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Case No: LC-2023-334

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT Ref: CHI/00HG/LSC/2022/0070-72

Royal Courts of Justice,
Strand,
London WC2A

16 January 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – liability of lessee under right to buy leases to contribute to cost of repairing roof – s.139 and Sch.6, para 14, Housing Act 1985 – appeal allowed

BETWEEN:

CRISPLANE LIMITED

Appellant

-and-

PLYMOUTH COMMUNITY HOMES LIMITED

Respondent

96 and 146 Rothesay Gardens,
Plymouth PL5 3TA

Martin Rodger KC, Deputy Chamber President

9 January 2024

Rawdon Crozier, instructed by Curtis Whiteford Crocker, for the appellant
Jonathan Ward, instructed by Tozers, for the respondent

The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36; [2015] AC 1619

City of London v Leaseholders of Great Arthur House [2021] EWCA Civ 431

Introduction

1. The issue in this appeal is whether the appellant, Crisplane Limited, is obliged to contribute through a service charge towards the costs incurred by the respondent, Plymouth Community Homes Ltd, in replacing the roofs of two blocks of flats in Rothesay Gardens in Plymouth. The appellant holds long leases of two flats from the respondent, one in each block.

2. The appeal is against a decision of the First-Tier Tribunal (Property Chamber) (the FTT) published on 12 April 2023. The FTT decided that under its leases the appellant was obliged to pay £7,965.60 for repairs carried out at each of the two buildings. Judgment for those sums plus interest and court costs were subsequently entered by the County Court pursuant to the FTT's determination. This appeal is solely against the FTT's decision and is brought with the its permission.

3. The appellant challenges the FTT's conclusion that the leases of its two flats impose an obligation on it to contribute towards the cost of work to the roof. The issue concerns the interpretation of the leases, not the extent of the work or the reasons it was required.

4. At the hearing of the appeal the appellant was represented by Mr Rawdon Crozier, who had not appeared before the FTT, and the respondent by Mr Jonathan Ward, who had.

The relevant statutory provisions

5. Before looking in any detail at the facts and, in particular, at the leases with which the appeal is concerned it is convenient to refer to the statutory provisions pursuant to which the leases were granted.

6. As the leases each recite at clause 2, they were granted pursuant to section 122, Housing Act 1985, which gives secure tenants of local authority housing the right to buy their homes on the terms provided by the Act. Where the property is a house the tenant is usually entitled to acquire the freehold; where it is a flat, the right is to acquire a long lease for a term of 125 years. Section 139(1) specifies that a grant of a lease executed in pursuance of the right to buy is to "conform" with Parts 1 and 3 of Schedule 6 to the 1985 Act. In the rest of this decision references to Schedule 6 are to Schedule 6 of the 1985 Act.

7. Schedule 6 is concerned with the terms of conveyances of freeholds and the grant of leases in pursuance of the right to buy. Part 1 contains "common provisions" applying both to freehold conveyances and to the grant of leases. Those common provisions include rights of support, rights of way and other easements, as well as provisions to secure that the tenant will be bound by restrictive covenants. Otherwise, the parties are entitled to agree reasonable terms for the lease, as is apparent from paragraph 5:

> "5. Subject to paragraph 6, and to Parts 2 and 3 of this Schedule, the conveyance or grant may include such other covenants and conditions as are reasonable in the circumstances."

8. Paragraph 6 renders void any provision of a conveyance or lease which purports to enable the landlord to charge the tenant a sum in connection with the giving of the consent or approval. Nothing in Part 1 of Schedule 6 expressly avoids any other type of provision; whether paragraph 5 might indirectly have that effect in the case of a provision of a lease which was subsequently found not to be reasonable is a question which may arise in the case of one of the appellant's leases, but not in this appeal.

9. Part 3 of Schedule 6 is concerned with the terms of leases granted in pursuance of the right to buy. Paragraph 14 deals with covenants by the landlord and is in the following terms:

> "14(1). This paragraph applies where the dwelling-house is a flat.
>
> (2) There are implied covenants by the landlord –
>
> (a) to keep in repair the structure and exterior of the dwelling-house and 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 rights by virtue of this Schedule;
>
> (c) to ensure, so far as practicable, that services that are to be provided by the landlord and to which the tenant is entitled (whether by himself or in common with others) are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services;
>
> (3) There is an implied covenant that the landlord shall rebuild or reinstate 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.
>
> (3A) [consistency with superior leases]
>
> (4) The county court may, by order made with the consent of the parties, authorise the inclusion in the lease or in an agreement collateral to it of provisions excluding or modifying the obligations of the landlord under the covenants implied by this paragraph, if it appears to the court that it is reasonable to do so."

10. Paragraph 16(b) of Schedule 6 provides that, unless the parties otherwise agree, there is implied into a lease of a flat granted in pursuance to the right to buy a covenant by the tenant to keep the interior of the dwelling-house in good repair (including decorative repair).

11. The general pattern of the statutory scheme, as far as repairing obligations are concerned, is therefore, unsurprisingly, that the landlord is to be responsible for repairs to the structure and exterior of the flat and the building, and the tenant is to be responsible for keeping the interior of the flat in repair. Schedule 6 does not expressly prohibit a different agreement, including one requiring the tenant to keep the structure and exterior in repair, and there is no equivalent of paragraph 6 rendering such a provision void. But paragraph 5 authorises

the inclusion in the lease only of "such other covenants and conditions as are reasonable in the circumstances" and the landlord's implied obligations may be excluded or modified only with the authorisation of the county court given under paragraph 14(4).

12. By paragraph 16A of Schedule 6 a lease may require the tenant to bear "a reasonable part" of the costs incurred by the landlord in discharging or insuring against the obligations imposed by the covenants implied by virtue of paragraph 14(2). That requirement is modified during the first five years after the grant of the lease by paragraph 16B, which limits the tenant's contribution to an amount not greater than the amount estimated in respect of works itemised in a notice given by the landlord before the lease was granted. Where specific works were not itemised in such a notice the tenant's contribution is limited by reference to an estimated annual average amount notified by the landlord before the grant of the lease. Paragraph 18 renders void any provision in so far as it purports to authorise the recovery of a service charge restricted by paragraph 16B.

The leases

13. The appeal is concerned with two flats in Rothesay Gardens, Nos. 96 and 146. Each of the flats is in a separate building. Each of the buildings is a two storey "Cornish Unit" containing four flats, two on the ground floor and two on the upper floor, each with its own separate entrance. The buildings were constructed in the immediate post-war period, either in the late 1940's or early 1950's. They have pre-cast reinforced concrete walls and a traditional timber pitched roof structure with hipped ends. As originally constructed the roof coverings were of concrete single lap interlocking tiles with concrete ridges and hips.

14. In 2018 the roofs of the two buildings were inspected by the respondents and found to be at or close to the end of their useful life. After consultation the roofs were stripped of their tiles, the roof structures were renewed and new tiles were fitted. It is no longer in dispute that the work was required, that it was carried out competently and that the cost incurred by the respondent was reasonable.

15. No. 96 Rothesay Gardens is an upper floor flat. The lease was granted on 26 February 1990 by Plymouth City Council to a Mr and Mrs Whitehead (referred to in the Lease as "the Lessee"). It now belongs to the appellant and the freehold reversion to the respondent.

16. The appellant also holds the lease of No. 146 Rothesay Gardens which was granted on 25 June 1990 by Plymouth City Council to a Mr Midgley. No. 146 is a ground floor flat.

17. The leases of the two flats are in the same terms which I assume were the standard terms used by the City Council in 1990 when granting right to buy leases. As will be seen, although the leases are in the same standard terms, the fact that one of the flats is on the ground floor and one on the upper floor means that those standard terms impose different obligations on the parties.

18. It is convenient to begin with the lease of No. 96, the upper floor flat.

96 Rothesay Gardens

19. The lease begins with a number of definitions in clause 1. "The property" is defined as "the building" shown on a plan annexed to the lease; notwithstanding that description it can be seen from the plan that the property is only half of the building, divided vertically and comprising No. 94 on the ground floor and No. 96 on the upper floor. The "property" does not include the other half of the building comprising Nos. 98 and 100.

20. The "demised premises" means No. 96, consisting of the upper storey of the property including the floor, half of the depth of the joist supporting the floor, the roof and the rain water gutters of the property as well as front and rear gardens.

21. The "reserved premises" means No. 94, consisting of the ground floor of the property including the ceiling and half of the depth of the joist supporting the ceiling together with outbuildings, foundation and front and rear gardens.

22. By clause 2 of the lease No. 96 was demised for a term of 125 years at a ground rent of £10 a year. The Lessee additionally agreed to pay a service charge and by clause 3 to comply with obligations in the Third Schedule. The Lessor covenanted to observe and perform obligations in the Fourth Schedule.

23. The lease reserved certain rights to the Lessee, recorded in the First Schedule. One of those rights is relied on by the respondent. It is at paragraph 3 of the First Schedule and confers on the Lessee:

> "All rights of way support and other easements and all quasi-easements rights and benefits of a similar nature now enjoyed or intended to be enjoyed by the demised premises over any part of the premises and the Estate."

24. The Third Schedule includes, at paragraph 3, a covenant by the Lessee to "keep and maintain the demised premises and all parts thereof … in a good and tenantable state of repair decoration and condition…". As the demised premises includes the roof, on the face of it (and assuming it is enforceable) this obligation places a responsibility for the repair of the roof on the Lessee.

25. Paragraphs 12 and 13 of the Third Schedule are concerned with the service charge. Paragraph 12 provides as follows:

> "The Lessee shall contribute and shall keep the Lessor indemnified from and against one half of all costs and expenses incurred by the Lessor in carrying out its obligations under and giving effect to the provisions of the Fourth Schedule hereto including clauses 8 and 9 of that Schedule but excluding clause 4 of the said schedule and in enabling the Lessee to enjoy the rights contained in the First Schedule hereto."

Paragraph 13 of the Third Schedule contains more detailed payment provisions which it is not necessary to refer to.

26. The Fourth Schedule contains the Lessor's covenants. Paragraphs 4 and 5 are material to the appeal and provide (so far as relevant) as follows:

> "4. The Lessor shall keep the reserved premises and all fixtures fittings and apparatus therein and additions thereto in a good and tenantable state of repair decoration and condition.
>
> 5. The Lessor shall keep and maintain the exterior of the property (excluding the roof thereof) in good and tenantable repair decoration and condition …"

146 Rothesay Gardens

27. The lease of No. 146 was granted a few months after the lease of No. 96 and is in substantially the same terms other than the definitions in clause 1. Once again, the "property" is defined by reference to a plan and means the upper and lower flats comprising one half of the block. This time the "demised premises" means the lower flat consisting of the ground floor of the property up to the mid-point of the joists supporting the ceiling. The "reserved premises" are the upper flat (No. 148) consisting of the upper storey of the property including the roof. The relevant covenants and obligations are expressed in the same terms as in the lease of No. 96.

The FTT's decision

28. The FTT's decision concerned three flats but the issue in relation to the third (34 Herbert Street, Plymouth) has not given rise to any appeal. The FTT proceedings arose out of county court proceedings issued by the respondent claiming unpaid service charges including £7,965.60 for the replacement of the roof of each of Nos. 96 and 146. The proceedings were transferred to the FTT for it to make a determination under section 27A, Landlord and Tenant Act 1985 of the amount of the service charge, if any, which was payable by the appellant. By amendment to its defence in the county court proceedings, the appellant disputed its liability to make any contribution towards the costs of repairs to the roof.

29. The FTT decided that the appellant was liable to pay the sum demanded under each of the leases. It did not distinguish between the two leases but accepted a submission by Mr Ward that each of them was subject to the implied covenants in paragraph 14 of Schedule 6 to the 1985 Act, including in particular paragraph 14(2)(a) which obliges the respondent to keep the structure and exterior of the dwelling-house and of the building which it is situated in repair. There was no dispute that the roof was part of the structure and exterior of the building and therefore it was caught by the implied repairing covenant. At paragraph 61 of its decision the FTT concluded that the implied covenant formed "part of the landlord's obligations under the Fourth Schedule of the leases".

30. The FTT then determined that the words in brackets in paragraph 5 of the Fourth Schedule which excluded the roof from the Lessor's obligation to repair the exterior of the property were "without effect" because "the parties cannot contract out of the implied covenants unless it has been ordered by a county court" (a reference to paragraph 14(4) of Schedule 6). In the absence of evidence of any county court order authorising a modification of the implied covenant on the grant of the leases of Nos. 96 and 146, the FTT considered that it

should disregard the words "(excluding the roof thereof)" where it appeared in paragraph 5 of the Fourth Schedule.

31. In paragraph 67 of its decision the FTT reiterated its view that the Lessee's obligation in paragraph 12 of the Third Schedule to contribute one half of the costs and expenses incurred by the Lessor in carrying out its obligations in the Fourth Schedule extended to the cost of complying with the implied repairing covenant imposed by paragraph 14(2) of Schedule 6. It also referred to paragraph 18 of Schedule 6, but as that provision relates only to the first five years of the term, and as the relevant costs were incurred long after that period, it is not necessary to consider that part of its decision.

32. The FTT was also satisfied that the requirement it had identified to pay one half of the cost of repairs was reasonable, and therefore consistent with paragraph 16A(1) of Schedule 6. It concluded that each of the leases authorised the respondent to recover half of the cost of the replacement of the roof over the property from the appellant through the service charge.

The appeal

33. The only issue in the appeal is whether the FTT was right to find that the appellant is liable to contribute towards the costs of repairs to the roof in the case of each of the two flats. The arguments presented to the FTT, and by the parties in their statements of case and skeleton arguments for the appeal, were very elaborate, and focussed at length on principles of interpretation and other issues which, on closer examination, have little or nothing to do with the issue to be determined.

34. Stripped of elaboration, Mr Crozier's argument on behalf of the appellant in relation to No. 96 was that the lease included an implied covenant by the Lessor to repair the roof, imported by paragraph 14(2) of the Schedule 6. Contrary to the view of the FTT, the implied covenant was not to be read as part of the Fourth Schedule to the lease and the cost of complying with it was not part of the costs and expenses referred to in paragraph 12 of the Third Schedule to which the Lessee is required to contribute. The lease of No. 96 imposed no other obligation on the appellant to contribute to the cost of repairs to the roof and the FTT's decision was therefore wrong.

35. In relation to the ground floor flat, No. 146, Mr Crozier submitted that the roof was part of the reserved premises which the Lessor was obliged by paragraph 4 of the Fourth Schedule to keep in repair. The cost of complying with that obligation was expressly excluded from the Lessees' contribution liability under paragraph 12 of the Third Schedule. The Lessee was required to contribute towards the Lessor's costs of complying with the remainder of its obligation under the Fourth Schedule, including paragraph 5, but paragraph 5 specifically excluded repairs to the roof. There was no other provision in the lease which required the Lessee to contribute towards the cost of repairs to the roof and, once again, the FTT's conclusion was therefore wrong.

36. On behalf of the respondent Mr Ward invited me to confirm the decision of the FTT for the reasons it gave or for an alternative reason which he had raised before the FTT but which it had not had to consider. He submitted in relation to No. 96, the upper floor flat, that the FTT had been correct to treat paragraph 5 of the Fourth Schedule as if the words "(excluding

the roof thereof)" had been removed because those words were an attempt to exclude or modify the statutory implied obligation of the landlord to keep the structure and exterior of the dwelling and of the building in which it was situated in repair. That obligation was incorporated by paragraph 14(2) of Schedule 6 and could only be avoided with the consent of the county court obtained under paragraph 14(4). In the absence of an order of the county court, the attempt to modify the landlord's obligation should be ignored. If the words in brackets in paragraph 5 of the Fourth Schedule were omitted, the effect of paragraph 12 of the Third Schedule was that the Lessee was obliged to pay half of the costs of keeping the exterior of the property in repair, which included replacing the roof.

37. As far as No. 146, the ground floor flat, was concerned, Mr Ward acknowledged that an argument based on paragraph 14(4) of Schedule 6 was more difficult. He nevertheless submitted that, viewed in isolation, paragraph 5 of the Fourth Schedule purported to exclude the landlord's obligation to keep the roof of the building in repair; that exclusion had not been authorised by the county court as paragraph 14(4) of Schedule 6 required for it to be effective. Mr Ward acknowledged that if the Lessor's obligations were viewed as a whole, rather than individually, his argument became problematic, since paragraph 4 of the Fourth Schedule imposed an obligation to keep the reserved premises, including the roof, in repair which was entirely consistent with paragraph 14(2) of Schedule 6 .

38. Mr Ward's alternative argument, which had not been addressed by the FTT, focussed on the concluding words of paragraph 12 of the Third Schedule which require the Lessee to contribute to all costs and expenses incurred by the Lessor "in enabling the Lessee to enjoy the rights contained in the First Schedule hereto".

39. Referring to paragraph 3 of the First Schedule, which in each lease confers on the Lessee "all rights of way support and other easements and quasi-easements rights and benefits of a similar nature now enjoyed or intended to be enjoyed by the demised premises over any part of the premises and the Estate", Mr Ward submitted that the Lessee enjoyed rights of support, shelter and protection for the demised premises as a result of this clause. The cost of repairing the roof was part of the cost of enabling the Lessee to enjoy that right of shelter or protection and paragraph 12 of the Third Schedule therefore required the Lessee to contribute one half of the cost of those repairs. Mr Ward submitted that the same obligation arose in each of the leases.

Discussion

40. This is not the first time that the extent of the obligations imposed on right to buy leaseholders to contribute towards the cost of structural repairs has given rise to difficulty. This appeal raises questions about the effect of paragraph 14 of Schedule 6 which, so far as I am aware, have not previously been the subject of judicial consideration. In particular, I was referred to no authority in which the effect of paragraph 14(4) had been considered.

41. Nevertheless, important general guidance is available from the decision of the Court of Appeal in *City of London v Leaseholders of Great Arthur House* [2021] EWCA Civ 431. That case concerned the scope of the obligation of the tenants of flats in Great Arthur House to contribute towards the cost of "specified repairs", an expression which was defined as "repairs to the structure and exterior of the premises not amounting to the making good of

structural defects". The issue was therefore quite specific but Lewison LJ (with whom Bean and Arnold LLJ agreed) made two general points which I bear in mind in this case.

42. The first (at [13]) was common ground between the parties in that case and was that "because the leases were granted pursuant to the right to buy, the legislative background is also an aid to interpretation of the covenants." But as Lewison LJ went on to explain (at [34]): "although the legislative background is undoubtedly relevant to the interpretation of a contract, it is not necessarily determinative".

43. The other general point to be taken from the *Great Arthur House* case is a reminder, at [38], that "there is no presumption that the cost of all works that the landlord is obliged to carry out can be passed on to the Lessees".

44. Neither of the leases in this case is particularly well drafted. Each document has been amended, either in typescript or manuscript, to make significant changes to its original form. Before those changes the Lessee's payment obligation under paragraph 12 of the Third Schedule extended to half of the Lessor's costs of carrying out all of its obligations in the Fourth Schedule. In that original form, paragraphs 4 and 5 of the Fourth Schedule comprised a single obligation by the Lessor to keep the reserved premises in repair and in particular to keep the exterior of the property (excluding the roof) in repair. The effect of the original draft, if it had not been amended, would have been that the Lessee would have contributed towards the cost of repairing the whole of the exterior of the property excluding the roof, but including the reserved premises.

45. Quite how, or why, the original parties (who are no longer the parties to the leases), came to agree the terms which were finally executed is not a question which is relevant to the interpretation of those terms. The task for the Tribunal is to understand what the parties meant by the words which they used in their final form. In undertaking that exercise it is necessary to bear in mind that, in granting and receiving a right to buy lease, the parties are likely to have been influenced by the 1985 Act and the limitations which it imposed on the terms which they were free to agree.

46. The effect of the parties' agreement in the lease of No. 146 is straightforward. As far as the Lessor's obligations are concerned, paragraph 4 of the Fourth Schedule requires that it keep the whole of the reserved premises in repair. The reserved premises expressly include the roof, so paragraph 4 obliges the Lessor to repair the roof. Paragraph 5 is a separate obligation on the Lessor to repair the exterior of the property (but excluding the roof).

47. Although there may at first appear to be some inconsistency in these provisions, on closer consideration there is none. The inclusion of the roof in one of the Lessor's Fourth Schedule repairing covenants and its exclusion from the other becomes explicable when read alongside paragraph 12 of the Third Schedule. Paragraph 12 requires the Lessee to contribute half of the costs incurred by the Lessor in carrying out its obligations under the Fourth Schedule, excluding paragraph 4 (the reserved premises obligation).

48. It follows that, having regard only to the express terms of the Lease of No. 146, the Lessee has no obligation to contribute towards the costs incurred by the Lessor in carrying out repairs to the roof, because the roof is specifically excluded from the parts of the property

covered by paragraph 5 of the Fourth Schedule and the Lessee's obligation in paragraph 12 of the Third Schedule does not include contributing to costs incurred in complying with paragraph 4 of the Fourth Schedule, which does extend to the roof.

49. Finally, paragraph 3 of the Third Schedule (the Lessee's obligation to repair the demised premises) is not engaged at No. 146, because the roof is not part of the demised premises.

50. The position is more complicated at No. 96, an upper floor flat. There, by including the roof in the definition of the demised premises the parties expressly agreed that it was to be part of the premises which paragraph 3 of the Third Schedule requires the Lessee to keep in repair. Whether that obligation is enforceable having regard to paragraph 5 of Schedule 6 to the 1985 Act, especially in the absence of an obligation on the Lessor to contribute to the Lessee's costs of repairing the structure and exterior of the demised premises, is not a question which arises on this appeal. This appeal is concerned only with the extent of the Lessor's entitlement to recover the cost of the work that it has carried out to replace the roof.

51. The Lessor's entitlement to recover the cost of repairing the roof is governed by paragraph 12 of the Third Schedule which obliges the Lessee to contribute half of the costs and expenses incurred by the Lessor in carrying out its obligations under the Fourth Schedule (excluding paragraph 4). At No. 96 the Fourth Schedule imposes no obligation on the Lessor to carry out any work to the roof at all. The roof is not part of the reserved premises and therefore does not fall within paragraph 4. The obligation in paragraph 5 to keep the exterior of the property in repair is subject to the express exclusion of the roof. On the face of it, therefore, the Fourth Schedule imposes no obligation to repair the roof and it follows that paragraph 12 of the Third Schedule does not require the Lessee to contribute towards the costs of any work which the Lessor carries out to the roof.

52. The FTT held that in the case of both flats the implied covenant introduced into the Leases by paragraph 14(2) of Schedule 6 to the 1985 Act not only required the Lessor to carry out repairs to the roof but did so by inserting the implied covenant into the Fourth Schedule thereby creating a contractual obligation on the part of the Lessee to contribute half the cost under paragraph 12 of the Third Schedule.

53. The FTT was clearly correct that the effect of paragraph 14(2) was to subject the Lessor to the implied covenant to keep the whole of the structure and exterior of the flat and the building in which it was situated in repair. So far as the roof of No. 146 is concerned, the implied covenant duplicates the Lessor's obligation under paragraph 4 of the Fourth Schedule to keep the reserved premises (including the roof), in repair. At No. 96, the implied covenant is the only obligation on the Lessor to repair the roof.

54. But the covenant implied into the Lease by the statute says nothing about any corresponding obligation on the Lessee to contribute towards the costs incurred by the Lessor in complying with it. Moreover, paragraph 16A(1) of Schedule 6 leaves the parties free to agree whatever terms they choose about contributions by the tenant towards costs incurred by the landlord in discharging the implied obligations (provided those contributions do not exceed a reasonable part of those costs). In neither of these leases did they expressly agree anything about those costs. Nor can any obligation to contribute be implied. At No. 146 any suggested implication would be inconsistent with the express terms which exempt the

Lessee from any responsibility for contributing towards the Lessor's costs of repairing the roof. At No. 96, the lease works perfectly well with the only relevant obligation being the Lessor's implied covenant to keep the structure of the building in repair without the need to imply any corresponding payment obligation on the Lessee's part. It cannot be said that the absence of a service charge covering the implied obligation causes the lease to lack business efficacy since, as Lewison LJ pointed out in *Great Arthur House*, "there is no presumption that the cost of all works that the landlord is obliged to carry out can be passed on to the Lessees".

55. The route by which the FTT found the appellant liable to contribute towards the cost of repairs to the roof does not seem to me to be justified. It relied on paragraph 14(4) of Schedule 6 as nullifying the parties' agreement that landlord's obligation to repair the exterior of the building was not to include an obligation to repair the roof. That is what it meant when it said in paragraph 62 of the decision that "the parties cannot contract out to the implied covenants unless it has been ordered by the County Court". It was this part of the FTT's reasoning that Mr Ward invited me to accept.

56. I do accept that the parties were not free to contract out of the statutory implied covenant. But that does not require any rewriting of paragraph 5. Paragraph 14(4) of Schedule 6 restricts the extent to which the parties may exclude or modify the obligations of the landlord under the covenants implied by paragraph 14. It has no effect on their express covenants, whether or not they are inconsistent with paragraph 14; the implied covenant to repair the structure and exterior of the dwelling and of the building is an additional obligation, the meaning of which is clear and which applies unamended. So far as it goes, the express obligation in paragraph 5 of the Fourth Schedule duplicates but is not inconsistent with the implied obligation. In both leases the Lessor is obliged by the statutory implied covenant to repair the roof, notwithstanding the exclusion of the roof from the separate covenant at paragraph 5 of the Fourth Schedule.

57. But, for the reasons I have already given in paragraphs 54 and 56 above, I do not accept that the implied covenant requires that the leases be read as if the words "(excluding the roof thereof)" did not appear in paragraph 5 of the Fourth Schedule.

58. It follows that when the respondent replaced the roof of No. 96 it was not carrying out any obligation under the Fourth Schedule. It was complying with the implied covenant. When it replaced the roof of No. 146 it was complying with the implied covenant and additionally with its obligation to keep the reserved premises in repair, but that obligation is excluded from the Lessee's contribution obligation by paragraph 12 of the Third Schedule.

59. That leaves only Mr Ward's fall-back argument based on the concluding words in paragraph 12 of the Third Schedule and the grant of easements, quasi-easements and rights of shelter and support by paragraph 3 of the First Schedule. Once again it is necessary to look at each of the two leases separately.

60. The roof was included in the demise of No. 96. The additional rights given to the Lessee by the First Schedule were not rights over the demised premises themselves. The roof was demised and was therefore fully under the control of the Lessee. It was not necessary, or possible, for the Lessor to grant rights, easements or quasi-easements over the roof.

61. As for No. 146, I will assume that paragraph 3 of the First Schedule entitles the ground floor flat to receive shelter from the first floor flat and the roof over it. On that assumption I nevertheless find it impossible to accept that the parties intended the cost of maintaining the roof and the structure of the upper flat thereby to become part of the Lessee's liability under paragraph 12 of the Third Schedule. They had crafted paragraph 12 to create a liability to contribute towards the cost of repairing the whole of the exterior of the property except the roof. It seems probable that the purpose of distinguishing between the reserved premises and the remainder of the exterior of the building was specifically to exempt the Lessee from a liability to pay for repairs to the roof. But whether that was their intention or not, the parties specifically excluded the roof from the Lessee's service charge liability in the Third and Fourth Schedules. It is impossible to believe that at the same time they intended, by their obscure reference to the costs of "enabling the Lessee to enjoy the Rights contained in the First Schedule", thereby to make the Lessee liable for half the cost of repairs to the roof. Had that been their intention it could have been achieved by simply omitting the words "(excluding the roof thereof)" from paragraph 4 of the Fourth Schedule.

62. The rights included in the First Schedule also included, at paragraph 5, an express right for the Lessee repair, renew or rebuild the demised premises or any part of the property giving shelter or protection to the demised premises, presumably at his own expense. In view of that entitlement, and the express exclusion of the cost of repairs to the roof from the liability otherwise described in paragraph 12 of the Third Schedule, I do not read the reference in paragraph 12 to the costs of "enabling" the Lessee to enjoy the rights contained in the First Schedule as covering the cost of repairs to building components for which liability had already been assigned or excluded. That reference seems to me to be more apt to refer to costs of other matters, not already covered by the Fourth Schedule. In particular, paragraph 6 of the First Schedule grants a right of way over land coloured yellow and grey on the lease plan, subject to paying half the expense of maintaining and keeping the surface of that land in repair. The plan available to the parties is not coloured, but I assume the land coloured yellow and grey represents the two halves of the shared footpath leading to the building from the public highway (the land coloured yellow is included in the demise of each flat and is described as "part of the footpath"). It seems to me to be likely that the additional obligation to contribute to the costs of enabling the Lessee to enjoy the First Schedule rights was a reference to the contribution obligation in paragraph 6 of the First Schedule.

63. In any event, I was reminded by Mr Crozier of the explanation of the proposition that service charge provisions should be construed "restrictively" given by Lord Neuberger of Abbotsbury PSC in *Arnold v Britton* [2015] UKSC 36, at [23], namely that "… the court should not 'bring within the general words of a service charge clause anything which does not clearly belong there'". The cost of repairing the roof is not clearly brought within the service charge obligation by the reference in paragraph 12 of the Third Schedule to the costs of "enabling the Lessee to enjoy the rights contained in the First Schedule". For that reason also the cost is not recoverable.

Conclusion

64. For these reasons I allow the appeal and set aside the FTT's decision. I substitute a decision that no service charge is payable by the appellant in respect of the work to replace the roofs of Nos. 96 and 146.

65. This decision does not dispose of the County Court Judgments entered in respect of the two properties on the strength of the FTT's determination of liability. If the appellant wishes to secure the discharge of those orders, it must apply to the County Court.

Martin Rodger KC,

Deputy Chamber President

16 January 2024

Right of appeal

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