victualler" gives three basic meanings, of which only the first is relevant. That meaning is stated to be as follows:

> "1. A supplier of victuals; spec (a) a person whose business is the provision of food and drink; (b)=licensed victualler".

53. The OED entry for "victuals" gives four basic meanings, of which all but one are described as rare. That one, so far as relevant, is:

> "Articles of food: supplies, provisions, now esp. as prepared for use".

54. The OED entry for "licensed victualler" is:

> "an innkeeper licensed to sell alcoholic liquor etc."

55. Those entries provide no basis for the Judge's conclusion that the ordinary or common understanding of persons in 1950 was that "victualler" was confined to a licensed victualler. On the contrary, they indicate that the general meaning of the word was a supplier of victuals, and that there was an established expression, "licensed victualler", denoting a person running a public house.

56. The long history of legislation concerning the licensing of victuallers to sell alcohol, and of the expression "licensed victualler", is illustrated by *R v Surrey Justices* which concerned a statute of the reign of George IV. In that case, Wills J. said:

> "I find it stated in *Tomlin's Law Dictionary* that a victualler means "a person who sells victuals"; and of course, when he gets a license he is called "a licensed victualler."

57. Accordingly, the more natural assumption would be that, if a person intended in 1950 to refer to a licensed victualler, he or she would have used the well understood and established expression "licensed victualler". That assumption would apply particularly to a legal and business document such as the Lease.

58. It is possible that the Judge's view of the ordinary person's understanding of the word "victualler" in 1950 was based on the reasoning that, since the word usually appeared

or was mentioned as part of the expression "licensed victualler", the ordinary person would have assumed that "victualler" meant "licensed victualler". Apart from the fact that there was simply no evidence before the Court to support such a deduction, I cannot accept the logic of the deduction when the dictionary definitions show that the word "victualler" carried a quite general meaning at that time, which was unrelated to the sale of alcohol generally or the running of a public house in particular.

59. As I have previously mentioned, the Judge considered there are two aspects in which the wording and context in clause II(7) support the conclusion that "victualler" there means a licensed victualler. The first is that the word "victualler" appears immediately before "Vintner Tavern Keeper Vendor of Malt Liquor". The force of that point is, however, to some extent undermined by the fact that the list of restrictions continues with "Restaurant or Coffee House Keeper", which have an association with food but not necessarily with alcohol.

60. The second aspect of clause II(7) on which the Judge relied is that, if the word "victualler" has the extended meaning for which Mount Cook contends, the references to the sale of particular types of food, including purveyor of meat , fishmonger and tripe seller, would all be redundant. That, however, is an entirely neutral point, since, if the word "victualler" meant licensed victualler, the references to other trades or businesses, such as tavern keeper and vendor of malt liquor, would equally be redundant.

61. During the course of Mr. Small's oral submissions, I suggested that one argument in favour of confining "victualler" in clause II(7) to a licensed victualler might be that, if "victualler" had been intended to bear its wider meaning, it might have been expected that it would precede the specific trades and businesses dealing in food in the first part of the clause, whereas it appears in a different and later part of the clause and is followed by a list of trades or businesses linked by a connection with alcohol and then references to a restaurant and a coffee house keeper, neither of which fall naturally within the expression "victualler" even in its wider sense.

62. The difficulty, however, is that clause II(7) is manifestly a hotchpotch of different and sometimes overlapping trades and businesses, in no particularly logical order. Arguments based on the layout of the clause or that seek to find some logic in particular runs of words are unlikely to provide any sure guidance.

63. Accordingly, I consider that that there is nothing to displace the inference that, when the parties chose, in this lease of commercial property, the text of which was plainly drafted by lawyers, to use the word "victualler" rather than the established expression "licensed victualler", they did so with the intention that the word should bear its ordinary general meaning and not the limited and specific meaning of "licensed victualler".

64. Mr.Jeremy Cousins Q.C., leading Mr. Philip Kremen, for JLHL and MPIL, submitted that, if the Court was left in doubt as to the meaning of "victualler" in clause II(7), that word should be interpreted in a way most favourable to JLHL in accordance with the rule that, in the case of doubt about the meaning of a contractual provision, the provision should be interpreted against the person who put it forward ("the Anti-Proposer Rule").

65. In the context of a covenant in a lease restricting the tenant's use of the demised premises, it is the landlord who requires and puts forward the clause, and, if the Rule applies, the landlord will be treated as the proposer: *Skillion plc v. Keltec Industrial Research Ltd* [1992] 1 EGLR 123.

66. I can see the force of the contention that, where the landlord has let property on terms which restrict the tenant's use of the property and there is doubt as to the extent of those restrictions because the landlord has chosen to use antiquated language in the lease, the uncertainty should be resolved against the landlord rather than the tenant.

67. It is well established, however, that the Anti-Proposer Rule only applies where there is an ambiguity or doubt which cannot be resolved by ordinary rules and principles of interpretation: see generally Lewison on the Interpretation of Contracts (2004) pp. 212-214. While the meaning of "victualler" in clause II(7) is not free from doubt or difficulty, that doubt is capable of being resolved in the manner and for the reasons I have given, in accordance with ordinary principles of interpretation of contracts.

68. For those reasons, I would allow Mount Cook's appeal.

**The Appeal: "Coffee House Keeper"**

The cross-appeal

69. It follows from my conclusion on the meaning of "victualler" that the cross-appeal - against the second and third declarations in the Judge's order that use of the Property for the sale of pre-prepared sandwiches, croissants, hot and cold non-alcoholic drinks and ancillary products for consumption on the Property would be a breach of clause II(7) of the Lease and of clause 5.4 (read together with clause 2.3) of the Concurrent Lease – must fail, and should be dismissed.

70. The principal ground of the cross-appeal is that the Judge was wrong to hold that such use would constitute a breach of the restriction in clause II(7) against carrying on the business of a coffee house keeper on the Property.

71. By contrast, one of the grounds of Mount Cook's appeal is that the Judge was wrong to conclude that the prohibition against carrying on the business of a coffee house keeper did not extend to the business of selling food and drink exclusively for consumption off the Property.

72. The arguments before this Court on those matters differed in significant respects from the way the matter was dealt with below. Among other things, the arguments disclosed the considerable difficulty arising from the way the declarations have been framed, without any specific reference to Pret à Manger and its business.

73. In view of the fact that some of the points may be of general interest and we had full argument on them, I set out below my analysis of the meaning and application of the restriction in Clause II(7) against use of the Property for the business of a coffee house keeper and the suitability of the declarations sought and granted, even though it is not strictly necessary to do so in order to dispose of the appeal or the cross-appeal.

74. Mr Cousins attacked the Judge's conclusions on this aspect of the case on a number of grounds. It is convenient to consider, first, his submission that the business of a coffee house keeper, like that of a tripe boiler, sugar baker and tallow chandler, all of which are mentioned in clause II(7), was obsolete by 1950 and inapplicable to any modern business, including, in particular, the business of Pret à Manger.

75. It was common ground before the Judge, as I have said, that the type of coffee house introduced into England in the middle of the 17th century flourished for 150 years or so and then fell into decline.

76. After quoting from Mr Littlewhite's book on "London Coffee Houses" as I have mentioned earlier, the Judge said :

> "23. After the middle of the 19th century, Mr Littlewhite described (at page 27) how:
>
> > "From now on the coffee-house is a rapidly dwindling force. A few were destined usefully to linger until either changing in character or merely closed, for coffee-houses which had so well served London for 200 years came slowly to an end."

77. Mr Cousins also referred to paragraph 6.14 of Mr Belcher's principal report in which he quotes the journalist George Sims, writing in the 1920s, who, when remarking on the difference between a coffee house and coffee rooms, stated that the coffee house had disappeared long before his time.

78. The approach of the Judge, which, as I have said, was plainly correct, was to consider what meaning the words in clause II(7) would have had in 1950.

79. Mr Cousins submitted, in the light of the history of the coffee house as mentioned above, that in 1950 a reasonable person would have concluded, on reading clause II(7), that coffee house keeper, along with tripe boiler and sugar baker, was just another antique trade which was of no practical interest.

80. In my judgment, the Judge was correct, and plainly so, to reject that contention.

81. The approach of Mr Cousins would be to give to the words "coffee house keeper" in clause II(7) no relevant meaning and effect in 1950, that is to say relevant to any activity conducted by business people at the time of the Lease. The court should be very slow to reach that conclusion.

82. Although Mr Belcher and Mr Drury have traced the wording of much of clause II(7) to the evolution of the Estate's standard form of lease, it is necessary to bear in mind that the Lease was not in fact granted by the Estate but by a wholly unconnected freeholder. Furthermore, it is clear that clause II(7) was not in every respect similar to the standard Estate lease. It appears, for example, that, shortly before the Property was purchased from the Estate by Sir John Ellerman, the standard Estate lease contained a prohibition against use for the business of an hotel. That particular prohibition is not to be found in the Lease.

83. To my mind, the reports of Mr Belcher and Mr Drury, far from showing that the term "coffee house" would have been understood in 1950 to be a reference to the historical coffee house introduced into England in the middle of the 17th century and which had, by 1950, long since disappeared, in fact support the conclusion that the term came to acquire a new meaning as a place where coffee and light refreshments were served.

84. In his principal report Mr. Belcher said:

> "6.16. Another institution which developed in the 19th century was the café, drawing its inspiration and its name from continental examples. Many were established by immigrants themselves in quarters peopled by them such as Soho. When in an oft-quoted chapter in his work, *Bohemia in London*, published in 1907, Arthur Ransome wrote about 'Coffee-houses about Soho', it was to the smaller and more exotic variety of such cafes that he was referring. They were establishments such as 'The Moorish Café' and 'The Algerian' which he described at some length. They were not coffee houses in the true meaning of the term."

85. Mr. Drury said in his report:

> "4.14. Since the end of the 19th century, the term coffee house (and latterly coffee shop) has become associated with the light refreshment end of the range of activity included within the definition in *Fitz v Iles*. It is indeed clear from Mr Belcher's para 6.16 that in the early 20th century the words 'coffee house' could be equated with a 'café'. This is indeed underlined in the mid 20th century by the Kardomah Café chain, established in 1894 and trading under the Kardomah name by 1938. At least one branch in London was destroyed in the second world war, and they continued to trade until 1966 (Richmond, L and Stockford, S, *Company Archives: The survey of the records of the first 1000 registered companies in England and Wales* (Aldershot 1986), p72). That they were commonly referred to as coffee houses as well as cafés is confirmed by recollections. For example, Alexandra Pringle, a publisher referring to school days in Chelsea during the 1950s, recalled that 'There were also quite sedate expeditions… to the Kardomah Coffee House following missions to Peter Jones for dress patterns or fabrics' (S. Maitland (ed), *Very Heaven*: *Looking back at the 1960s* (Virago, London) 1988, 36).
>
> 4.15. The use of the word 'House' in the same sense as its use in the terms 'Coffee House' or 'Public House' was of course epitomised by the name of the Lyons Corner Houses, which spanned much of the 20th century (1909-77)."

86. I agree with the Judge and Mr. Drury that this transition in the common understanding of what was meant by "coffee house" is illustrated by *Fitz v Iles*. In that case the plaintiff , George Fitz, was the tenant of premises under a lease in which he

covenanted to carry on the business of a coffee house keeper. The lessor, Daniel Iles, covenanted not during the term to let any shop in the same road, over which he had any control, as a coffee house. Mr Fitz subsequently let other premises to Messrs Went & Buchanan in the same road under a lease which prohibited them from using their premises as a coffee house and required them to use the premises only for the trade or business of a tea and coffee dealer and for the sale of non-intoxicating refreshments. Went & Buchanan carried on business as dealers in tea, coffee, sugar and other groceries; but they proposed, for the convenience of their customers and for the purpose of attracting custom to their shop, to supply their customers with cups of tea and coffee, and also with bread and butter, cake, eggs, sandwiches, and other light refreshments to be consumed on the premises. Mr Fitz having ascertained the intentions of Went & Buchanan, and finding that they were fitting up their shop with a view to selling refreshments, commenced proceedings against them (and Mr Iles) for, among other things, an injunction to restrain them from using their premises as a coffee house.

87. In the course of his judgment Lindley LJ said, at p.82 :

> "There are skilled people in the coffee-house trade, coffee-house keepers and brokers, who say this is the business of a coffee-house keeper, and the Defendants are using the premises as a coffee-house, although they are also using them for something else. On the other hand, there is evidence to the contrary effect. We must use our common sense. I think this case is really one of degree, and the conclusion to which I have arrived is that in the fair meaning of this covenant the Defendants are carrying on two businesses, one of which is a grocer's business and the other of which is a coffee-house business, though, perhaps, not a very extensive one. They do not sell everything which coffee-house keepers sell; a coffee-house keeper need not sell all sorts of meats and so forth. He may confine himself to light refreshments such as these…… I look upon this as really a new-fashioned coffee-house, but one to which the covenant is applicable."

88. Mr Cousins sought to undermine the relevance and significance of *Fitz v Iles*, and in particular that passage in the judgment of Lindley LJ, on the ground that the plaintiff's lease in that case described him as a coffee-house keeper and required him to carry on that trade. Mr Cousins submitted that, since the plaintiff's lease was granted only 17 months before the lease to Went & Buchanan, the landlord was hardly in a position to dispute that the plaintiff's business was that of a coffee house keeper.

89. The significance of the facts and the judgments in *Fitz v Iles*, however, is that the parties to the leases, as well as the Court of Appeal, plainly thought that the expression "coffee house keeper" was meaningful and applicable at that time as referring to a business that was quite different from the historic coffee house which had been introduced in the middle of the 17th century and, by the time of the grant of the leases in *Fitz v Iles*, had really ceased to exist.

90. In short, there was material before the Judge in the present case on which he was well entitled to reach, and in my judgment plainly correct to reach, the conclusion that the expression "coffee house" in clause II(7) of the Lease had a contemporary significance in 1950 as a place for the sale and consumption of food and drink.

91. I should mention that Mr. Cousins referred us to *St Marylebone Property Co. Limited v Tesco Stores* [1988] 2 EGLR 40 and *Texaco Antilles Ltd v Kernochan* [1973] AC 609, which were concerned with whether certain activities fell within specified restrictions on user bearing in mind changes in commercial practices since the date of the relevant grant. Those cases seem to me to be of no assistance in the present case, which is concerned with a quite different issue, namely whether or not, in view of commercial developments prior to the grant of the Lease, the relevant restriction is to be interpreted as referring to an obsolete type of business and so was of no relevance to any commercial activity current at the date of the grant.

92. I further agree with the Judge that the linking of restaurant with coffee house in the words "restaurant or coffee house keeper" in clause II(7) supports the conclusion that it was the intention of the parties to the Lease that the words should apply, in appropriate circumstances, to a business, of a more modest nature than a restaurant, at which food and drink, whether alcoholic or non-alcoholic, are served for consumption on the premises.

93. Mr Cousins again urged that the Court should interpret the expression "coffee house keeper" in clause II(7) in the sense least favourable to Mount Cook on the basis of the Anti-Proposer Rule. The meaning of the expression can, however, be resolved by applying ordinary rules and principles of interpretation, and so there is no scope for applying that Rule.

94. I next turn to an argument advanced by Mr. Cousins, which appears not to have been developed before the Judge or at least not to the same extent as before this Court, namely that the business of Pret à Manger on the Property would be one business, that of a take away sandwich shop, even though there would be a limited facility for fast food consumption on the Property. Mr. Cousins submitted that the conduct of such a business would not involve carrying on at the Property both the business of a sandwich shop and the business of a coffee house keeper.

95. On that footing, he criticised the following statement of the Judge in paragraph 32 of his Judgment:

> "Insofar, therefore, as what is proposed for the premises, as reflected in the declarations which Joint London invites me to make, involves consumption on the premises of prepared food, it is caught by the restriction. The fact that it may be no more than ancillary to the sale of pre-prepared and pre-packaged food and drink for consumption off the premises, does not detract from this any more than it did in *Fitz v Iles*, that the service of light refreshments on the premises was ancillary to the defendant's grocery business in that case."

96. Mr. Cousins referred us to *Stuart v Diplock* [1899] 43 Ch 343. In that case lessors covenanted not to permit or suffer to be permitted on an adjoining property the

business of ladies' outfitting. The adjoining property was subsequently let to the defendants, who were hosiers, who sold four classes of clothes that a ladies' outfitter would sell. The tenant holding under the first lease brought proceedings against the tenants of the adjoining property for an injunction to restrain them carrying on the business of ladies' outfitting. The Court of Appeal held that the defendants were not carrying on that business.

97. Cotton LJ said, at pp. 350-351:

> "If it could be made out that the sale of these articles made up the business of a ladies' outfitter it would be quite another question, but it does not follow, because it is necessary for a ladies' outfitter to sell certain articles, that every one who sells these articles is carrying on the business of a ladies' outfitter. Suppose, for instance, that the sale of corsets is an important part of the business of a ladies' outfitter, it could not be contended that a person who sold corsets, and nothing else, was to be considered a ladies' outfitter. That trade is not carried on by any one who does not sell substantially all articles of ladies' underclothing. The Defendants sell many things which are not sold by ladies' outfitters, and do not sell many things which are sold by ladies' outfitters. They sell some things which are sold by ladies' outfitters, but they sell them in the ordinary course of their business as drapers and hosiers. The covenant is not against selling any of the articles which are sold by ladies' outfitters, such a covenant would raise quite a different case. "

98. Bowen LJ said, at p.352:

> "The business of a ladies' outfitter is one business – the business of a hosier is a distinct business. The two businesses overlap each other by having four classes of articles the sale of which is common to them both. But a covenant not to carry on the business of a ladies' outfitter is not broken by carrying on the business of a hosier, and the hosier commits no breach by selling some articles which are usually sold by a ladies' outfitter, if he does it in the ordinary course of the business of a hosier. Mr *Dauney* put the argument of the Respondent very happily in the form of a syllogism: "All ladies' outfitters sell combinations, the Defendants sell combinations, therefore the Defendants are ladies' outfitters." I do not think that a covenant not to carry on the business of a ladies' outfitter is broken by carrying on a part of that business, which is also a part of another distinct business, even though it be a substantial part of the business of a ladies' outfitter and only a subordinate part of the other business."

99. Mr. Cousins developed the point in his written skeleton argument. He referred there to Simons J in *A Lewis & Co. (Westminster) Ltd v. Bell* [1940] 1 Ch 345, in which Simons J said at p.348:

> "In my view, what is done at these premises is the carrying on of the business of a tea-shop, and that involves, among other things, the sale of cigarettes. It is common-indeed, I was told that it was almost universal-that in tea-shops of this character cigarettes should be sold. Accordingly, it appears to me that it is no more right to predicate of this shop that there is carried on there the business of the sale of tobacco, cigars and cigarettes than to say of it that there is carried on the business of the sale of milk, or the business of the sale of confectionery. There is there carried on the usual business of a tea-shop, which involves the sale of a number of articles therein usually sold."

100. Mr Cousins also referred, for the same principle, to the judgment of McNair J. in *Labone v. Litherland UDC*[1956] 1 WLR 522, 525.

101. Mr. Cousins further observed in his skeleton argument that in *Fitz v Iles* the relevant tenant's covenant was not to use the demised premises or permit them to be used as a coffee house.

102. By contrast, he observed, the covenant in clause II(7) is not to carry on the business of a coffee house keeper. He submitted that it is not a covenant, and it is to be contrasted with a covenant, not to carry on the business of a coffee house. Unless Pret à Manger can be classified as the keeper of a coffee house, clause II(7), he submitted, is not engaged.

103. He submitted that the business of Pret à Manger, and the business that would be carried on at the Property, as described earlier in this judgment, would be that of a sandwich shop. Whether its customers eat on or off the Property, they would choose precisely the same products, from the same shelves, and pay the same staff at the same point. There would be no waiter or waitress service. Moreover, the evidence of Mr. Pasha was that any consumption of food on the Property would not realistically exceed 10 per cent of the anticipated turnover. No one, Mr Cousins submitted, would describe that in ordinary language as a sandwich shop and a coffee house.

104. Mr Small did not take issue with the principle that, where one business sells products commonly sold by another, the former is not automatically to be regarded as carrying on both businesses.

105. It is common ground that, in each case, the question is one of fact and degree.

106. This analysis has highlighted the inappropriateness of the declarations sought and granted in the present case insofar as they state in general terms, and without reference to Pret à Manger's specific business, the effect of the restriction in clause II(7) on use as a coffee house keeper where food and drink are sold primarily for consumption off the Property, but with limited facilities for consumption on the Property.

107. In the light of the cases and the principle relied upon by Mr Cousins, Mr Small, as was inevitable, conceded in his oral submissions before us that he could not support the view expressed in the Judgment, and intended to be reflected in the second and third declarations granted by the Judge, that the sale of any prepared food, whatever

the amount or value, for consumption on the Property, where the principal activity is sale for consumption off the Property, would inevitably be a breach of the prohibition on use as a coffee house keeper. If the appeal were not successful, therefore, those declarations would have to be set aside.

108. For his part, Mr Cousins, recognising, by virtue of his own line of argument, the inappropriateness of his own clients' claim to declaration (ii) in the Part 8 Claim Form, valiantly persisted in seeking the grant of a declaration that would indicate that use of the Property for the same type of business as is carried on by Pret à Manger would not be a breach of the prohibition on use as a coffee house keeper. To that end, he sought permission, on behalf of JLHL and MPIL, to amend Section 8 of the Respondents' Notice to ask for a declaration which would include part of the description of Pret à Manger's business which I have given in paragraph 14 of this judgment and which is taken from paragraph 2 of the Judge's judgment.

109. After a number of false starts, he settled on the following wording for the proposed declaration:

> "the use of premises at 41 & 42 Eastcastle Street and 2 & 3 Market Place, London W1 ("the Premises") as a shop for the sale of pre-prepared and packaged sandwiches, snacks, salads and similar cold food, together with a variety of non-alcoholic drinks, whether or not including coffee, are displayed for sale, primarily for consumption off the premises would not constitute a breach of clause II(7) of the lease of the Premises made on 18th September 1950".

110. Even if it were otherwise appropriate to make any declaration on the cross-appeal, Mr. Cousins' suggested declaration would not, in my judgment, be a proper or useful one for the Court to make. Whether or not the type of business carried on by Pret à Manger would, if carried on at the Property, constitute the business of a coffee house keeper as well as that of a sandwich shop is, as I have said and as is common ground between the parties, a question of fact and degree. The words "primarily for consumption off the premises" in the proposed declaration would not be decisive of that question.

111. In the first place, the word "primarily" introduces an imprecise and uncertain yardstick for resolving the question of fact and degree. It would be satisfied by a range of on-premises consumption from minimal to just under equal consumption on and off the Property. Furthermore, it is unclear and uncertain against which matters the "primarily" test would be judged. Would it be turnover or number of people or some other factor or combination of factors? As Mr. Small observed, 10% of anticipated turnover at the Property could well be a very substantial sum reflecting a significant business activity.

112. In the second place, the proposed "primarily" test is not the legal test or an accurate reflection of it. The question being one of fact and degree, it seems to me dangerous and indeed impossible to provide a simple legal yardstick that will resolve the issue whatever the facts may be. In this connection, it is to be noted that, shortly after the commencement of the proceedings, Stephenson Harwood, for Mount Cook, wrote to Brecher Abram, for JLHL, seeking a range of information about Pret à Manger's

business at all its outlets in central London as well as about the business proposed to be carried on at the Property. Brecher Abram replied declining to provide such information on the ground that the "question for the Court to determine is one of construction", and the proposed declaration "does not require any analysis of Pret à Manger's trading information". Consequently, there appears to have been very little information about Pret à Manger's business before the Judge, and certainly not sufficient to determine as a matter of fact whether or not the proposed user would be that of a coffee house keeper as well as that of a sandwich shop.

113. Mr Cousins urged that it is commercially desirable for there to be a declaration in the proposed terms so as to provide both the landlord and the tenant of the Property with some certainty about what would and would not be a permitted user. The proposed declaration would, however, for the reasons I have given, give rise to uncertainty and the prospect of yet further disputes arising from that uncertainty and it would indeed impose a test that does not accurately reflect the law. I can see no commercial advantage in such a declaration.

114. For those reasons, I would refuse permission to amend the Respondents' notice in the manner sought.

The Appeal

115. In the light of my finding as to the meaning of "victualler", it is not necessary for me to deal with that part of Mount Cook's appeal which challenges the Judge's finding that the prohibition against carrying on the business of a coffee house keeper does not extend to the business of selling food and drink exclusively for consumption off the Property.

The Part 20 Declarations

116. As part of their cross-appeal JLHL and MPIL contend that, since there was never any threat that JLHL or MPIL intended to act in breach of the Lease and the Concurrent Lease respectively, Mount Cook should not have issued its Part 20 Claim and, for that reason, no declarations should have been made on the Part 20 Claim.

117. That criticism of the judgment is clearly wrong.

118. The Part 20 Claim was issued pursuant to permission granted by Master Bartlett on 9 August 2004, notwithstanding the opposition of JLHL and MPIL. There was no appeal from the Master's decision.

119. In those circumstances, it is impossible to see any basis for criticising the Judge for making the declarations on the Part 20 Claim.

**Decision**

120. For the reasons I have given, I would allow the appeal and dismiss the cross appeal.

121. **Jonathan Parker LJ**: I agree.

122. **Chadwick LJ**: I agree.