UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2019] UKUT 341 (LC)
UTLC Case Number: LRX/42/2019

LANDLORD AND TENANT – SERVICE CHARGES – preliminary issue on interpretation of terms in standard 'right to buy' long leases – works of repair to structure and exterior of building – whether cost of works 'amounting to the making good of structural defects' were chargeable as service charge if carried out for the purpose of repairing the structure and exterior – meaning of 'structural defects'

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

BETWEEN:

THE MAYOR AND COMMONALTY AND CITIZENS OF THE CITY OF LONDON

Appellant

and

VARIOUS LEASEHOLDERS OF GREAT ARTHUR HOUSE **Respondents**

**Re: Flats at Great Arthur House,
Golden Lane Estate,
London,
EC1Y ORD**

Mr Justice Fancourt, Chamber President

The Rolls Building

29 October 2019

Mr Timothy Straker QC and Mr Jonathan Manning (instructed by the City of London Corporation Comptroller and City Solicitor) for the Appellant
Mr Christopher Baker (instructed by DAC Beachcroft) for the Respondents

The following cases are referred to in this decision:

Payne v Barnet LBC (1998) 30 HLR 295

Ravenseft Properties Ltd v Davstone (Holdings) Ltd [1980] 1 QB 12

McDougall v Easington D.C. (1989) 21 HLR 310

Stent v Monmouth D.C. (1987) 19 HLR 269

Post Office Ltd v Aquarius Properties Ltd (1987) 54 P&CR 61

Introduction

1. The Appellant, the City of London Corporation ("the Corporation") appeals with permission of the First-tier Tribunal against a decision of the Residential Property division of the Property Chamber (Judge Carr, Mr W Richard Shaw FRICS and Mr Clifford Piarroux JP) dated 7 January 2019 ("the Decision").

2. In the Decision, the Tribunal expressed its conclusion on the meaning and effect of service charge provisions in standard form long leases of flats in Great Arthur House, London EC1 ("the Building"). The Building comprises some 120 flats but the leases – which were created pursuant to the Right to Buy provisions of the Housing Acts 1980 and 1985 – are in substantially identical terms.

3. The matter in dispute between the Corporation and the lessees relates to the costs of carrying out substantial work to the structure and exterior of the Building, between 2016 and 2018. This comprised works to the curtain walls on the west and east facades of the Building, the roof and concrete walls. The total cost was in excess of £8 million. The Corporation claims that the cost of the works is chargeable to the lessees as service charge under the leases (amounting to about £72,000 per flat). The lessees deny this.

4. The parties have attempted to reach a compromise solution to their dispute but have discovered that issues of principle relating to the meaning of the leases prevent agreement being reached. Accordingly, the lessees applied to the Tribunal for a determination under section 27A of the Landlord and Tenant Act 1985 about recovery of service charges but asked at a case management hearing for a hearing of preliminary issues.

5. The Tribunal was presented with issues relating to the meaning and effect of the leases that had been agreed between representatives of the lessees and the Corporation. The Tribunal approved the issues and gave directions, including directions relating to witness statements and reliance on expert reports that had already been obtained by the parties.

6. The issues directed were in the following terms:

> "In respect of the term 'specified repairs' in the lease(s) and in particular the words 'not amounting to the making good of structural defects':
>
> (i) what distinguishes making good one or more structural defects from carrying out other works of repair;
>
> (ii) for that purpose, in what respect and to what extent if at all is there a material difference between
>
> (a) work to make good one or more structural defects and

(b) work so required but the carrying out of which also addresses deterioration and/or consequential damage to the affected part(s) of the building which occurred over the time that the structural defect was not made good; and/or

(c) work so required but the carrying out of which also involves replacement of one or more building components at the end of their lifespan;

(iii) if and insofar as there is any such difference, what if any apportionment of the cost of such work, between making good a structural defect and carrying out of the work of repair, should be made and on what principle should that be done?"

7. Despite the fact that voluminous evidence was filed for the hearing of these issues, the parties confirmed to the Tribunal that the issues were solely ones of interpretation of the lease. The Tribunal was not presented with any agreed facts, nor did it make any findings of fact relating to the works to the Building. Although the Decision goes into a little detail about the nature of the works, the conclusions expressed could therefore only be a decision on the meaning and effect of the lease.

8. The Tribunal made the following determinations in relation to these issues:

"(a) Work carried out to remedy structural defects, even if that work happens to remedy disrepair, falls outside of the definition of 'specified repairs' for the purposes of charging a lessee for works, as long as either (i) the lessee was not notified of the structural defects at the time of the grant of the lease or (ii) the Corporation did not become aware of the structural defect earlier than the end of the initial period of either 10 or 5 years after the grant.

(b) a structural defect in this case is broadly understood to be an inherent defect in the design and construction of the building.

(c) this interpretation of the definition of 'specified repairs' in the lease means that there is no difference for the purposes of the relevant clause of the lease between

(i) work to make good one or more structural defects and/or

(ii) work so required but the carrying out of which also addresses deterioration and/or consequential damages to the affected part(s) of the building which occurred over the time that the structural defect was not made good; and/or

(iii) work so required to remedy structural defects but the carrying out of which also involves replacement of one or more building components at the end of their lifespan.

(d) There is therefore no need to decide on apportionment of the costs of the works."

9. The wording of the issues was not, in my judgment, wholly appropriate for a determination of preliminary issues about the true meaning and effect of the leases. The first question as drafted is too open and does not identify the difference between the parties. The Tribunal's answer, on any view, wrongly refers to two preconditions (a)(i) and (ii) as being alternatives. However, as the hearing of the appeal proceeded, it became clear what the real issue was. The second question is too imprecise: a court or tribunal cannot decide – in the absence of any agreed or determined facts – in what respects and to what extent there is a material difference between different sets of assumed circumstances described in broad terms. Further, the question does not really capture the real issue and the difference between the parties. The third question is not possible to answer as a matter of interpretation of the leases, save by stating the broad proposition that costs are recoverable to the extent that they relate to works that are 'specified repairs', but that is of course wholly circular. Any meaningful answer would necessarily depend on the particular facts.

10. In order to understand the issues that divide the parties it is necessary to set out the relevant terms of the leases.

11. Each lease is granted for a term of 125 years from 10 May 1982 at a premium. There is a statutorily implied obligation on the Corporation as landlord:

> "(a) to keep in repair the structure and exterior of the dwelling-house and of the building in which it is situated (including drains, gutters and external pipes) and to make good any defect affecting that structure;
>
> (b) to keep in repair any other property over or in respect of which the tenant has any rights…"

12. By clause 4 (3) of the lease, each lessee covenants that throughout the term he or she will pay to the Corporation a reasonable part of the costs of carrying out specified repairs and of insuring against risks involving specified repairs. The lease then provides machinery for payment, followed by definitions of terms used in the covenant. The relevant definition is that of "specified repairs", which:

> "… means repairs carried out in order:
>
> (i) to keep in repair the structure and exterior of the premises and of the Building in which they are situated (including drains gutters and external pipes) not amounting to the making good of structural defects;
>
> (ii) to make good any structural defect of whose existence the Corporation has notified the tenant in the notice served pursuant to [section 10 Housing Act 1980] which therein stated the Corporation's estimate of the amount (at then current prices) which would be payable by the tenant towards the costs of making it good (such defects being listed in the Fourth Schedule hereto) or of which the Corporation does not become aware earlier than ten years after the grant hereof and
>
> (iii) to keep in repair any other property over or in respect of which the tenant has any deemed rights".

In later leases, the words in square brackets refer to the corresponding section of the Housing Act 1985.

13. The issue that divides the parties is the effect to be given to the words "not amounting to the making good of structural defects" in para (i) of the definition. The lessees argue that works that in law are repairs are not "specified repairs" if the effect of the works is to make good a structural defect, unless the works fall within para (ii). The Corporation contends that works that make good structural defects are "specified repairs" if in law they are repairs and the purpose of the works was to remedy disrepair.

14. It was confirmed at the hearing of the appeal (though unclear from the Decision) that neither side contends that, as a matter of interpretation of the definition, works carried out to keep in repair the structure and exterior and works amounting to the making good of structural defects are mutually exclusive categories. Both sides accept that there is an overlap between the categories. The relevant question, then, is whether works that are repairs and make good structural defects can fall within para (i) of the definition and if so in what circumstances. The lessees say that they cannot, and that works that amount to the making good of structural defects can only fall within para (ii). The Corporation says that works that amount to making good structural defects can and do fall within para (i) if they are repairs and were carried out for the purpose of repairing the structure and exterior of the Building.

15. As can be seen from para (a) of its determination, the Tribunal agreed with the lessees on this issue. The reasons given are various. At [88], the Tribunal states that the case law, including *Payne v Barnet LBC* (1998) 30 HLR 295, does not directly assist in interpreting the words of the lease, but nevertheless the purpose of conferring protection on right to buy tenants in relation to the costs of structural works does supports the lessees' case. A further reason for the Decision appears to be that at [90], where the Tribunal accepts the argument that if costs recovery depends on remedying disrepair there would be a perverse incentive for the Corporation to wait until a structural defect had given rise to disrepair of the structure and exterior, rather than comply promptly with its obligation to make good the defect.

16. The Tribunal also records at [91] its agreement with the lessees that works "'not amounting to…' require a substantive approach to be taken in determining whether certain repairs are excluded from sub-para (i) of the definition", which requires one to look to the effect of the works; and that if they have, substantively, the character of remedying a structural defect they are excluded from para (i) (para [92]).

17. In short, the Tribunal appears to have accepted the argument of the lessees that if, in substance, the works have the effect of remedying a structural defect then, even if in law they are repairs, they do not fall within para (i), but can fall within para (ii) if the works were notified upon grant of the lease or came to the Corporation's knowledge more than ten years afterwards.

18. The relevant background to the individual leases is the statutory right to buy provisions, first contained in the Housing Act 1980, then subsequently amended, then consolidated in the Housing Act 1985 and then further amended by the Housing and Planning Act 1986. The form of lease prepared by the solicitor to the Corporation was, self-evidently, intended to comply with the statutory requirements for "right to buy" long leases, namely that the lease must comply with Parts I and III of Schedule 2 to the 1980 Act. It is important therefore to understand the terms of the relevant parts of the legislation with which the leases were intended to comply. Neither side in this dispute contends that any other factual circumstances surrounding the grant of individual leases are material to their interpretation.

19. Paragraph 13 of Part III of Schedule 2 provides:

> "(1) There shall be implied, by virtue of this Schedule, covenants by the landlord –
>
> > (a) to keep in repair the structure and exterior of the dwelling-house and of the building in which it is situated (including drains, gutters and external pipes) and to make good any defect affecting that structure;
> >
> > (b) to keep in repair any other property over or in respect of which the tenant has any rights by virtue of this Schedule;…
>
> (2) the covenant to keep in repair implied by virtue of sub-paragraph (1)(a) above includes a requirement that the landlord shall rebuild or re-instate the dwelling-house and the building in which it is situated in the case of destruction or damage by fire, tempest, flood or any other cause against the risk of which it is normal practice to insure.
>
> ……"

20. Paragraph 15 of Schedule 2 provides (so far as material):

> "Any provision of the lease or of any agreement collateral to it shall be void insofar as it purports –
>
> > (a) ……
> >
> > (b) to enable the landlord to recover from the tenant any part of the costs incurred by the landlord in discharging or insuring against his obligations under paragraph 13(1)(a) or 13(1)(b) above, or
> >
> > …….
>
> but subject to section 19 of this Act and paragraph 16 below.

Paragraph 16 provides:

> "A provision is not void by virtue of paragraph 15 above insofar as it requires the tenant to bear a reasonable part of the costs of carrying out repairs not amounting to the making good of structural defects or of the costs of making good any

structural defects falling within paragraph 17 below or of insuring against risks involving such repairs or the making good of such defects."

Paragraph 17 provides:

"A structural defect falls within this paragraph if –

(a) the landlord has notified the tenant of its existence before the lease was granted; or

(b) the landlord does not become aware of it earlier than 10 years after the lease was granted."

21. As observed by Brooke LJ in the *Payne* case, the draftsman was clearly aware of the difficult issue in landlord and tenant law of distinguishing between a liability to repair and a liability to remedy a defect. A covenant to repair is not triggered if the building is not in disrepair. Further, work to remedy disrepair or defects may be so extensive and expensive and have the effect of producing a building of a wholly different character, such that it cannot properly be considered to be work of repair: see *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] 1 QB 12; *McDougall v Easington D.C.* (1989) 21 HLR 310.

22. The obligation implied by paragraph 13(1) of Schedule 2 is not limited to work of repair; neither is the covenant to make good any defect affecting the structure of the dwelling-house or building limited to cases of "inherent defects". Both paragraph 13(1) and (2) demonstrates that works that would ordinarily be beyond the scope of a repairing obligation are within the implied covenant. In my judgment, the words "to make good any defect affecting that structure" are intended to broaden the scope of the implied covenant, and therefore, in that context, must be taken to contemplate works that do not fall within the scope of what is meant in law by "repair".

23. It might therefore have been thought that the categories of "repairs" and "works to make good any defect affecting the structure" were mutually exclusive; however paragraph 16 shows that this distinction was not applied in relation to charging the cost of works. This paragraph deals with two categories of works in respect of which the lease may provide for the landlord to recover from the tenant part of the costs incurred: "repairs not amounting to the making good of structural defects" and "making good any structural defects falling within paragraph 17". If, for the purpose of charging, the two categories had been mutually exclusive, the words "not amounting to the making good of structural defects" would be surplusage. This provision therefore accurately reflects the state of the law, in which works that have the effect of making good a structural defect can nevertheless be repairs: see, e.g., the *Ravenseft Properties* case and *Stent v Monmouth D.C.* (1987) 19 HLR 269.

24. The Housing and Building Control Act 1984 substituted new paragraphs 16 and 17 in Schedule 2 to the 1980 Act, by reason of the new requirement on a landlord to give an estimate of the amount that would be payable by a tenant towards the cost of making good identified

structural defects; but these paragraphs do not change the wording of the particular provisions explained above.

25. Upon consolidation in the 1985 Act, the implied covenants were materially unchanged, and paragraph 18 of Part III of Schedule 6 to that Act contains similar provisions to those of Part III of Schedule 2 to the 1980 Act, as amended. These, first, make void any term enabling a landlord to recover from the tenant any costs incurred in performing the implied covenants, and then exempt two categories of works: "repairs not amounting to the making good of structural defects" and costs incurred in respect of a structural defect that was either notified to the tenant upon grant of the lease or of which the landlord became aware more than 10 years (or 5 years, as it later became) after grant. The statutory language, so far as directly relevant to the issue of interpretation of the lease in this case, is therefore the same.

26. The statutory scheme was changed again by the 1986 Act, which permitted a lease to require the tenant to bear a reasonable part of costs incurred by the landlord in complying with the implied covenants, but restricted the amount of liability during an initial period of 5 years from grant to the amount specified in a statutory notice required to be given by the landlord before grant. Further provision was made in relation to contributions to the costs of improvements. A new paragraph 16B(1) of Schedule 6 to the 1985 Act states:

> "Where a lease of a flat requires the tenant to pay service charges in respect of repairs (including works for the making good of structural defects), his liability in respect of costs incurred in the initial period of the lease is restricted as follows."

Once again, therefore, the draftsman did not treat repairs and works for the making good of structural defects as mutually exclusive categories.

27. Against that background, it is clear that the terminology of the lease is, to a large extent, intended to mirror the underlying statutory provisions. The lease defines those "specified repairs" to which the lessee must contribute. Given the provenance of the terms used and the fact that "specified repairs" are described generically as "repairs", the parties agree that the lease does not draw a clear division between repairs on the one hand and the making good of structural defects on the other. The wording of the definition contemplates that works may be done to the structure and exterior of the Building which are properly characterised as repair and which also amount to the making good of structural defects.

28. The central question is whether all works in that "overlap" category, or only some of them, are excluded from para (i) of the definition of "specified repairs". If all, as the lessees submit, then, under para (ii), only repairs that make good structural defects that were notified to the lessee before grant or of which the Corporation became aware more than 10 years after grant, are chargeable as "specified repairs". If only some are excluded, as the Corporation contends, how does the wording of the lease differentiate between works that do and works that do not fall within para (i)?

29. Mr Straker QC's answer to this question, on behalf of the Corporation, is that the distinction is made depending on the purpose for which the repairs were carried out. In that regard, he points to the words of the definition "in order … to keep in repair" and contends that these require a purposive evaluation of the works: were the works done with the purpose of remedying disrepair? If so then the works are "specified repairs" under para (i). If they are undertaken with the purpose of making good structural defects, they are not.

30. Mr Baker, for the lessees, argues that the significant words for present purposes are not the words "in order … to" but the words "not amounting to" and submits that these words require one to consider the effect of the works: do they have the effect of making good structural defects? If so, the costs of such works can only be recovered as service charge, if at all, under para (ii) of the definition.

31. Mr Straker criticises the Tribunal's conclusion on the ground that it treats the determining factor as being whether a structural defect has been made good, whereas under the law of landlord and tenant there is nothing determinative about a defect being structural, or an inherent defect; rather, the relevant questions are whether there is disrepair and, if so, whether the works done amount to repairs, even if they also make good an inherent defect. Mr Straker therefore submits that the interpretation favoured by the lessees has the effect of reversing the approach under the general law, by making an assessment of whether the works make good a structural defect determinative.

32. Well though the argument was presented, I am satisfied that the lessees' interpretation is the right interpretation of the leases.

33. The purpose of the relevant provisions of the statutory code was to protect former council tenants from exposure to very substantial and unexpected service charges upon their acquiring long leases of their flats. That protection was tempered by reference to time. Works to repair the structure and exterior would be chargeable to the lessees, but not the more substantial costs associated with remedying structural defects, unless either the lessee had bought on notice of the likelihood of such works or the defect was first discovered a number of years into the term of the lease. That objective is more likely to be achieved if the cost of unforeseen works that have the effect of remedying a structural defect (which works are likely to be more expensive than works of simple repair) is excluded from the service charge rather than included.

34. Given that, as Mr Straker accepts, the words starting "not amounting to …." operate by way of exception or proviso to what has gone before, one would expect the language of the exception to define what is excluded. What is excluded is repairs that amount to the making good of structural defects. The natural reading of these words is that they are works, which in law are properly characterised as repairs, but which amount to the making good of a structural

defect. The words "amounting to" seem to me to be used in the sense of what the works in substance do or achieve.

35. Given that the purpose of para (i) of the definition (as it common ground) is to exclude from charge certain works of repair, it does not seem to me to be a convincing basis of distinction to ask the question: with what purpose (objectively) were the works carried out? If the works are works of repair then, objectively, the works are likely to have been carried out wholly or partly for the purposes of repairing the Building. That would have the effect of enabling a landlord to charge for all works except those that, objectively, were carried out for the sole purpose of making good a structural defect but incidentally achieved a repair. I do not find that convincing. It would have the result of permitting the Corporation to charge for all but a small class of works and would allow the costs of expensive structural works to be charged in many if not most cases. That sits uncomfortably with the evident purpose of the statutory provisions from which the terms of the lease are derived. I consider that too much weight is being given by the Corporation to the general words "in order to" that introduce the various paragraphs of the definition.

36. Mr Straker rightly pointed out that the distinction between chargeable and non-chargeable works arises in the context of determining whether a term of a lease permitting the landlord to recover costs is void. He submits that a distinction that depends on the effect of various works that are to be done is not one that enables one easily to answer the question whether the term of the lease is void. I do not accept that argument. Voidness depends on whether the lease term as drafted only allows a landlord to recover permitted costs. If these are defined as excluding costs of works that amount to (or have the effect of) making good structural defects (save in so far as they fall with para (ii) of the definition) then the lease is valid; if they do not then they are void to that extent. In any event, Mr Straker's suggested criterion of the purpose for which the works are carried out is susceptible to the same criticism.

37. As for the reversal of the approach of the general law, in which the concept of inherent or structural defect plays a subsidiary role, I agree that when considering whether or not works fall within a repairing covenant a tribunal will be concerned with whether (a) the subject matter of the works was in disrepair and (b) the works are by their nature works of repair (whether or not they remedy an inherent defect) or are works that are too extensive and expensive properly to be characterised as works of repair: see *Post Office Ltd v Aquarius Properties Ltd* (1987) 54 P&CR 61 and the *McDougall* case. However, that is because the question is whether the works fall within the scope of a repairing obligation. If the covenant (as the statutorily implied covenant does) goes further and also imposes an obligation to make good structural defects, then the focus is equally on whether the works amount to making good a structural defect.

38. In the context of Right to Buy leases, the relevant concepts, derived from the Housing Acts, are repair and the making good of structural defects. The Acts and the leases posit a category of works that are repairs and amount to works to make good structural defects. The leases exclude from para (i) of the definition repairs that amount to making good structural

defects. In those circumstances, it is not surprising that the focus is on whether the works amount to making good structural defects. The answer is not provided by asking whether or not the works are works of repair. As the parties agree, the distinction in para (i) is not between works that are repairs and works that are not.

39. In my judgment, therefore, works of repair of the structure and exterior of the Building do not fall within para (i) of the definition of "specified repairs" if the effect of the works is to make good a structural defect. The costs of works that do have the effect of making good a structural defect are only recoverable if they fall within para (ii). Thus, if works have the effect of making good a structural defect, it makes no difference that the works also remedy deterioration that has occurred over the time that the defect existed.

40. A structural defect is not confined to a so-called inherent defect but must be something that arises from the design or construction (or possibly modification) of the structure of the Building. It is to be contrasted with damage or deterioration that has occurred over time, or as a result of some supervening event, where what is being remedied is the damage or deterioration. That is repair and is not in the nature of work to remedy a structural defect, even if it is a part of the structure that has deteriorated. As a simple example, mastic sealant is part of the structure of a modern building. The replacement of degraded sealant – even with a more modern and better type of sealant – is repair, not the making good of a structural defect; similarly, repointing a flank wall, or replacing spalled brickwork. These are simple examples.

41. At the other end of the scale of size and complexity of work, the gradual deterioration over time of substantial components of a building, such as the fenestration or curtain walling, may be a matter of simple repair, even if the only economically defensible way to repair is to replace and upgrade to a modern specification. On the other hand, if a structural component has deteriorated in condition because of a defect in its design or construction, the work to repair and eradicate the structural defect is likely to amount to work to make good a structural defect. There is no bright line that can be drawn as a matter of principle. Whether repairs are works that have the effect of making good structural defects is necessarily a fact-sensitive assessment.

42. In practice, a contract for extensive works may include works that fall into both categories. There is no reason of principle why a package of works cannot be analysed to see whether there are separate constituent parts, some of which are in the nature only of repairs to remedy disrepair of the Building and others of which are works to make good a structural defect.

43. In the light of the conclusions that I have reached, it is appropriate to set aside the determinations made by the Tribunal at paragraphs (1) and 82 of its Decision, even though Mr Baker has persuaded me that the Tribunal was broadly right in the conclusions to which it came on the matters raised by Questions (1) and (2). The answers that the Tribunal has given are potentially misleading. I have substituted for them the narrative decision in this judgment.

44. While it would have been possible to frame more limited and suitable questions about the interpretation of the lease, neither party has suggested this and the parties indicated that they were content for me instead to provide such guidance as was possible on the meaning of the definition, in the light of the arguments presented. The only relevant issues capable of being decided as issues of interpretation of the lease, without any agreed or found facts, are the issue explained in para 14 above and, in that context, the meaning of "structural defects".

45. Accordingly, I allow the Corporation's appeal but only to the very limited extent of setting aside the Tribunal's determinations and substituting a reasoned, narrative decision. In substance, on the central issues, the lessees have succeeded.

46. Works of repair of the structure and exterior of the dwelling-house and the Building only fall within para (i) of the definition of "specified repairs" if they do not have the effect of making good a structural defect. The cost of works that do have the effect of making good a structural defect of the dwelling-house or the Building are only chargeable as service charge if they fall within para (ii) of the definition.

Mr Justice Fancourt

Chamber President

20 November 2019