Neutral Citation Number: [2024] UKUT 193 (LC)

Case No: LC-2023-748

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

FTT REF: LON/00BE/LRM/2023/0038, LON/00BE/LRM/2023/0039, LON/00BE/LRM/2023/0040, LON/00BE/LRM/2023/0041

11 July 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – construction of the lease – remedying structural defects in the Large Panel System – meaning of covenant "to maintain" – significance of a "sweeper clause"

BETWEEN:

THE LONDON BOROUGH OF TOWER HAMLETS

Appellant

-and-

LESSEES OF BREWSTER HOUSE AND MALTING HOUSE

Respondents

Various properties at Brewster and Malting House, London, E14

Upper Tribunal Judge Elizabeth Cooke
25 June 2024

Mr Justin Bates KC and Ms Mattie Green for the appellant, instructed by the appellant's legal team
Ms Ellodie Gibbons for the respondents, instructed by Bishop & Sewell LLP

The following cases are referred to in this decision:

Alker v Collingwood Housing Association Ltd [2007] EWCA Civ 343
Arnold v Britton [2015] UKSC 36.
Assethold Limited v Watts [2014] UKUT 537
City of London v Leaseholders of Great Arthur House [2019] UKUT 341 (LC) and [2021] EWCA Civ 341
Dell v 89 Holland Park Management Company Limited [2022] UKUT 169 (LC)
Fluor Daniel Properties Ltd and ors v Shortlands Investments Ltd [2001] 2 EGLR 103
Holland Park Management Company Limited v Dell [2023] EWCA Civ 1460
Mason v Totalfinaelf UK Limited [2003] EWHC 1604 (Ch)
Post Office v Aquarius Properties Ltd [1987] 1 All ER 1055
Quick v Taff-Ely Borough Council [1986] QB 809
Welsh v London Borough of Greenwich [2000] 3 EGLR 41
Westbury Estates Ltd v The Royal Bank of Scotland Plc [2006] CSOH 177
Wood v Capita Insurance Services Ltd [2017] UKSC 24

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") that the appellant landlord was not entitled to recover from the respondents, as part of their service charge, the cost of work needed to remedy structural defects caused by the construction of the building using the Large Panel System.

2. The appellant was represented by Mr Justin Bates KC and Ms Mattie Green, and the respondents by Ms Ellodie Gibbons, and I am grateful to them all.

3. There are 32 long leaseholders in the buildings concerned but only nine have participated in these proceedings; Mr Bates KC confirmed at the hearing that the appellant will apply the outcome of this appeal to all the long leaseholders. As I shall explain, the appeal fails, and therefore none of the long leaseholders will be charged the cost of the works in question.

The Barleymow Estate and the Large Panel System

4. The Barleymow Estate in East London used to be an industrial area belonging to the Barley Mow Brewing Company; in the early 1960s it was acquired by the London County Council and redeveloped as social housing. Three blocks were built, of which one has since been demolished; the respondents hold long leases in the two remaining buildings, Malting House and Brewster House. Their leases were granted under the right to buy scheme at various dates from 1989 to 2005.

5. The blocks were built using the Large Panel System ("LPS"), a construction technique widely used in the 1960s whereby mass produced concrete slabs were bolted together to form the walls and floors of the building. The peril of that system was that the walls bore the weight of the building; when a piped gas explosion destroyed external walls in the Ronan Point building in 1968 the floors collapsed too, and four people were killed and 17 injured.

6. The Ronan Point Inquiry recommended work to safeguard buildings constructed with the LPS from the risk of collapse in case of abnormal loading (such as a gas explosion); Government circulars 62/68 and 71/68 set standards for such work, and the requisite work was carried out on the Barleymow Estate in the late 1960s.

7. The Estate was transferred to the appellant in 1986.

8. Additional work was carried out to strengthen the building, between 1990 and 1994, following concerns raised in a report by the London Dockland Development Corporation prior to the construction of the new Limehouse Link tunnel. Again the work was done in order to make the building safe in case of abnormal loading; it was still considered that LPS was safe under normal loading (that is, the weight of its occupants and contents).

9. In 2017 after a fire in Shepherds Bush the Department for Communities and Local Government wrote to local authorities to explain further safety concerns, and in January 2018 a report commissioned by the appellant from Wilde Carter Clack concluded that the work done in the 1960s was satisfactory and that there was no problem with normal loading but recommended further review; and that further review, in 2018, concluded for the first time that the reinforcement of the building was insufficient to cope with normal loading.

10. More investigation was carried out and in March 2020 the appellant decided to carry out:

- Installation of external steel frame.
- Application of external reinforcement to cross walls.
- Installation of internal bedroom steel frames.
- Installation of lobby cupboard steel frames.
- Associated works.

11. The total cost for the two blocks was estimated at £8,066,944.38 (half to each block). The appellant wishes to recover part of the cost through the service charge – only part, because some of the flats in the buildings are let to periodic tenants and the appellant has apportioned the cost accordingly. It estimated initially that for the long-leaseholders the cost would be £60,971 for a one-bedroom apartment, for a two-bedroomed flat £73,066, and for a three-bedroomed flat £82,136, and we are told that higher sums are now anticipated. The appellant carried out extensive consultation with the leaseholders, beyond the statutory requirements. Contractual arrangements were put in place to carry out the work and, if I have understood correctly, they have been commenced.

12. The respondents made an application to the FTT for it to determine pursuant to section 27A of the Landlord and Tenant Act 1985 whether those service charges were payable under the terms of the lease, and whether the costs were or were going to be reasonably incurred under section 19 of the 1985 Act. As to whether the costs were reasonably incurred the respondents said not only that the cost was excessive but also that the work proposed will not adequately address the inherent structural defects in the buildings.

13. By way of postscript to what I have said about the factual background, I should acknowledge that what I have said here does not reflect the detail of the account given by Mr Bates KC, nor the diligence of the archival research carried out by the appellant in order to establish what has happened to these two blocks over the last 60 years. I have kept my summary brief because the point sought to be made by Mr Bates KC in giving such a detailed account is not in dispute: all the work required to be done in the aftermath of the Ronan Point disaster was done, and until 2018 no-one had the faintest idea that these buildings might be unsafe under normal loads.

14. In the FTT the focus was on the terms of the leases and whether they permitted the appellant to charge the respondents for the work to be done as a result of the July 2018 investigation. The focus of the appeal is the same; the FTT decided the charges were not payable, and did not make any decision about the challenge under section 19 of the 1985 Act on the usual "in case we are wrong" basis, because it regarded that challenge as premature. If the appeal were to succeed the respondents would still be entitled to challenge the service charge on the basis that the costs were not reasonably incurred.

The terms of the leases and the FTT's decision

15. So the appeal is from the FTT's determination that the terms of the lease do not allow the landlord to recover the cost of the work as part of the service charge, and it is therefore about the construction of the respondents' leases.

16. They all contain covenants by the landlord as follows:

"(5) Subject to and conditional upon payment being made by the Lessee of the Interim Charge and the Service Charge at the times and in the manner hereinbefore provided:-

(a) To maintain and keep in good and substantial repair and condition:

(i) The main structure of the Building including the principal internal timbers and the exterior walls and the foundations and the roof thereof with its main water tanks main drains gutters and rain water pipes (other than those included in this demise or in the demise of any other flat in the Building)

…

(j)

(ii) To employ direct or enter into contracts with all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building…

…

(o) Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors may be considered necessary or advisable for the proper management maintenance safety amenity or administration of the Building

17. They all contain a covenant by the lessee to "pay the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule hereto". The Fifth Schedule is as follows in all the leases except that only the leases of 7 Malting House and 44 Brewster House (the two earliest of the nine leases, granted in 1989 and 1990) contain the words in italics:

"THE FIFTH SCHEDULE

The Service Charge

1. In this Schedule the following expressions have the following meanings respectively:-

(1) "Total Expenditure" means the total expenditure incurred by the Lessors in any Accounting Period in carrying out their obligations under Clause 5(5) of this Lease less sums expended from the monies set aside under Clause 5(5)(p) of this Lease *and save such repairs as amount to the making good of structural defects other than structural defects already notified to the Lessee and which are specified in the Sixth Schedule hereto or of which the Lessor does not become aware earlier than 5 years from the date of this Lease and a reasonable proportion of the cost of insuring against risks involving such repairs not amounting to structural defects (except for structural defects notified as aforesaid) of which the Lessor does not become aware earlier than 5 years from the date of this Lease and*

> *also of insuring against the making good of structural defects* and any other costs and expenses reasonably and properly incurred in connection with the Building …
>
> (2) "the Service Charge" means such reasonable proportion of Total Expenditure as is attributable to the Demised Premises …"

18. The two leases that contain the italicised proviso also contain a Sixth Schedule, and it is blank. The lease of 17 Malting House also contains a blank Sixth Schedule, but there is no reference to that Schedule elsewhere in the lease.

19. Before the FTT the appellant argued that the cost of the proposed works was payable as part of the service charge either because they amounted to maintenance under clause 5(5)(a), or because they fell within the landlord's obligations under clause 5(5)(o), or because they fell within the definition of "Total Expenditure" in the Fifth Schedule.

20. The FTT recorded the parties' agreement that "the proposed works do not involve repair in that they are not aimed, either in whole or in part, at remedying a deterioration in the buildings from some previous physical condition (*Quick v Taff-Ely Borough Council* [1986] QB 809 and *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055)".

21. Turning to clause 5(5)(a), the FTT explained that the appellant relied upon the obligation to "maintain". It discussed the cases cited by the respondents (which we shall have to look at again in the argument in the appeal so I will not set them out here); it noted the appellant's reliance on the Tribunal's decision in *Assethold Limited v Watts* [2014] UKUT 537 but disagreed with Mr Bates' reading of the decision. It concluded:

> "Remedying a major structural defect absent of some degree of physical damage or deterioration does not come within the term. Clause 5(5)(j) does not expand on the Respondent's obligations to maintain or repair rather than simply permitting the employment of suitable professionals in support of those obligations."

22. As to clause 5(5)(o) the FTT said:

> "36. Clause 5(5)(o) of the lease is what is commonly known as a "sweeper" clause in that it aims to "sweep up" or include management functions not expressly addressed in other clauses. Of course, giving a clause such a label does not define its meaning or extent. Interpreting a contractual term requires ascertaining the objective meaning of the language in the context of the contract as a whole: *Wood v Capita Insurance Services Ltd* [2017] UKSC 24."

23. Nevertheless the FTT was wary of a literal construction of the clause because, taken literally, it was hard to see what it could not cover. The FTT devoted some paragraphs to a discussion of the provisions of the Housing Act 1985 in their original form, in view of the echo of those provisions in the two earliest of the respondents' leases (see paragraph 17 above). It said that the policy of those provisions was that if landlords wanted to pass on to the lessee the costs of making good structural defects, they had to provide notice of those defects. It concluded:

> "46. … It would be entirely contrary to the purposes of the statutory right to buy scheme if such works could be caught within a sweeper clause rather than being addressed expressly and specifically.

> 47. Even looking at the words of the lease as a whole in isolation from the statutory scheme and its purposes, it is clear that clause 5(5)(o) is not intended for works so extensive that the costs would vastly exceed those likely in any category expressly mentioned."

24. For the same reasons the FTT found that the definition of Total Expenditure in the Fifth Schedule did not enable the appellant to charge for the work. "It is a definitional section and is not intended to provide for liabilities found nowhere else in the lease."

25. Accordingly the FTT found that the cost of the work could not be charged to the service charge under any provision of the respondents' leases.

26. On appeal the appellant maintains that the cost of the works is chargeable under those same provisions, and it is convenient to look at the arguments about each provision in turn. Before I do so I should like to clear away two red herrings, by which I mean issues that at first glance might appear significant but are in fact irrelevant.

Two irrelevant issues

The right to buy legislation

27. The right to buy legislation has been amended on a number of occasions; the provisions in the Housing Act 1980 were replaced by those of the Housing Act 1985, which was then amended by the Housing and Planning Act 1986 which came into force on 7 January 1987.

28. All the respondents' leases were granted after that date. That means that all were subject to restrictions only as to the level of service charges recoverable for the first five years of the term: section 125, and Schedule 6 paragraphs 16B and 15C, of the Housing Act 1985 as amended. Accordingly none of the statutory provisions in the right to buy regime has any effect now upon the extent to which the service charges imposed by the leases are recoverable and I do not need to look further at that legislation. And I am not assisted by the decisions of the Tribunal and of the Court of Appeal in *City of London v Leaseholders of Great Arthur House* [2019] UKUT 341 (LC) and [2021] EWCA Civ 341, which were about leases where the landlord was obliged to make good structural defects.

The proviso in the two earliest leases

29. Second is the proviso to the definition of Total Expenditure in the leases of 7 Malting House and 44 Brewster House (italicised in the text quoted at paragraph 17 above). The effect of the proviso is to narrow down any provision in the lease that enables the landlord to charge to the service charge the cost of "such repairs as amount to the making good of structural defects"; it therefore has no effect at all unless any of the provisions of the lease allow the landlord to charge for such items. The appellant relies upon the terms of the lease (although it does not say that the proposed work amounts to "repair"); it says that if the lease does allow it to charge for the work then the proviso in these two leases does not affect that entitlement because the need to strengthen the buildings against normal loading was not known until very recently. Conversely, if the provisions of the lease do not allow the appellant to charge for the work the proviso does not add anything.

30. As will be seen, I agree with the FTT that the terms of the lease do not allow the appellant to charge the lessees for the work, and so the terms of the proviso are irrelevant.

31. Ms Gibbons sought to argue that the proviso was nevertheless relevant in that it had obviously been drafted with the right to buy legislation in mind and that that strengthened the respondents' position, since the policy of that legislation was that they should not be charged for this sort of work. I am unimpressed with that argument. Policy changed in 1986 and the right to buy legislation was amended so that the landlord's ability to recover a service charge was not regulated beyond the first five years of the lease; I do not agree with Ms Gibbons, nor with the FTT, that a policy expressed in legislation that is no longer in force should colour the construction of the leases. They are to be construed in accordance with the ordinary principles of construction as elucidated in *Arnold v Britton* [2015] UKSC 36.

Clause 5(5)(a): "To maintain and keep in good and substantial repair and condition"

32. I now turn to the provisions of the lease on which the appellant relies. Mr Bates KC rightly emphasised the approach set out by the Supreme Court in *Arnold v Britton*, and particularly paragraph 15:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101*, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. …"

33. Clause 5(5)(a) of the leases requires the landlord "To maintain and keep in good and substantial repair and condition … the main structure of the buildings". Mr Bates KC argued that the FTT was wrong to find that remedying a structural defect, absent some degree of physical damage or deterioration, does not fall within that obligation. He accepted that this was not a work of "repair", because the authorities are clear that there can be no repair in the absence of disrepair. But the work falls squarely within the natural and ordinary meaning of the word "maintain", which means to prevent damage or harm. They will ensure that the buildings do not fall down and are safe for occupation and habitation; if the work is not done the building will not be "maintained" or in "good condition".

34. Mr Bates KC relied on the decision of the Deputy President, Martin Rodger KC, in *Assethold Limited v Watts* where the Tribunal had to decide whether a landlord was entitled to recover from its tenants the legal expenses incurred in a dispute with the owner of neighbouring land over work to a party wall. One of the provisions on which the landlord relied was its covenant to maintain the property, and to do whatever "may be considered necessary or desirable" for its "proper maintenance safety [and] amenity". At paragraph 44 the Deputy President recorded the landlord's argument:

> "that it was not necessary that there first exist some element of disrepair in the structure of the Building before the appellant's obligation [to maintain] was engaged. "To maintain" meant something different from "to repair", since otherwise one or other expression would be wholly redundant. While "repair" connoted a process or activity involving the restoration to its original condition of something which had deteriorated from that condition, the verb "to maintain" described a result to be achieved, namely the preservation of the subject matter of the covenant in its original state. Maintenance therefore included preventative measures taken before any state of disrepair had developed."

35. That argument was not successful because incurring legal fees was found not to fall within the covenant to maintain (although the landlord succeeded on a different basis); but Mr Bates KC relies on what the Deputy President said at paragraph 49:

> "To my mind, "to maintain" and "to repair" each connote the doing of something to the subject matter of the covenant. To repair involves undertaking work to restore the subject to a former condition from which it has deteriorated. To maintain involves preserving a functional condition by acts of maintenance performed on or to the thing to be maintained. In neither case is the expression apt to describe a process or activity remote from the thing to be repaired or maintained."

36. The work in question here is precisely to preserve the building in a functional condition, said Mr Bates KC. Looking again at the points made in paragraph 15 of the Supreme Court's judgment in *Arnold v Britton*, the natural and ordinary meaning of this covenant encompasses the work. Another relevant provision is clause 5(5)(j) which sets out the professionals that the landlord is required to instruct: the wide range of skills indicates the breadth of the landlord's obligations. As to what the parties knew at the time the lease was granted, at the time of the grant of each of these leases everyone had good reason to suppose that the problems of the Large Panel System had been fixed. All the work required had been done. So it is wrong to suggest that if the parties intended work caused by the large Panel Systems to be included they would have said so expressly; on the contrary there was no reason for them to mention it.

37. For the respondent, Ms Gibbons pointed out that the approach to "maintain" in *Assethold Limited v Watts* does not take the appellant far enough; there was no finding that to maintain means to improve on the building's original state or to put the buildings into a condition they have never before been in.

38. Ms Gibbons continued to rely on the authorities about the meaning of "maintain", which the FTT found persuasive. I can go through them relatively briefly.

39. *Welsh v London Borough of Greenwich* [2000] 3 EGLR 41 was a claim for damages by a tenant; the Court of Appeal found that by allowing severe black spot mould to develop in the building the landlord was in breach of its covenant to "maintain the dwelling in good condition and repair." There was no disrepair, but the problem was caused by a failure to provide thermal insulation or dry lining for the walls, and crucially the problem was a physical one which meant that the building was not in good condition.

40. In *Fluor Daniel Properties Ltd and ors v Shortlands Investments Ltd* [2001] 2 EGLR 103 the issue was whether a landlord was entitled to recover by way of service charge the cost

of replacing major components of the air-conditioning in the building, which it could do if the work fell within its covenant to "uphold maintain repair amend renew …and otherwise keep in good and substantial condition and as the case maybe in good working order and repair… all apparatus equipment plant and machinery" in the building. The landlord failed; Blackburne J found that although the covenant "extends to the doing of works which go beyond repair strictly so called", nevertheless the obligations "presuppose that the item in question suffers from some defect (*i.e. some physical damage or deterioration or, in the case of plant some malfunctioning*) such that repair, amendment or renewal is reasonably necessary" (emphasis added).

41. In *Mason v Totalfinaelf UK Limited* [2003] EWHC 1604 (Ch) Blackburne J reached a similar conclusion in a claim for damages for terminal dilapidations. Here the covenant in question was to "well and substantially uphold support maintain amend repair decorate and keep in good condition the demised premises", and the question was whether that could include preventive work; it was held that it could not, and that there was no authority for the proposition that:

> "merely because a piece of equipment is old and there must inevitably come a time when the equipment must be replaced, preventative works can be required to prevent the consequences of the equipment failing even though, in the meantime, it continues to perform its function."

42. The same conclusions were reached in *Westbury Estates Ltd v The Royal Bank of Scotland Plc* [2006] CSOH 177 (the Outer House of the Scottish Court of Session) and in *Alker v Collingwood Housing Association Ltd* [2007] EWCA Civ 343. Finally Ms Gibbons turned to *Dowding & Reynolds, Dilapidations,* where there is no separate consideration of the meaning of a covenant to "maintain" but a discussion of an obligation to "keep in good condition". At paragraph 8-14 under that heading the learned authors discuss of *Welsh v Greenwich LBC* and the Court of Appeal's approach to a covenant to "maintain … in good condition and repair" and say this:

> "… even though there need not necessarily be disrepair, nevertheless some form of physical manifestation in the subject-matter of the covenant is required before the covenantor is liable."

43. Paragraph 8-15 states:

> "Absent special circumstances, it is thought that where an obligation to keep in good condition is included as part of a wider covenant to keep in repair, it will ordinarily be interpreted as meaning that no work is required until some degree of physical damage or deterioration has occurred."

44. Mr Bates KC argued that the cases turn on their own facts, and that all I need do is look at the words of the lease in light of what is said in *Arnold v Britton*. I do not agree that these authorities are rendered irrelevant by the Supreme Court's decision; the appellant accepts, as it must, that the meaning of "repair" is well-established, and in the same way the approach taken by the courts to "maintain" – and similar terms such as "keep in good condition" - cannot be ignored. The cases seem to me to speak with one voice that such covenants are engaged only where there is some form of physical deterioration; none of the cases supports the appellant. *Assethold Limited v Watts* is as unhelpful as the rest; what was argued there was that maintenance was "the preservation of the subject matter of the covenant *in its*

original state" (*Assethold* paragraph 44, quoted at paragraph 34 above), and at paragraph 49 the Deputy President said that "To maintain involves *preserving* a functional condition by acts of maintenance performed on or to the thing to be maintained"; the emphases are mine. To preserve is not to make something new, or to make something safe that was not safe.

45. In *Alker v Collingwood Housing Association Ltd* at paragraph 13 Laws LJ said:

> "I do not think that a covenant to maintain comes any closer to a covenant to make safe than does a covenant to repair."

46. That sums up the position precisely. The consistent approach of the authorities is that whilst "maintain" does mean something different from "repair" – it is not otiose and can denote something preventive rather than remedial – neither a covenant to repair nor a covenant to maintain is a covenant to remedy structural defects, nor to make safe a building that was not safe when it was built.

Clause 5(5)(o): safety

47. Clause 5(5)(o) requires the landlord:

> "Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors may be considered necessary or advisable for the proper management maintenance safety amenity or administration of the Building."

48. If the work does not amount to maintenance, said Mr Bates KC, it is nevertheless obviously being done for the safety of the buildings and falls within this clause. Again he referred to clause 5(5)(j) as an illustration of the range of skills the parties had in mind that the landlord might need. Mr Bates KC criticised the FTT for reading down this provision on the basis that it is a "sweeper" clause.

49. In fact at its paragraph 36 the FTT was careful to point out that "giving a clause such a label does not define its meaning or extent." But this is a deliberately non-specific clause coming at the end of a list; I agree with Mr Bates KC that it is a form of future-proofing such as is commonly and sensibly provided for in a lease that is supposed to last for many decades. The idea is to pick up items that cannot be specifically foreseen on the date of the lease

50. Mr Bates relied again upon *Assethold v Watts*, where at paragraph 58 Deputy President said that language that is clearly intended to encompass a wide variety of situations should not be so restrictively construed as to deprive it of any real effect, and added:

> "It seems to me to be wrong in principle to start from the proposition that, with certain types of expenditure, including the cost of legal services, unless specific words are employed no amount of general language will be sufficient to demonstrate an intention to include that expenditure within the scope of a service charge. Language may be clear, even though it is not specific."

51. Ms Gibbons argued that a purely literal construction of this clause is not appropriate. As Lord Hodge said in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, paragraph 10:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focusing solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning"

52. So the issue is: was clause 5(5)(o) intended to encompass anything so far-reaching as an obligation to remedy structural defects? The FTT said that such a clause was "not intended for works so extensive that the costs would vastly exceed those likely in any category expressly mentioned."

53. Mr Bates KC argued that it is wrong to consider the cost of the work when construing the Clause. Cost is relevant to the reasonableness of service charges in accordance with section 19 of the Landlord and Tenant Act 1985, but not relevant to construing the lease.

54. I agree with that to the extent that if a particular type of work were clearly within an obligation, then the fact that a particular instance of that work was dreadfully expensive would not be relevant to the construction of the lease. But this clause is, necessarily, unclear; and so it is relevant to its construction that the remedying of structural defects generally tends to be very expensive, and that a commitment to bear the cost of such work is obviously a commitment to something "potentially ruinous", as I put it in *Dell v 89 Holland Park Management Company Limited* [2022] UKUT 169 (LC). I appreciate that the sums involved here are lower, but for the leaseholders of flats in Tower Hamlets a liability of £60,000, £70,000 or £80,000 may well be impossibly expensive. That is part of the facts and circumstances known to the parties, which *Arnold v Britton* tells us to consider, and also a matter of commercial common sense. The Court of Appeal in *Holland Park Management Company Limited v Dell* [2023] EWCA Civ 1460 confirmed at paragraph 51 (Falk J) that that was the correct approach. The issue there was whether the landlord's covenants included an obligation to object to planning applications and to engage in litigation about a neighbour's building operations which (unlike those in *Assethold Ltd v Watts*) did not threaten the structure of the landlord's building. Reliance was placed upon a similar "sweeper clause"; after a long list of obligations relating to repair, maintenance, insurance, cleaning, and the employment of staff and professional advisers the lease required the landlord:

> "Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the reasonable discretion of the Lessor may be considered necessary or advisable for the proper maintenance safety amenity and administration of the Building."

55. In examining that clause the Court of Appeal considered that the fact that this was a "sweeper" clause was relevant; as Falk J explained at paragraph 48 the specific provisions that precede it are "the best indication" of what it might include. Such a clause might include the incurring of costs in a dispute over the repair of the building, but could not be extended to the extraordinary litigation costs the landlord had incurred, going far beyond the scope of its obligation to repair and maintain the building and so on in the clauses that precede the sweeper clause. Only an express provision could go that far.

56. I agree with Ms Gibbons that exactly the same can be said here. Clause 5(5)(o) in requiring the landlord to do everything it considers necessary or advisable "for the proper management maintenance safety amenity or administration of the Building" does not require it to remedy structural defects because that goes too far beyond the scope of anything that precedes it. Mr Bates KC argued that the words "Without prejudice to the foregoing" at the start of the clause mean that in construing it one cannot look at the items earlier in the list, but that is not correct. The effect of those words is to state that clause 5(5)(o) does not narrow down or contradict anything previously provided, but that does not mean those previous items have to be ignored. Far from it; they set the context for this clause and indicate its purpose and effect. Yes, it is intended to provide for items not yet thought of, but only express words will generate an obligation that is vastly different in kind and in likely scale from the obligations already specified.

57. In particular, in my judgment a tenant who signs up to pay for the landlord's compliance with a covenant to "repair" and to "maintain" has to be taken to know that the courts have specifically held that neither of those terms includes an obligation to remedy a structural defect. Such a tenant would not intend that the obligation to do just that could be tucked in to the general words of a future-proofing clause like clause 5(5)(o).

58. In conclusion I agree with the FTT: clause 5(5)(o) does not encompass the work in issue here.

The definition of Total Expenditure

59. Finally, we turn to the definition of Total Expenditure. I set out the relevant provisions again, without the wording that appears in only two leases and that I have explained is irrelevant to what I have to decide:

> "The Service Charge
>
> 1. In this Schedule the following expressions have the following meanings respectively:-
>
> (1) "Total Expenditure" means the total expenditure incurred by the Lessors in any Accounting Period in carrying out their obligations under Clause 5(5) of this Lease less sums expended from the monies set aside under Clause 5(5)(p) of this Lease and any other costs and expenses reasonably and properly incurred in connection with the Building …
>
> (2) "the Service Charge" means such reasonable proportion of Total Expenditure as is attributable to the Demised Premises …"

60. So the term "Total Expenditure" indicates the entire sum of which each leaseholder pays a proportion. It is defined as what it costs the landlord to carry out its obligations under clause 5(5) of the lease – of which we have encountered three already, and of which the rest are not of assistance – and "any other costs and expenses reasonably and properly incurred in connection with the Building."

61. So again we have a sweeping up clause. Again therefore it is not appropriate to read it literally as including absolutely anything that the landlord might reasonably and properly do in connection with the building, for the reasons set out above; we are required by *Arnold*

v Britton to look at the context of the clause, which here includes its function, which is a definition. It clearly takes the scope of the service charge beyond what the landlord is obliged to do under clause 5(5), but how much wider does it go? It recognises that the landlord might reasonably and properly do more than it is actually obliged to do, and has the effect that if he does so the leaseholders must foot the bill; but could the parties have intended it to include the potentially open-ended and ruinously expensive obligation in question here? In my judgment clearly not.

62. And again, in signing up to covenants to repair and maintain, the original tenants knew that those terms excluded the remedying of structural defects. They would not have intended that potentially enormous liability to be included in the general wording of clause 5(5)(o); still less would they expect it to be derived from the words of a definition.

63. In my judgment the landlord cannot rely upon the definition of Total Expenditure to make the leaseholders liable for this work.

Conclusion

64. The appeal fails and the decision of the FTT stands.

65. Mr Bates KC indicated that the appellant is content to submit to an order under section 20C of the Landlord and Tenant Act 1985 that its costs in this litigation shall not be recovered from the leaseholders by way of service charge; if the parties would like a formal order to that effect I shall make one

Upper Tribunal Judge Elizabeth Cooke

11 July 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

ANNEX

Belinda Janet Le Mesurier

Timothy James Woodward

Christel Hawkins

Constantinos Thoma

Gillian Susan Thoma

Jean-Paul Noel Raven

Ya Wen

Kear Khanom Ali

WSJL Ltd

Li Menggian