UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – Construction of Lease – whether roof within the demised premises – apportionment of costs of roof repair – whether tenant liable to contribute 75% or 50% of the costs of repair – held roof included within demise and tenant liable to contribute 75% of repair costs – Appeal allowed on substantive point – section 20C appeal adjourned for further submissions.

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE FIRST TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

BETWEEN:

ROBERT RYAN **Appellant**

and

EUGENIA VILLAROSA **Respondent**

Re: Flat 2, 49 Coningham Road, London W12 8BS

Determination by written representations

Representations were received from
Justin Bates instructed by Northover Litigation on behalf of **the Appellant** and
Stan Gallagher instructed directly by **the Respondent**

The following case is referred to in this decision:

DECISION

Introduction

1. This is an appeal against the decision of the First – tier Tribunal ("the Ft-T") dated 1 March 2017.

2. The decision concerned the roof of a property known as 49 Conningham Road, London W12 8BS ("the building"). It is a Victorian terraced house in the Shepherd's Bush area of London and comprises a basement, a ground floor and two upper floors. The roof is above the second floor. It is not in dispute that the roof is in need of repair.

3. Ms Villarosa is the tenant of the ground, first and second floors of the building under a 99 year lease dated 6 June 1991 paying a rent of £100 per annum rising by £100 per annum every 33 years. Mr Ryan is the owner of the building and holds the reversion under the lease.

4. The lease contains provisions requiring the tenant to pay a service charge amounting to three quarters of the cost of the landlord fulfilling the obligations in the Third Schedule. Those obligations appear to include the repair and renewal of the roof. It also contains a clause deeming the roof and the foundations to be party matters and repaired at the joint expense of the tenant and the tenants or occupiers of the remainder of the building.

5. Those obligations are at the heart of this dispute. The F-tT held that the roof was within the demise but that the deeming clause had the effect of reducing the tenant's obligation to the costs of repair to 50%. It also made an order under s 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") that only 50% of the landlords costs are to be regarded as relevant costs to be taken into account in determining the amount of the service charge.

6. Permission to appeal was granted by the Deputy President on 14 March 2017. In granting permission he commented:

> There is clearly room for argument over the proper construction of the lease, which the Ft-T described as badly drafted, and it is in the interests of both parties for a definite conclusion to be reached on the status of the roof and the extent of the parties' respective liabilities to contribute to its repair. [The landlord's] contentions in respect of the roof are arguable and have a realistic prospect of success.

7. The Deputy President also granted permission in relation to the s 20C order. However, he made the point that the Tribunal will only reconsider the s 20C order if it reaches a different conclusion on the substantive issues. If it upholds the Ft-T's decision the decision to make a partial order under s 20C was well within its discretion.

The terms of the lease.

8. A number of the terms of the lease dated 6 June 1991 are relevant.

9. The Property is described as

Remainder of the Building at 49 Coningham Road, London W12

10. Under clause 1 the landlord demises

ALL THAT the property described in the First Schedule

11. The parcels clause in the First Schedule is in the following terms:

All that the whole of the building excepting the basement floor at 49 Coningham Road London W12 such flat to be known as flat number 2 in the County of London including the floorboards and joists on which the floors thereof are laid and the ceiling plaster of the said flat and (including also the door door frames windows and window frames) as the same is delineated and shown edged red (hereinafter called the Demised Premises") together with …

12. Clause 2 contains covenants by the tenant. Clause 2(3) obliges the tenant:

Subject to the provisions of Clause 2(9) hereof well and substantially to repair and at all times during the said term to keep in good and substantial repair the demised premises and all sewers drains roads and walls (including the doors door frames windows and window frames fitted in such walls) and erections which at any time during the said term may be upon any part of the demised premises.

13. Clause 2(9) is the service charge provision which so far as relevant provides:

To pay to [the landlord] without any deduction by way of further and additional rent three quarters of the expenses and outgoings incurred by [the landlord] in the repair maintenance renewal and insurance of the said building and the provision of services therein and the other heads of expenditure as the same are set out in the Third Schedule hereto …

14. The Third Schedule lists the expenses and outgoings which may be included within the service charge. The list includes:

The expense of maintaining repairing redecorating and renewing amending cleaning repointing painting graining varnishing whitening or colouring the said building and all parts thereof and all the appurtenances apparatus and other things thereto belonging and more particularly described in Clause 5(5) and 5(6) hereof.

15. Clause 5 contains covenants by the landlord. Clause 5(5) is concerned with repair and Clause 5(6) with external painting. Clause 5(5) provides:

> Subject to prior payment by [the tenant] of his due contribution towards the reasonable cost thereof to repair cleanse maintain resurface and renew the roofs structure walls foundations and main structure of the building of which the demised premises form part and the chimney stacks gutters and rainwater pipes service pipes and other cables and drains not comprised within this demise and any other walls used or to be used in common by the occupiers of the demised premises and the occupiers of the remainder of the building of which the demised premises form part …

16. Clause 6 contains declarations by the parties. Thus, Clause 6(1) contains a declaration that

> The roof of the building of which the demised premises form part and the foundations thereof shall be deemed to be party matters to be maintained and repaired at the joint expense of [the tenant] and the lessees or the tenants of [the landlord] or the occupier for the time being of the remainder of the building of which the demised premises form part.

The reasoning of the Ft-T

17. In paras 9 to 16 the Ft-T set out or summarised the terms of the lease relevant to the issues. It described the lease as poorly drafted in that clause 5(5) (which requires the landlord to repair the roof and to recover the due proportion (75%) from the tenant under the service charge) is inconsistent with the declaration in clause 6(1) (which declares the roof to be a party matter to be maintained and repaired as a joint expense of the tenant and the tenant or occupier of the remainder of the building.) This inconsistency is at the heart of the dispute and demonstrates the failure of the draftsman to adjust the lease to take account of the unusual arrangement between the residential units in this terraced property.

18. The F-tT referred to the decision in *Arnold v Britton* [2015] AC 1619 as authority for the proposition that the Ft-T had to interpret the lease by identifying what the parties had meant through the eyes of a reasonable reader.

19. It concluded that the roof was part of the demise. In so doing it relied on the definition of the Property at the head of the lease, the parcels clause in Schedule 1 and the phrase in clause 6(1) "*The roof of the building of which the demised premises form part"*. These seemed clearly to show to the Ft-T that it was intended that the roof was part of the demised premises.

20. The Ft-T went on to consider the meaning of clause 6(1). In its view it was the intention of the parties in 1991 that the roof was within the demise but that the foundations were not included. However as both the roof and the foundations benefited both parties they should be maintained and repaired at joint expense. It went on to consider the meaning of joint expense. In its view a reasonable reader would have understood it to mean a 50/50 split. Thus clause 5(5) would apply to both the roof and the foundations but that the tenant's contribution would be 50% of the cost of these items.

Mr Bates's submissions

21. Mr Bates submits that the Ft-T's construction of the lease was wrong. He points out that there is no express reference to the roof being demised in Schedule 1. He suggests that the obligation on the landlord in Clause 5(5) to repair the roofs structure and walls is a strong indication that the roof has been retained. He points out that Clause 2(3) makes no reference to the roof and that the service charge mechanism incorporates Clause 5(5) as part of the obligation within the service charge. He submits that the Ft-T was wrong to derive support from the description of Property at the top of the lease and wrong to derive support from clause 6.

22. Once it is accepted that it is the landlord's obligation to repair the roof under Clause 5(5) the apportionment should be in accordance with Clause 2(9). The reference to joint expense in clause 6(1) does not assist the tenant. Joint need not be equal.

23. He also submits that the Ft-T was wrong to deprive the landlord of 50% of his costs.

Mr Gallagher's submissions

24. Mr Gallagher submits that the Ft-T was correct for the reasons it gave. He draws attention to the words of the parcels clause – "the whole of the building excepting the basement floor". He submits that that means what it says. He submits that the natural meaning of the parcels clause should not be affected by the bad drafting of Clauses 2(3), 5(5) an 6(1). He also submits that the Ft-T was right to interpret "joint expense" in the way it did.

Discussion.

Arnold v Britton

25. Lord Neuberger's judgment in *Arnold* is the most recent case of the highest authority on the interpretation of written contracts. He puts it this way in para 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] 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.

26. He went on to emphasise seven factors. It is not necessary to cite them in full. The second and fourth reasons are relevant:

> 18 Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.
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> 20 Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

Was the roof included in the demise.

27. I agree with Mr Bates that this is primarily a matter of interpreting the parcels clause in Schedule 1. I also agree with him that Clause 6 does not assist in that task. As already noted Clause 6(1) starts

> "The roof of the building of which the demised premises form part and the foundations thereof"

28. In my view the words "*of which the demised premises form part*" refer to the building and not to the roof. This is confirmed by the use of the word "*thereof"* after foundations. Thus, this must also be a reference to the foundations of the building of which the demised premises form part.

29. I turn to the parcels clause. The crucial words are at the beginning - *All that the whole of the building excepting the basement floor*. The natural meaning of those words is to my mind unambiguous. It includes the roof.

30. Mr Bates suggests that the natural meaning should be rejected because there is no express reference to the roof in Schedule 1, and Clauses 5(5), 2(9) and 2(3) suggest that the roof is not included.

31. For my part I see nothing in Clause 2(3) inconsistent with the natural interpretation of the parcels clause. Clause 2(3) is subject to Clause 2(9). Subject to Clause 2(9) it requires the tenant

to repair the demised premises. It says nothing about what is included in the demised premises. As already noted that is in the parcels clause.

32. Clause 2(9) has to be read with the Third Schedule and Clause 5(5). There can be no doubt that Clause 5(5) imposes an obligation on the landlord to maintain repair and renew the roof. Under Clause 2(9) the tenant has to contribute 75% of the cost. However, I do not accept that that obligation is inconsistent with the roof being included within the demise. It is a matter for the parties how they allocate the repairing responsibilities under the lease. There is nothing unusual with an arrangement such as that contemplated by this lease.

33. In my view there is nothing to displace the natural meaning of the words in the parcels clause. In agreement with the Ft-T I would hold that the roof is included in the demise. I reach this conclusion without considering the words "*Remainder of the Building at…"* at the beginning of the lease. However, as those words are consistent with the parcels clause I do not need to consider them further.

Contribution

34. I agree with the Ft-T that there is an inconsistency between the carefully drafted scheme imposed by Clauses 2(3), 2(9), 5(5) and The Third Schedule on the one hand and the declaration in Clause 6(1) on the other. I also agree that the draftsman does not appear to have considered how Clause 6(1) fits into that scheme. To that extent I agree that this is a poorly drafted lease.

35. I have to determine what a reasonable person having all the background knowledge which would have been available to the parties in 1991 would have understood those clauses in the lease to mean.

36. A number of points can be made about Clause 6(1). First, it is said to be a Declaration and thus not necessarily imposing a contradictory obligation. Second, it is not a declaration as to the rights between the landlord and the tenant. The rights are as between the tenant on the one hand and tenants and/or occupiers of the remainder of the building (i.e the basement flat). Those tenants or occupiers are not party to the lease and it is difficult to see how they could be bound by it. Indeed it is conceivable that the basement flat could be empty and unlet. Third, as Mr Bates points out, the expression "at the joint expense" is silent as to the division of the expense between the tenant and the tenant/occupiers of the basement. Fourth, the demised premises comprise three of the four floors. Thus, whilst as the Ft-T pointed out the roof clearly benefits all four floors the tenant would appear to get greater benefit. As noted above Clauses 2(3), 2(9) 5(5) and the Third Schedule create a coherent logical scheme which imposes a liability on the tenant to contribute 75% of the cost of the roof repairs. For the above reasons I do not think that that scheme is overridden by the poorly drafted declaration in Clause 6(1) between the tenant and the tenant/occupiers of the basement flat.

37. It follows that I would respectfully disagree with the views of the Ft-T and hold that the landlord is entitled to recover 75% of the costs of the roof repair under Clause 2(9).

Section 20C

38. It is important to remember- that the jurisdiction under section 20C only arises where the landlord has the right to include the costs of the proceedings as part of the service charge. If there is no such right the Ft-T cannot grant such a right.

39. In this case the items included within the service charge are contained in the Third Schedule. The only item which could conceivably be relevant is item 6:

> All fees and costs incurred in respect of the annual certificate and of accounts kept and audits made for the purpose thereof.

40. I am conscious that this is not a point that was argued below or has been raised in this appeal. However, my strong provisionally held view is that this clause cannot possibly authorise the inclusion of the landlord's costs before the Ft-T as part of the service charge.

41. If, however, my provisional view is wrong and there is power to include the landlord's costs in the service charge I can see no basis for making a s 20C order. In the light of this decision the landlord has succeeded on all material points, there is no basis for depriving him of his costs.

42. As this is a point which has not been raised before I would give the parties 21 days to make any submission they think appropriate in respect of it.

Conclusion

43. I would allow the appeal on the substantive issue but adjourn the section 20C appeal pending further submissions on the question of whether there is any power in the lease for the landlord to include his costs before the Ft-T as part of the service charge.

ADDENDUM

44. In their further submissions Mr Bates and Mr Gallagher have agreed that there is no power to include the landlord's costs before the Ft-T as part of the service charge. In those circumstances (and in the light of Mr Gallagher's request) I would:

1. dismiss the appeal on the issue of whether the roof is included in the demise and declare that the roof is included within the demise.
2. allow the appeal on the issue of the percentage contribution and hold that the landlord is entitled to recover 75% of the costs of the roof repair under clause 2(9);
3. dismiss the section 20C appeal upon the parties having now agreed that there is no power in the lease that enables the landlord to include his costs of these proceedings as service charge

His Honour John Behrens
7 December 2017