UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – construction of lease – no variable service charge provisions in lease – leaseholder's right of way over communal stairway and landing conditional on paying half of the cost of maintaining them in repair – whether leaseholder required to contribute to cost of repairs to roof over stairwell – appeal dismissed

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

BETWEEN:

TWO RIVERS HOUSING

Appellant

-and-

JACOB EDWARD SANDERS

Respondent

Re: 3 Wynols Close,
Broadwell,
Coleford GL16 7RR

Martin Rodger QC, Deputy Chamber President

10 March 2022

Remote hearing by video link

James Fieldsend, instructed by Birketts LLP, for the appellant
The respondent in person

The following cases are referred to in this decision:

BNY Mellon Corporate Trustees Services Ltd v LBG Capital No.1 Plc [2016] UKSC 29

Fishbourne Developments Ltd v Stephens [2020] EWCA Civ 1704

McGeown v Direct Travel Insurance [2004] 1 All E.R. (Comm) 609

Introduction

1. No.3 Wynols Close is a one-bedroom flat on the first floor of a block containing four similar flats on a former local authority housing estate at Coleford in Gloucestershire. The issue in this appeal is whether the First-tier Tribunal (Property Chamber) (FTT) was correct when it decided that the leaseholder of the flat, Mr Sanders, is not liable to contribute towards costs incurred by his landlord, Two Rivers Housing, in carrying out repairs to a section of the roof of the building covering a communal stairwell and first floor landing providing access to the flat.

2. The issue came before the FTT on an application by Two Rivers under section 27A of the Landlord and Tenant Act 1985 for a determination whether expenditure incurred in carrying out repairs to the roof in 2019 could be recovered from Mr Sanders. The application also included a request under section 20ZA, 1985 Act, for dispensation from the relevant statutory consultation requirements.

3. In a decision published on 6 July 2021 the FTT decided that the lease did not include any provision under which Mr Sanders could be required to contribute towards those costs. If it had done the FTT was satisfied that no prejudice had been caused by the landlord's omission to consult before carrying out works, and that the cost of the works had been reasonable.

4. The FTT granted Two Rivers permission to appeal because its decision raises an issue of importance concerning the proper interpretation of a standard form of lease. The appeal was presented on behalf of Two Rivers by Mr James Fieldsend, while Mr Sanders made representations on his own behalf. I am grateful to them both for their assistance.

The facts

5. The building was constructed by the Forest of Dean District Council in about 1977. The FTT did not provide a detailed description but I have been shown some useful photographs and some detailed construction drawings which, unusually, are attached to Mr Sanders' lease. From the photographs and plans it is apparent that the block of flats is of brick construction with a pitched roof covered by concrete tiles. It is on two floors and contains four flats, two on each floor, each of which has a more or less identical layout. At the front a projecting part of the structure contains the communal entrance lobby giving access to the two ground floor flats and a staircase leading to the upper floor landing and the remaining flats; the entrance lobby has two external doors, one on each side, and there are windows on the half landing and upper landing. There are two storerooms beside the staircase on each floor. The staircase, landings and storerooms are fully enclosed by the exterior walls of the building and covered by part of the main pitched roof.

6. Following a routine inspection of the building in 2018 water was found to be penetrating through part of the roof above the communal stairwell. The problem was attributed to the age of the roof and the appellant's surveyor determined that the roof tiles would have to be removed, the roof felt and batons replaced, and the roof re-tiled using the original tiles. The work was complicated by the presence of asbestos surrounding some of the timber beams

over the stairwell. The appellant decided that the risks associated with the asbestos required that work should be undertaken immediately without engaging in a statutory consultation with leaseholders. Work was carried out between January and April 2019 and a work order suggests that 30 square metres of roof tiling was lifted to enable rafters, roof joists and fascias to be renewed. Some re-pointing of the exposed brick work surrounding the stairwell was also carried out, but no work was required to the staircase itself.

7. The cost of the works was £6,264 and the landlord claims to be entitled to recover half of that cost from Mr Sanders. In February 2021 it issued its applications under s.27A and s.20ZA, Landlord and Tenant Act 1985 to establish whether it has the right to recover that sum.

The lease

8. The lease under which Mr Sanders holds his interest was granted on 11 April 1994 by the Forest of Dean District Council to give effect to the tenant's statutory right to buy. It is for a term of 125 years and demises the property described in the first schedule. That description refers to a number of detailed lease plans. The property includes, in addition to the flat on the first floor, an enclosed storeroom on the first-floor landing immediately outside the flat and a portion of the garden at the rear of the building.

9. By clause 9(i) of the lease the landlord covenanted "to keep in repair (including decorative repair) the structure and exterior of the property and the building".

10. The lease contains a form of service charge which is usually seen only in right to buy leases, but these are coupled with additional payment conditions which are unusual for any sort of lease. Beginning with the service charge, clause 3 of the lease is a leaseholder's covenant to pay a rent of £10 per year together with two other sums by way of further and additional rent which are designated "the service charge". The first component of the service charge comprises £33.75 per annum, being "part of the expenses and outgoings incurred by the Council in the repair maintenance and renewal of the external decorations of the property and contribution to communal stairway lighting of the property". The second component is a sum £76.14 per annum (to be increased from time to time in line with inflation) in respect of the insurance of the property. Neither of these sums is capable of varying by reference to the costs incurred by the landlord and so neither sum is a "service charge" within the statutory regime in sections 18-30 of the 1985 Act.

11. The additional payment conditions are associated with a number of rights and easements granted to the leaseholder and specified in the second schedule to the lease. Of particular relevance are the rights conferred by paragraphs 4, 10 and 11 of that schedule.

12. By paragraph 4 of the second schedule the leaseholder was granted, in unqualified terms:

> "a right of use of and protection from and by the roof of 1 Wynols Close aforesaid for the benefit of the property …".

I take the reference to "the roof of 1 Wynols Close" as being to the whole of the roof of the building. It cannot mean the roof of Flat 1, because Flat 1 is on the ground floor and is specifically referred to in the next paragraph of the second schedule where a right of support from Flat 1 is granted for the benefit of the property. A number of buildings were constructed by the District Council in Wynols Close and I assume this building was known at the time the lease was granted as 1 Wynols Close.

13. Paragraphs 7 to 11 grant the leaseholder five different rights of way, each of which is subject to the payment of a share of the expense of maintaining and keeping the subject of the right in repair. Paragraphs 7, 8 and 9 confer rights of way over pathways and parking areas subject to the leaseholder contributing to the cost of repairs in proportion to the number of flats granted the same right (one quarter in the case of the paths leading to the main entrance, one half in the case of the path leading to the rear garden, and one twelfth in the case of the common parking area). These routes are shown clearly marked on plan number 2 annexed to the lease.

14. Paragraphs 10 and 11 confer rights of way over the internal common parts of the building.

15. Paragraph 10 grants a right of way for the leaseholder and those authorised by him:

> "over and along the internal paved entrance area of the property shown coloured blue on plan number 1 annexed hereto … subject to a payment of a one quarter share of the expense of maintaining and keeping the whole or any part or parts of the said paved entrance area in repair."

16. Paragraph 11 grants a right of way over the stairway and landing leading from the entrance area to the flat on the upper floor, as follows:

> "A right of way from time to time and at all times hereafter and for all purposes … on foot only to and from the property … over and along the stairway and landing coloured yellow on the said plan number 1 annexed hereto subject to the payment of one half of the expense of maintaining and keeping the whole or any part or parts of such stairway and landing in repair."

The first of the plans annexed to the lease shows the ground and upper floors of the building; it also shows all four external faces in elevation, and a detailed section through the building depicting each of the rooms, the stairway and the landing as well as the structure of the roof and walls. The depiction of the ground floor on the plan shows the internal entrance area coloured blue and the lower part of the staircase and a half landing coloured yellow. The upper floor plan shows the remainder of staircase and the landings also coloured yellow. The four storerooms are shown uncoloured, as are the external walls of the building which surround the coloured areas. The demised premises themselves including one of the first-floor storerooms are shown edged in red on the plan of the upper floor and the flat is also edged in red on the elevational drawings.

17. To summarise, the lease obliges the landlord to keep the structure and exterior of the property and the building in repair (clause 9(i)). It contains no variable service charge entitling the

landlord to recover a contribution towards its performance of that obligation and the only covenanted contributions required of the leaseholder are the sums of £33.75 and £76.14 payable by clause 3(ii) as additional rent. The leaseholder's only other obligation is to contribute a variable amount towards the cost of repairing the various rights of way granted by the second schedule.

The FTT's decision

18. The only basis on which the landlord sought to recover a contribution from Mr Sanders towards the cost of the works was under paragraph 11 of the second schedule to the lease. The FTT recognised that the critical issue was one of construction of the lease and in paragraph 54 it directed itself that the approach it should adopt was: "one of applying a natural meaning to the words and if there is an ambiguity this ought properly to be resolved in favour of the respondent [the leaseholder] in this case being the party not seeking to rely upon the terms."

19. At paragraph 58 it went on:

> "The clause relied upon is part of the lease granting rights to the respondent leaseholder. In our opinion a narrow interpretation should be applied and the costs recoverable are only those relating specifically to repairs and maintenance of the areas defined in the plans. In our judgment as a matter of fact this does not include the roof."

The appeal

20. On behalf of Two Rivers Mr Fieldsend took issue with the approach to construction adopted by the FTT and criticised its suggestion that ambiguity ought to be resolved in favour of the leaseholder. In his submission the FTT had misapplied the *contra proferentem* principle, meaning that approach to interpretation of formal documents which proposes that any ambiguity should be resolved against the interests of the party who is assumed to have been responsible for drawing up the document.

21. I agree that premature resort to the *contra proferentem* principle is not appropriate and that, if it is to be used at all, it should be the last tool to be employed, not the first. In *BNY Mellon Corporate Trustees Services Ltd v LBG Capital No.1 Plc* [2016] UKSC 29 at [53] Lord Neuberger PSC declined to make use of the principle, describing it as "very much a last refuge, almost an admission of defeat". In *McGeown v Direct Travel Insurance* [2004] 1 All E.R. (Comm) 609 Auld LJ warned that:

> "A court should be wary of starting its analysis by finding an ambiguity by reference to the words in question looked at on their own. And it should not, in any event, on such a finding, move straight to the contra proferentem rule without first looking at the context and, where appropriate permissible aids to identifying the purpose of the commercial document of which the words form part. Too early recourse to the contra proferentem rule runs the danger of 'creating' an ambiguity where there is none."

22. Mr Fieldsend referred to *Fishbourne Developments Ltd v Stephens* [2020] EWCA Civ 1704, and to Asplin LJ's concise and heplful summary of the modern approach to contractual interpretation, at [33] :

> "The legal principles which apply to the interpretation of written contracts are very well known. The court's task when construing the [contract] is to ascertain the objective meaning of the words used by the parties in the context of the [contract] as a whole, taking into account the relevant factual background which would have been available to the parties, but excluding subjective evidence of the parties' intentions. The court must focus on the meaning of the relevant words in their documentary, factual and commercial context. If there is an ambiguity, or in other words, there are rival meanings, the court can give weight to the implications of the rival constructions by reaching a view as to which is more consistent with business common sense: *Arnold v Britton & Ors* [2015] AC 1619 per Lord Neuberger PSC at [14] – [23] and *Wood v Capita Insurance Services Limited* [2017] AC 1173: [2017] UKSC 24 per Lord Hodge JSC at [8] – [15] and *Rainy Sky SA & Ors v Kookmin Bank* [2011] UKSC 50 per Lord Clarke at [21]."

23. Mr Fieldsend suggested that, applying the proper approach to interpretation, the landlord was entitled to recover half of the cost of the work of repair to the roof from the leaseholder in reliance on paragraph 11 of the second schedule. The relevant costs were those of maintaining and keeping in repair "the whole or any part or parts of [the] stairway and landing". The reference to the stairway and landing was to an enclosed area which included the walls and roof. The ordinary and natural meaning of those words did not limit the stairway and landing to an area which excluded the roof. Rather, the language of paragraph 11 was, as Mr Fieldsend put it, "all encompassing", capturing the whole and any part of the stairway and landing.

24. Mr Fieldsend suggested that the scope of the payment condition relating to the stairway and landing could not be determined by reference to the lease plans because they were only a two-dimensional diagram. If the area included within the payment proviso was to be determined by reference to the plans, they would be limited to the floor of those areas, which would not be consistent with the words actually used which extended to "the whole or any part or parts".

25. The construction favoured by Mr Fieldsend was said to be consistent with the purpose of the payment proviso. That purpose was to require the leaseholder to contribute to the cost of maintaining and keeping in repair the property over which he had been granted a beneficial right.

26. Even if the "stairway and landing" did not include the roof over the stairwell Mr Fieldsend submitted that it did not follow that the cost of the works fell outside the scope of the leaseholder's payment condition. The maintenance and repair of the stairway and landing (limiting those expressions simply to the areas over which the leaseholder could pass on foot) required remedial work to be carried out to the roof to remedy the cause of the leak.

The cost of that work was within the scope of paragraph 11 even if the necessary work was to a part of the building not forming part of the stairway and landing.

Determination

27. Despite Mr Fieldsend's cogent argument I have no doubt that the FTT was right in finding that the lease does not oblige the leaseholder to contribute towards the costs of repairs to the roof over the stairwell. I have reached that conclusion based on the language of paragraph 11 itself, in the context of the lease as a whole, and without the need to make any adverse assumption against the appellant as successor to the grantor of the lease. My reasons can be explained as follows.

28. First, as a matter of language, the extent of "the whole or any part or parts of such stairway and landing" referred to in paragraph 11 is limited to the structures over which the leaseholder has been granted a right to pass, and does not include the structures enclosing the stairwell or the roof covering it over which the leaseholder has been granted no rights. The careful scheme of proportionate contributions based on usage also supports the straightforward construction requiring the leaseholders to contribute only towards the cost of maintaining the routes over which they have access, and not any other part of the structure of the building including the walls enclosing those routes or the roof covering them.

29. Secondly, the landlord's comprehensive repairing obligation in clause 9(i) is not made subject to any contribution from the leaseholder. The lease does not include a conventional variable service charge allowing the recovery of all costs incurred by the landlord. It would not be right to approach the construction of the lease expecting to find some provision requiring the leaseholder to make a significant variable contribution to the upkeep of the structural parts.

30. Thirdly, the leaseholder is granted an unqualified right of support and protection from the roof of the building by paragraph 4 of the second schedule. That right is not conditional on the making of any contribution towards the cost of repair of the roof. It is a clear indication that the parties did not contemplate that the lessee would be required to contribute towards the cost of repairs to the roof.

31. Fourthly, the lease plans are detailed and precisely coloured and the same colouring is accurately described in the body of the lease. The stairway and landing are coloured yellow on the plan, and the entrance area is coloured blue. The areas coloured blue and yellow, representing the route of the rights of way conferred by paragraphs 10 and 11 exclude the structural walls enclosing the stairwell. Nor has the colouring been extended to other parts of the structure surrounding the staircase or landings, including in particular the storerooms. The plans are sufficiently detailed in both plan and elevation to have enable the parties to identify precisely which parts of the structure the lessee was to have rights over and was to contribute towards, but none of the vertical surfaces or the roof have been coloured.

32. Fifthly, the roof itself is a continuous structure covering the whole of the building. There is no separate roof over the stairwell. There is no indication that the cost of works to the roof was to be apportioned into costs referable to the part of the roof covering the stairwell and

cost referable to other parts of the roof and no mechanism for that to be done or for any disagreement over an apportionment to be resolved.

33. Sixthly, the right of way over the ground floor entrance area is conditional on the lessee paying one quarter of the costs of necessary repairs. The right of way over the stairway itself and the landing on the upper floor is conditional on the lessee paying half of the expense of relevant repairs. A clear line is represented on the plans between areas coloured blue and yellow. The parties did not treat the whole of the projecting area of the building containing the entrance area, the stairwell and landings as a single subject over which the lessee was granted rights conditional on contributing a single proportion of the cost of repairing the whole. Rather, they identified specific parts of the structure and required different contributions to the repairs of different parts. The parts they identified are all on the horizontal plane and the dividing line between them is clear. But the boundary between the parts of the walls which are to be regarded as enclosing the area coloured blue, and those parts to be treated as enclosing the area coloured yellow is not indicated on the plan. Moreover, the roof and the walls enclosing the stairway serve the leaseholders on the ground floor by providing protection to the entrance area, just as they serve the leaseholders on the upper floor by providing support and protection for the staircase and landing. The proportions in which the leaseholder is required to contribute to the maintenance of different areas are based on usage, not benefit, and they break down if applied to the structural components of the building which enclose, but do not form part of, the routes of the different rights of ways.

34. Finally, the storerooms on the ground and upper floors comprise about a quarter of the floor area of the projecting structure at the front of the building which houses the stairwell and landings, about a quarter of the external walls of that structure encloses the storerooms, and about a quarter of the roof over it covers the storerooms on the upper floor. The storerooms are not coloured yellow or blue on the plan and the leaseholder is not granted any right of way over them (one is demised to him, and he has no rights over the remaining three). Yet the appellant's case is that the leaseholder is required by paragraph 11 to contribute half of the cost of repairing the roof over the whole of the projecting structure, including the storerooms. The storerooms are clearly not part of internal paved entrance area, or of the stairway or landing and there is no basis on which the leaseholder can be required to contribute to their repair, or to the repair of the structural parts of the building which enclose them.

35. These seem to me to be powerful indicators that the parties did not intend the leaseholder of Flat 3 to be liable as a condition of access to his flat to contribute to the repairs of the roof over the stairwell. I therefore dismiss the appeal.

Martin Rodger QC,

Deputy Chamber President

14 March 2022

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.