UPPER TRIBUNAL (LANDS CHAMBER)

Neutral citation number: [2022] UKUT 347 (LC)

UTLC No: LC-2022-209

Royal Courts of Justice, Strand,
London WC2A 2LL

19 December 2022

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – FTT Procedure – new point taken by applicant on day of hearing – whether FTT acted unfairly in permitting point to be taken – whether lease capable of rectification by construction – appeal dismissed

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

BETWEEN:

ENGLISH ROSE ESTATES LIMITED

Appellant

-and-

PRAVEEN MENON AND PRADEEP MENON (1)
GRANT PEARSON (2)
JULIE CHISHOLM (3)
KAREN HOPKINS (4)
JIM BRADSHAW (5)
PETE RAZAQ (6)
IAN SHARRAFF (7)
PAUL WILLETTS (8)
CAMERON KIGGELL (9)

Respondents

Re: Ashbrooke Mews,
1-4 Ashbrooke Terrace,
Sunderland SR2 7HG

Martin Rodger KC, Deputy Chamber President
23 November 2022

Daniel Dovar, instructed by Protopapas LLP Solicitors, for the appellant
Edward Blakeney, instructed by direct access, for the respondents

The following cases are referred to in this decision:

Abdulle v Commissioner of Police of the Metropolis [2016] 1 WLR 898

Al Rawi v Security Service [2010] 3 WLR 1069

Birmingham City Council v Keddie [2012] UKUT 323 (LC)

Britvic Plc v Britvic Pensions Ltd & Anor [2021] EWCA Civ 867

Chartbrook Ltd v Persimmon Homes Ltd & Ors [2009] UKHL 38

Jalla v Shell International Trading and Shipping Co Ltd (Appeal 3: Refusal to Extend Time) [2021] EWCA Civ 1559

Mannion v Grey [2012] EWCA Civ 1667

Monsolar IQ Ltd v Woden Park Ltd [2021] EWCA Civ 961

Pink Floyd Music Ltd v EMI Records Ltd [2010] EWCA Civ 1429

Regent Management Ltd v Jones [2012] UKUT 369 (LC)

Revenue and Customs Commissioners v Benchdollar Ltd [2010] 1 All ER 174

Royal and Sun Alliance Insurance PLC v T & N Ltd [2002] EWCA Civ 1964

Singh v Dass [2019] EWCA Civ 360

Tallington Lakes Ltd v South Kesteven DC [2022] UKUT 334 (LC)

Introduction

1. At the hearing of this matter before the First-tier Tribunal (Property Chamber) (the FTT) on 18 January 2022 counsel for a group of residential leaseholders was permitted to raise a new point which had not previously been mentioned in the proceedings. The FTT then decided the new point in the leaseholders' favour and disallowed about £40,000 of insurance premiums which had been paid by the leaseholders to their landlord over a period of 7 years. The issues in this appeal from the FTT's decision concern the fairness of the proceedings before it and the correctness of its conclusion on the insurance issue.

Proceedings before the FTT

2. The proceedings arise out of an application under section 27A, Landlord and Tenant Act 1985 for a determination of service charges payable by the respondent leaseholders to the appellant, English Rose Estates Ltd, their landlord of nine self-contained flats at 1-4 Ashbrook Terrace in Sunderland. The flats were all let by the appellant on long leases in 2002, and the respondents are successors in title to the original leaseholders. The leases of each of the flats include provision for the appellant to insure the property. Since 2002 the appellant has complied with that obligation and has recovered the cost of doing so through the service charges paid by the leaseholders.

3. After a large increase in premiums the leaseholders applied to the FTT for a determination of the reasonableness of the insurance charges and a number of other service charge items. In total, the sums put in issue for the seven years from 2014 to 2021 came to a little over £81,000.

4. When the parties exchanged details of their respective cases on the disputed items, the leaseholders challenged the reasonableness of the insurance premiums, but not the principle that they were liable to reimburse the cost incurred by the appellant in insuring the property.

5. Until shortly before the hearing of their application the leaseholders acted without legal advice, but for the hearing itself they instructed counsel, Mr Blakeney. At 9.30am on the morning of the hearing, Mr Blakeney supplied the FTT and counsel then acting for the appellant with a skeleton argument in which he argued that nothing in the lease required the respondents to contribute towards the cost of insuring the building.

6. In its decision published on 11 March 2022, the FTT recorded that it had heard objections from the appellant's counsel to the admission of the new point but, having regard to its overriding objective to deal with cases fairly and justly, it had decided to permit the issue of the leaseholders' liability to contribute towards the cost of insurance to be raised. The FTT later explained that it had been particularly influenced by the leaseholders' lack of legal representation until shortly before the hearing. The FTT also refused a request by the appellant's counsel for an adjournment of the hearing "in view of the substantial delay and additional cost that would likely be incurred". Instead, the FTT gave directions allowing the appellant to provide written submissions on the new issue within 21 days of the conclusion of the hearing.

7. The appellant's counsel made submissions on the new issue at the hearing and also took the opportunity offered by the FTT to make written submissions. In those written submissions the appellant accepted the leaseholders' main argument that the leases did not include an express term for the recovery of the costs of insurance but it argued that a term to that effect should be implied, or that an estoppel by convention had arisen over the years which prohibited the leaseholders from disputing their liability to pay charges which had already been incurred. The appellant also argued that the procedure adopted by the FTT had been unfair and that it ought not to decide the issue of liability without allowing it the opportunity to file evidence and, if necessary, without reconvening the hearing to enable that evidence to be tested. The appellant did not file any evidence at that stage (nor has it done so subsequently) but in its written submissions it suggested that the evidence would concern the detriment it would be caused if the leaseholders were permitted to resile from the common understanding that the cost of insurance was properly recoverable as a service charge item.

8. In its decision the FTT agreed that there was no express term permitting the recovery of insurance premiums. It dismissed the appellant's suggested implied term (which is no longer pursued). In doing so it rejected a submission that reasonable people in the position of the parties would have thought it obvious that the lease would include a term permitting the recovery of insurance premiums. In the FTT's view:

> "a scenario in which the [appellant] insures the property at its own expense in consideration for the rent payable is, at the very least, conceivable. Such an arrangement would not, in the tribunal's view, lack business efficacy. The lease is not unworkable without an implied ground for recovery of premiums. To imply such a term would be to effectively rewrite the lease…"

9. The FTT also refused to construe a standard covenant requiring the appellant to pay all rates duties charges assessments impositions and outgoings as extending to the cost of insurance. Once again that argument is not pursued at this appeal.

10. The FTT referred to the analysis of the law on estoppel by convention by Briggs J in *Revenue and Customs Commissioners v Benchdollar Ltd* [2010] 1 All ER 174 at para 52. Unlike this appeal, *Benchdollar* dealt with the principles applicable to an estoppel by convention arising out of non-contractual dealings; it is not necessary to refer to those principles in detail other than to mention one requirement which must be established by a party seeking to rely on an estoppel by convention. That is that some detriment must have been suffered by that party by reason of its reliance on a common convention, or some benefit must have been conferred on the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal or factual position.

11. The FTT pointed out that the only detriment which the appellant claimed to have suffered was that if the leaseholders were allowed to resile from the joint assumption that they should pay for insurance, it would be liable to repay the premiums which had been collected through the service charge (subject to any defences, such as change of position or limitation) and, it would have to cover the premium itself in future. The FTT was satisfied that a liability to repay sums which the appellant had not been entitled to receive did not amount to a detriment

sufficient to make it unjust or unconscionable for the respondents to be permitted to rely on the terms of the original agreement. That analysis is clearly correct, and it is not challenged in this appeal. Nor has any other form of detriment been identified on the appellant's behalf.

12. The FTT also addressed the appellant's complaint of procedural unfairness relating to its refusal to adjourn the hearing. As to that it said, at [90]:

> "Whilst the tribunal allowed for additional written submissions on these issues, the tribunal did not expressly allow for the submission of witness statements and did not agree to reconvene the hearing to permit oral testimony and cross-examination. Having received the [appellant's] comments on the issue of procedural unfairness within the additional submissions, and the [respondents'] response to these comments, the tribunal had the opportunity if it considered it appropriate, to issue further directions in the light of these and to reconvene the hearing, before reaching its decision."

13. The FTT then explained that it had not invited further evidence or reconvened the hearing because it had been able to deal with the payability of the insurance premiums by determining what the lease meant, which was a question of law on which no evidence was necessary. It was also able, at [92], to dismiss the suggested estoppel by convention on the basis that an essential ingredient was obviously missing:

> "On this later point neither had identified any benefit conferred on the leaseholders or detriment to the [appellant] as a result of the [appellant] recovering premiums as service charge in reliance upon a common assumption. With no such benefit or detriment being identified by the parties, the tribunal considered that there was no real prospect that further evidence would demonstrate any benefit to the [leaseholders] in having to pay premiums that were not payable under the temporary lease, or any detriment to the [appellant] in recovering amounts that were not recoverable under the Lease."

14. The FTT therefore decided that insurance charges totalling a little over £40,000 had not been payable by the leaseholders. In case it was wrong on that issue it considered whether the charges had been reasonably incurred and were reasonable in amount. It concluded that if the insurance premiums had been recoverable as service charges under the terms of the leases, the amounts charged would have been reasonable and payable.

The appeal

15. The Tribunal gave permission to appeal on the following three grounds:

    (1) whether permitting the respondents to raise an entirely new and substantial challenge to the insurance premiums on the day of the hearing had been procedurally unfair;

    (2) whether the FTT's refusal to adjourn the hearing to give the appellant time properly to consider the point had been procedurally unfair;

(3) whether the FTT had wrongly construed the lease, with respect to the recoupment of insurance premiums from the leaseholders.

Grounds 1 and 2: procedural unfairness

16. In *Al Rawi v Security Service* [2010] 3 WLR 1069, at [18], Lord Neuberger MR said that the common law had developed a fundamental rule of natural justice that:

> "… a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments for trial."

That fundamental principle is the basis of the first two grounds of appeal, which I will take together.

17. The FTT's decision to allow the new point to be taken and its refusal to adjourn were both case management decisions made after receiving oral argument. An appellant who challenges such a decision faces a high hurdle. In *Mannion v Grey* [2012] EWCA Civ 1667 at [18], Lewison LJ said that "it is vital for the Court of Appeal to uphold robust, fair case management decisions made by first instance judges."

18. Appeals from case management decisions will only be allowed where the tribunal has failed to take into account a relevant factor or has regard to an irrelevant factor or has reached a decision that was plainly wrong. There are many authoritative statements to that effect including *Royal and Sun Alliance Insurance PLC v T & N Ltd* [2002] EWCA Civ 1964, at [38], and *Jalla v Shell International Trading and Shipping Co Ltd (Appeal 3: Refusal to Extend Time)* [2021] EWCA Civ 1559, at [27]. The importance of the decision to the outcome of the proceedings is a relevant factor for the court or tribunal making the original decision, but in *Abdulle v Commissioner of Police of the Metropolis* [2016] 1 WLR 898, the Court of Appeal emphasised that the same approach applied to appeals even where the case management decision in question had had a very significant impact on the proceedings.

19. On behalf of the appellant Mr Daniel Dovar (who did not appear at the FTT) submitted that the FTT had acted in a way which was procedurally unfair by permitting the leaseholders to raise an entirely new point on the morning of the hearing. As he pointed out, by then the proceedings had been on foot for almost two years and the parties had had ample time to consider their arguments, prepare their submissions, and investigate all of the issues. The FTT had acted unfairly, Mr Dovar suggested, in depriving the appellant of the opportunity to consider and prepare for a fundamental challenge to half of the total sum in issue.

20. Secondly, Mr Dovar submitted that the FTT's solution of allowing written representations after the hearing was not sufficient to remedy the inherent unfairness in permitting the appellant to be, as he put it, "ambushed" and compelled to respond to the new point on the hoof at the hearing. In support of this point. Mr Dovar referred to certain provisions of the FTT's rules, The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, and in particular to rule 3(2)(c) which explains that the FTT's overriding objective of dealing

with cases fairly and justly includes "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings". Mr Dovar also referred to rule 31(1) which provides that "the tribunal must hold a hearing before making a decision which disposes of proceedings" unless it has the consent of the parties to proceed without a hearing. Finally, he referred to rule 32 which requires that, unless the parties consent or there are urgent or exceptional circumstances, the FTT must give each party reasonable notice of the time of the hearing, which must be no less than 14 days.

21. Mr Dovar submitted that the obligation to hold a hearing with reasonable notice should be understood as requiring the FTT to deal with each matter in issue at a hearing and to do so after giving the parties at least 14 days' notice. Read together, the rules prevented the FTT from determining points which were raised for the first time at a hearing without adjourning the proceedings for at least two weeks.

22. Mr Dovar also submitted that the FTT had given no good reasons for permitting the new point to be taken. The fact that the leaseholders had instructed counsel very late in the day was not something that should be allowed to prejudice the appellant. The "substantial delay and additional cost" which the FTT feared would be caused by an adjournment was a significant reason to refuse to permit the new point to be raised at all but could not justify refusing to adjourn to enable to appellant to prepare properly to meet it. Finally, the new point was not trivial, but related to half of the total amount in dispute and it was disproportionate and contrary to the overriding objective for the leaseholders to be permitted to ambush the appellant with it.

23. In its decision refusing permission to appeal the FTT explained that when preparing for the hearing it had already identified the absence of any charging provision in the lease before it received Mr Blakeney's skeleton argument and that if the leaseholders had not taken the point it would have done so itself. Mr Dovar referred to the well-known decisions of this Tribunal in *Regent Management Limited v Jones* [2012] UKUT 369 (LC) and *Birmingham City Council v Keddie* [2012] UKUT 323 (LC), and submitted that the FTT could not fairly have raised the new point on the morning of the hearing without giving the appellant the time and opportunity to consider it and deal with it properly.

24. On this last point I agree with Mr Dovar's submission. If it would be unfair to permit a new point to be raised at a very late stage by one of the parties, it cannot be fair for the same point to be raised by the tribunal. The FTT is entitled to raise new points of law which arise out of the uncontested facts or the evidence which the parties have put before it, but it need not, and should think very carefully about the consequences for the course of the hearing before doing so. It is vitally important that any court or tribunal should preserve the reality and appearance of its own independence. Taking a new point which favours one side over the other puts that appearance of independence at risk. As well as the new point itself requiring consideration it may also open up unanticipated factual or legal issues which the parties may need to consider and investigate.

25. I also agree with Mr Dovar that the risk of additional expense and delay which might be caused by an adjournment would have been a strong reason for the FTT to refuse to permit the new point to be taken at all. The fact that the leaseholders had been unrepresented until

the last minute was not a consideration of much weight in favour of allowing the new point to be argued, but it provided a good reason why it had not been raised earlier and was therefore a relevant consideration.

26. I do not accept Mr Dovar's submission that the FTT acted in contravention of its own rules by failing to adjourn to enable argument on the new point at a future hearing. The FTT's rules provide for a hearing to take place unless both parties consent (or may be taken to have consented) to the proceedings being determined without one. A decision made without a hearing where one party has requested one is liable to be set aside, as recently happened in *Tallington Lakes Ltd v South Kesteven DC* [2022] UKUT 334 (LC). But in this case the FTT did hold a hearing and gave more than 14 days' notice before doing so. At that hearing the appellant's counsel was able to make submissions on the new point. Rule 31 requires that the FTT "must hold a hearing before making a decision which disposes of proceedings". It would require a restrictive interpretation of that rule to read it as requiring that each and every point be determined exclusively on the basis of submissions presented at a hearing. The FTT was right to make the overriding objective in rule 3 its primary guide and was entitled to prioritise flexibility in the proceedings and the avoidance of delay over a more exhaustive approach, provided, that is, that it was satisfied that it could do so without unfairness and with proper consideration of the issues.

27. Once the issue of the leaseholders' liability to contribute towards the cost of insurance had been identified, it would have left the parties in a considerable state of uncertainty had it been left unresolved. Although the FTT's decision to allow an entirely new point to be argued for the first time on the morning of the hearing was a robust one, in circumstances where both parties were represented and the point in issue was one of construction and of such importance to the parties' continuing rights, I do not think it can fairly be said to have fallen outside the range of decisions open to a tribunal faced with such an application.

28. Whether the appellant should have been allowed an adjournment of the appeal to consider its response to the new point is a separate question. It is impossible to consider whether the FTT's decision to refuse an adjournment was unfair without taking account of how the proceedings developed once permission to take the new point had been given.

29. With the benefit of hindsight, it can be seen that the leaseholders' new point was capable of being determined on the basis of legal argument alone, without the need for a further hearing to consider new evidence. That was not obvious when the FTT made its decision to allow the point to be taken on the morning of the hearing; it was perhaps not obvious even when the appellant's original counsel settled the additional written argument, which included a request for the opportunity to file further evidence. At the hearing of the appeal, however, Mr Dovar accepted that the FTT had reached the right conclusion about the meaning of the lease on the basis of the arguments presented to it; he did not suggest its conclusion on the absence of an estoppel by convention was open to challenge; nor did he suggest that a different outcome might have been secured if the appellant had been able to call further evidence. On the contrary, he accepted that the only point on which the appellant could hope to succeed was on a different approach to the interpretation of the lease from the case presented to the FTT. Those concessions are important, in particular because they dispel any doubt over the FTT's conclusion on the only issue which depended on factual findings, namely, the issue of estoppel by convention.

30. I agree with Mr Blakeney that the new point he raised was a point of law capable of being determined on the basis of submissions. The appellant's original counsel tried to get an estoppel argument off the ground but failed because of the difficulty of identifying any relevant detriment. It is now accepted that the estoppel defence was rightly rejected, and it is not suggested that an opportunity to provide further evidence would have made any difference. In those circumstances even if the FTT's decision might have given rise to a risk of unfairness, it can be seen that none has eventuated.

31. I am also satisfied that the safeguard which the FTT put in place was sufficient to avoid the risk of unfairness. The appellant was given the opportunity to make further submissions in writing after the hearing. When it made its original decision the FTT did not exclude the possibility that the appellant might be able to provide additional evidence and that it might be necessary to reconvene the hearing be necessary. At paragraph 90 of its decision, it said specifically that it left open the possibility, if it considered it appropriate, of reconvening the hearing but did not need to do so for the reasons I have already referred to in paragraph 13 above.

32. In my judgment the approach taken by the FTT to case management was not unfair, and the final outcome was not unfair. In those circumstances the appeal on grounds 1 and 2 is dismissed.

Ground 3: interpretation of the lease

33. The substantive point taken by Mr Dovar was a new one, which had not been argued before the FTT. Although Mr Blakeney made an initial show of resistance, he sensibly recognised that he did not occupy high ground as far as raising new points was concerned and withdrew his objection to the point being argued at all. I am satisfied that the conditions which apply to taking new points on an appeal, and which were restated by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360, at [16] to [18], are met in this case and that it is not an answer to Mr Dovar's argument that it has emerged only at the appellate stage. No new evidence is required; there is no suggestion that the course of the proceedings before the FTT would have been different if the argument had been deployed before it; the leaseholders have had the opportunity to deal with the point and have not acted to their detriment on the strength of it not having been taken before.

34. The basis of the FTT's decision on insurance was that the cost incurred by the appellant was not recoverable because the obligation to insure fell within clause 5 of the lease, whereas the leaseholders' obligation (in cluse 3) was to pay for matters listed in the Sixth Schedule, which did not mention insurance. Mr Dovar submitted that the failure to include a provision for the recovery of the cost of insurance was a clear mistake and that the lease should be rectified by construction.

35. Rectification of a document by construction does not involve rectification in the equitable sense at all. Instead, it is a technique of interpretation or construction which can be employed where a document has only one apparent meaning which obviously cannot have been what the original parties intended. In *Monsolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961, at [25], Nugee LJ referred to it as

> "… the *Chartbrook* principle, under which the literal meaning of a provision can be corrected if it is clear both that a mistake has been made, and what the provision was intended to say. This is in principle a different exercise from that of choosing between rival interpretations."

36. Nugee LJ's reference to the *Chartbrook* principle was to the decision of the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd & Ors* [2009] UKHL 38, which concerned the proper interpretation of a development agreement. The conditions which needed to be satisfied for a document to be corrected as a matter of construction were identified by Lord Hoffmann, at [25], after a review of earlier authorities:

> "What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.

37. Mr Dovar submitted that the lease contained an obvious mistake which was signalled by a grammatical flaw in clause 5. The landlord's covenants were split between those in the Sixth Schedule, which were introduced through clause 4, and those in clause 5 which is where the insurance obligation is found. Clause 5 begins with the introductory words 'THE Lessor HEREBY COVENANTS with the Lessee that: ...' and is then divided into five distinct provisions. The first four of these provisions (clauses 5.1(a) to (d)) make grammatical sense when prefaced by the introductory words; but clause 5.2 does not. Including those words, it reads:

> 'THE Lessor HEREBY COVENANTS with the Lessee that: ... 5.2 To insure and keep insured the Property ....'

38. Mr Dovar suggested that this was not simply a grammatical error but indicated that clause 5.2 had been put in the wrong place. Clause 5.2 was the only part of clause 5 which concerned the provision of a specific service or the incurring of any irrecoverable cost by the landlord. Clause 5.1(a) required the landlord to include similar covenants in each lease it granted of a flat in the building; 5.1(b) was the covenant for quiet enjoyment; 5.1(c) required the landlord to enforce the covenants in other lease in return for an indemnity against costs incurred; and 5.1(d) required a contribution by the landlord for any flats it retained in hand. Clause 5.2 appeared out of place in that company.

39. All of the obligations imposed by clause 4 are about the provision of services, the keeping of accounts and holding of funds. None of those activities would result in the landlord incurring costs which it could not recover through the service charge. In comparison, all of the obligations listed in the Sixth Schedule shared two characteristics: they required the landlord to undertake works or provide services (and therefore to incur costs); and the operative parts commenced with the word 'To' (as in "to keep in good and substantial repair …" in paragraph 1). As Mr Dovar pointed out, if clause 5.2 was relocated in the Sixth Schedule, it would make grammatical sense.

40. Mr Dovar also identified some consequences of the landlord being unable to recover the cost of insurance, which he suggested cannot have been intended by the parties. Clause 5.2 gave the landlord some discretion over the risks for which cover was to be obtained ("loss or damage by fire and surveyors and other professional fees and all usual special perils … and for such other risks as the Lessor may from time to time reasonably deem necessary"). If the landlord was unable to recover the cost of the premium, it would have an incentive to procure the minimum cover consistent with its obligation, omitting, for example, cover against damage to a leaseholder's flat from burst pipes.

41. These features were sufficient, Mr Dovar submitted, to satisfy the first requirement for rectification by construction, namely, that there is an obvious error in the document. Confidence in that conclusion was strengthened even further by the undoubted fact that the treatment of the costs of insurance in the lease was a departure from what Mr Dovar called "the usual paradigm".

42. The existence of a residential leasehold paradigm, by which the cost of insurance is almost invariably recovered through the service charge, meant that there was also no difficulty in satisfying the second requirement for rectification by construction, namely, identifying what the parties had really intended. The solution was to read the lease as if clause 5.2 was situated in the Sixth Schedule with the result that the leaseholders are liable to contribute to the cost incurred by the landlord in placing insurance. Mr Dovar therefore submitted that the FTT had been wrong to find that the costs of insurance were not recoverable.

43. I do not accept Mr Dovar's submissions. It is certainly possible that the drafter of the lease made an error, and that had they appreciated what they had done they would have corrected it in the way suggested by Mr Dovar. But I am far from sure that that is what happened. The peg on which Mr Dovar hung his submission was that there was a clear grammatical error in clause 5.2. I agree, but the correction of that grammatical error is a simple matter of reading "to "as if it read "it will", or by editing out the word "that" in the opening words of clause 5. As for the suggestion that the insurance obligation is out of place in its current location, two things are noticeable clause 5: the first is that the obligations cover a variety of subject matter which do not share any clear common characteristic; the second is that the first four obligations are grouped together as clauses 5(1)(a) to (d), whereas the obligation to insure is given a new sub-clause number, 5(2), which may suggest an appreciation that it dealt with a slightly different subject. Neither of these features supports the suggestion that the inclusion of the insurance obligation in clause 5 rather than the Sixth Schedule was a mistake.

44. The real error which requires to be corrected, for the appellant to succeed, is not the grammatical error, it is the allocation of responsibility for the cost of insurance away from the party who would normally expect to bear it, the leaseholder, to the landlord. Whether that is an error at all is much less obvious.

45. In *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429, Lord Neuberger MR said, of the sort of error which would be amenable to rectification by construction, that:

> "One is normally looking for an outcome which is 'arbitrary' or 'irrational' before a mistake argument will run."

Similarly, in *Monsolar*, the case to which Mr Dovar referred, Nugee LJ made a distinction, at [31], between "a case which concerns a provision which seems merely imprudent and one which appears irrational". The mistake in *Monsolar* was that interpreted literally the formula for increasing the rent by reference to an index would have had the effect of increasing the rent for 15 acres used for a solar farm from £15,000 a year to £76 million a year. The suggested mistake in this case is not of that magnitude, and the parties could have made the choice which appears on the face of the document without it being possible to say that they had produced an absurd or unworkable result. The suggested difficulties which Mr Dovar identified were very modest, and whether they exist at all depends on the meaning given to the expression "all usual special perils" (which is likely to take away a large part of the suggested discretion).

46. That is not to say that it is anything other than very surprising that a landlord would be prepared to take the risk of irrecoverable premiums varying entirely outside its control, or to accept a ground rent in return for the cost of insuring the completed building. But the covenants in the leases were not the only terms which the parties agreed. Each of the leases was granted in return for a premium, which may in principle at least have been influenced by the other terms of the bargain. There is no evidence to indicate whether the price paid for the leases was out of the ordinary, and without it it is not possible to achieve the level of confidence required before the suggested mistake could be corrected.

47. The nature of the suggested mistake also appears to me to put it beyond the limits of the principle. In *Chartbrook* Lord Hoffmann said that it must be clear "that something has gone wrong with the language". In *Britvic Plc v Britvic Pensions Ltd & Anor* [2021] EWCA Civ 867, which concerned the interpretation of a carefully drafted pension scheme, Coulson LJ, at [61], pointed out that:

> "The authorities suggest that corrective construction should be confined to those case, like *Mannai* and *Chartbrook*, where something has obviously gone wrong in a description, a date, a figure or a calculation, and the correct description, date, figure or calculation is obvious from the material before the court."

Mr Dovar's suggestion is not that there was a mistake with the language the parties have employed, or that they had slipped up on a point of drafting detail, but rather that they had made a mistake in the structure of the document and the allocation of responsibility between them. That is a mistake of a different quality which puts it beyond the scope of the principle relied on. One illustration of that difference is that the mistake in this case is over a relatively simple and obvious point, who is to the responsible for the cost of insurance, rather than over the meaning of a complex formula or the inclusion, omission or mistranscription of a date or a figure. It is much more difficult to accept that a mistake of the suggested type would have gone unnoticed by any of those who had to check and advise on the draft before the leases were executed. It was immediately obvious to the FTT, for example, when it read the lease.

48. Finally, I remain in some doubt about Mr Dovar's suggestion that the appropriate method of correcting the mistake is obvious. There is more than one way in which costs of insurance can be recouped from leaseholders, and if the parties had intended that it should be recoverable, they would also have had to give some thought to how that should be done. Mr Dovar proposed that the insurance obligation should be treated as another of the landlord's obligations in the Sixth Schedule, which would cause the premium to fall within the costs declared in clause 3(a) to be part of the service charge. That is an approach which is often seen in residential leases, but it is also often the case that parties agree that the cost of insurance is to be paid on demand as soon as the landlord has paid the premium. It is also not uncommon for the cost of insurance to be reserved as rent, so that the lease may be forfeited if the leaseholder fails to make the required contribution.

49. The fact that there is more than one possible solution is a consequence of the nature of the suggested mistake. Rather than find that the availability of alternative solutions is fatal, I prefer to base my decision on the twin propositions that the suggested mistake is not sufficiently obvious and that it is not amenable to a corrective construction because it involves reallocating responsibilities rather than correcting a linguistic or arithmetic slip. As the FTT said when dismissing the suggested implied term, to interpret the leases as the appellant suggests would in effect be to rewrite them.

50. For these reasons I am satisfied that the appellant is not entitled to succeed on ground 3 and the appeal is dismissed.

51. That is not a particularly satisfactory outcome for either side. The appellant is left unable to recover the cost of insurance which it has covenanted to obtain every year for the remainder of the term. It may be able to obtain a variation of the leases by applying to the FTT under Part IV of the Landlord and Tenant Act 1987 and relying on section 35(2)(e) (which permits a variation where a lease fails to make satisfactory provision with respect to the recovery by one party of expenditure incurred on behalf of another party). The leaseholders are free of the obligation to contribute towards the cost of insurance for the time being, but to some extent they are now at the mercy of the solvency of whoever might become their landlord. Whether that will enhance or diminish the value of their property now or in the future is unclear. Whether they are entitled to be repaid the money they have contributed in the past to the cost of insurance is also uncertain and is likely to depend on the strength of the defences which may be available to the appellant. What is clear, however, is that the parties may find themselves involved in further litigation if they cannot reach a comprehensive agreement dealing with past and future rights and liabilities. They would be well advised to seek such an agreement, with the assistance of a mediator if necessary.

Martin Rodger KC

Deputy Chamber President

19 December 2022

Right of appeal

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