UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case No: LRX/107/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD & TENANT – right to manage – whether a building 'structurally detached' and therefore self-contained – whether the right to manage acquired - Commonhold & Leasehold Reform Act 2002, s. 72

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

Between:

CQN RTM Company Limited

Appellant

and

(1) Broad Quay North Block Freehold Limited
(2) Broad Quay Management Company Limited

Respondents

Re: Central Quay North,
Broad Quay,
Bristol BS1 4AU
and
8 Marsh Street,
Bristol BS1 4AX

Before: His Honour Judge Hodge QC

Sitting at The Royal Courts of Justice, Strand, London WC2A 2LL
on
15 May 2018

The Appellant was represented by **Mr Philip Rainey QC** instructed by **Watson Farley & Williams LLP**

The Respondent was represented by **Mr Jonathan Upton** instructed by **Ashley Wilson Solicitors LLP**

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The following cases are referred to in this Decision:

Albion Residential Limited v Albion Riverside Residents RTM Company Limited [2014] UKUT 6 (LC)
Gala Unity Ltd v Ariadne Road RTM Co Ltd [2012] EWCA Civ 1372, [2013] 1 WLR 988

Grand v Gill [2011] EWCA Civ 554, [2011] 1 W.L.R. 2253
Ibrahim v Dovecorn Reversions Ltd [2001] 2 EGLR 46, (2001) 82 P & CR 362
Irvine v Moran [1991] 1 EGLR 261, (1990) 24 HLR 1
Marlborough Park Services Ltd v Rowe [2006] EWCA Civ 436, [2006] 2 EGLR 27, [2006] HLR 541
No.1 Deansgate (Residential) Ltd v No.1 Deansgate RTM Co Ltd [2013] UKUT 580 (LC)
Parsons v Gage (Trustees of Henry Smith's Charity) [1974] 1 WLR 435
Pearlman v Harrow School [1979] QB 56
*Railtrack plc v Guinness Limited [*2003] EWCA Civ 188, [2003] 1 EGLR 124
Re L (Children) (Preliminary Findings: Power to Reverse) [2013] UKSC 8, [2013] 1 WLR 634
Sheffield City Council v Oliver LRX/146/2007, [2008] EWLands LRX_146_2007
Southwark Council v Various Lessees of the St Saviours Estate [2017] UKUT 10 (LC)

The following additional case was referred to in the skeleton arguments:

St Stephens Mansions RTM Co Ltd v Fairhold NW Ltd [2014] UKUT 541 (LC)

DECISION

(As corrected)

Introduction

1. This is an appeal from a decision of the First-Tier Tribunal ('the FTT') dated 6 June 2017, following an inspection of the premises and a hearing on 29 March 2017. It raises the question of the true meaning of the phrase 'structurally detached' in s. 72(2) of the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act'). The FTT determined that the appellant right to manage company was, on the relevant date (5 October 2016), not entitled to acquire the right to manage premises at Central Quay North, Broad Quay, Bristol BS1 4AU and 8 Marsh Street, Bristol BS1 4AX ('the premises') under Chapter 1 of Part 2 of the 2002 Act. One of its reasons – and the only one relevant to this appeal - is that the FFT found that the appellant had not established that the premises were a structurally detached building for the purposes of s.72 of the 2002 Act. The FTT refused an application for permission to appeal.

2. On 19 December 2017 the Upper Tribunal (HHJ Gerald) granted permission to appeal limited to the issue of whether the premises consist of a self-contained building within s.72(2) of the 2002 Act. The Upper Tribunal refused permission to appeal on the separate issue of whether the premises consist of a self-contained part of a building within s.72(3)(a) of the 2002 Act. The reason given for granting permission to appeal was that having found that the premises were constructed separately from the adjoining central Tower Block, of different materials, and with no load-bearing connection between them, the FTT had failed to give adequate reasons as to why it had found that they were nonetheless not 'structurally detached', merely stating one reason (that there was no 'visible division' where the car park ceiling and the floor slabs joined underneath the premises and the central Tower Block). It was said to be arguable that the FTT had over-emphasised the absence of 'visible division', alternatively that it had misapplied the law in that regard. The appeal was directed to proceed as a review of the decision of the FTT, to be conducted under the Tribunal's standard procedure, with no new evidence being permitted. The Upper Tribunal directed that grounds 1 and 2 of the application for permission to appeal were to stand as the appellant's notice and grounds of appeal. Ground 1 is that the FTT was wrong in law to apply a test of visible division. Ground 2 is that there was a procedural defect in that the FTT applied the law incorrectly to the evidence before it and failed to give adequate reasons for its decision. The Tribunal's order stated that the appeal was to be listed at the Royal Courts of Justice in London (rather than in Bristol).

3. The appeal was heard on Tuesday 15 May 2018. The appellant was represented by Mr Philip Rainey QC and the respondents by Mr Jonathan Upton (of counsel). Both counsel had submitted detailed written skeleton arguments which the Tribunal had had the opportunity of pre-reading. The Tribunal is grateful to both counsel for their helpful written and oral submissions.

The statutory provisions

4. Chapter 1 of Part 2 of the 2002 Act makes provision for the acquisition and exercise by an RTM company, formed by leaseholders specifically for that purpose, of rights in relation to the management of premises to which that Chapter applies (which are referred to in s.71 as 'the right to manage'). The premises to which Chapter 1 applies are identified in s.72 which, so far as material to this appeal, provides as follows:

"**72 Premises to which Chapter applies**

(1) This Chapter applies to premises if—

(a) they consist of a self-contained building or part of a building, with or without appurtenant property,

(b) they contain two or more flats held by qualifying tenants, and

(c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.

(2) A building is a self-contained building if it is structurally detached.

(3) A part of a building is a self-contained part of the building if—

(a) it constitutes a vertical division of the building,

(b) the structure of the building is such that it could be redeveloped independently of the rest of the building, and

(c) subsection (4) applies in relation to it.

(4) This subsection applies in relation to a part of a building if the relevant services provided for occupiers of it—

(a) are provided independently of the relevant services provided for occupiers of the rest of the building, or

(b) could be so provided without involving the carrying out of works likely to result in a significant interruption in the provision of any relevant services for occupiers of the rest of the building.

(5) Relevant services are services provided by means of pipes, cables or other fixed installations."

The facts

5. The premises are owned and managed by the first and second respondents respectively. They form part of a redeveloped site between Broad Quay to the west and Marsh Street to the east in the centre of Bristol. The redevelopment, which took place between 2004 and 2009, involved the demolition of the existing buildings on the site except for a central concrete frame Tower Block which was retained, re-clad and extensively refurbished and extended

and is now the Radisson Hotel. New buildings were constructed to the north and south sides of this central Tower Block. The premises are the new building that was constructed to the north of the central Tower Block. They were said by the FTT to comprise a small basement, two ground level commercial units, and residential flats on floors 1 to 7. The residential flats consist of 95 private apartments (known as Central Quay North) which are accessed from an entrance in Broad Quay and 30 social housing flats which are accessed from a separate entrance in Marsh Street (known as 8 Marsh Street). A ramp from Marsh Street runs down to an underground car park. The car park is mostly underneath the central Tower and the South Block. However, part of the ramp is under the premises, which at that point are supported by concrete pillars, two of which rise from the central kerb that separates the up and down lanes of the ramp. There are water storage tanks and a pump in the basement area. The residential tenants do not have the use of the car park.

6. The appellant RTM company served the relevant claim notice claiming the right to acquire the right to manage the premises on or about 5 October 2016. The respondents served a counter notice alleging that the appellant was not entitled to do so by reason of s. 72(1)(a) of the 2002 Act, on the basis that the premises did not consist of a self-contained building or part of a building.

The FTT's decision

7. Before the FTT, there were five issues for determination, of which only the third is still live for the purposes of this appeal, namely whether the premises were a self-contained, structurally detached building for the purposes of s.72(2) of the 2002 Act. The FTT addressed this issue at paragraphs 50 to 59 of its Decision. It purported to explain and supplement its reasoning at paragraphs 17 to 23 of the FTT's reasons for refusing permission to appeal.

8. At paragraphs 50 and 51 of its original Decision, the FTT recognised that the central element of the respondents' opposition to the claim is whether the premises qualify as either a self-contained building or a self-contained part of a building for the purposes of s.72(1)(a) of the 2002 Act. It said that the resolution of that matter was "not easy". The FTT acknowledged that s.72(2) clearly provides an exhaustive definition of whether a building is self-contained. The building is either structurally detached, in which case it is self-contained, or it is not structurally detached, in which case it cannot be a self-contained building.

9. The FTT summarised Mr Upton's submissions for the respondents at paragraphs 52 and 53 of its original Decision. It referred to, and summarised, the evidence of Mr Stewart Booth MCIOB, a construction surveyor and director of Corrigan Gore (Project Management) Ltd, who was called to give evidence for the appellant, at paragraph 54; and it referred to the submissions of the solicitor-advocate then appearing for the appellants to the effect that the premises are structurally detached at paragraph 55. So far as material to this appeal, the gist of the FTT's decision is at paragraphs 56-59 of its original Decision as follows:

> [56] The Tribunal finds that whether a building is structurally detached for the purposes of s.72(3) [sic] is a mixed matter of fact and law. One must interpret the wording of the statute and then apply that meaning to the facts.
>
> [57] The purpose of s.72 is to permit a RTM Company to manage discretely self-contained manageable premises. Thus it is necessary to afford a meaning to structurally attached in that context (*No 1 Deansgate*). The question then becomes one of what degree of attachment would prevent a building from being structurally detached from another for the purposes of s.72. It is clearly something that goes beyond mere touching. Beyond that it becomes a matter of fact as to whether the connection can be said to be structural.
>
> [58] In the present case, the Applicant clearly asserts that the North Block building simply abuts the neighbouring buildings. That proposition may well be the case in so far as Tec House and 8 Broad Quay are concerned. They are independent load bearing buildings, which do not rely on any support from the North Block and there is no evidence that those buildings are structurally attached to the North Block. Any connection appears to be by way of weathering materials only. The North Block and the central Tower Block were also constructed separately and of different materials and it has been established by the Applicant that there is no load bearing connection between them. Nevertheless, it does not follow that the buildings are therefore structurally detached from each other. The Respondents assert that the decorative façade that runs across the buildings makes them structurally attached to each other. The Tribunal does not agree. The fact that repairing covenants would treat such elements as part of the structure of a building does not make the buildings that are connected by such features 'structurally attached' to each other for the purposes of s.73 [sic] of the 2002 Act.
>
> [59] However, the Tribunal finds that the claim nevertheless fails. If one looks at the connection between the buildings behind the façade there is no single visible division between them. This is evident, for example, when looking at the car park ceiling and floor slabs where they join underneath the central Tower and North Block. The connection is more than a mere touching. The Tribunal agrees with the Respondents that *No 1 Deansgate* is distinguishable because in that case there was a clear divide, between the building and the surrounding buildings, which was simply hidden by weathering strips. Thus there was no structural attachment. In the present case no such division is discernible. The Tribunal accordingly finds that the Applicant has not established that the North Block is a structurally detached building for the purposes of s.72 of the 2002 Act."

10. The FTT sought to explain further the reasons for its decision when refusing permission to appeal. In response to the appellant's contention that the FTT had been wrong in law to apply a test of visible division when determining that the premises were not a self-contained building for the purposes of s.72(2) of the 2002 Act, it stated (at paragraph 17) that it was clear from a reading of paragraphs 57 to 59 of its Decision that the FTT had had in mind, and

had applied, the correct test, as established in the case of *No 1 Deansgate (Residential) Ltd v No.1 Deansgate RTM Co Ltd* [2013] UKUT 580 (LC). Paragraph 59 had referred to the absence of a visible division between the buildings, but that had been to contrast the position with *No 1 Deansgate* where there had been such a division if one disregarded the non-structural weathering strips that covered the gaps. At paragraph 21 of its further decision the FTT recorded that:

> "The Appellant sought to establish that the North Block and Central Tower merely abutted each other. The Tribunal found that a visual inspection (as stated above) did not lead to the conclusion that there was a mere touching, but that the integrated connection between the two buildings went beyond that to amount to structural attachment."

11. The FTT also sought to address the appellant's case that it was procedurally unfair to reject its evidence on the issue of structural detachment without giving adequate reasons for such decision. The appellant maintained that there had been no other evidence before the FTT to contradict the unchallenged evidence of Mr Booth. The appellant objected that the conclusions made by the FTT at paragraph 59 were not open to it on the basis of the evidence before it. At paragraph 23 of its further decision the FTT stated:

> "The Tribunal does not accept that this is the case. It is clear from paragraph 58 of the decision document that the Tribunal did not accept that simply because the North Block and the Central Tower Block were not structurally dependent on each other in terms of load bearing and support it did not follow (for the reasons given in paragraph 59) that the North Block was not structurally attached to the Central Tower Block."

The appellant's submissions

12. The appellant invites the Tribunal to allow the appeal and substitute a determination that it is entitled to acquire the right to manage the premises.

13. Before the FTT only the appellant RTM company had led any evidence about the structure of the premises and their structural detachment from the neighbouring buildings to the north (Tec House and No.7 Broad Quay) and south (the 'hotel extension'). That evidence, from Mr Booth, had taken the form of a witness statement dated 17 February 2017 exhibiting a report he had prepared for the appellant. Mr Booth had been closely involved in the construction of the premises so his report is said not to be just a 'desktop' exercise. It is said to be both comprehensive and thorough (although it does not directly address the construction of the floor slabs, the ramp or the ceiling of the underground car park, which does not serve the premises). So far as it concerns the issue under appeal, Mr Booth's evidence was not challenged. The FTT decision quotes from his evidence at some length, and there is said to be no suggestion that the FTT rejected any part of it. Despite accepting Mr Booth's evidence that there was no load-bearing connection between the premises and its neighbours, the FTT found against the appellant on a single point (at paragraph 59), that there was 'no single visible division'. The appellant submits that this is entirely unsatisfactory because it is not

clear what the FTT actually meant by this. It appears that the FTT found against the appellant because the structurally independent premises touch the equally structurally independent hotel extension. In refusing permission to appeal, the FTT elaborated a little on what paragraph 59 of its decision was supposed to mean. At paragraph 21 of the permission decision, the FTT explained that their visual inspection showed that the 'integrated connection' between the two buildings went beyond mere touching to amount to structural attachment. The appellant submits that that elaboration does not improve on the FTT's original reasoning, because it is entirely unclear what 'integrated connection' means. Neither 'single visible division' nor 'integrated connection' are terms found in the 2002 Act, nor in any of the relevant cases. Whatever precisely the FTT may have meant, its decision is said to be wrong in law.

14. The appellant has two live grounds of appeal. The first is that a test of 'single visible division' is wrong in law and that the FTT's reasoning was internally inconsistent. The second is that the FTT misapplied the law to the facts, relied on something ('integrated connection') which was not canvassed in evidence, and gave inadequate (not properly intelligible) reasons for its decision. The two grounds are said to overlap because it is said that: (a) it is not at all clear what test the FTT was actually applying, notwithstanding that the members evidently believed themselves to be following the decision of this Tribunal (HHJ Huskinson) in *No.1 Deansgate*; and (b) given the unchallenged structural evidence, there is no, or no adequate, explanation as to what it was about the FTT's visual inspection (or site view) which led it to find that the premises did not meet the s.72(2) test. If the FTT intended to follow *No. 1 Deansgate*, it is said that it fell into error and misapplied it.

15. By s.72(2) of the 2002 Act, a building is 'a self-contained building' if it is 'structurally detached'. There is no other component of this part of the qualifying test since subsections (3) to (5) are inapplicable. There is no definition in the 2002 Act either of 'building' or of what 'structurally detached' means. It follows that those words should be given their ordinary meaning (although the appellant accepts that this can be said to re-state the question rather than to answer it). The appellant submits that it is clear that if a building is structurally detached, it does not matter what shape it is. There is said to be no 'vertical division' test in s.72(2). It does not matter if, for example, an upper floor lies above a roadway (as it does in the present case). If the lack of 'a single visible division' or 'integrated connection' refers to the lack of any dividing wall where the ramp is, then it is submitted that the FTT was wrong in law. If a building is structurally detached, it does not matter that in practice some common services or external facilities (such as a common access road) are shared with other buildings: a building can be 'structurally detached' even though it cannot function independently (citing *Gala Unity Ltd v Ariadne Road RTM Co Ltd* [2012] EWCA Civ 1372, [2013] 1 WLR 988 at paragraph 13). Again, if the lack of 'visible division' or 'integrated connection' refers to the lack of any dividing wall where the ramp is, then the FTT is said to have been wrong in law. Structural detachment is all that is required to satisfy the test of self-containment.

16. Mr Rainey notes that in the first sentence of paragraph 57 of its decision, the FTT observed that "the purpose of s.72 is to permit a RTM company to manage discretely self-contained manageable premises". If it is considered to be important, Mr Rainey submits that

both this, and the similar observation of HHJ Huskinson in *No.1 Deansgate* (at paragraph 29 of the Decision, and cited at paragraph 29 below) as to the purpose of the qualifying test, are wrong. Mr Rainey submits that this has nothing to do with whether or not a building is susceptible to being managed as a discrete unit. S.72 (and Sch.6) of the 2002 Act are borrowed from ss.3 and 4 of the Leasehold Reform, Housing & Urban Development Act 1993 (identifying the premises to which the right of collective enfranchisement conferred on the qualifying tenants of flats applies), which in their native context are concerned (if anything) with avoiding flying freeholds and whether freehold covenants would be workable after collective enfranchisement. Overlapping, or 'flying', freeholds are well known to create serious difficulties in the enforcement of covenants, because freehold covenants simply do not run with the land at law in the way that leasehold covenants do. Mr Rainey submits that the qualifying provisions were copied into the 2002 Act simply because it was hoped to dovetail RTM companies with RTE companies and that RTM companies might be a stepping-stone to collective enfranchisement. As Mr Rainey put it in his oral submissions, the s.72 test is no more than an accident of history. By contrast, the observations of this Tribunal (Martin Rodger QC and Paul Francis FRICS) in *Albion Residential Ltd v Albion Riverside Residents RTM Co Ltd* [2014] UKUT 6 at paragraph 36 are said to be persuasive: part of the purpose of the qualifying definition (whether in the 1993 or 2002 Acts) is to avoid disputes and uncertainty about running costs if repairs are needed to shared structural elements or where redevelopment is contemplated. In practice, Mr Rainey submits, ss.3 and 4 of the 1993 Act, and s.72 and Sch.6 of the 2002 Act, simply lay down a set of black-letter rules as to qualification against which the validity of claims can be determined and which are, in the context of the 2002 Act, fairly arbitrary.

17. In *No.1 Deansgate* it was held there could be some attachment to another structure as long as the attachment was non-structural. In that case, two buildings were built separately, but very close to each other, with a narrow gap in between which was covered by weathering features to prevent water ingress. A right to manage claim was made in respect of one of the buildings. On the facts, the building was held to be structurally detached, notwithstanding the weathering features, because the 'attachment' was non-structural. In *No. 1 Deansgate*, this Tribunal specifically held that *Parsons v Gage (Trustees of Henry Smith's Charity)* [1974] 1 WLR 435 was a decision concerning a different context, namely the Leasehold Reform Act 1967, and was not applicable to the 2002 Act. Decided shortly after *No. 1 Deansgate*, *Albion* went the other way on the facts but on reasoning which is said to be entirely consistent with *No. 1 Deansgate*. At paragraph 30, reliance on *Parsons v Gage* was again rejected. In *Albion* this Tribunal considered a claim to the right to manage in respect of a 'structurally complex modern building', which was mixed commercial and residential and which lay above an underground car park. The car park itself extended beneath a neighbouring block. Expert evidence demonstrated that the two parts were structurally dependent on one another, with the car park being an essential part of the load-bearing design of the block. The building in respect of which the right to manage claim was made was thus not 'structurally detached'. Mr Rainey submits that the decisions of this Tribunal in *No 1 Deansgate* and *Albion* are correct in rejecting any reliance on the approach in *Parsons v Gage* in the present context and that they should be applied in the instant case. Although he accepts that they do not completely answer the issue on the present appeal, Mr Rainey submits that they go a long way to support the appellant's case that the FTT's decision was wrong. Mr Rainey did not go so far as to

suggest that these two authorities actually settled the law at this level, but he invited this Tribunal to follow them. He submitted that the respondents were wrong to rely on authorities on the meaning of 'structural alterations' or "structure' in the present context because they were unhelpful in considering whether a building was 'structurally detached'. Authorities on the meaning of repairing covenants in leases were said to be particularly unhelpful because they were looking at the meaning of the covenant in the context of the subject lease, and so were liable to be influenced by other provisions in the lease, particularly the definition of the demised premises, and by the need to construe the lease as a whole so as to avoid any gaps or overlapping obligations. Mr Rainey illustrated the point by reference to paragraph 15 of Neuberger LJ's judgment in *Marlborough Park Services Ltd v Rowe* [2006] EWCA Civ 436, [2006] 2 EGLR 27, [2006] HLR 541as showing that even very small differences in language could potentially make very great differences in the result.

18. Mr Rainey submits that the instant case is like *No. 1 Deansgate*, and quite unlike *Albion*, because here there is no structural interdependency. The only difference is that in *No. 1 Deansgate* there was a small gap between the two buildings which was covered by a weathering feature, whereas in the present case the two buildings (the premises and the hotel extension) were built without leaving a gap. The appellant's case – which the FTT itself began its analysis by accepting (at paragraph 57) – is that it does not matter that the buildings touch, or abut, or adjoin (the word used is immaterial). What matters is that they are separate structures, and that the premises remain structurally detached from their neighbour(s). Mr Rainey submits that if two buildings have no common structural components, and there is nothing which transmits the load from one building to the other, then they are 'structurally detached'. The FTT fell into error in finding that there was anything beyond mere touching. There must be a load-bearing connection or some structural dependence.

19. In the present case, there was clear, and on this aspect of the case unchallenged, evidence from Mr Booth of how the premises were constructed. The appellant accepts on this appeal, as it did before the FTT, that the premises touch or abut or adjoin the neighbouring buildings. But this is not a disqualifying feature. The FTT's permission decision accepts this. The FTT found on the evidence (at paragraph 58 of its decision) that there is no load-bearing connection between the premises and its neighbour. The FTT also correctly held that the decorative façade running across the face of the premises and its neighbour was not a structural attachment; a decision supported by *No. 1 Deansgate*. Mr Rainey submits that the fundamental error of law arises at paragraph 59 of the FTT's decision. There is no need for a 'visible division'. Such a requirement is not found in the 2002 Act and it is not found in the authorities; and, as noted in *Albion* at paragraph 30, it is not helpful to re-frame the statutory test in different terms.

20. If (which it is said not to be) structural abutment were a disqualifying feature, then the FTT decision was internally inconsistent as that would have been a disqualifying feature applicable to the façade point also, and to the buildings to the north (Tec House and No.7 Broad Quay), something which the FTT expressly rejected at paragraph 58 of its decision.

21. Mr Rainey submits that structural abutment is not a basis for distinguishing *No.1 Deansgate*. The question is not whether the structures of the two buildings abut or adjoin; the question is whether the building which is the subject of the RTM claim is structurally detached. The FTT appears to have been treating the test for a self-contained building as if it was simply 'detached', as in the common meaning of a 'detached house'. That is said to be wrong as it gives no significance to the word 'structurally'. The statutory definition uses the phrase 'structurally detached', not 'wholly detached' or even 'detached' on its own. The word 'structural' was clearly intended to qualify the word 'detached' in some significant manner. Further, the phrase 'structurally detached' must take its colour from the context in which it is found, including s.72(3) which contemplates that the structure of part of a building may be capable of being redeveloped independently of the rest of the building even though it is not 'structurally detached'. On the true construction of s.72(2), a building does not cease to be 'structurally detached' if its structure touches a part (whether structural or otherwise) of a neighbouring building. It only ceases to be structurally detached if the subject building is not structurally independent, as in *Albion*.

22. It is submitted that further support for this construction can be derived from a consideration of the point that the 'structurally detached' test is a test of self-containment. A distinct new building does not cease to be self-contained just because it is built hard up against its neighbour, but clearly it would not be self-contained if it shared load-bearing support with its neighbour or was in part built off the neighbour. It would not, in those latter situations, be structurally detached. The observation in *Albion* at paragraph 36 that one objective of the test is to avoid shared structural elements is said to support these propositions.

23. If it is accepted (as the FTT correctly did) that the fact that buildings touch is not enough for s.72(2) not to apply, then it is impossible to understand what it was about seeing the ceiling/floor slabs 'join' underneath the central Tower Block and the premises which could have led the FTT to find that there was a lack of structural detachment. Their visual inspection could only have been superficial. In Mr Rainey's skeleton argument, it was asserted that the evidence of Mr Booth was that the floor slabs and supporting structures were separate, and that nothing was put to him to suggest that they 'join' or that his evidence was otherwise incorrect. In his oral opening, I had understood Mr Rainey to accept that Mr Booth's evidence did not directly address the construction of the floor, or base, of the underground car park, the ramp serving it, or the ceiling of the underground car park. In the light of his post-draft decision Note (referred to in the Addendum below), I acknowledge that Mr Rainey made no such concession, at least in relation to the floor, or base, of the underground car park. Mr Rainey submitted that what the FTT members saw in the basement was that there is no gap between the buildings – they adjoin. But that was obvious from the plans, and structurally they remain detached. If the FTT thought that the floor did more than merely 'touch', and thus was not 'structurally detached', they were wrong. Mr Booth's clear evidence was said to be that the floor slabs for the two buildings are separate and separately supported on different sets of pillars (which indeed are of different materials – steel for the hotel extension, concrete for the premises). The floor slabs do meet: in that sense they 'join' and can be seen to do so; but they simply touch. They are not connected.

24. As to the FTT's attempted further reasoning in the permission decision, no one can say what 'integrated connection' means. It may re-state the statutory test in a yet different manner. It surely cannot mean structural integration on the evidence; if it does, then the FTT was clearly wrong to think so. Mr Rainey speculates that the FTT may have meant that the boundary between the buildings is not entirely in a vertical plane and overlaps a roadway ramp where there is no physical division and thus no visible division. That might be implied by the phrase 'no single visible division'. If so, then the FTT is criticised for having wrongly carried over the 'vertical division' element of the 'self-contained part of a building' test.

25. In this case, Mr Rainey submits that on the unchallenged evidence, two adjoining buildings were constructed at the same time, but of entirely different materials. As constructed, it is said to be apparent on visual inspection that there is no gap between them; but they share no load-bearing elements, and the structures are separately supported and independent. It is true that, as built, the dividing line is not on a vertical plane and overlaps the ramp, but the buildings were separately built like that. The pictures of them half-built are said to show this very clearly.

26. In reality, the appellant submits that the FTT decision turns on the 'no single visible division' point; and the FTT clearly went wrong because there is no evidence that the 'connection' is 'more than a mere touching'. The only finding open to the FTT, properly directed, was that the premises are structurally detached and therefore that s.72(2) is satisfied and the appellant is entitled to acquire the right to manage the premises.

27. In his oral submissions, Mr Rainey indicated that he did not take issue with paragraph 56 of the FTT's decision. Subject to the qualification mentioned at paragraph 16 above as to the purpose of the qualifying test of structural detachment), Mr Rainey did not take issue with paragraph 57, although he pointed out that the final sentence introduced a new concept of 'connection' (rather than 'attachment'). Mr Rainey was in agreement with paragraph 58 of the FTT's Decision. Indeed, after the FTT had found (correctly) that the premises and the central Tower Block had been constructed separately, and of different materials, and that there was no load-bearing connection between them, Mr Rainey submitted that a finding of structural detachment was likely to follow. Paragraph 59, however, was said to be wholly lacking in clarity. For the reasons stated in paragraph 23 above, it was not at all clear why the FTT found that the structural detachment test had not been satisfied; and the reason given for refusing permission to appeal further obscured the basis for the FTT's decision. Since the floor slabs on which the car park rested, and its roof, were not structurally dependent upon each other, the "integrated connection" identified by the FTT could not connote mutual structural reliance. There was contiguity or touching; but the FTT had accepted that that was not enough. Nor was it clear what the FTT's "visual inspection" had revealed; and it had not been put to Mr Booth, which was said to be procedurally improper. The reasonable reader of the FTT's decision would not know why the test of structural detachment had not been met.

28. In his reply, Mr Rainey submitted that if one were to adopt the *Irvine v Moran* "good working definition" of 'structure' as those elements of the overall building "which give it its

essential appearance, stability and shape", then anything more than a mere weathering feature would be likely to satisfy that test. The ramp serving the car park was not part of the structure of the premises but merely part of the ground upon which it was constructed. The FTT had not been entitled to make any assumptions about how the ramp was constructed. There was nothing below the ramp: it was not a 'flying' ramp but was supported by the ground. The situation was entirely different from that in *Albion* where (as explained at paragraph 19 of this Tribunal's decision in that case) the car park had been constructed as a single 'box' and not simply dug into the ground. There was no similar evidence about the construction of the car park and ramp in the present case. Whilst the line separating the premises from the hotel extension straddles the ramp, the ramp was said to be a red herring. There was said to be a lack of forensic reasoning about the FTT's decision: what is it about the nature and degree of attachment of the premises to the central Tower Block that means that, as a matter of fact and degree, the premises do not satisfy the statutory requirement of 'structural detachment'? Mr Rainey submits that one could not derive the answer from the FTT's reasoning unless mere touching was enough. The two buildings were attached, but not structurally so; they abutted but were not 'structurally attached'. Mr Rainey did not dispute the effect of the authorities in the context they were addressing; but the *Irvine v Moran* test was said to be of no assistance in determining whether or not two buildings were 'structurally detached'.

The respondents' submissions

29. For the respondents, Mr Upton submits that the FTT correctly applied the law, that its finding of fact as to the degree of attachment is unimpeachable, and that the appeal should be dismissed. He starts by endorsing HHJ Huskinson's observation in *No 1 Deansgate* (at paragraph 29) that

> "… the purpose of this part of the 2002 Act is to permit a RTM company to manage premises which are self-contained and which are in consequence susceptible to being managed as a discrete unit. S.72(2), which provides that a building is a self-contained building if it is structurally detached, should be construed in that context."
>
> Mr Upton points out that a similar statement (which in fact merely reproduces the submission of Mr Rainey in his capacity as counsel for the respondent RTM company in that appeal) appears at paragraph 28 of this Tribunal's decision in *Albion*. Merely because the concept had been borrowed from s.3 of the 1993 Act, it did not follow that this was not self-evidently one of its statutory purposes.

30. Mr Upton points out that the question of structural detachment for the purposes of s.72 of the 2002 Act is a question of fact which depends on the nature and degree of attachment, citing *No.1 Deansgate* at paragraph 26 and *Albion* at paragraph 36. In his written skeleton argument, Mr Upton cited the following observations of Lord Wilberforce (with which all of the other members of the House of Lords agreed) in *Parsons v Gage* at page 439 C-D (when considering the proper construction of the words 'structurally detached' in s.2(2) of the Leasehold Reform Act 1967):

> "As a matter of ordinary English, I should regard the meaning as reasonably plain. 'Structurally detached' means detached from any other structure. If it is said that this would be the meaning of 'detached' alone, and that 'structurally' is, on this view, superfluous, I would reply that the adjective is a natural addition because of the following reference to 'the structure'. The two words complement each other."

Mr Upton recognisers that *in No.1 Deansgate* this Tribunal held (at paragraph 28) that the meaning of the words 'structurally detached' in the 1967 Act, as construed by Lord Wilberforce, could not be taken as determinative of the meaning of those words in s.72(2) of the 2002 Act. In that case, this Tribunal dismissed an appeal based on the proposition that any degree of connection or touching between the building in question and any other structure would be sufficient to prevent it from being 'structurally detached'. Thus, a building which had been built as a detached building, but then linked to a subsequently constructed building by a weathering feature, remained 'structurally detached'. In that case, if the weathering features between the building and the neighbouring buildings were removed, then there would be a gap between the buildings down which one could notionally drop a pebble so that it fell vertically to the ground between the buildings: see paragraph 5. At paragraphs 30 to 31, HHJ Huskinson held:

> "[30] I accept [Counsel's] argument that to construe 'structurally detached' as requiring the absence of any attachment or touching between the subject building and some other structure is to construe section 72(2) as though it said 'detached' or 'wholly detached' rather than 'structurally detached'. What is required is that there should be no structural attachment (as opposed to non-structural attachment) between the building and some other structure.
>
> [31] I consider the extracts from the Oxford English Dictionary to be helpful. In particular I note the definition of the word 'structurally' as meaning: in structural respects; with regard to structure. It is attachment of this sort which prevents a building being structurally detached."

31. Mr Upton considered that *No 1 Deansgate* was wrongly decided and that the Upper Tribunal in that case should have followed *Parsons v Gage*. However, Mr Upton was realistic enough to recognise that when two previous decisions of this Chamber of the Upper Tribunal (differently constituted) have held that the test in the latter case was not the applicable test, it would be difficult to persuade this Tribunal to hold otherwise. In any event, Mr Upton did not need to say that *No 1 Deansgate* was wrongly decided in order to succeed on this appeal. If an observer were to view the premises from Marsh Street, he would conclude that they were not 'structurally detached'.

32. Mr Upton proceeds to consider the correct approach. In determining whether a building is 'structurally detached', he submits that it is first necessary to identify which parts of the premises are attached to some other building(s) before deciding whether, having regard to the nature and degree of that attachment, the premises are 'structurally detached'. It is said to be axiomatic that if a structural part of the premises is attached to a structural part of another building, the premises are not structurally detached.

33. Mr Upton then considers the meaning of the words "structure', 'structural' and 'structurally'. He points out that these words have been used and interpreted in multiple different contexts, citing, by way of example, *Stroud's Judicial Dictionary of Words and Phrases* (8th edition). In none of these various contexts have the words apparently been limited to mean 'independently load-bearing', which is what the appellant submits. Mr Upton submits that 'structurally' should be given its ordinary and natural meaning, not the narrow meaning of 'load-bearing', used only by structural engineers and other similar professionals. The most helpful interpretation of 'structure' and 'structural' for the purposes of s.72(2) of the 2002 Act is said to be found in the context of repairing covenants and covenants against structural alterations.

34. In *Pearlman v Harrow School* [1979] QB 56 the issue was whether certain works constituted structural alterations to a building within the meaning of para 1(2) of Sch. 8 to the Housing Act 1974. At page 79D Eveleigh LJ noted the suggested definition of 'structural' by the judge at first instance as "appertaining to the basic fabric and parts of the house as distinguished from its decorations and fittings"; and Eveleigh LJ said that in his opinion the judge had the right conception of what Parliament meant by 'structural'.

35. In *Irvine v Moran* (1990) 24 HLR 1 Mr Recorder Thayne Forbes QC, sitting as a Deputy Judge of the Queen's Bench Division, considered s.32(1)(a) of the Housing Act 1961, which implied in any lease of a dwelling-house to which the section applied a covenant "to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes)". The issue was whether certain items, including external sash windows, were within the scope of the covenant. The Deputy Judge held that they were both part of the structure and part of the exterior of the dwelling-house. At page 5 he said:

> "I have come to the view that the structure of the dwelling-house consists of those elements of the overall dwelling-house which give it its essential appearance, stability and shape. The expression does not extend to the many and various ways in which the dwelling-house will be fitted out, equipped, decorated and generally made to be habitable. I am not persuaded … that one should limit the expression 'the structure of the dwelling-house' to those aspects of the dwelling-house which are load-bearing in the sense that that sort of expression is used by professional consulting engineers and the like; but what I do feel is, as regards the words 'structure of the dwelling-house', that in order to be part of the structure of the dwelling-house a particular element must be a material or significant element in the overall construction. To some extent, in every case there will be a degree of fact to be gone into to decide whether something is or is not part of the structure of the dwelling-house."

36. Having considered some of the other items that were in dispute, the Deputy Judge referred at page 6 to the windows:

> "Windows pose a slightly different problem. I have some hesitation about this, but bearing in mind that one is talking about a dwelling-house, and rejecting as I do the suggestion that one should use 'load-bearing' as the only touchstone to determining

> what is the structure of the dwelling-house in its essential material elements, I have come to the conclusion that windows do form part of the structure of the dwelling-house. My conclusion might be different if one were talking about windows in, let us say, an agricultural building. The essential material elements may change, depending on the nature and use of the building in question. In the case of a dwelling-house, it seems to me that an essential and material element in a dwelling-house, using ordinary common sense and an application of the words 'structure of the dwelling-house' without limiting them to a concept such as 'load-bearing', must include the external windows and doors."

37. Mr Upton points out that the first of the passages cited above was referred to with approval by Rimer J in *Ibrahim v Dovecorn Reversions Ltd* (2001) 82 P & CR 362 at 369 in construing the meaning of 'main structure' in a repairing covenant; and that both passages were cited by the President of the Lands Tribunal (George Bartlett QC) in *Sheffield City Council v Oliver* LRX/146/2007. In *Marlborough Park Services Ltd v Rowe* [2006] EWCA Civ 436, [2006] HLR 541 the issue was whether certain parts of a building were within the term 'main structures' in a covenant to repair. Neuberger LJ, having quoted the first of the passages cited above from *Irvine v Moran*, said (at paragraph 17):

> "While I accept, as I have emphasised, that words such as 'structure' or 'main structures' must take their meaning from the particular document, lease or statute in which they are found, and from the surrounding circumstances, and although it can be said that any attempt to define them will, to an extent, raise as many questions as it answers, it seems to me that that is a good working definition to bear in mind, albeit not one to apply slavishly."

38. More recently, in *Grand v Gill* [2011] EWCA Civ 554, [2011] 1 WLR. 2253 the Court of Appeal also accepted the Deputy Judge's observations in *Irvine v Moran* as providing "a good working definition", but it disagreed with his conclusion that the plaster was not to be regarded as part of the structure. (Although the head-note to the report in the Weekly Law Reports states that *Irvine v Moran* was "overruled" that is only in relation to that part of the Deputy Judge's decision that held that plasterwork was not part of the 'structure' of a dwelling-house.) Rimer LJ said (at paragraph 25):

> "For myself, whilst I would accept and adopt Mr Recorder Thayne Forbes QC's observations as to the meaning of 'the structure … of the dwelling house' as providing for present purposes, as Neuberger LJ put it, a good working definition, I am respectfully unconvinced by his holding that the plaster finish to an internal wall or ceiling is to be regarded as in the nature of a decorative finish rather than as forming part of the 'structure'. In the days when lath and plaster ceiling and internal partition walls were more common than now, the plaster was, I should have thought, an essential part of the creation and shaping of the ceiling or partition wall, which serve to give a dwelling house its essential appearance and shape. I would also regard plasterwork generally, including that applied to external walls, as being ordinarily in the nature of a smooth constructional finish to walls and ceilings, to which the decoration can then be applied, rather than a decorative finish in itself. I would therefore hold that it is part of

the 'structure'. I would accordingly accept that the wall and ceiling plaster in Ms Grand's flat formed part of the 'structure' of the flat for the repair of which Mr Gill was responsible."

39. Agreeing with Rimer LJ, Lloyd LJ said (at paragraphs 33 to 34):

"Like Rimer LJ, I would respectfully differ from Mr Recorder Thayne Forbes QC on this point, not as regards the … first passage … in which he sought to identify a principle on which to decide the point, but rather as regards his application of that principle to the particular case of plaster … As Rimer LJ says, in the case of the use of plaster in ways which are now perhaps historic rather than current (but of which examples are certainly still to be found) such as lath and plaster construction, the plaster is clearly part of the structure. The expert's second report suggests … that this technique may have been used in parts of the premises relevant to this case.

I would not limit my reasoning, however, to cases where the wall or ceiling is of lath and plaster or similar construction. I agree that plaster as applied to even a solid wall or ceiling is not 'in the nature of a decorative finish', as Mr Recorder Thayne Forbes QC said, and that it is to be regarded as a part of the wall or ceiling upon or to which a decorative finish, of whatever kind, may be applied. Accordingly, I would hold, as a general proposition, that plaster forming part of or applied to walls and ceilings is part of the structure of the relevant premises."

40. Thomas LJ agreed with both judgments, holding that the reasoning and conclusion of Mr Recorder Thayne Forbes QC in relation to wall plaster were not correct. Plaster forming part of or applied to walls and ceilings was part of the structure of the relevant premises.

41. Thus, in the instant case, Mr Upton submits that the structural parts of the premises include those elements which give them their essential appearance, stability and shape. They plainly include the roof and the exterior walls. Mr Upton then goes on to consider whether the structural parts of the premises are 'structurally attached' to another building. The fact that the premises and the Tower Block are, in purely civil engineering terms, independent load-bearing structures does not mean that the buildings are "structurally detached". He submits that plainly they are not.

42. That fact is said to be vividly demonstrated by the plans in the AWW Report exhibited by Mr Booth. The supposed 'separation line' is shown by a dotted red line on the plan for each floor. The need for a super-imposed separation line in bold red ink is itself said to indicate that there is no detachment. It is said to be clear that the premises are attached to the Tower Block at each level; a party wall divides the two buildings in most cases. Moreover, Mr Upton submits that one only has to look at the plans of the Broad Quay and Marsh Street elevations of the premises to understand that the exterior of the premises is attached to the exterior of the Tower Block. It is said to be difficult if not impossible (absent the red separation line) to discern where one ends and the other begins. In particular, Mr Upton

originally suggested that there was a structure on the roof of the central Tower Block shown on the Broad Quay elevation at page 288 which straddled the so-called separation line. It was said by Mr Upton that by reason of this feature alone the premises were not susceptible to being managed as a discrete unit; it was not at all clear who would have the responsibility to repair and maintain which parts and at whose expense. During the course of the hearing, Mr Upton rightly abandoned any reliance upon this point when it became apparent (from looking at the roof plan at page 287 and the Marsh Street elevation at page 289) that this structure was a plant compound which was situated entirely on the roof of the hotel extension and did not straddle the separation line: any apparent straddling of the separation line, when viewed from Broad Quay, was a trick of perspective resulting from the separation line not running at right angles to Broad Quay.

43. Nevertheless, Mr Upton submitted that the degree of attachment in the instant case goes far beyond the mere 'weathering features' in issue in *No.1 Deansgate*. At paragraph 58 of the Decision the FTT had acknowledged that the appellant had established that there was no load-bearing connection between the premises and the Tower Bock (such not being challenged by the respondents). But at paragraph 59 of the Decision the FTT had also found as a fact that: "If one looks at the connection between the buildings behind the façade there is no single division between them. This is evident, for example, when looking at the car park ceiling and the floor slabs where they join underneath the central Tower and North Block. The connection is more than a mere touching." In so doing, the FTT was essentially said to be rejecting the appellant's argument that 'structurally detached' means having no load-bearing connection. It could not be said that the FTT did not deal with the substance of the case presented by the appellant in sufficient detail for it to be able to understand why its case was rejected: see *Southwark Council v Various Lessees of the St Saviours Estate* [2017] UKUT 10 (LC) at paragraphs 17 to 21 per this Tribunal (HHJ Gerald).

44. Mr Upton submitted that the ramp of the car park, and its ceiling were clearly part of the structure of the car park, and that part of them were comprised within the premises. They were not an appurtenance. He reminded this Tribunal of what had been said at paragraphs 32 and 34 of *Albion*. Adopting the language of that case, the ramp and ceiling of the car park were said to be "vital building components which are firmly attached to that which is below and around" the premises. The car park ramp straddled the boundary. It was all made of concrete and was not merely a decorative feature, but was clearly a structural part of the building. The fact that it was not load-bearing was said to be immaterial. It had never been part of the respondents' case that the premises and the hotel extension were structurally interdependent in the sense that a civil engineer would understand that phrase to mean. The FTT had correctly applied the test laid down in *No 1 Deansgate* and in *Albion* at paragraph 57 of its Decision. Whilst paragraph 59 might not be a "beacon of clarity" in terms of its reasoning, nevertheless, Mr Upton submitted, it was clear enough how and why the FTT had reached its conclusion. Having had the benefit of a sight inspection, and having accepted that there was no load-bearing connection, the FTT had nevertheless found a sufficient degree of attachment to take the premises outside the 2002 Act. The FTT had cited two examples; that of the car park ceiling and the floor slabs. The nature and degree of their attachment had been sufficient for the FTT to have found as a fact that the premises were not structurally detached.

That was a finding of fact that was said to be perfectly open to the FTT. As a result, the appellant had been forced to submit that the proper test of ‘structural attachment’ was load-bearing connection or structural interdependence. But the FTT had had the correct test in mind. They had referred to it, and had understood that the question was the nature and degree of the attachment. They had accepted the expert evidence as to how the premises and the hotel extension had been constructed. The FTT had been perfectly entitled and correct to distinguish the present case from No 1 Deansgate on the basis that, apart from the weathering feature, in that case there had been a clear gap between the two buildings, which were therefore detached, whereas in the present case they had been attached or joined at each level. Paragraph 23 of the FTT’s further reasons was said to be correct. The test was not whether two buildings were structurally inter-connected or inter-dependent since these concepts required more than mere structural attachment. In this case the degree of touching or connection was so great as to make the situation distinguishable from that in *No 1 Deansgate*. That was a finding that had been open to the FTT and which it had been perfectly entitled to make. Here the degree of connection was sufficiently different from the weathering features in that earlier authority.

Discussion

45. It is appropriate to begin with an analysis of the relevant authorities.

46. In *No 1 Deansgate* this Tribunal (HHJ Huskinson) set out its conclusions on the meaning of the phrase ‘structurally detached’ at paragraphs 25 to 35 of its Decision. It rejected the submissions of the appellant landlord that a building was only ‘structurally detached’ within the meaning of s.72(2) if there was no touching or attachment (or at the most de minimis touching or attachment) between the subject building and some other structure. This Tribunal was unable to accept that in *Parsons v Gage* Lord Wilberforce was intending to lay down that the words ‘structurally detached’ should be construed in all statutes as meaning that a building was only structurally detached if it did not touch, and was in no way attached to, any other structure, irrespective of the subject matter and intent of the particular statute and the context in which the words were used. It was held that the meaning of the words ‘structurally detached’ in the 1967 Act, as construed by Lord Wilberforce, could not be taken as determinative of the meaning of those words in s.72(2) of the 2002 Act. At paragraph 29 of its Decision, this Tribunal agreed with the LVT's observation that “the purpose of this part of the 2002 Act is to permit a RTM company to manage premises which are self-contained and which are in consequence susceptible to being managed as a discrete unit. S.72(2), which provides that a building is a self-contained building if it is structurally detached, should be construed in that context.”

47. This Tribunal accepted the argument of counsel for the respondent RTM company that to construe ‘structurally detached’ as requiring the absence of any attachment, or touching, between the subject building and some other structure was to construe s.72(2) as though it said ‘detached’ or ‘wholly detached’ rather than ‘structurally detached’. What was required was that there should be no structural attachment (as opposed to non-structural attachment)

between the building and some other structure. This Tribunal considered the extracts from the *Oxford English Dictionary* to be helpful. In particular, it noted the definition of the word 'structurally' as meaning: in structural respects; with regard to structure. It was attachment of that sort which prevented a building being structurally detached. In the result, this Tribunal concluded that the LVT had been correct. It had examined not whether there was any attachment at all (such as touching) between the building and neighbouring structures. Instead the LVT had examined the correct question, namely whether there was any attachment of a structural nature. The LVT had found (as it was clearly entitled to do) that such attachment as existed was not structural, and that the building was therefore structurally detached and was, in consequence, a self-contained building within the right to manage provisions.

48. In *Albion* this Tribunal (Martin Rodger QC and Paul Francis FRICS) agreed (at paragraph 24 of its Decision) that the words 'building' and 'structurally detached' were not defined in the 2002 Act and should be given their ordinary meaning. At paragraph 29, the question whether or not premises in respect of which a right to manage was claimed comprised a self-contained building was said to be an issue of fact which depended on the nature and degree of attachment between the subject building and other structures. At paragraph 30 this Tribunal said that:

> "… the statutory language speaks for itself and that it is neither necessary nor helpful for a tribunal considering whether premises are structurally detached to reframe the question in different terms. The decision of the House of Lords in *Parsons v Gage* was not concerned with the 2002 Act and did not purport to lay down a test of general application wherever the expression 'structurally detached' was employed in a statute; on the contrary Lord Wilberforce had been considering a specific submission made in the context of a particular set of facts. In *No.1 Deansgate* … the Tribunal (Judge Huskinson) has recently dismissed an appeal based on the proposition (said to be derived from Lord Wilberforce's dictum in *Parsons*) that any degree of connection between the building in question and any other structure would be sufficient to prevent it from being structurally detached."

49. At paragraphs 31 to 33 of its Decision in *Albion*, this Tribunal identified a two-stage inquiry:

> "31. In order to consider whether premises are a building which is structurally detached, it is first necessary to identify the premises to which the claim relates. Until the premises have been clearly identified one cannot begin to consider whether they are a building or part of a building or whether they are structurally detached…
>
> 33. The next step in the inquiry is to ask whether the building which has been identified as the subject of the claim is self-contained i.e. is it structurally detached? The Building, as we have described it above, is not structurally detached at ground or basement level from the continuous concrete slabs which form the floor and ceiling of the underground car park. We agree with

> Mr Rainey [who in *Albion* appeared as leading counsel for the respondent RTM company] that the car park itself would not ordinarily be regarded as part of the Building (although that part of it which lies beneath the structure of the Building probably would be); but that is not the issue. The issue is whether the Building is structurally detached from the car park and from any other structure. In circumstances where continuous concrete structures - the ground and basement floor slabs - are major and integral components both of the Building and of the car park, the piazza and Building 1, it is not possible in our judgment to regard the Building as structurally detached."

50. At paragraph 36, this Tribunal said that it did not consider that the respondent RTM company in that case was assisted by the adoption of a purposive approach to the construction of s.72(1) and (2):

> "The question of structural detachment is a question of fact and having identified the manner in which the Building has been constructed we can see no more benevolent approach to the statutory language capable of producing a different outcome. No doubt, as Mr Rainey emphasised, the right to manage could be exercised for most practical purposes in relation to the Building either as we have defined it, or as the respondents prefer to regard it. Nonetheless Parliament has decided that in this, as in other statutory contexts, it is important for practical reasons to confine the acquisition of the relevant right to buildings which are structurally detached. In that way disputes or uncertainty will be avoided in the event that repairs to shared structural elements are required, or redevelopment is contemplated. It is not fanciful to speculate that during the 999 year terms of the leases of flats in the Building major building elements may have to be the subject of extensive work, including the floor and ceiling slabs in the car park."

51. As this Tribunal recognised in *Albion* (at paragraphs 8 and 38), *Gala Unity* was concerned with a different issue, namely the treatment of appurtenant property utilised by two self-contained buildings, and it is of no assistance in the context of the present appeal. For premises to come within the right to manage provisions of the 2002 Act, they must consist of a self-contained building, or part of a building, with or without appurtenant property. The identification of other property which is appurtenant to the self-contained building, or part of a building, is a separate exercise which will not arise if the principal subject matter of the claim is not self-contained. If the only case being advanced is that the subject of a right to manage claim is a self-contained building (and not a self-contained part of a building), the existence of another structure which is not itself part of the building, but to which the building is structurally attached, will be fatal to the claim; and that will be the case whether the attached structure is appurtenant property or not. But *Gala Unity* also decides that the 2002 Act defines a self-contained building by reference to it being 'structurally detached', and that there is no further requirement that the structurally detached building must be able to function independently, without the need to make use of any shared facilities, such as private access roads, car parking, gardens or other communal areas.

52. Whether or not it is strictly binding upon me, I consider that I should follow the approach of this Tribunal in *No 1 Deansgate* and in *Albion* on the meaning of the phrase 'structurally detached' in s.72(2) of the 2002 Act. Where different constitutions of the Lands Chamber have reached the same decision on a point of statutory construction, then the interests of legal certainty require that that meaning should be followed by this Tribunal unless there are cogent reasons for thinking that it is wrong. In the present case, far from being satisfied that there are cogent reasons for thinking that the approach in those two decisions was wrong, in my judgment this Tribunal's reasons for rejecting the approach of Lord Wilberforce in *Parsons v Gage*, and its analysis of the meaning of 'structurally detached' in s.72(2), are correct. In its statutory context, to construe 'structurally detached' as requiring the absence of any attachment or touching between the subject building and some other structure would be to construe s.72(2) as though it said 'detached' or 'wholly detached' rather than 'structurally detached'. What is required was that there should be no structural attachment (as opposed to non-structural attachment) between the building and some other structure. For what it is worth, unlike Mr Rainey (see paragraph 16 above), I see no tensions between the statements as to the statutory purpose of the qualifying test at paragraphs 29 of *No 1 Deansgate* and 36 of *Albion*. The desirability of avoiding disputes and uncertainty about running costs if repairs are needed to shared structural elements, or where redevelopment is contemplated, is but one of the reasons why Parliament thought it appropriate for an RTM company to manage premises which are self-contained, and which in consequence are susceptible to being managed as a discrete unit. I would accept the submission of Mr Upton that merely because the concept of 'structural detachment' has been borrowed from s.3 of the 1993 Act, it does not follow that this was not self-evidently one of its statutory purposes: Why, one asks rhetorically, was this concept borrowed from s.3 in the first place if it was not considered by Parliament that it embodied a useful, and purposeful, test for qualification for the right to manage?

53. I agree with Mr Rainey's submission that authorities on the meaning of 'structure' and 'structural' in the context of repairing covenants and covenants against structural alterations have to be applied with caution in the present, and different, context of identifying whether or not a building is 'structurally detached' for the purposes of s.72 of the 2002 Act and the qualifying test for acquiring the right to manage leasehold premises. Such covenants are drafted, and entered into, with very different objectives in mind; and, because they are looking at the meaning of the covenant in the context of the subject lease, decisions on their true meaning and effect are liable to be influenced by other provisions in the lease (in particular, the definition of the demised premises, and the need to construe the lease as a whole so as to avoid any gaps or overlapping obligations). In particular, I consider that the test in *Irvine v Moran* should be regarded as providing little, if any assistance, in determining whether or not two buildings are 'structurally detached' because, as Mr Rainey submits, if one were to adopt the "good working definition" of 'structure' as those elements of the overall building "which give it its essential appearance, stability and shape", then anything more than a mere weathering feature would be likely to satisfy the test. Even the test identified in *Pearlman v Harrow School* (see paragraph 34 above) of "appertaining to the basic fabric and parts of the house as distinguished from its decorations and fittings" would seem to me to understate the necessary 'structural' element of the concept. Doing the best I can to formulate a definition of 'structural' in the present, statutory context of s.72 of the

2002 Act, I would construe 'structural' as meaning "appertaining or relating to the essential or core fabric of the building".

54. From the authorities, I derive the following propositions:

(1) The expressions 'building' and 'structurally detached' are not defined in the 2002 Act and should be given their ordinary and natural meaning.

(2) The statutory language speaks for itself and it is neither necessary nor helpful for a tribunal which is considering whether premises are 'structurally detached' to reframe the question in different terms. Thus, it is not helpful to substitute a test of 'structurally independent' or 'having no load-bearing connection' for that of 'structurally detached'.

(3) Nevertheless, some explanation of when a building can properly be characterised as 'structurally detached' is clearly called for.

(4) What is required is that there should be no 'structural' attachment (as opposed to non-structural attachment) between the building and some other structure. The word 'structurally' qualifies the word 'attached' in some significant manner.

(5) Thus, a building may be 'structurally detached' even though it touches, or is attached to, another building, provided the attachment is not 'structural'.

(6) 'Structural' in this context should be taken as meaning 'appertaining or relating to the essential or core fabric of the building'.

(7) A building will not be 'structurally detached' from another building if the latter bears part of the load of the former building or there is some other structural inter-dependence between them.

(8) So long as a building is 'structurally detached', it does not matter what shape it is or whether part of it overhangs an access road serving some other building.

(9) A building can be 'structurally detached' even though it cannot function independently.

(10) Adjoining buildings may be 'structurally detached' even though a decorative façade runs across the frontage of both buildings.

(11) The question whether or not premises in respect of which a right to manage is claimed comprises a self-contained building is an issue of fact and degree which depends on the nature and degree of attachment between the subject building and any other adjoining structures.

(12) In determining whether a building is 'structurally detached', it is first necessary (a) to identify the premises to which the claim relates, then (b) to identify which parts of those premises are attached to some other building, and finally (c) to decide whether, having regard to the nature and degree of that attachment, the premises are 'structurally detached'.

(13) If a structural part of the premises is attached to a structural part of another building, the premises are unlikely to be 'structurally detached'.

55. Against that legal background I turn to consider the merits of the appeal.

56. By s.11 of the Tribunals, Courts & Enforcement Act 2007, an appeal lies to this Tribunal from a decision of the FTT on any point of law arising from that decision. In appeals from tribunals, the concept of an error of law or a point of law has been widely interpreted. In *Railtrack plc v Guinness Limited* [2003] EWCA Civ 188, [2003] 1 EGLR 124 at paragraph 51 Carnwath LJ summarised the principles applicable to an appeal on a point of law from a specialist tribunal (in that case the Lands Tribunal) as follows:

> "This case is no more than an illustration of the point that issues of 'law' in this context are not narrowly understood. The Court can correct 'all kinds of error of law, including errors which might otherwise be the subject of judicial review proceedings' ... Thus, for example, a material breach of the rules of natural justice will be treated as an error of law. Furthermore, judicial review (and therefore an appeal on law) may in appropriate cases be available where the decision is reached 'upon an incorrect basis of fact', due to misunderstanding or ignorance ... A failure of reasoning may not in itself establish an error of law, but it may 'indicate that the tribunal had never properly considered the matter…and that the proper thought processes have not been gone through' …."

57. In the *Railtrack* case the issue was whether the Lands Tribunal had misunderstood some complicated expert evidence, resulting in a double counting in the valuation. The Court of Appeal accepted that, in principle, that was a permissible ground of appeal where the right of appeal was limited to questions of law, but it held that the ground was not made out on the facts. Some errors of law will be easily identified, as where a statute or document which the tribunal is called upon to interpret has been misconstrued. As the decision of the Court of Appeal in *Railtrack* indicates, however, the concept of appeal on a point of law is widely understood, particularly in appeals against decisions of tribunals. It is not possible or desirable to provide any sort of exhaustive list, but the following examples illustrate the breadth of the concept:

(1) A procedural irregularity or manifest unfairness which causes the decision of a tribunal to be unjust.

(2) A decision based on a finding of fact for which there is no supporting evidence.

(3) A finding of fact which is so obviously wrong as to be perverse.

(4) A failure to provide adequate reasons for a decision.

(5) A failure to resolve a conflict of evidence or opinion which is central to the fair resolution of the issues in a case.

(6) An over-reliance on the burden of proof as a means of avoiding the resolution of competing expert opinions.

(7) A mistake of fact giving rise to unfairness in the decision.

58. There are three ways in which an appeal to this Tribunal may proceed. The parties can say which type of process they think the Tribunal should adopt in the forms they complete and submit, but the Tribunal makes its own assessment of which type of appeal is the most appropriate in the particular case. If the Tribunal directs the case to be an appeal by way of review, the Tribunal will determine the appeal at a hearing (or it may dispense with a hearing if it thinks it appropriate to do so) where it will consider whether the FTT correctly applied the law to the evidence put before it. No further evidence is heard by the Tribunal. Where a rehearing is directed, the parties call the witnesses and evidence they rely on in support of their case. The Tribunal may, at its discretion, permit new evidence which was not before the FTT to be called. Where a direction is given to conduct a review with a view to a rehearing, the Tribunal first holds a hearing to review the FTT's decision and then, if necessary, continues to a rehearing of the matter, usually on the same day.

59. In an appeal such as the present, where the grounds of appeal criticise the FTT for relying upon its own visual inspection of the premises, and include the submission that "any integrated connection, if it exists is unlikely to be 'evident from looking' … because any such connection would be obscured by virtue of the surfaces abutting or touching", this Tribunal questions whether it was appropriate for the appellant to pursue its appeal without either requesting the Tribunal to view the premises (for which purpose the appellant should have asked for a hearing in Bristol rather than one at the Royals Courts of Justice) or, at the very least, seeking to put before the Tribunal photographic or DVD evidence of the present state of the car park ramp, ceiling and floor slabs so that this Tribunal could have seen what would have been apparent to the FTT on its own view of the premises and their surroundings. Although before the FTT reliance was placed upon photographs showing the premises and the hotel extension in the course of development during 2005-8 (and those photographs are in evidence before this Tribunal), there were no contemporaneous photographs showing what would have been apparent to the FTT on its visual inspection of the premises and its adjoining properties. This Tribunal has been impaired in its ability to consider this appeal by an inability to visualise what was viewed by the FTT on its visual inspection of the premises and the hotel extension. At the hearing of this appeal, neither party suggested that a view would be appropriate, even if that were procedurally permissible.

60. This is an appeal by way of review. On such an appeal, there is no appeal against the FTT's factual findings as regards the construction and nature of the premises and any neighbouring buildings or structures or as to the nature and extent of any physical features separating or dividing them. The FTT found as a fact that the degree of attachment between the premises and the neighbouring hotel extension was insufficient to make the premises not 'structurally detached'. Accordingly, since the matter is one of fact and degree, the present appeal must fail if the FTT's reasons for its decision demonstrate that it applied the correct test in law, and that it reached a conclusion which was open to it on the facts that it had found.

61. Despite the submissions ably advanced by Mr Rainey (as summarised above), this Tribunal is unable to find that the FTT's Decision discloses any error of law (in the wide sense explained at paragraphs 56 and 57 above). This Tribunal prefers, and accepts, the competing submissions of Mr Upton summarised, in particular, at paragraphs 43 and 44 above. The FTT correctly identified the issue raised by this appeal, and addressed the applicable statutory provision, at paragraphs 50 and 51 of its decision. The FTT accurately summarised the competing submissions of the parties, and the expert evidence of Mr Booth, at paragraphs 52 to 55. I can discern no error of law in paragraphs 56 and 57. Although it might have been preferable for the FTT to have used the word 'attachment' rather than 'connection' in the final sentence of paragraph 57, I do not consider that this led the FTT into error. It is clear from these paragraphs that the FTT: (1) derived assistance from the decision in *No 1 Deansgate* and (2) recognised that mere touching did not prevent a building from being structurally detached from another for the purposes of s.72. At paragraph 17 of its further reasons, the FTT conformed in terms that it had had in mind, and had applied, the correct test as established in the *No 1 Deansgate* case. In paragraph 58 of its Decision the FTT expressly recognised that: (1) a connection by way of weathering materials did not prevent one building from being structurally detached from another, (2) the appellant had established that there was no load-bearing connection between the premises and the central Tower Block, and (3) the decorative façade that runs across the buildings did not make them structurally attached to each other. Mr Rainey's only criticism of this paragraph was that the finding that there was no load-bearing connection between the premises and the central Tower Block should have inclined the FTT to conclude that they were 'structurally detached'.

62. I have already summarised Mr Rainey's criticisms of paragraph 59 of the FTT's decision. In my judgment, these are not well-founded, for the reason submitted by Mr Upton at paragraphs 43 and 44 above, with which I agree. In my judgment, by paragraph 59 of its Decision the FTT was not substituting a new test of 'single visible division' between the two buildings for the test of 'structural detachment' which it had previously clearly identified as the real point for decision in the case. The FTT clearly regarded the car park ceiling and its floor, or base, as doing more than merely touching. Reading the decision as a whole, it is clear that the FTT regarded them as a single and indivisible structure which straddled both buildings and meant that they could not properly be regarded as being 'structurally detached'. It is implicit in the FTT's decision that they rejected the need for there to be any load-bearing connection between the two buildings (and this rejection was clearly articulated at paragraph 23 of the FTT's further reasons), but in my judgment they were right to do so: whilst mutual structural reliance, or inter-dependency, may indicate structural attachment, its absence does not, in my judgment, necessarily connote structural detachment, provided some part of the essential or core fabric of the subject premises is attached to some part of the essential or core fabric of another building. As explained at paragraph 21 of its further reasons, the FTT "found that a visual inspection … did not lead to the conclusion that there was a mere touching, but that the integrated connection between the two buildings went beyond that to amount to structural detachment". In my judgment, that was a finding of fact that the FTT was entitled to arrive at on the basis of its view of the premises and the adjoining building. This was not a case merely of two adjoining walls touching, with no structural connection between them: on the basis of the FTT's visual inspection, it concluded that the car park ceiling and its floor, or base, constituted a single composite structure. In my judgment the

appellant cannot successfully maintain that the FTT applied the wrong legal test or that it reached a conclusion which was not open to it on the facts it had found. In this connection, it must be borne in mind that whilst Mr Booth's expert evidence was to the effect that the floor slabs for the two buildings were separate and separately supported on different sets of pillars (which, indeed, were of different materials – steel for the hotel extension, concrete for the premises), it not directly address the construction of the floor, or base, of the underground car park, the ramp serving it, or the ceiling of the underground car park. Had it done so, then there might well have been force in Mr Rainey's point that the FTT should have raised with Mr Booth the impression which it had formed about the "integrated connection" between those aspects of the two buildings on the basis of its visual inspection. Since Mr Booth's report had not addressed this aspect of the construction of the hotel extension and the premises, however, there was, in my judgment, no obligation upon the FTT to do so (however sensible this might have been). The FTT had correctly understood, and applied, the *No 1 Deansgate* test in relation to the buildings to the north of the premises and the façade; and the appellant has not satisfied this Tribunal that the FTT applied any different, and inappropriate, test when considering the position in relation to the premises and the hotel extension. Nor, in my judgment, and in a matter which is essentially one of fact and degree, has the appellant demonstrated that the FTT failed properly to apply that test to the results of its visual inspection of the premises and its surrounding buildings.

63. In my judgment, the FTT's decision (as explained in its further reasons) is not inadequately reasoned. It is clear that the FTT took the view that this was not a case merely of two adjoining walls touching, with no structural connection between them. Rather, and on the basis of the FTT's visual inspection, it concluded that the car park ceiling and its floor, or base, constituted a single structure. The appellant may not agree with that conclusion, but it cannot fairly say that it cannot understand why it lost its right to manage claim.

64. For the reasons stated above, which merely express, in different language, the points made by Mr Upton at paragraphs 43 and 44 above (which I accept), this appeal is dismissed.

Decision

1. **The appeal is dismissed**

2. **The First-Tier Tribunal's determination is affirmed.**

ADDENDUM TO DECISION

65. On 23 May 2018 I sent my draft decision to the Tribunal's secretariat for circulation to the parties in the usual way with a view to them drawing my attention to any minor corrections and typographical errors. I understand that this was done on or about 29 May. On 6 June I received by email a Note from Mr Rainey QC (for the appellant) dated 5 June 2018 asking me to alter paragraphs 23 and 62 of my draft decision before hand-down (pursuant to the jurisdiction recognised by the Supreme Court in *Re L (Children) (Preliminary Findings:*

Power to Reverse) [2013] UKSC 8, [2013] 1 WLR 634) on the ground that they contained a fundamental error in incorrectly recording Mr Rainey's submissions, which had led to a mistaken view of the unchallenged evidence of Mr Booth and the validity of the FTT's reasons; and that in consequence the draft conclusion and outcome of the appeal should fall to be reversed.

66. My draft decision at paragraph 23 recorded that:

> *"...In Mr Rainey's skeleton argument it was suggested that the evidence of Mr Booth was that the floor slabs and supporting structures were separate and that nothing was put to him to suggest that they 'join' or that his evidence was otherwise incorrect; but in his oral opening I understood Mr Rainey to accept that Mr Booth's evidence did not directly address the construction of the floor slabs, the ramp or the ceiling of the underground car park…*"

67. Mr Rainey objects that he did not say that. There were three sub-elements within that sentence: (1) the floor slabs, (2) the ramp, and (3) the ceiling of the car park. As to element (1), the floor slabs, Mr Rainey says that he made no such departure from his skeleton argument. On the contrary, he took the Tribunal to Mr Booth's evidence on the point, which was in part summarised in paragraph 23 itself a little later:

> "*…Mr Booth's clear evidence was said* [by Mr Rainey] *to be that the floor slabs for the two buildings are separate and separately supported on different sets of pillars (which indeed are of different materials – steel for the hotel extension, concrete for the premises). The slabs do meet: in that sense they 'join' and can be seen to do so; but they simply touch. They are not connected."*

68. Subject to that, Mr Rainey did state, in criticism of the FTT's "integrated connection" reason, that there was no evidence as to what happened where the floor slabs meet.

69. As to element (2) the car park ramp, Mr Rainey took the Tribunal at one stage to the photograph at p.325 of the appeal bundle and the plans, which showed that nothing lay beneath the ramp. That was briefly recorded in paragraph 28 of the draft decision. In answer to a submission made by Mr Upton, Mr Rainey said that there was no evidence as to whether the ramp was made of concrete (although it might be).

70. As to element (3), the ceiling, Mr Rainey accepted that there was very little evidence as to the construction of the car park and nothing directed at the ceiling of the car park.

71. Mr Rainey submits that the same erroneous recording of his submission appears in the critical paragraph 62 of the draft decision:

> "*…In my judgment the appellant cannot successfully maintain that the FTT applied the wrong legal test or that it reached a conclusion which was not open to it on the facts it*

had found. In this connection, it must be borne in mind that Mr Booth's expert evidence did not directly address the construction of the floor slabs, the ramp or the ceiling of the underground car park (as Mr Rainey accepted during the course of his oral opening of the appeal) …"

72. Mr Rainey requests that paragraphs 23 and 62 of the draft decision are corrected, as set out in paragraphs 67-70 above.

73. Mr Rainey submits that such correction has the consequence that other parts of paragraphs 62 and 63 of the draft decision must be revisited, as follows.

74. At paragraph 62 the Tribunal decided that the FTT:

> *"… clearly regarded the car park ceiling and floor slabs as doing more than merely touching. Reading the decision as a whole, it is clear that the FTT regarded them as a single and indivisible structure which straddled both buildings and meant that they could not properly be regarded as being 'structurally detached'…."*

75. Paragraph 63 finds that:

> *"… on the basis of the FTT's visual inspection, it concluded that the car park ceiling and floor slabs constituted a single structure. The appellant may not agree with that conclusion, but it cannot fairly say that it cannot understand why it lost its right to manage claim."*

76. If that is what the FTT meant, then Mr Rainey submits that the FTT was plainly wrong and that the appeal should be allowed. Shorn of the support of the wrongly-recorded oral submission at paragraphs 23 and 62 above, such a finding simply was not open to the FTT and cannot be confirmed by this Tribunal given Mr Booth's evidence as to the construction of the floor slabs and (*inter alia)* his unchallenged evidence (at p.269 of the appeal bundle) that the North Block "*is a distinct and discrete physical structure"* and (at p.335) his annotated photograph of the cantilevered upper floors of the hotel extension which "*…do not form any structural connection to the North Block*".

77. Furthermore, immediately before and after reciting the wrongly-recorded submission, the draft decision at paragraph 62 provided:

> *"…The FTT clearly regarded the car park ceiling and floor slabs as doing more than merely touching. Reading the decision as a whole, it is clear that the FTT regarded them as a* <u>*single and indivisible structure*</u> *which straddled both buildings …Mr Booth's expert evidence did not directly address the construction of the floor slabs, the ramp or the ceiling of the underground car park (as Mr Rainey accepted during the course of his oral opening of the appeal). Had it done so, then there might well have been force in Mr Rainey's point that the FTT should have raised with Mr Booth the impression which it had formed about the "integrated connection" between those aspects of the*

> *two buildings on the basis of its visual inspection. Since Mr Booth's report had not addressed this aspect of the construction of the hotel extension and the premises, however, there was, in my judgment, no obligation upon the FTT to do so (however sensible this might have been) …."*

78. Mr Rainey submits that shorn of the support of the wrongly-recorded oral submission at paragraphs 23 and 62 above, this passage cannot stand. Given that there was unchallenged evidence which directly addressed the construction of the floor slabs, there clearly was force in the submission that the "integrated connection" point and/or anything about the car park ceiling which the FTT thought it saw had to be raised with the parties and put to Mr Booth if it was to form any part of the FTT's reasoning.

79. Mr Rainey accepts that, as stated at paragraph 60 of the draft decision:

> "*This is an appeal by way of review. On such an appeal, there is no appeal against the FTT's factual findings as regards the construction and nature of the premises and any neighbouring buildings or structures or as to the nature and extent of any physical features separating or dividing them….*"

> But he submits that there are no findings of fact by the FTT, because there was no evidence on the points other than that of Mr Booth. If the observations on a site view/inspection were to be treated as part of the evidence, and to become findings of fact, they needed to be put to Mr Booth.

80. Mr Rainey submits that if the corrections to paragraphs 23 and 62 are accepted, as they ought to be, then it follows that the result, as set out in paragraph 64 of the draft decision, should be reversed. The appellant's challenge to the FTT decision is made out. The appeal should be allowed, and a finding substituted that the appellant is entitled to acquire the right to manage the premises.

81. The appellant notes the Tribunal's observations at paragraph 59 of the draft decision, which cannot be challenged under the *Re L* jurisdiction as they are unaffected by the correction of paragraphs 23 and 62 which the appellant seeks. Consequently, in the alternative to the submission that the consequence of correcting paragraphs 23 and 62 is that the appeal should be allowed, and the FTT decision reversed, the appellant submits that:

> (1) the effect of correcting paragraphs 23 and 62 in the context of the unchallenged evidence of Mr Booth is that the FTT's reasoning must be found inadequate;
>
> (2) the FTT's finding of a "single composite structure" or an "integrated connection" (which cannot be regarded as a finding of primary fact) is a finding for which there was no supporting evidence - indeed was contrary to the only evidence - and cannot stand;

(3) reliance on something (it is unclear to this Tribunal what that was) that was seen by the FTT on a site view but not put to the only material witness and was not adequately explained is a serious procedural irregularity and manifest unfairness;

(4) the FTT decision is unjust; but

(5) this Tribunal, as an appellate court or tribunal on review, is not in a position to re-make the first-instance decision.

82. The Appellant's alternative submission is that the proper outcome in those circumstances is that the appeal should be allowed, and the matter remitted to the FTT.

83. On 20 July 2018 I received by email a Note from Mr Upton (for the respondents) in response to Mr Rainey's request for me to alter my draft decision. Mr Upton did not dispute that the Tribunal had the necessary jurisdiction to alter the draft decision before it was handed down. Mr Upton's detailed note of the appeal hearing was said not to assist on the question of what in his oral submissions Mr Rainey had or had not accepted about Mr Booth's evidence, and so Mr Upton made no submissions as to whether paragraphs 23 and 62 of the draft decision should be amended as requested.

84. Mr Upton did, however, take issue with the submission that, if the draft decision were amended as requested, the outcome of the appeal should fall to be reversed.

85. Mr Rainey was said to appear to accept that Mr Booth's evidence did not directly address the construction of the ramp or the ceiling of the underground car park. The draft decision was, therefore, plainly right in respect of Mr Booth's evidence (or lack of it) as regards those issues. Importantly, having carefully reviewed Mr Booth's report and the FTT's Decision, Mr Upton could find no evidence in support of the submission (at paragraph 36 of Mr Rainey's skeleton argument dated 8 May 2018) that:

> *"Mr Booth's clear evidence is that the floor slabs for the two buildings are separate and separately supported on different sets of pillars (which indeed are of different materials – steel for the hotel extension, concrete for the Premises)."*

86. Mr Booth's report contains no specific evidence as to: (1) the floor slabs; (2) the ramp; or (3) the ceiling of the car park. Further, there is no reference in the FTT's decision to Mr Booth having given oral evidence on any of those specific matters. Thus, whether or not Mr Rainey *accepted* that Mr Booth's evidence did not directly address "the construction of the floor slabs, the ramp or the ceiling of the underground car park", as a matter of fact Mr Booth's evidence did <u>not</u> directly address these issues. Mr Upton submits that that should be sufficient to dispose of the request to alter the draft decision, at least in respect of the request to "reverse" the outcome of the appeal. If that is wrong (and there is some reference in Mr Booth's report or in the FTT's Decision to Mr Booth's evidence on the floor slabs which Mr Upton cannot find), and even if Mr Rainey did not accept in oral submissions that Mr Booth's evidence did not directly address "the construction of the floor slabs, the ramp or the ceiling

of the underground car park", it does not affect the reasons for dismissing the appeal in the draft decision.

87. Mr Upton submits that the "offending" sentence in paragraphs 23 and 62 of the draft decision has three elements: (1) the floor slabs; (2) the ramp; and (3) the ceiling of the underground car park. As explained above, it appears to be accepted that Mr Booth's evidence did not directly address elements (2) or (3). At its highest, the extent of Mr Booth's evidence on the *floor slabs* is that recorded at paragraph 23 of the draft decision:

> *"Mr Booth's clear evidence was said to be that the floor slabs for the two buildings are separate and separately supported on different sets of pillars (which indeed are of different materials – steel for the hotel extension, concrete for the premises)."*

88. As regards this (alleged) evidence, the submission advanced on behalf of the appellant was that: "The slabs do meet: in that sense they 'join' and can be seen to do so; but they simply touch. They are not connected." Mr Rainey accepts (in paragraph 10 of his Note requesting the draft decision to be altered) "that there is no evidence as to what happens where the floor slabs meet". At paragraph 62 of the draft decision the Tribunal said that:

> *"The FTT clearly regarded the car park ceiling and floor slabs as doing more than merely touching. Reading the decision as a whole, it is clear that the FTT regarded them as a single and indivisible structure which straddled both buildings and meant that they could not properly be regarded as being 'structurally detached'. It is implicit in the FTT's decision that they rejected the need for there to be any load-bearing connection between the two buildings (and this rejection was clearly articulated at paragraph 23 of the FTT's further reasons), but in my judgment they were right to do so: whilst mutual structural reliance, or inter-dependency, may indicate structural attachment, its absence does not, in my judgment, necessarily connote structural detachment, provided some part of the essential or core fabric of the subject premises is attached to some part of the essential or core fabric of another building. As explained at paragraph 21 of its further reasons, the FTT "found that a visual inspection ... did not lead to the conclusion that there was a mere touching, but that the integrated connection between the two buildings went beyond that to amount to structural detachment". In my judgment, that was a finding of fact that the FTT was entitled to arrive at on the basis of its view of the premises and the adjoining building. This was not a case merely of two adjoining walls touching, with no structural connection between them: on the basis of the FTT's visual inspection, it concluded that the car park ceiling and floor slabs constituted a single composite structure."*

89. Mr Upton submits that nothing in that passage is affected by the fact that Mr Rainey did or did not accept in oral submissions that Mr Booth's evidence did not directly address "the construction of the floor slabs, the ramp or the ceiling of the underground car park". Paragraph 62 of the draft decision continues as follows:

> *"In my judgment the appellant cannot successfully maintain that the FTT applied the wrong legal test or that it reached a conclusion which was not open to it on the facts it had found. In this connection, it must be borne in mind that Mr Booth's expert evidence did not directly address the construction of the floor slabs, the ramp or the ceiling of the underground car park (as Mr Rainey accepted during the course of his oral opening of the appeal). Had it done so, then there might well have been force in Mr Rainey's point that the FTT should have raised with Mr Booth the impression which it had formed about the "integrated connection" between those aspects of the two buildings on the basis of its visual inspection. Since Mr Booth's report had not addressed this aspect of the construction of the hotel extension and the premises, however, there was, in my judgment, no obligation upon the FTT to do so (however sensible this might have been)."*

90. Mr Upton submits that this passage must be read in the light of the extent of Mr Booth's evidence on the construction of the floor slabs – that the floor slabs for the two buildings are separate and separately supported on different sets of pillars – and the appellant's submission in respect of this evidence – that the slabs touch but they are not connected – as recorded at paragraph 23 of the draft decision. It cannot be said that the Tribunal did not understand the extent and quality of Mr Booth's evidence on the floor slabs. It may have been more accurate to state:

> "In this connection, it must be borne in mind that Mr Booth's expert evidence did not directly address the construction of the floor slabs (other than stating that the floor slabs for the two buildings are separate and separately supported on different sets of pillars), the ramp or the ceiling of the underground car park."
>
> But this does mean that the Tribunal's conclusion is wrong. The key points, as the Tribunal concluded at the end of paragraph 62, are that the FTT applied the correct legal test and that, in a matter which is essentially one of fact and degree, the appellant has not demonstrated that the FTT failed properly to apply that test to the results of its visual inspection of the premises and its surrounding buildings.

91. As to the alternative submission that the appeal should be allowed and remitted to the FTT on the basis that the FTT's reasons are not adequate, this should be rejected for the reasons given by the Tribunal in paragraph 63 of the draft decision.

92. I regret that I may have misunderstood the nature of Mr Rainey's concession. I also regret that I may not have made myself clear in recording my understanding of that concession in paragraph 23 of my draft decision. In the "offending" sentence of paragraph 23 (cited at paragraph 66 above) I had intended the phrase "of the underground car park" to qualify the reference to "the construction of the floor slabs" as well as the references to the ramp and the ceiling. I had understood Mr Rainey to have accepted that Mr Booth's evidence did not address the construction of the floor (or base) of the underground car park; but if I was wrong in that I apologise to him. I will correct the relevant passages in paragraphs 23, 62 and 63 of my draft decision to remove any reference to any concession in that regard and also

to make my true meaning clear. Whilst I readily accept that Mr Booth's annotated photograph 16 (at p 335 of the appeal bundle) made it clear that the upper floors of the hotel extension were cantilevered from the structural steel columns and did not form any structural connection to the premises, I accept Mr Upton's submission that Mr Booth's evidence does not directly address the construction of the floor (or base) of the car park. Thus, in my judgment, the corrections which I find it appropriate to make to my draft decision do not mean that I formed a mistaken view of the unchallenged evidence, or as to the validity of the FTT's reasoning or the sufficiency of its reasons; nor do they falsify my draft conclusion or the outcome of this appeal.

93. I regret that the exchange of post-draft decision notes between Mr Rainey and Mr Upton, and my pre-existing sitting commitments, have delayed, by some two months, the formal handing-down of this Decision.

David R. Hodge

His Honour Judge Hodge QC

31 July 2018