

ROLLS *v.* MILLER.

[1883. R. 2413.]

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PEARSON, J.

Covenant—Lease—Restriction against Trade or Business—Charitable Institution where no Payment received—“Home for Working Girls.” March 7, 8.

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May 20, 28.

The lease of a house contained a covenant that the lessee should not use, exercise, or carry on upon the premises any trade or business of any description whatsoever :—

Held (affirming the decision of *Pearson, J.*), that a charitable institution called a “Home for Working Girls,” where the inmates were provided with board and lodging, whether any payment was taken or not, was a business, and came within the restrictions of the covenant.

It is not essential that there should be payment in order to constitute a business; nor does payment necessarily make that a business which without payment would not be a business.

THIS was a motion to commit the Defendants, the trustees of a charitable institution known as the “Home for Working Girls,” for a breach of the order made by Mr. Justice *Pearson* on the 23rd of November, 1883, restraining them from using the house No. 13, *The Paragon, New Kent Road*, or permitting the same to be used as one of the “Homes for Working Girls in London,” and from otherwise using the said premises, or permitting them to be used, in breach of the covenant in that behalf contained in their lease (1).

The lease was dated the 30th of July, 1825, and thereby the Plaintiff demised the premises to *J. Russell* for a term of eighty years from Michaelmas, 1824. The lease contained the following covenant :—

“And further that the said *J. Russell*, his executors and administrators, shall not nor will at any time during the term hereby granted use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on in or upon the premises hereby demised any trade or business of any description whatsoever without the consent of the said *J. Rolls*, or his assigns, or of the person or persons so entitled as aforesaid, in writing.”

The lease afterwards became vested in the Defendant, Mr. *Miller*,

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who granted an underlease for twenty-one years to the other Defendants, the trustees, which contained a similar covenant, but with the proviso that nothing therein contained should be deemed to prohibit the use of the premises as a Home for Working Girls, or to render it requisite for the lessees to obtain any consent from the lessor or any other person or persons before using the same for that purpose.

The girls received into the institution made small payments for the use of their rooms and for food daily provided for them according to arrangement, but it appeared from the yearly accounts of other similar homes that no profits were really made, but on the contrary there was always a heavy loss.

The Plaintiff having brought the present action to restrain the Defendants from using the house for the purpose of a Working Girls Home, on the ground that it was a violation of the covenant not to use it for any trade or business, Mr. Justice *Pearson* granted an injunction till the hearing as previously reported.

After this order was made the Defendants, the trustees, gave notice to the Plaintiff that they had decided to open the house as a home for the free use of working girls, without taking any payment, which they considered not to be a breach of the injunction: and, in answer to a letter from the Plaintiff's solicitor asking for a more clear declaration of their intention, they sent the following letter:—

“You are quite correct in assuming that our previous letter was intended to give you definite notice of the intentions of the Defendant trustees.

“The following regulations have been decided upon, though possibly they may hereafter be added to so far as the domestic arrangements are concerned, and they will we think give you sufficient information as to the manner in which it is proposed to use the house.

“1. This house is intended by the committee for the free use of working girls and young women between the ages of fifteen and twenty-five, who are without situations and temporarily unable to support themselves.

“2. All applications for admission to be made personally to the superintendent, with whom will rest the right of refusing

admission without alleging any reason, and to whom satisfactory references as to respectability must be furnished.

“3. No charge of any kind will be made for the use of this house, or for any meals that may be supplied therein.

“4. The residents will therefore consider themselves as guests of the superintendent and committee, and will, it is hoped, feel it incumbent on them to regard the wishes of the superintendent, who so far as possible will desire them to conduct themselves as if they were in their own homes.

“5. The superintendent, however, wishes it to be understood that the residents will be expected to attend the morning and evening family prayers in the house, and also to attend Divine service every Sunday at some place of religious worship to be approved of by her, and to render her, if and when she wishes it, cheerful assistance in the performance of the domestic duties of the house.”

The parties agreed that this declaration of intention to open the “Home” should be taken as an actual user of the house in the mode proposed, and the Plaintiff moved for a writ of attachment against the Defendants for breach of the injunction. The motion came on for hearing before Mr. Justice *Pearson* on the 7th of March, 1884.

Cozens-Hardy, Q.C., and *Butcher*, for the Plaintiff.

Sir *F. Herschell*, S.G., *W. W. Karlake*, Q.C., and *Birrell*, for the Defendants.

PEARSON, J. :—

The application in this case is supplemental to one that was made to me in November last year. On that occasion the Plaintiff applied for an injunction against the Defendants, who are trustees of a society which is engaged in work touching homes for working girls in *London*. The injunction was to restrain them from establishing one of their homes at No. 13, *The Paragon, New Kent Road*, on the ground that in the original lease there was a covenant that the lessee “shall not, nor will at any time during the term hereby granted, use, exercise, or carry on, or

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permit or suffer to be used, exercised, or carried on in or upon the premises, or any part thereof, any trade or business of any description whatsoever, without the consent of the lessor or his assigns or the persons entitled as aforesaid in writing." On that occasion it was stated that the Defendants' intention was to open the house as one of their homes, and to take payment from all the persons who were admitted to it, either for lodging or for lodging and board, as they might elect. I came to the conclusion, on the argument before me, that that was a business, and that the opening of a home for that purpose would be carrying on a business in the house, and was a breach of the covenant, and I accordingly granted the injunction.

At the time that I did so I threw out a strong hint to the parties that it might be advisable for them to take the case to the Court of Appeal, in order that on a question so undetermined as the meaning of the word "business" they might, if they thought fit, take the opinion of the Superior Court. That, however, I am sorry to say, was not done. The injunction now stands, and the trustees of these homes, or the persons who manage them, have communicated to the Plaintiff that they now propose to open this home for the admission of girls of the same description, in the same need of lodgings, to be conducted in the same way, with the only exception that no payments now are to be asked from them either for lodging or for board. That being so, by arrangement between the parties, and a very proper arrangement in order to save expense, the question has been brought before me for adjudication on the supposition that the actual opening of the house has taken place on those terms, and that the Plaintiff is now moving to commit the Defendants for a breach of the injunction so awarded by me. I am, therefore, to consider really the question whether the opening of the house for the purpose now mentioned is, or is not, a breach of the covenant contained in the lease.

Mr. *Cozens-Hardy*, who argued the case for the Plaintiff, suggested at once, as was natural, that it follows necessarily from the injunction that was granted before, and from the terms of my judgment, that that was a breach of the covenant, inasmuch as I had said before that I thought the question of profit made no

difference, and Mr. *Hardy* urged that the question of payment would make no difference because profit depends upon payment.

The Solicitor-General, on the other side, said that that was not a fair way of treating the case at all. He says: "You ought to dismiss the judgment in the other case entirely from your recollection; you ought to treat this case as a new case altogether; you ought to suppose that this case is brought before you for the first time, of a home being opened for the admission of friendless girls without payment of any sort or description, and an admission which, according to the rules, is to be one which will make them, when they are admitted into the home, guests rather than lodgers," and not only so, but the Solicitor-General urged very strongly upon me that I ought to consider this as if it was the only house opened by the society, as I must call them, and that I ought not to take into consideration that they had other houses in which payment was exacted. I do not entirely agree with the Solicitor-General in that view, and I will give presently one or two reasons why I do not agree with him. But at all events, I shall not be treating his clients unfairly if I adopt his suggestion and look at this case *de novo*, as if it was the first time I had heard the case, and had to consider the case only of the house being opened without payment.

Now, of course it is to be borne in mind, that the covenant, although it contains the largest words with regard to a business (because it is, a business of any description whatever), does not contain words very commonly found in a covenant, which are that the use of the house is to be confined to the use as a private dwelling-house. There is very little authority when you come to search the books as to what the meaning of the word "business" is. Nevertheless there is something to be found in the books, and there is a case which is constantly referred to, that of *Doe v. Keeling* (1). I am quoting from p. 98, where the words "being used as a private dwelling-house," were also wanting, but where the word was "business," and where the business which was being carried on was the business of a schoolmaster, which the Court held to be a "business," although it was said to be a profession. Lord *Ellenborough* uses this language, he says (2): "I own I have no doubt that this is a business within the meaning of

(1) 1 M. & S. 95.

(2) 1 M. & S. 99.

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the covenant, and one which is likely to create as much annoyance as can be predicated of almost any business. It surely cannot be contended, that the noise and tumult which sixty boys create, are not a considerable annoyance, as well to the neighbourhood as to the house, from which any landlord may fairly be supposed to be desirous of redeeming his premises; and the exhibition, too, of the boys may be said somewhat to resemble a show of business within the terms of the covenant." That, of course does not arise here. "The intention of the covenant was, that the house should not be converted to any purposes which might be likely to annoy the neighbourhood, and by that means to depreciate its value at any future period when another tenant might be required. But a business of this kind would necessarily produce inconvenience to the neighbourhood, both by the disturbance which the inmates of the house would create, and by drawing to the spot a large resort of persons, such as the parents and friends of the children; and it is therefore that species of business which would have most prominently offered itself as fit to be excluded." And then he says, "and as to the intention, if the party had it in his contemplation either to secure his own privacy or that of the neighbourhood, there can be no doubt that this is a species of business that he would have particularly excluded. He has not done so by express words; but still the words are sufficient, and the intention is clear." Mr. Justice *Le Blanc*, says (1): "I do not think that the meaning of the parties can be fairly confined to trade, because they have used in addition the word 'business,' which must be intended of something not falling within the description of trade. The question then is, whether a school, to which the public at large are invited to send their children, does not fall within the words of the covenant. I think it does; and if so, there is no doubt it falls within the mischief intended to be provided against."

Now I do not know that even on the high authority of Lord *Ellenborough* I could have followed him in considering that I must look to the intention of the lessor only in this matter. If his Lordship had said the intention of both parties, I could have understood it. But I do not think I am at all justified in imagining what the intention of the grantor or lessor was. I must find his intention

(1) 1 M. & S. 100.

in the words which he has used. But using these judgments, I come to this conclusion upon them. In the first place, that "business" means something other than "trade;" in the second place, that whether or not it is a business, certain *indicia* are given here; the one is that all the public, and, of course, as far as the school goes, the boys, are the public, speaking generally, the public are invited to go; the second, is the number of persons in the home would be much larger than those in a private house; and, thirdly, all manner of persons would be induced to resort to the house because of the persons who are living in it.

Starting from this conclusion, I come to consider what exactly is this house which it is proposed to open, and I think I shall find all these *indicia* are to be found in regard to this particular house. I have referred to two or three passages in the report, and I find that, taking them in the order of their pages, at p. 29, speaking of *Morley House*, which is one of the houses, it says: "Since 1880, 268 young women have dwelt here, and during 1882, 101 have availed themselves of its shelter. These figures are perhaps less than might have been expected; but they are accounted for by the fact that twenty have lived here for twelve months, and ten for more than six months." Then I think there is another place in which they speak of the stabling of one house that might fall into possession before very long, which will enable them to accommodate twenty-eight beds. Then I come to p. 54, and I find this: "To any who have the opportunity of making the homes known among girls and women, the honorary director will be pleased to send hand-cards containing the addresses of the homes and particulars as to terms, &c. To others, who are able to hang them in workrooms, offices, class rooms, or public rooms, he would also forward, carriage paid, prettily mounted and varnished advertisement notices." Then I find further on, at p. 86, this advertisement: "Any of the homes can be visited and inspected daily between the hours of 3 and 5 P.M., and the committee would be glad to know, that some friends do, from time to time, visit the houses and thus see for themselves to what extent the home-life arrangements are carried out, and also judge for themselves of the benefits accruing therefrom." So much for the report.

Now I come to the proposals which are stated in the letter of

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Messrs. *Nisbet & Daw*. It says: "This house is intended by the committee for the free use of working girls and young women between the ages of fifteen and twenty-five who are without situations and temporarily unable to support themselves. All applications for admission to be made personally to the superintendent, with whom will vest the right of refusing admission without alleging any reason, and to whom satisfactory references as to respectability must be furnished." And it says "that no charge will be made, and those who are admitted are to consider themselves as guests;" and it contains, amongst other things: "The superintendent, however, wishes it to be understood that the residents will be expected to attend the morning and evening family prayers in the house, and also to attend Divine service every Sunday at some place of religious worship to be approved of by her, and to render her, if she wishes it, cheerful assistance in the performance of the domestic duties of the house." Now, I gather from that, and also from a note in the report with regard to superintendents, that there are paid superintendents who live in these homes. I am not absolutely certain about the payment, but I gather from one clause in the report, that the superintendent is neither the lessee nor the owner of the house; that they invite persons to make application to the superintendent for admission; that they invite other persons—the public generally—to resort to the house between 3 and 5 o'clock to inspect the house; that in all probability if young women are living in these homes and want to obtain situations, application will be made to the superintendent as to their character. Therefore for every purpose for which I can see that the home is to be used, with the single exception of young women actually lodging and boarding there, they are purposes quite outside the ordinary domestic life of persons. The house is not to be replenished with guests, as the Solicitor-General said, in the ordinary way in which a person invites guests to his house. It is the public who are invited—so much of them as are young women of fifteen to twenty-five who want a home. They are invited to come and ask to be admitted, which is what your guest commonly does not do. They are to be received, not in the ordinary way in which a person receives his guests, but they bring a testimonial of respectability, and, of course, they bring proof of their want of accommodation. Under



all these circumstances I think it is absolutely diverse from and outside the domestic life of a house, and if I were to add anything to the unsuccessful attempt I formerly made to define "business," I should say that is a business which is carried on by any person in addition to, and diverse from, his ordinary domestic life, and this, to my mind, is something which is carried on by the society not being ordinary domestic life at all, but being a business for which they solicit subscriptions, and which they carry on by means of those subscriptions.

I am of opinion, therefore, in this case also, notwithstanding there is to be no payment, that it is nevertheless a business, and is in contravention of the terms of the covenant.

I may add that I have looked at it now, as the Solicitor-General invited me to do, as if this were the only home, but I find it exceedingly difficult to say that that is the proper and right way of looking at the matter. It is one home out of many, and I think in order to judge whether it is a business or not, I am entitled to know that it is one home out of many, and if the other homes are decided to be businesses, I feel it difficult to say that this, which is one of them, is no business, whereas all the rest are businesses.

I came to this conclusion early in the argument yesterday, but out of respect to the argument which has been addressed to me on the other side, I thought it right to reflect upon it. I see no reason to alter the conclusion at which I had arrived, and I must, therefore, I presume, make this order:—The Court being of opinion that the home proposed to be opened would be a business in contravention and breach of the covenant in the lease, and the trustees undertaking not to open the home in that way, no order except that they pay the costs of the application.

T. W. G.

The Defendants appealed from this order, and also from the previous order of the 23rd of November, 1883. The appeal was heard on the 20th of May, 1884.

Sir *F. Herschell*, S.G., and *W. W. Karslake*, Q.C. (*Birrell* with them), for the Appellants:—

The Appellants have not violated the covenant by opening the

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“Home for Working Girls,” whether they receive payment for board and lodging or not. No profit was ever intended to be made; and now that they have given up the intention of taking any payment, there can be no pretence for saying they are exercising a trade or business. The covenant is merely a negative one, and does not go on to bind the lessees to use the house as a private residence. Therefore, the only question is, whether this is the exercise of a trade or business. We say it is the exercise of hospitality, not of a business. A business means that by which a man gains a livelihood. The authorities relied on by the other side are not applicable. In *Bramwell v. Lacy* (1) the hospital was a nuisance, and in *German v. Chapman* (2) the covenant precluded the premises from being used otherwise than as a private dwelling-house.

*Cozens-Hardy*, Q.C., and *Butcher*, for the Plaintiff:—

The Defendants are not using the house as a dwelling-house, but have fitted it up and intend to use it for a definite object of a different kind. They are associated together, and invite subscriptions from the public for this object. Therefore, their user has two of the indicia of a business, namely, publicity and a definite object distinct from dwelling in the house.

[COTTON, L.J.:—If a man receives into his house his nephews and nieces from *India*, and furnishes his house with that object, should you call that a business?]

Certainly, whether he received payment for them or not. A school is a business, and it can make no difference whether the scholars are paid for or not. The question is whether the object of taking the house is to receive lodgers, or the receiving of them is merely accidental. We admit that a house may be used accidentally for various purposes, either for the sake of amusement or of hospitality, but if the object of keeping up the house is to carry on some particular occupation, then it is used for a business: *Doe v. Bird* (3); *Smith v. Anderson* (4); *German v. Chapman*; *Bramwell v. Lacy*; *Doe v. Keeling* (5). In *Portman*

(1) 10 Ch. D. 691.

(3) 2 Ad. & E. 161.

(2) 7 Ch. D. 271.

(4) 15 Ch. D. 247.

(5) 1 M. & S. 95.

*v. Home Hospital Association* (1), it was held that the carrying on of a hospital or similar association, without a view to profit,

(1) M. R. Dec. 1, 1879.

PORTMAN *v.* HOME HOSPITAL  
ASSOCIATION.

IN this case the lease of a house contained a covenant not to use the premises hereby demised, or any part thereof, or permit the same or any part thereof to be used in the exercise or carrying on of any art, trade, or business, occupation, or calling whatsoever.

The Defendants were an incorporated association, the objects of which were to provide accommodation for patients willing to pay for it, for providing medical attendance, nursing, food, and medicine, and all appliances of a medical and surgical character, and the comforts and advantages of home in various degrees according to the payments made by the patients. Infectious diseases were not included, and the only persons to be admitted were the members, who all paid a certain sum, or were nominated in a particular way.

The lessor brought an action and moved for an injunction to restrain the Defendants from using the house for the purposes of the association.

*Southgate, Q.C., Chitty, Q.C., Davey, Q.C., A. T. Watson, Ribton, and Methold*, appeared for the various parties.

JESSEL, M.R. :—

I have no doubt whatever as to the decision which I ought to give in this case. The difficulty I feel is to define the meaning of the terms used, so as not to include some case not intended to be included; but that the terms used include this case appears to me quite plain. The covenant is that the

lessee should not use the premises, or any part thereof, or permit the same or any part thereof to be used in the exercise of any art, trade, or business, occupation, or calling whatsoever. The terms “use or permit to be used” seem to me to get rid of much of the difficulty, because the accident of something taking place in the house is not permitting the house to be used for that purpose. Suppose, for instance, that a man residing in a private dwelling-house calls in a physician, because he or any member of his family is ill. The physician could exercise his calling or occupation in the house, he could use the art of healing, and perhaps receive his fee before leaving the house, but I should not hold that to be a breach of the covenant, because it is not using or permitting the house to be used. It would be a mere accident, not that to which the use of the house is devoted. Now, suppose instead of this you take a collection of any patients who may come, which, as I understand, is intended here, of thirty or forty in number, and then call in a physician who receives his fee, you are using the house for that very purpose. Your object is to get them into that house, and to use the house for allowing the physician to exercise his calling there, and it appears to me that that shews the distinction between the using or permitting the house to be used, and the accident of the patient being in the house. The very object of the Defendants in this particular case is, that the patient shall come to that house or home for the purpose of being there visited by the physician, who shall there exercise his calling. It is emphatically the use of the house for

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was a violation of a covenant not to carry on "any art, trade, business, occupation, or calling."

Sir *F. Herschell*, in reply.

that very purpose, and it appears to me that under the word "art" alone such a use of the house is prohibited. I may give a further illustration. Many physicians in *London* do not reside at the place where they receive their patients. A man may hire a consulting room, with a room or two adjoining, and there consult with his patients, who are living at a distance, perhaps, in the country. The consulting room is the place where he exercises his art or calling, and those rooms are used for that purpose. Suppose that physician having left those rooms, goes back to his own house, and a patient having arrived too late at the consulting room, takes a cab and goes after him. In such a case the patient would see the physician in his own house by an accident. I should not call that the using of the private dwelling-house of the physician for the purpose of carrying on his calling, because that is not the use of it. It is not the using of the house, but the accident of the physician being in the house. I might illustrate that further by supposing that the physician had gone to another patient's house, and was followed by the first patient, you would not say that the physician used the other patient's house for the purpose of carrying on or exercising his calling, though he happened to be there when he did, in fact, so exercise his calling.

What is forbidden is allowing the place to be used for that purpose, and what is done appears to me to be exactly within that part of the covenant. I think also that it is within another

part of the covenant. The question is what is the meaning of "any occupation or calling whatsoever." It is suggested on the part of the Defendants that that means where you get a profit. I cannot accede to that. I do not think profit is the test, but the use of the house for the purpose. A man may have an occupation from which he does not get any profit, and never intends to get any profit. He may have as an occupation the printing and publishing of papers, or books, or pamphlets, for a charitable society for which he charges nothing. It may be carried on, as it is in some cases, by an officer of the society who is not paid, and who does it from charitable and benevolent motives. Can that make any difference? The using of the house for that purpose is a using it for some occupation or calling. The occupation of the man's life may be that, and no other. I have heard of a man occupying his time, in fact, making the occupation of his life, the practice of philanthropy. When you come to look at the meaning of the word "occupation," it is, such an occupation that you can use a house for it, that is, something done in the course of the user of the house which shews that it is used for that occupation. It would be very ridiculous to say that opening a bookseller's shop by a man is the using of a house within the meaning of the words "exercise or carry on any art, trade, or business, occupation, or calling whatsoever," and at the same time to say that the identical user, in every respect, except that a man does it

1884. May 28. COTTON, L.J.:—

This is an appeal from two orders of Mr. Justice *Pearson*. One was an order granting an injunction restraining the Defendants from using a house of which the Plaintiff is landlord as a girls' home, and the other was an order declaring that what was afterwards proposed to be done would be a breach of that injunction, and therefore would be a contempt. The parties have

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from benevolence or charitable motives, is not to be so treated. I will give another illustration; I will go back to the physician and the consulting room. The physician who uses the consulting room for the purposes of seeing his patients there is clearly using it for the purpose of his occupation or art. Suppose that, instead of seeing his patients at his own rooms, he is a physician to a public dispensary, or the physician in charge of the out-patients in any of our large hospitals. He then goes, not to his own consulting rooms, but to the room of the dispensary or hospital. Does not he use that room for the purpose of his occupation? And suppose he has no other practice—some of them have no other practice—for what purpose does he use the consulting room of the hospital? Surely in the exercise of his occupation or calling, his calling being that of a physician. It cannot make any difference that he gets no fees; that he does not get paid, and does not attempt to get paid. He still uses that room for the purpose of his calling or occupation, and really it is far better to look at the ordinary meaning of the words and see whether they apply to this case, than to attempt to lay down some definition which may err on one side or the other. It appears to me that this is a user for that purpose. Now I come to a third point, which I think is equally against the Defendants, though I am sorry for it, because I

think this is a useful institution and one that should be encouraged. What is the occupation of the Defendants? They are a corporation incorporated for a particular purpose, and I must say they intend to have an occupation, and I hope will have a very considerable one. Now let us see. What is their occupation? [His Lordship stated the objects of the association, as above set out, and continued:—] It is open in fact to the whole public who can afford to pay those sums. That is the occupation of the association. I suppose I cannot understand any meaning of the word "occupation" which would not describe this as being such occupation. Are the Defendants going to use the house for that purpose? They are there for no other purpose whatsoever. How can I properly be called upon to say that they are not going to use the house in the exercise or carrying on of any occupation or calling whatsoever? If this is not their occupation they have none at all, and that of course is not a position in which I could place the association.

It seems to me to be perfectly plain that the keeping of a hospital by a hospital association, and the user of the house for the purpose of keeping that hospital, is a user for the purpose of that occupation, and a breach of the covenant. I regret the result, but I must administer the law as it stands and grant the injunction.

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acted in a most reasonable way. The Plaintiff, the landlord, is protecting not only his property, but the other residents on it, and he and the Defendants have taken the shortest possible means of ascertaining whether the original scheme, or the modified scheme proposed to be adopted, is, or is not, to be restrained. The Plaintiff is landlord, as I have stated, of a house of which these Defendants are underlessees, and the object of this action is to enforce a covenant contained in the original lease. The Defendants who are now appealing are the trustees of a charity, the nature of which I shall have presently to consider. The covenant is this: "Further that the said *James Russell*"—he is the original lessee—"his executors and administrators shall not, nor will at any time during the term hereby granted, use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on, in or on the premises hereby demised, any trade or business of any description whatsoever without the consent of the Plaintiff." Now this covenant evidently had for its object to keep this house as a residence or dwelling-house, but the covenant does not, as is very usual in these clauses, contain any restriction against using the house "otherwise than as a dwelling-house," or say that it shall "only be used as a private dwelling-house." What we have to consider is, whether what is proposed to be done, and has been done by the Defendants, is, or is not, a breach of the covenant upon the fair construction of the words used, and of course we must construe these words with reference to what is the apparent object of this covenant, although it does not contain the usual words which I have mentioned.

Now, the Defendants who are now appealing, are trustees of what appears to me to be a most admirable institution, though of course, that cannot affect our decision in any way. They are a nobleman and certain gentlemen who combine together for the purpose of raising subscriptions for providing homes for working girls. In this house, and in other houses which they have obtained, they have a resident and paid superintendent, and they provide rooms, and board also, for girls who have not any home of their own, and who are working in *London*. They invite all the members of the public to assist in getting the girls to find a

home in these houses, and they have no connection with the girls except this, that those girls who want a home, are, if they come, provided, subject to certain regulations, with a home in these houses, in which there are bedrooms, and a common sitting-room, and where they are provided with board.

The case came before Mr. Justice *Pearson* on two occasions, when he made the orders now appealed from under somewhat different circumstances. In the first instance, the Defendants were receiving payment from those girls who occupied rooms and availed themselves of the benefit of this home, and the injunction was granted to restrain the Defendants from using the house in that way, on the ground that such user was a violation of the covenant. Then, by arrangement and correspondence between the parties, what the Defendants determined to do was, not to receive any payment, but to make the benefits conferred on the girls entirely gratuitous. The question is whether what they are doing is a business; it is not a trade. The words are "trade or business" and there can be no question that the Defendants are not carrying on any trade. The question then is, is what they are doing a business?

I cannot read the two words "trade" and "business" as synonymous. There may be a great many businesses which are not trades, and although, in my opinion, receiving payment for what is done, using what you are doing as a means of getting payment with a view to profit—whether profit is actually obtained or not, must of course be immaterial—is certainly material in considering whether what was being done is, or is not, a business, yet, in my opinion, it is not essential that there should be payment in order to constitute a business. And the mere fact that there is payment under certain circumstances, does not necessarily make a thing a business which if there was no payment would not be a business. In my opinion, in the present state of things, what is now intended to be done does not put the matter in a different position from that in which it stood when the Defendants received payment, because that payment was not a payment in the ordinary way for the purpose of getting profit if they could—it was not to constitute this a business for the purpose of profit—but it was simply a payment to go towards the charity in

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order to aid the funds of the charity. In my opinion, it really does not make any difference that the Defendants are not now receiving any payment. If without payment this scheme would not be a business, in my opinion, having regard to the mode of payment and the object for which the payment was required, payment would not make any difference. But one has to consider whether this is carrying on a business, and I come to the conclusion that Mr. Justice *Pearson* is right in the view which he has taken, that it is. It has been urged upon us very strongly that it is no business at all, but a charity; that the Defendants, in making a home for these girls are treating them simply as guests, and that receiving any number of guests or any number of friends into a house cannot be said to be carrying on a business in that house. I quite agree that bringing guests into, or having any number of guests or friends in, your house is not in any way carrying on a business. But what is done here? None of the Defendants are residing in the house, nor are they receiving into their house as their guests or friends, these girls who make their home there. The Defendants have a paid superintendent who manages the house for them, and it is the duty of that paid superintendent so to manage the house, and to see that the girls who are there conduct themselves properly, and in accordance with the rules and regulations of the charity, and provision is made as to the way in which they are to be accommodated. It is not that any particular individuals known to Defendants or whom they treat as their friends (except so far as they wish to be the friends of all those who are in distress) are admitted, but that all the public who are objects of this charity, on submitting to these regulations, are admitted into the house which they occupy. It might well be that the Defendants if they liked to do this in a house which they occupied might do so, but when they do so in a house in which they pay a superintendent in order to receive the girls, these girls are really lodgers. They lodge there, and although the trustees are, with a most praiseworthy object, using this lodging-house for the purpose of charity, nevertheless, in my opinion, although the lodging is given gratuitously, what is being done must be considered as carrying on the business of a lodging-house. Therefore, unhappily, these trustees, in my opinion,

cannot, having regard to this covenant, use the house which belongs to the Plaintiff even according to this modified scheme. In my opinion, therefore, this appeal fails.

LINDLEY, L.J.:—

I am of the same opinion. The question we have to determine is whether this covenant, which is a very simple one, is being infringed or not. The covenant is that the lessee will not use, exercise, or carry on, or permit or suffer to be used, exercised or carried on, on the premises, any trade or business of any description without the consent of the Plaintiff.

Now the first question to be considered is what is the object of this covenant? The covenant must be construed consistently with that object, and on the other hand, something may fall within the scope of the covenant which does not fall within the words. One must look, therefore, at both the words and the object. The necessity of doing both may be made apparent by putting an illustration. If you take the words of the covenant simply, without looking at the object, it would prevent a private family from having their victuals cooked in the ordinary way on the premises, that is to say, by a cook, whose business it is to cook the victuals. The words in this covenant are that no business shall be allowed to be carried on, and it would be ridiculous to construe the covenant as extending to any such business as that. You must look beyond the words, to the object of the covenant, and, looking to the object of the covenant, one sees plainly what it is. The house was a dwelling-house; it is so described in the lease. It was let as a dwelling-house, and this covenant was inserted in the lease. Well, what is the object of that covenant? There can, I think, be but one answer to that question. It was to prevent the house being used otherwise than as a dwelling-house. I think that is conceded on all hands. It is very true that this covenant does not go on, as such covenants usually do, "And not to use the house or allow it to be used otherwise than as a private dwelling-house." But that is the object of the whole thing, and if those words were not implied the covenant would be senseless. Another question is, what sort of a dwelling-house is it to be, because dwelling-houses are of various kinds? For example,

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hotels are dwelling-houses of a certain kind ; persons eat and drink and sleep there, and do nothing else that I know of except cook meals, and so on. Is that the kind of dwelling-house that is meant ? I apprehend not. I think that, although a dwelling-house was contemplated, keeping the house as an hotel would fall within the words and object of this covenant, because the hotel-keeper would be carrying on a business, and the business which he carried on would be one which it was the object of this covenant to prevent. What are the Defendants doing ? The Solicitor-General made a great point of the fact that it was impossible to say what kind of business this was. I do not think myself that is conclusive, it is quite possible to have new businesses which have not yet got names. But I do not think that difficulty as great as he thought it. When we understand what is being done it strikes me that it is not difficult to give a name to this business. I should call it the business of a lodging-house-keeper. It is very true it is a charitable lodging-house, but what is being done ? The Defendants are associated together for the purpose of finding a home for these working girls, and they invite them to come and board and lodge there. They do not take any payment now—I do not think that is material—but they have a staff. They have a superintendent in this house whose business it is to look after the lodging-house, and that appears to me to fall both within the words of the covenant and within the mischief. That it is within the mischief I am afraid is too plain ; persons complain of it, and it is clear that it was not the kind of thing that was contemplated when the covenant was entered into. But the great difficulty is, is it within the words ? Can it be said to be carrying on, or allowing to be carried on a business, on these premises ? When we look into the dictionaries as to the meaning of the word “business,” I do not think they throw much light upon it. The word means almost anything which is an occupation, as distinguished from a pleasure—anything which is an occupation or duty which requires attention is a business—I do not think we can get much aid from the dictionary. We must look at the words in the ordinary sense, and we must look at the object of the covenant ; and, looking at both, I have no hesitation in saying

that this is clearly within the words and within the object of the covenant. I think the view of Mr. Justice *Pearson* was correct, and that the appeal ought to be dismissed with costs.

Solicitors for Appellants: *Nisbet & Daw.*

Solicitors for Plaintiff: *Markby, Wilde, & Burra.*

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[1881 H. 3315.]

Vendor and Purchaser—Forfeiture of Deposit—Purchaser's Failure to complete.

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On a sale of real estate the purchaser paid £500, which was stated in the contract to be paid "as a deposit, and in part payment of the purchase-money." The contract provided that the purchase should be completed on a day named, and that if the purchaser should fail to comply with the agreement the vendor should be at liberty to re-sell and to recover any deficiency in price as liquidated damages. The purchaser was not ready with his purchase-money, and, after repeated delays, the vendor re-sold the property for the same price.

The original purchaser having brought an action for specific performance, it was held by the Court of Appeal, affirming the decision of *Kay, J.*, that the purchaser had lost by his delay his right to enforce specific performance:—

Held, also, that the deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract, and that the Plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit.

Palmer v. Temple (1) distinguished.

THIS action was brought for specific performance of a contract for sale of certain freehold lands known as *Hill's Farm*, in the county of *Middlesex*, for £12,500.

The contract was dated the 24th of March, 1881, and thereby the Plaintiff, *T. H. Howe*, agreed to purchase the premises in question "for the price of £12,500, £500 part thereof having been paid on the signing of this agreement as a deposit and in part payment of the purchase-money." Various stipulations were made as to the title, and it was agreed that the purchaser should pay the balance of the purchase-money on the 24th of April,