



Neutral Citation [2022] EWHC 3367 (Ch)

Case No: CH-2022-000048

**IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
CHANCERY DIVISION  
Chancery Appeals**

Heard remotely at:

The Royal Courts of Justice  
Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL

Date: 11 November 2022

**Before:**

**THE HONOURABLE MR JUSTICE MARCUS SMITH**

BETWEEN:

**(1) KIRAN RAJARAM PATWARDHAN  
(2) ANJALI PATWARDHAN**

Appellants

(Defendants in the court below)

- and -

**IVYGATE DEVELOPMENTS LIMITED**

Respondents

(Claimants in the court below)

**Mr Daniel Dovar** (instructed by **Wallace LLP**) for the **Appellants**

**Ms Ellodie Gibbons** (instructed by **Soloman Taylor and Shaw LLP**) for the **Respondent**

Hearing date: 11 November 2022

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**Approved Judgment**

**Mr Justice Marcus Smith:**

1. I have before me an appeal from the order of Mr Recorder Hansen (the “Order”). The material parts of the Order record that there was an application of the Claimant (the Respondents to this appeal) for a declaration that a notice dated 27 April 2020 (the “Notice”), purportedly served by the Defendants (here the Appellants) under section 42 of the Leasehold Reform, Housing and Urban Development Act 1993 (the “Act”), claiming a new lease of 2 Wellington Place, Great North Road, East Finchley, London, N2 0PN (the “Flat”), is invalid.
2. I shall, in this Judgment, refer to the parties as the “Appellants” and the “Respondents”.
3. I will come to the basis for the application by the Respondents in due course. In paragraph 1 of the Order, the Recorder declared that the Notice was invalid. That was because the claim for a new lease was stated to extend beyond the Flat so as to include the roof space above the Flat, which (so the Recorder found) was not demised to the Appellants. The Notice therefore included property which ought not to have been included in the Notice. It is common ground between the parties that if the Notice extended beyond the demise, then it was invalid and would need to be amended. The real issue (both before the Recorder and on this appeal) is whether the Notice is, in fact, coextensive with the demise that the Appellants claim that they have.
4. The Appellants seek to appeal this part of the Order, as well as certain consequential orders made (in relation, e.g., to costs). This is a case where the Recorder himself gave permission to appeal. His reasons for giving permission were as follow:

“There is room for argument as to the proper construction of the lease. I have placed particular weight on the description of the property as all that first floor maisonette but the Defendants’ construction arguments stand a real prospect of success. I am less persuaded by the argument on adverse possession but, on balance, conclude that the Defendants’ arguments on that issue have a more than fanciful prospect of success.”
5. It is necessary to begin with a description of the physical property itself. I draw my statement of the facts regarding the property from the careful judgment of the Recorder, and in particular [1] to [3] of his judgment.
6. The Respondents are the freehold owners of the land known as 1-14 Wellington Place, Great North Road, London N2, registered with HM Land Registry under title MX206931 (the “Development”). The Appellants are the leasehold owners of the Flat (also referred to as a “maisonette”) pursuant to a lease dated 15 February 1966 (the “Lease”). Their title is registered at HM Land Registry under title number NGL13412.
7. The Flat is one of fourteen maisonettes which, together with the associated garages and gardens, comprise the Development. The Development comprises three buildings, each of which contain two ground floor maisonettes and two first floor maisonettes, as well as a smaller building containing one ground floor maisonette and one first floor maisonette. The Development was carried out in or about 1966, the date of the Lease. Each of the buildings has a pitched roof. Each upper maisonette has the same layout and includes its own entrance at ground floor level and its own staircase from ground to first floor. At first floor level, there is a hatch in the ceiling with leads to a roof space (the “Roof Space”) which spans across and over the first floor level of the Flat. The only access to the Roof Space is via that hatch, which is located in the hallway to the demised premises.

8. I have had the benefit of seeing both a plan and a photograph of the relevant property. If I begin with the photograph, one sees is a typical 1960s development, what would be a house, or a *maison*, but for the fact that it has two front doors, one of which leads one to the ground floor flat or *maisonette* and the other to the first floor flat or *maisonette*. Turning to the plan, we see again a staircase which leads up to the first floor flat and ends at a hallway. The hatch door to the Roof Space appears either at the very top of the stairs, or in the hallway, it matters not which. The key point to note is that the front door to the first floor *maisonette* is at the foot of the stairs and not at the top of the stairs before the hallway. The hatch to the Roof Space is thus only accessible through the front door (which, of course, can and generally will be locked by the occupier of the property) of what is the Appellants' property under the demise in the case of the Flat.
9. Section 42 of the Act enables a qualifying tenant of a flat to acquire a new lease over a flat by giving notice under that section. In this case, the matter before the Recorder, which arose in the context of a Part 8 claim, was an application for a declaration that the Notice served by the appellants under section 42 of the Act seeking a new lease was invalid on the grounds that it purported to include the Roof Space in circumstances where it was said by the landlord (the Respondent) that that the Roof Space was not demised to the appellants under the Lease.
10. The inclusion of property in a notice made pursuant to section 42 of the Act which ought not to have been included invalidates that notice unless it is appropriately amended. The authority cited for that proposition is *Malekshad v. Howard de Walden Estates (No 2)*, [2004] 1 WLR 862. That proposition was uncontroversial as between the parties before me, as it was uncontroversial before the Recorder himself.
11. The issue is therefore a relatively short but important one: is the Roof Space as defined by the Recorder, and as defined by me, part of the Flat demised to the Appellants, or is it not? The Recorder held not. He also considered an alternative case based on adverse possession to which I will come in due course.
12. There is, additionally, a point taken by the Respondents in relation to the adverse possession case: if I reject the Appellants' appeal on the construction of the Lease, but uphold it on the alternative adverse possession case, the Respondents say that the outcome that the Recorder reached can nevertheless be upheld on different grounds because the Appellants have registered no title to the Roof Space. Again, that is a point I shall come to in due course.
13. It is first appropriate to turn to the provisions of the Lease. The Lease is dated 15 February 1966. The first two recitals to the Lease read as follows:
  - “(1) The lessors are registered at Her Majesty’s Land Registry as proprietors with absolute title of the freehold property consisting of fourteen maisonettes and eight garages known as Wellington Place, Great North Road, East Finchley, N2 (hereafter called ‘the Building’) and the gardens and grounds thereof, all which premises are hereafter referred as ‘the Mansion’.”
  - “(2) The lessors have previously sold, or granted leases of, or intend hereafter to sell or grant leases of the maisonettes in the Mansion other than the premises hereby demised and the lessors have in every transfer lease imposed, and intend in every future transfer lease to impose, the restrictions set forth in the first schedule hereto to the intent that any owner or lessee for the time being of any part of the Mansion or any maisonette therein may be

able to force the observance of the said restrictions by the owners or occupiers for the time being of the other maisonettes.”

14. Ending there, it is clear that this was a collaborative development whereby the freeholder was proposing to or had let out on leases various of the maisonettes; and it was intended that there be a pattern of leasehold ownership throughout what is referred to as the “Mansion”.

15. I turn to the operative clauses of the Lease and I begin with clause 1. That materially provides:

“In pursuance of the said agreement, and in consideration of the sum of £5,600 paid to the lessors by the lessee on or before the execution hereof, the receipt whereof the lessors hereby acknowledge and of the rent and covenants herein after reserved and contained and on the part of the lessee to be paid and observed and performed, the lessors hereby demise unto the lessees first all that first floor maisonette known as number 2, Wellington Place, Great North Road, East Finchley, aforesaid, and the staircase leading thereto (herein after called “the Maisonette”), including one half in depth of the concrete between the floors of the Maisonette and the ceilings of the Maisonette below it, together also with the dustbin area shown by way of identification only on the plan annexed hereto and thereon coloured pink, and, secondly, all that the garden land belonging to the Maisonette for the purpose of identification only shown on the said plan and thereon coloured green, all of which premises are herein after called ‘the Demised Premises’...”

16. I shall end the quotation there. I have underlined what I consider to be very important words in clause 1, and I will be returning to those words in due course. The question that I will have to address is this: are the words “first floor” confined or limiting the demise to what the Recorder and the parties refer to as the “horizontal plane”. In other words, is the effect of the term “first floor” either:

- (1) To delimit the rights under the Lease to literally that horizontal plane, namely the first floor of the Maisonette, and nothing above or below; or
- (2) To describe not a horizontal plane, but merely to enable anyone seeking to understand the Lease to differentiate between a ground floor maisonette and a first floor maisonette?

That articulates the battle lines between the parties.

17. In this context, it is worth noting, and again this is something I will be coming back to, the very clear delimitation between levels that arises where there is a boundary between the ground floor and the first floor maisonettes. I am referring to the words describing the demise regarding the concrete barrier between the floors of the maisonettes. What the Lease says in clause 1 is that one half in depth of the concrete between the floors of the maisonette and the ceilings of the maisonette below is part of the demise and the other half inferentially will be part of the demise to the ground floor maisonette immediately below this one.

18. It is also worth noting that the demise expressly includes the staircase leading up from the ground floor to the Flat and, again, that is something that I will be coming back to.

19. Moving on, however, from clause 1, the next relevant provision that I want to draw attention to is clause 4.1:

20. “The lessee hereby covenants with the lessors and with the owners and lessees of the other maisonettes comprised in the Mansion that the lessee will, at all times hereafter:

“Keep the demised premises other than the parts thereof comprised or referred to in paragraphs (c), (d), and (e) of clause 5 hereof, and all walls, sewers, drains, pipes, cables, wires, and the pertinences thereto belonging in good and tenantable repair and condition, and in particular but without prejudice to the generality of the foregoing so as to support shelter and protect the parts of the building other than the Maisonette.”

21. The a qualification in clause 4.1 (“other than”) refers (amongst other provisions) to paragraph (c) of clause 5 of the Lease.. Clause 5(c) says that:

“The lessors hereby covenant with the lessees as follows:

...

- (c) That subject to contribution and payment, as herein before provided, the lessors will maintain repair, redecorate, and renew:
- (i) The roof, main structure, boundary walls, pathways, fences, gutters, and rainwater pipes of the mansion;
  - (ii) The gas and water pipes, drains, and electric cables and wires in, under, and upon the mansion and enjoyed or used by the lessee in common with the owners and lessees of the other maisonettes.”

22. Moving on to the remaining relevant provisions in clause 4:

“(iii) The lessee shall contribute and pay on equal fourteenth part of the costs, and expenses, and outgoings, and matters mentioned in the fourth schedule hereto;

(iv) Permit the Lessors and their surveyors or agents with or without workmen and others at all reasonable times on notice to enter into and upon the demised premises or any part thereof to view and examine the state and condition thereof and to check and to take inventories of the landlords fixtures therein, if any, and make good all defects, decays and wants of repairrepair of which notice in writing shall be given by the lessors to the lessee and for which the lessee may be liable hereunder within three months after the giving of such notice’

(v) Permit the lessors and their surveyors or agents with or without workman and others at all reasonable times on notice to enter into and upon the Maisonette or any part thereof for the purpose of repairing any part of the Mansion and for the purpose of making, repairing, maintaining, rebuilding, cleansing, lighting and keeping in order and good condition all sewers, drains, pipes, cables, water courses, gutters, wires, party structures, or other conveniences belonging to or serving or used or any part of the Mansion and also for the purpose of laying down, maintaining, repairing, and testing draining, gas and water pipes, and electric wires and cable, and for similar purposes.”

Finally, clause 4(viii) refers to an obligation to close carpet the floors in all rooms in the said Maisonette excepting only the kitchen and bathroom thereof.

23. That concludes my running through of the provisions in the Lease. I have not referred to all of the provisions that were cited to me by counsel in the course of their helpful

submissions, but I have referred to those that are necessary for me to deal with the matters that are before me.

24. I want to pay tribute to the Recorder's careful consideration of the issues arising, and I mean no disrespect to him if I keep my references to his judgment short. I do so simply because, where there is a question of construction, the primary material is, of course, the document being construed – here the Lease. On the pure questions of construction, which I will consider first, it is the document that is paramount.
25. In the course of argument, I was referred to the well-known decision in *Arnold v. Britton*, [2015] AC 1619 and I accept that I must follow the general approach to construction that is there articulated. There is no particular point of controversy arising out of the principles of construction that I should apply: accordingly, I will not set out in any length what *Arnold v. Britton* teaches. I should say, however, something about the question of extrinsic evidence.
26. The Appellants relied very much on the phrase “known as”, which appears in clause 1 before the designation “number 2, Wellington Place, Great North Road, East Finchley”. What was said, relying on the authority in *Taylor v. Lambert*, [2012] EWCA Civ 3 at [32]-[33], is that where this phrase is used, or phrases similar to that, there is an almost inevitable need to have recourse to extrinsic evidence in order to understand the precise scope of the demise.
27. I do not consider this to be a case where it is necessary to have regard to the extrinsic evidence to which I was taken by Mr Dovar, who appeared on behalf of the Appellants. That is because I consider the terms of the Lease to be unequivocally clear without the need to refer to extrinsic evidence. With some regret, given his careful judgment, I have concluded that the Lease means what the Recorder said it did not, namely that the Roof Space, as defined by the Recorder, unequivocally falls within and not outside the demise.
28. It is important, since I am differing from the construction of the learned Recorder, that I set out my reasons for this conclusion. They are as follows:
  - (1) The “Mansion”, as the Lease describes it, is to be divided into fourteen maisonettes. There is no specific reservation of any part of the Mansion to the landlord, including, in particular, the Roof Space, which I stress is a term coined by the Recorder and not one present in the Lease.
  - (2) In clause 1 (set out in paragraph 15 above), the reference to “first floor maisonette” is, in my judgement, intended only to differentiate the first floor maisonette from the ground floor maisonette. There is no need to read anything more into those words. Their purpose is as simple and as necessary as this.
  - (3) I consider that it is wrong to read these words as somehow confining the demise to the horizontal plane. That is, itself, for a number of reasons.
    - (a) It is not the natural reading of the words. The natural reading of the words is, in a building comprising a ground floor and a first floor, to ensure that one knows what the Lease is referring to. What the Lease is referring to is the upper of the two dwellings in the building rather than the lower. That is

all that those words are doing and that is, I find, the natural meaning of those words.

- (b) It is unnecessary to read the words in any more specific way as referring to a horizontal plane because the borderline between the ground floor and the first floor is defined separately in clause 1. We see that the concrete floor/ceiling is divided fifty %/fifty % as between the upper and the lower flats. The Lease does not define any border either above the first floor maisonette, nor does it define any border on the “vertical plane”, as I probably should call it, namely in regard to the walls of the upper flat. The fact is that the Lease does not need to do so because there is no border are perimeter to be expressed demarcated. The only one is the floor/ceiling border, and that (as I have described) is the subject of express provision in the Lease.
  - (c) The remaining physical parameters of the demised premises are capable of being confined or included within the demise without any difficulties in terms of demarcating the rights of the leaserholder of this Maisonette and the other maisonettes. The walls and the area above the horizontal plane are included, not excluded, within the demise because there are no other conflicting property rights.
  - (d) The need to repair such parts is catered by the other provisions in clauses 4 and 5 of the Lease, as I have described.
- (4) It follows that the obligation under clause 5, whereby the Lessors covenant to repair, relates to matters in the shape of the roof, the main structure, and the boundary walls, to matters that are unequivocally within the demises of one or more of the Leases in issue here. It follows, therefore, that the Roof Space, as the judge defined it, falls within the demise according to the natural reading of clause 1, particularly when read in relation to the repairing obligations that I have described.
- (5) The inclusion of the staircase in the demise does not help understand the meaning of the words “first floor”. It is, however, highly significant that the staircase leading to the Roof Space is included in the demise. If the Roof Space was the landlord’s, one would expect unfettered access to that space. Yet there is not. That, in itself, shows the construction contended for by the Respondent must be wrong. If the Roof Space was not demised, but retained by the landlord, the Lease would make provision for the Landlord’s coming and going to the Roof Space consistent with the Landlord’s rights (i.e., access unfettered by purpose via the staircase and hatch in the Appellants’ hall). The Lease makes no such provision. The Lease makes clear, as I have indicated, that there is no such unfettered access: there is restricted access arising out of the terms of clauses 4 and 5, essentially to inspect and to repair. Thus, the landlord gets access on limited terms, which are not consistent with a retention of the Roof Space.
- (6) The effect of the Recorder’s construction is, therefore, that the Roof Space would be held by the Respondent and not be demised to the Appellants, but on such terms as to be incapable of use by the Respondent in any sensible way.

29. It follows from this that I do not need to have regard to extrinsic evidence, and I do not consider that I should do so save where there is a need to clarify the terms of the Lease, rather than to contradict it. I see no need to clarify the terms of the Lease. For the reasons I have given, the Lease is clear. It follows, therefore, that I do not really need to consider the extrinsic evidence summarised by the Appellants' counsel in paragraph 35 of the Appellants' written submissions.
30. Nevertheless, it is helpful (if ultimately irrelevant) to note that paragraph 35, referring to this extrinsic evidence, very much confirms the construction that I have reached. Paragraph 35 of Mr Dovar's written submissions reads as follows:

"Further, having correctly identified that extrinsic evidence was necessary to determine the terms of the Lease, the learned judge failed to take into account properly or at all:

- (a) That there was a partition in the Roof Space between the two first floor maisonettes along the vertical line between the two first floor maisonettes, with the natural conclusion that each therefore owned the Roof Space on their side of the building. If this had not been part of the demise, there would have been no reason to partition the space.
- (b) That the electricity to the Roof Space was connected to the Maisonette's electricity supply. To find that this was not within the demise meant that the landlord had constructed the roof so as to take electricity from the owner of the Flat.
- (c) That the Roof Space contained a water tank and heating plant serving [the Appellants'] property only;
- (d) The absence of any express right in the Lease for the tenant to instal a heating system, water tank, or electrical system. When combined with the evidence of the same installations in all the other maisonettes, the only conclusion to draw was that these were all put in situ by the landlord with the result that this area was part of the demise."

The learned Recorder did not draw the inferences that the Appellants say he should have done. I am not going to go into these questions – which factual – because I have reached a clear conclusion on the question of construction. It is therefore not something that I need consider for the purposes of this appeal and, to be clear, I do not do so. It seems to me that the assessment of the extrinsic evidence is something which was primarily a matter for the learned Recorder and that I should differ with some hesitation from his assessment in relation to those facts. I appreciate, of course, that this was a Part 8 claim, and that the Recorder heard no oral evidence. Nevertheless, a judge at first instance is entitled to a high degree of respect in their assessment of questions of fact, and an appellate court ought to be slow to revisit what is primarily a matter for the judge below. Had the extrinsic evidence pointed the other way, then (clearly) I would have had to consider it in rather greater detail although – given my construction of the Lease – my view would probably not have changed.

31. It also follows that I do not need to consider the question of adverse possession nor the Respondent's point on registration. Again, although this was a Part 8 claim and I am therefore in as good a position as the Recorder to evaluate these questions of fact, the



Recorder is once more entitled to a higher degree of deference in his factual findings which are principally matters for him and not for me. I would have taken some persuading that the Recorder had erred on the point of adverse possession given his careful judgment. But for the reasons that I have given, it is unnecessary to consider the point and I do not do so.

32. It follows that I do not need to consider further the Respondent's point about registration nor how it might have resolved the issues had they gone one way rather than the other.
33. For the reasons that I have given, which relate to the construction of the Lease, the appeal must be allowed.