UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – sheltered housing – notional rent for flat provided by landlord to resident warden – whether recoverable – appeals dismissed

IN THE MATTER OF APPEALS AGAINST DECISIONS OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

RETIREMENT LEASE HOUSING ASSOCIATION LIMITED (1)
FOUNTAIN RETIREMENT HOUSING ASSOCIATION LIMITED (2)

Appellants

and

MRS PAULINE SCHELLERUP and MISS PHYLIS WOODFORD (1)
MRS C MARTIN and others (2)

Respondents

Re: Pavilion Court, Grand Parade Mews, Brighton (1)
Batworth Park House,
Crossbush, Arundel, West Sussex (2)

Martin Rodger QC, Deputy Chamber President

9 June 2020

Hearing by remote video platform

Mr Edward Denehan, instructed by PDT Solicitors, for the appellant in the first appeal
Ms Isabel Petrie, instructed by Canfields Law, for the appellant in the second appeal
Mrs Pauline Schellerup for the respondents in the first appeal
Mr Dudley Joiner of RTMF Services Ltd for the respondents in the second appeal

The following cases are referred to in this decision:

Agavil Investments Ltd v Corner unreported, 3 October 1975, CA

Arnold v. Britton [2015] A.C. 1619

Gilje v Charlegrove Securities Limited [2001] EWCA Civ 1773

Investors Compensation Scheme v. West Bromwich Building Society [1998] 1 W.L.R. 896

Lloyds Bank plc v. Bowker Orford [1992] 2 E.G.L.R. 44

Mitchell v Watkinson [2014] EWCA Civ 1472

Re Sigma Finance Corp. (in administrative receivership) [2010] 1 All E.R. 571

Stena Line v Merchant Navy Ratings Pension Fund Trustees [2010] EWHC 1805 (Ch)

Introduction

1. These appeals concern the entitlement of the landlords of two supported housing developments to recover contributions towards the cost of providing accommodation for a resident warden in an apartment belonging to the landlord itself and for which it pays no rent. In each case the First-tier Tribunal (Property Chamber) (FTT) found in favour of leaseholders of apartments in the developments that such notional costs were not recoverable. In each case the landlord now appeals with the permission of this Tribunal.

2. The first appeal is against a decision of the FTT given on 3 December 2019 concerning the leases of two flats at Pavilion Court, Grand Parade Mews, Brighton. Pavilion Court is a sheltered housing development of 45 flats owned by the appellant, Retirement Lease Housing Association Ltd. The respondents, Mrs Pauline Schellerup and Miss Phylis Woodford, own long leases of two of the flats and are required to contribute through a service charge to the landlord's costs of running the development. In July 2019 they applied to the FTT under section 27A, Landlord and Tenant Act 1985 for a determination of their liability to contribute to the notional rent for a flat provided rent free by the appellant to its resident manager. The period covered by the application was from 2012 to 2019.

3. At the hearing of the appeal the appellant was represented by Mr Edward Denehan of counsel and the respondents represented themselves, with Mrs Schellerup making most of their submissions.

4. The second appeal is against a decision of the FTT made on 6 November 2019 on an application made by 17 leaseholders of 12 flats at Batworth Park House, Crossbush, Arundel. Batworth Park House is a purpose-built development of supported accommodation provided in 21 flats one of which is used to provide accommodation for a warden. The development is owned by Fountain Retirement Housing Association Ltd and the lead respondent is Mrs Cheri Martin. The leaseholders' application concerned charges for the wardens flat included in the service charge payable from 2013 to 2019.

5. The appellant was represented at the hearing of the appeal by Ms Isabel Petrie of counsel and the respondents were represented by Mr Dudley Joiner of RTMF Services Ltd. Due to restrictions imposed as a result of the Covid-19 pandemic the appeals were conducted using a remote digital platform on which all parties were able to participate.

Authorities relied on by the parties

6. The parties in both appeals referred to a number of authorities which it is convenient to mention at this stage before turning to the detail of the individual leases and the arguments on the appeals.

7. Mr Denehan began with familiar principles concerning the construction of contracts, summarised in the speech of Lord Hoffmann in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 W.L.R. 896, 912H-913F. It is enough to recall that the meaning of the document is what the parties using those words against the relevant

background would reasonably have been understood to mean. Both counsel also referred to Lord Neuberger's observation (approved by Lord Mance in *Re Sigma Finance Corp. (in administrative receivership)* [2010] 1 All E.R. 571, at [12]) that the resolution of an issue of interpretation is an iterative process, involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences.

8. Reference was also made to the decision of the Supreme Court in *Arnold v. Britton* [2015] A.C. 1619, as had the FTT in the Pavilion Court case, in particular to the judgment of Lord Neuberger at [15]. Although *Arnold v. Britton* was a service charge case it was, Mr Denehan suggested, simply an example of the application of the same principles. It confirms, of course, that no alternative principles are applicable to the interpretation of service charge provisions in leases.

9. The parties also referred to four cases concerning the cost of accommodation provided for resident staff employed by the landlord to provide services to leaseholders. The earliest of these is *Agavil Investments v Corner*. Despite this being an unreported decision of the Court of Appeal delivered on 3 October 1975, Mr Joiner had managed to obtain a copy.

10. *Agavil* concerned a block of flats in Ealing let on long leases which obliged the leaseholders to pay a specified proportion of "the costs expenses outgoings and matters" mentioned in a schedule. These included the cost to the landlord of carrying out obligations amongst which was employing a caretaker "whether resident upon the premises or otherwise". The relevant costs also included "all other expenses reasonably incurred by the Lessor in or in connection or relating to the Buildings the communal gardens caretaker's accommodation …". The landlord chose to house the caretaker in a flat in the building and sought to recover through the service charge a sum for "rent and rates of caretaker's flat", which the landlord explained was the rent which they could have obtained for the caretaker's flat if it had not been occupied by the caretaker, or represented the sum they would have had to add to the caretaker's remuneration if they had not provided him with accommodation. The leaseholders disputed their liability to pay the charge, but the Judge in the County Court found against them.

11. In the Court of Appeal the leading judgment was given by Cairns LJ, with whom Stephenson LJ and Goff LJ agreed. Cairns LJ did not find dictionary definitions of "costs" and "expenses" helpful. These were ordinary words of variable meaning depending on the context. He was satisfied that:

> "the loss to the landlords by giving up the flat for occupation of a caretaker, and therefore being unable to let the flat to a tenant, falls reasonably within the words … 'costs or expenses incurred by them in carrying out their obligations'".

If he was wrong about that, Cairns LJ considered that the cost of providing accommodation to the caretaker was certainly within the wide words "all other expenses reasonably incurred by the lessor in or in connection with or relating to … the caretaker's accommodation". Both he and Stephenson LJ were influenced by the leaseholder's

acceptance that if the landlord had not provided accommodation but had paid the caretaker a higher salary, the full additional cost would have been recoverable: "it would be wrong to suppose that the landlords intended to put themselves in a worse position if they housed the caretaker on the premises instead of elsewhere." As for the suggestion that the word "incurred" would not be used except of a payment out of pocket, Cairns LJ did not agree:

> "It appears to me to be an appropriate word to use in connection with any cost falling upon the landlord, including the cost which consists in their foregoing an advantage which they would otherwise have had."

12. *Agavil* was relied on by David Neuberger Q.C. sitting as a Deputy Judge of the High Court in *Lloyds Bank plc v. Bowker Orford* [1992] 2 E.G.L.R. 44. The service charge provisions of a residential lease obliged the leaseholder to pay a proportion of "the total cost to the lessor … of providing" certain services. The lease required that "a resident caretaker should be employed housed and uniformed" and the lessor claimed to be entitled to recover the notional cost of providing accommodation in the building for that caretaker. The Deputy Judge held that the cost was recoverable. Noting that the caretaker was required to be "housed" he went on, at 47 D-E:

> "This obviously supports the contention that the cost of such housing should be part of the service charge. That argument is supported by the fact that the cost of the other two requirements in relation to the resident caretaker, namely that he be "employed" and "uniformed", can obviously be included in the service charge. It is true that the cost of housing him is in one sense a notional cost, because the plaintiff owns the accommodation, which I understand to be on the top floor of the building, but, in reality, it seems to me that this is a cost in the sense of money forgone, as opposed to money spent. In this connection I derive considerable assistance from the unreported decision of the Court of Appeal in *Agavil Investments v Corner."*

13. The Court of Appeal returned to this subject in *Gilje v Charlgrove Securities Ltd [2001] EWCA Civ 1773* which concerned the construction of underleases of five flats in a block in which the sixth flat was occupied by a resident caretaker. The leaseholders covenanted to contribute towards "all monies expended by the lessor" in providing services identified in a schedule. The schedule catalogued the "costs, expenses, outgoings and matters" in respect of which the leaseholders were to contribute. These included the provision of a housekeeper who was required to reside in the basement flat provided for him and, separately, the cost of utilities supplied to the flat and its repair. The landlord obtained the advice of a local surveyor as to the letting value of the basement flat and included that notional rent in its service charge calculation. The Lands Tribunal (HHJ Rich QC) held that the notional expense was not payable, and he considered that the reference to specific expenses relating to the basement flat (utilities etc) which did not include its notional rental value suggested that the cost foregone was not intended to be recoverable. The Court of Appeal agreed, although it did not adopt all of the Tribunal's reasoning.

14. Laws LJ gave the leading judgment with which Mummery LJ and Kennedy LJ agreed. The question whether the leaseholders were bound to pay the sum demanded depended on

whether the notional rent of the basement flat, which was foregone by the landlord in fulfilling its obligation to provide a resident housekeeper, could be described as "monies expended", since that was the expression used in the contribution covenant (at [15] and [23]). Referring to *Agavil* he had agreed that income foregone could be regarded as a "cost", but the operative expression in this case was different. The lease had to be construed as a whole and while the schedule was headed "costs, expenses, outgoings and matters in respect of which the lessee is to contribute" it also lacked any mechanism for calculating or revising a notional rent. Laws LJ concluded that "I do not consider that a reasonable tenant, or prospective tenant, reading the underlease which was proffered to him, would perceive that paragraph 4(2)(1) obliged him to contribute to the notional cost to the landlord of providing the caretaker's flat." That obligation did not "emerge clearly and plainly from the words that are used."

15. In *Earl Cadogan v 27/29 Sloane Gardens Ltd* [2006] L&TR 18, the Lands Tribunal (HHJ Rich QC) had no difficulty in concluding that the language of the lease under consideration was sufficiently clear to entitle the landlord to recover a notional rent for the caretaker's flat. The relevant words obliged the leaseholders to contribute towards "the cost of employing maintaining and providing accommodation in the building for a caretaker … including an annual sum equivalent to the market rent of any accommodation provided rent-free by the Lessor."

16. As these cases illustrate, the question whether a leaseholder is obliged to contribute towards the rent foregone by a landlord in fulfilling an obligation to provide accommodation for a resident member of staff is not a question of principle to which the same answer will be given in every case. In each case the answer will depend on the language used. The authorities do illustrate that, in the right context, it is not a misuse of language to refer to income foregone as a "cost", but beyond that there is little to be gained by tribunals comparing the language with which they are concerned with different provisions agreed between different parties. The focus should be on the words of the lease, read as a whole and in their relevant context, with the well-known principles of contractual interpretation in mind.

The Pavilion Court leases

17. Of the 45 apartments at Pavilion Court, 44 are demised on leases in substantially the same form. The only flat which is not demised is Flat 1 which is used by the appellant to provide accommodation for its resident manager. Each lease is for a term of 99 years and contains a recital that it was intended to demise the 45 units on similar terms to "elderly retired persons". In each case the rights granted with the demise include the right in common with others to use the entrance halls, communal rooms and other communal areas, including gardens, subject to such rules and regulations as may be made by the appellant.

18. Pavilion Court is referred to in the leases as "the Property" and those parts of the Property which are not demised are referred to as "the Retained Parts". These include structural parts of the building as well as areas which are used in common by the residents and other areas which are not demised. Each leaseholder covenants by clause 2.1 of their lease to

pay the "Management Service Charge", an expression defined in clause 1.4 of the Third Schedule as meaning one forty-fourth part of the "Service Provision". The Service Provision is a sum computed in accordance with the provisions of the Third Schedule.

19. Clause 3 of the Third Schedule explains what is meant by the Service Provision. It is a sum "computed" in accordance with clauses 2 and 3 of the schedule. Clause 2 deals with the estimated Service Provision which is to be the aggregate of "the expenditure estimated by RLHA as likely to be incurred in the Account Year" less any sum to be drawn from reserves, to which is added "an appropriate amount as a reserve".

20. Clause 3 then provides as follows:

> "3. The expenditure to be included in the Service Provision shall comprise of all expenditure of RLHA in connection with the repair management maintenance and provision of services for the Property and shall include (without prejudice to the generality of the foregoing):
>
> 3.1 The cost of the salary of the resident manager and deputy resident manager (if any) and the provision of accommodation for them at the Property and all other direct costs in connection with the provision of the resident manager's service together with twelve and one half per cent of the aforesaid costs as a contribution towards the cost of administering the resident manager's service"

A further eight sub-paragraphs identify particular costs and expenses which are to be included in the Service Provision. These include the cost and expense of decoration, maintenance and repair of the exterior of the Property and the Retained Parts, the maintenance repair and cultivation of the gardens and lawns; the maintenance and repair of the interior of the Demised Premises and other units of accommodation; lighting, heating and cleaning the areas used in common; any rates, taxes, charges and other outgoings in respect of the Retained Parts; the expense of insurance of, amongst other things, the Retained Parts; and a contribution towards general administration costs.

21. By clause 4 of the Third Schedule the appellant is required to "determine and certify the amount by which the estimate referred to in Clause 2 of this Schedule shall have exceeded or fallen short of the actual expenditure in the Account Year and shall supply the Tenant with a copy of the Certificate." Clauses 5 and 6 then deal with payment of the management Service Charge by the lessee and the reimbursement of any surplus collected by the appellant.

22. The leases do not include an absolute obligation on the part of the appellant to employ a resident manager or to provide on-site accommodation for any employee, but by clause 4 the appellant assumed the following more limited "best endeavours" obligation:

> "4. Agreement by Tenant in case of special medical attention
>
> Whilst RLHA agrees to use its best endeavours to employ a resident warden for general supervision of the Property and for the answering of emergency

> calls of the Tenant it cannot guarantee to give a twenty-four hour service and neither RLHA nor the resident warden or any relief warden can accept responsibility for medical or other care of the Tenant …"

The FTT's decision in relation to Pavilion Court

23. The FTT reviewed a number of authorities on the general principles of construction of service charge provisions before explaining its conclusion that no contribution towards a notional rent for the resident manager's flat was payable by the leaseholders. It accepted that in certain contexts the word "cost" could include a notional cost, but it considered that the natural and ordinary meaning of clause 3, and in particular the stipulation that the Service Provision "shall comprise all *expenditure* of RLHA in connection with the …. provision of services" indicated that only actual or anticipated expenses were to be included in the Service Provision. The FTT referred to the decision of the Court of Appeal in *Gilje* as supportive of that interpretation. The words of clause 3 were insufficiently clear to impose the suggested obligation and the charges which had been levied since 2012 were therefore not payable. The FTT found that the sum included in the Service provision had risen from £7,384 in 2012/13 to £7,801 in 2018/19 and calculated that each of the applicants had paid £1,211.80 more during that period than they ought to have done.

24. The FTT also made orders under section 20C of the 1985 Act and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 relating to the costs of the proceedings, and directed the appellant to repay the tribunal fee paid by the respondents when they made their application.

The Pavilion Court appeal

25. Mr Denehan referred to a large number of provisions of the Pavilion Court lease which he submitted demonstrated that the lease was designed for tenants who, because of their age and other physical characteristics, were likely to require more sheltered, supervised and monitored accommodation than others who might take long leases of residential flats. The provision of a resident manager was, he suggested, an important ingredient in the provision of such accommodation. I agree with both of those propositions.

26. He submitted that the critical feature of the lease was the inclusion, by clause 3.1 of the Third Schedule, as one component of the Service Provision "the cost of … the provision of accommodation in the Property for the resident manager and deputy resident manager (if any)." A cost can include money or income foregone and in this case the monetary value of Flat 1 was a cost within the meaning of clause 3.1.

27. I do not accept Mr Denehan's submission. A number of features of the Pavilion Court lease seem to me to establish clearly that the leaseholders are not obliged to reimburse the receipt foregone by the appellant as a result of the use of one of the 45 flats to accommodate the resident warden whom it has agreed to use its best endeavours to employ.

28. First, and at a general level, the lease appears to me to have been drafted with some care and consistency. A relevant example can be found in clause 2 of the Third Schedule (which deals with the estimated Service Provision) where the language distinguishes between "expenditure estimated" and "an appropriate amount as a reserve" which is not referred to as expenditure. The sample lease I was shown was granted in 2009 and it is apparently the practice for leases to be bought in and new leases granted with each change of resident. The person responsible for drafting a lease of apparently good quality may be expected to have some awareness of the way in which key provisions (including service charge provisions) have been interpreted by the Courts, including the Court of Appeal's observations in *Gilje* about the need for payment obligations to appear "clearly and plainly from the words that are used."

29. Secondly, it is clear from clause 3 that the leaseholders are to contribute only towards "expenditure", thus, "the expenditure to be included in the Service Provision is to comprise all expenditure of RLHA in connection with …". The word "expenditure" is not an apt description of income foregone. That was the substance of the helpful argument advanced by Mrs Schellerup and it has considerable force.

30. Mr Denehan accepted that in ordinary usage, "to expend" means to use up, or dissipate, and in the context of money, may refer to money spent. He nevertheless submitted that clause 3 did not provide that the Service Provision was to consists only of "expenditure"; it certainly included expenditure, but it also included the items in clauses 3.1 to 3.9, which did not refer to "expenditure" at all. Thus, Mr Denehan suggested, "expenditure", when used in the opening part of clause 3, was referring only to the appellant's expenditure in connection with the repair, management, maintenance and provision of services for the Property and did not apply to the items listed in the following sub-clauses of clause 3. The general opening words of clause 3 had nothing to do with the cost of providing accommodation for the resident manager or a deputy, which was brought into consideration only by the final words of the clause 3 ("and shall include (without prejudice to the generality of the foregoing)") and by clause 3.1.

31. Mr Denehan's argument seems to me to overlook the fact that the nine categories of "costs" and "expenses" which follow the opening words of clause 3 and which are expressly included in the Service Provision are all said to be "without prejudice to the generality of the foregoing". The clause must be read as a whole and I take that qualification to mean that the specific categories of costs and expenses which are identified in clauses 3.1 to 3.9 are not to be understood as narrowing the scope of the Service Provision, rather than *vice versa*. I do not accept that clause 3 is divided into two parts (the second with nine sub-parts) as Mr Denehan suggested. On the contrary, the items listed in clauses 3.1 to 3.9 are obviously specific examples of the overarching category of "all expenditure … in connection with the repair management and provision of services." The itemised costs and expenses all fit comfortably within that wider description (clause 3.1 refers, for example, to "all *other* direct costs in connection with the provision of *the resident manager's service*", confirming that the cost of accommodation is also viewed as part of the costs of the same service).

32. Mr Denehan suggested that a "cost" simply meant any negative consequence. I agree that it can do, but the context in which the expressions "cost" and "cost and expense" appear in

clause 3 demonstrate that these terms are intended to be synonymous with "expenditure" and, in this instance, cannot be taken to extend to a cost in the sense of an opportunity foregone.

33. If the parties had intended that the use of one flat to accommodate the resident manager should give rise to a notional expense it is likely that they would have appreciated that some additional more specific language was required to make that intention reasonably clear. An example of the type of language they might have thought it appropriate to include to convey that intention is provided by *Earl Cadogan v 27/29 Sloane Gardens.* But far from including any such specific language, the parties instead provided significant confirmation in two places that the Service Provision was to include only "actual expenditure" and not notional costs or income foregone.

34. The first of these indications is in clause 3.1. After referring to the cost of the salary of the resident manager and any deputy and the provision of accommodation for them at the Property, clause 3.1 goes on to include in the Service Provision "all other direct costs in connection with the provision of the resident manager's services." When used to qualify "costs" the word "direct" imposes a limitation. Its position in this clause also suggests that the costs which had already been referred to, including the cost of the provision of accommodation, were intended to be limited to "direct" costs only. That limitation does not sit comfortably with the suggestion that opportunity costs are also intended to be included.

35. The second and even more explicit indication is found in clause 4, where the appellant is to certify the amount by which the estimated Service Provision has exceeded or fallen short of "the actual expenditure". That usage does not suggest any intention that notional expenditure or income foregone were to be taken into account in compiling the certificate.

36. At a general level, the thinking which underpins the appellant's contention, namely the assumption that, by providing accommodation for a resident manager it had foregone an income generating opportunity and thereby incurred a cost for which it ought to be reimbursed, seems to me to be questionable. The terms of the lease oblige the appellant to use its best endeavours to provide a manager resident in the Property, rather than somewhere else. As Mr Denehan stressed in his written submissions, the provision of a resident warden service is likely to be regarded as a particularly important in the context of retirement housing and as a significant part of the bargain which leaseholders understood they were entering into when they acquired their leases. By choosing to limit occupation to "elderly retired persons" the appellant created expectations about the characteristics of the development which new leaseholders were invited to buy in to, one of which was that it would be supported by a resident manager. Having made that choice, the appellant was not free to make use of the warden's flat for any other purpose (or at least, if it did so, it would have to find other accommodation in the Property for the warden). The appellant was not in the same position as the landlord in *Agavil*, for example, who had a genuine choice whether to use its own property to house the caretaker, or find accommodation elsewhere for that purpose while letting what would otherwise have been the caretaker's flat.

37. For that reason, it does not seem to me to be apt, either linguistically or with regard to the commercial purpose of the transaction, to think of the appellant as incurring the cost or expense of using its own property to house the resident manager. The presence of the resident manager was part of the leasehold package and the appellant was not free to use Flt 1 for any alternative more profitable purpose, having bargained that opportunity away when granting the leases. I appreciate that the bargain also included the right to recoup certain expenditure, and that this objection might be said to beg the question whether that expenditure includes the cost said to have been foregone, but I nevertheless consider that the parties would have been rather surprised at the suggestion that the appellant was entitled to charge for its own use of its own property. Had that been the parties' intention it is to be expected that they would have recorded it in clear language.

38. The parties would surely also have been expected to make clear how the cost or expense was to be determined. The lease includes no mechanism for including in the Service Provision a sum to represent the cost of providing the resident manager's accommodation. On the contrary, the appellant's certificate given under clause 5 is required to record only variances between the estimated Service Provision and "actual expenditure" and does not appear to be intended to take account of indirect costs.

39. Even if a notional cost could be taken to be part of "actual expenditure" the lease gives no clue as to how that notional cost is to be calculated, by whom, or by what yardstick it is to be measured. Once again, the indications are that the parties had no such intention. The fifth recital to the lease states that the appellant intends to let all of the flats in the Property on similar terms and clause 3.7 is a specific covenant by the appellant that every lease will be in substantially the same form. That form is not appropriate to a letting on rack rental terms, not least because the lease does not include provision for the payment of a rent. Is it to be supposed that the opportunity supposedly foregone by the appellant, and which is to be treated as a cost, is the opportunity to let the warden's flat for a term of 99 years, with any premium being translated by some unspecified process into an annual "cost"? That seems far-fetched. Mr Denehan suggested that clause 3.7 related only to leases and did not restrict the terms of shorthold tenancies which the appellant could grant. That would be contrary to the intention stated in the fifth recital and, if correct, would leave the landlord free to let any number of flats to short term tenants on different terms from those of the standard lease. That is clearly not what the parties intended.

40. Mr Denehan's strongest argument was that clause 3.1 of the Third Schedule refers in terms to "the cost of … the provision of accommodation" and that effect could only be given to that reference by including the rent foregone as a result of making the flat available to the resident manager. But I am satisfied that the better construction of clause 3.1, and the one which the language of the lease would have conveyed to a reasonable person in the position of the parties, is that it extends only to direct costs, or actual expenditure, on the provision of accommodation for the resident manager. If work is done to the flat itself, if it is furnished, or if utilities are provided, expenditure will necessarily be incurred and in my judgment it is that sort of expenditure, and not a notional rental value, which the appellant is entitled to include in the service charge.

The Batworth Park House leases

41. Batworth Park House is a purpose-built retirement development comprising 21 flats, of which 20 are let on long leases for terms of 99 or 999 years. The lease I was shown was granted in 1987 by the appellant to Mr and Mrs Quilter. It begins with a recital identifying the landlord's estate known as Batworth Park which is said to include 21 self-contained units of accommodation together with garages, a warden's flat, a community laundry room and various external areas. The estate as a whole is described as "the Property" and the expression "the Retained Parts" is used to denote parts of the Property used in common, structural parts, and other parts which are not demised. A second recital refers to the landlord's intention to demise the other units in the Property on similar terms to elderly retired persons.

42. By clause 5(d) the landlord covenanted to "employ a warden who shall be resident in the Property for the purpose of giving help and advice to the Tenant and who will be the first point of reference when any communication is needed between the Tenant and the Landlords".

43. The first reference to the Service Charge is in clause 1 of the lease where it is said to be "payable in respect of the matters referred to in the Schedule hereto" and by clause 4(i) the leaseholder covenanted to pay that service charge. By paragraph 1 of the Schedule the amount of the Service Charge is to be certified by the landlord's accountant annually and each leaseholder to pay 5% of the aggregate of "the Landlord's expenses and outgoings in respect of the Property and its management".

44. Clause 2 states that the accountant's certificate is to contain "a summary of the Landlord's expenses" and that the Service Charge is to "make provision for the services more particularly mentioned in sub-clauses 5(i) and 5(ii) hereof. Those sub-clauses contain the landlord's covenants including those in respect of the repair and insurance of the Property and the employment of the warden who is to be resident on the Property. The Service Charge is also to "make provision for … the following matters", including at paragraph 2(a):

> "The cost of the warden's salary and the cost of the accommodation for the warden at the Property and all other costs in connection with the provision of the warden's service."

Other matters to be provided for by the service charge include the cost and expense of decorating the Property, including the warden's flat, the expense of lighting, cleaning and heating areas used in common, the expenses of maintaining the communal laundry room and the garden.

The FTT's decision in relation to Batworth Park House

45. The FTT described the issue for determination as "the validity of charges demanded by the respondent for rent allegedly payable in respect of accommodation provided free of charge for a resident warden" for the years 2013 to 2019. The reference to rent "allegedly payable" was to the fact that the service charge budget supplied each year to the leaseholders included an item for rent under the heading "expenditure". No such sum had

been paid by the appellant to anyone and the FTT described the entry in the budget and in the subsequent accounts as "fictitious". The appellant pointed out that the sample budget provided to each intending purchaser of a lease as part of its pre-purchase information included the same heading and each leaseholder must have taken their lease in the expectation that such a charge would be payable. In argument before the FTT this amount was described as "rent foregone" and it was suggested that the practice of charging the sum had continued for so long that the leaseholders should be regarded as "estopped" from denying that it was a valid service charge item.

46. The FTT compared the language of the Batworth Park House leases with the language of the leases considered by the Court of Appeal in *Agavil* and *Gilje*. It considered *Gilje* to be the more helpful authority and, on that basis, it found that the notional rent was not a "cost" or an "expense" and so could not be recovered as part of the service charge. Any letting of the warden's flat would have been a breach of covenant by the appellant, since it was required to employ a resident warden. It added that, in any event, the sum included in the accounts (£8,425 in 2016) was more than it considered could have been achieved on a letting of the warden's flat (which was subject to planning restrictions and the landlord's obligations).

47. The FTT had refused the appellant's request to rely on a witness statement tendered for the first time at the opening of the hearing and which went to the issue of estoppel which it wished to argue. It dealt with that issue largely on the basis of some pre-purchase literature supplied to prospective leaseholders. It said that the inclusion of a rent for the warden's flat in a sample service charge account would have been understood as a representation that a contribution was required towards an actual cost, rather than a notional cost, and that the leaseholders were otherwise unaware of the basis of the charge and could not be estopped from challenging it. The evidence was that 10% of the notional rent collected was added to the sinking fund and that the remainder was retained by the appellant. The FTT found that the total sum charged from 2013 to 2018 had been £50,105 which ought to be repaid or credited to the leaseholders in the proportions in which they had contributed towards its, and that the sum of £9,070 included in the 2019 budget should not be demanded.

The Batworth Park House appeal

48. Ms Petrie, who did not appear before the FTT, submitted that it had reached the wrong conclusion about the cost of providing the warden's flat. She suggested that the reasonable person reading the lease as a whole would understand that an amount in respect of rent for the warden's accommodation was intended to form part of the Service Charge, and that it should be equal to the achievable market rent for that unit.

49. Ms Petrie also submitted that the FTT had been wrong to reject the appellant's case that the leaseholders were estopped from disputing the validity of the charge for the warden's accommodation. An estoppel by convention regulated the relationship of the parties in respect of that cost; it had been assumed that the relevant sum was properly included in the Service Charge since at least 1999 when there had been correspondence on the matter between the residents' association and the appellant. She relied on a letter forming part of

this correspondence, which had not been produced to the FTT, although its existence had been referred to by Mr Barker, the director of the appellant who had represented it at that time, and its content appears not to have been disputed. That correspondence had resulted in the residents' association at the time accepting a notional rental charge for the warden's flat in return for an agreement by the appellant to deposit 10% of the sum collected in the sinking fund.

50. Ms Petrie relied on Briggs J's discussion of the principles applicable to estoppel by convention in *Stena Line v Merchant Navy Ratings Pension Fund Trustees* [2010 EWHC 1805 (Ch) at [134] to [137] (which was subsequently approved by the Court of Appeal in *Mitchell v Watkinson* [2014] EWCA Civ 1472 at [48]). As Briggs J explained:

> "Commonly, such an estoppel arises where parties contract together on terms which mean one thing, but then conduct their relationship under that contract by reference to a subsequently formed convention between them that it means something else …"

51. On the proper construction of the lease Ms Petrie suggested that the FTT had wrongly assumed that the appellant was obliged to house the warden in the warden's flat, and that it could not have let it without breaching its covenant; the warden was required to be housed somewhere on the Property but there was no further restriction on where that should be (although Ms Petrie did not suggest that, in practice, there was any alternative accommodation available). I accept that the appellant has that flexibility, and that in a lease for a term of ninety-nine years the parties need not be assumed to have intended that the warden's flat will always be in the same place. But I do not think that is a consideration of much significance. The important point is that the appellant is obliged by the terms of the lease to provide accommodation for the warden on site and is therefore necessarily obliged to use part of its own property for that purpose and for no other potentially more profitable purpose. The question is whether the financial consequences of complying with that obligation were intended to be compensated for by an annual contribution from each leaseholder, or whether the consideration for those consequences was included in the capital sum paid by the leaseholders to acquire their leases.

52. The critical part of the lease is paragraph 2(a) of the Schedule which is the first of the "matters", in addition to complying with the appellant's covenanted obligations, which are to be provided for by the Service Charge and included in the "summary of the Landlords' expenses" to be contained in the certificate prepared annually by the Landlords' Accountants. The parties intended that the Service Charge should include "the cost of the warden's salary and of the accommodation for the warden at the Property and all other costs in connection with the provision of the warden's service." They also listed as separate matters, under paragraph 2(b), the cost and expense of decorating, maintaining and repairing the property "including the warden's flat", and under paragraph 2(f), "the rates, taxes and outgoings payable upon the Retained Parts" (which also include the warden's flat).

53. The question whether foregoing the opportunity to let the warden's flat was regarded by the parties as a "cost" recoverable under paragraph 2(a) is much more finely balanced in

this case than in the first appeal, but I am influenced by the following features of the language in reaching the same conclusion, namely that it was not.

54. First, although the neutral word "matters" is used in clause 1 of the lease when describing the subject of the Service Charge, and is repeated in paragraph 2 of the Schedule in introducing the list of things to be charged for, the Service Charge itself is stated in paragraph 1 to be 5% of "the aggregate of the Landlords' expenses and outgoings … incurred" in the year to which the certificate relates. That language is more suggestive of money laid out, than of advantages foregone.

55. Secondly, although I acknowledge that the word "cost" is capable of meaning more than expenditure and can include a benefit foregone, it is not an obvious word to use when trying to convey that meaning in the context of a list of matters which involve the expenditure of money and which have already been described as "expenses and outgoings". Acceptance of the appellant's argument requires that "cost" is used in paragraph 2(a) to cover both expenditure in money and a non-monetary imposition ("the cost of the warden's salary and of the accommodation for the warden"). That seems to me to be the less likely meaning.

56. Thirdly, the fact that the list in paragraph 2 includes a separate specific reference to the cost of repairs and decoration of the warden' flat, and a more general reference to rates, taxes and outgoings which applies to the warden's flat, does provide support for Ms Petrie's argument. What else, it may be asked, is the reference to the cost of the warden's accommodation in paragraph 2(a) intended to cover if not some monetary figure attributed to the value of the accommodation itself? I see the force of that point, and it is the strongest part of the appellant's case but, in a sense, it goes too far. The parties' concern to be specific about certain expenses, and to exclude any ambiguity over responsibility for repairs to the warden's accommodation, makes it less likely that they would have been satisfied to leave so substantial an item as the annual rental value of the accommodation to be understood from much less explicit language. The force of the point that there may not be any other obvious cost of accommodation which is covered by the language of paragraph 2(a) and not also covered elsewhere in paragraph 2 is also diminished to some extent by the fact that the lease is for a term of ninety-nine years during which unforeseen costs may arise.

57. Added to these linguistic features are two more general considerations which point away from the appellant's construction.

58. The first is, once again, the absence of any guidance as to the manner in which the "cost" of the warden's accommodation is to be determined. The Service Charge is to be "certified" by an accountant and nowhere in the Schedule is there found any language suggestive of valuation or determination, or any reference to the comparator to be used in ascertaining the sum to be included. It is not at all obvious that the parties would have intended the "cost" of a flat in a retirement complex let on long leases to be equated to its open market rental value if let at a rack rent. Would that rental value be on the basis of a letting to an "elderly retired person", as the FTT assumed when it considered the charge that would have been reasonable if it had construed the lease as the appellant suggested?

The parties' omission to provide any guidance on practical questions which would have to be addressed annually on the appellant's case is a significant pointer against acceptance of that case. I do not think the statutory safeguards against unreasonable charges provided by the 1985 Act, which Ms Petrie pointed to, provide an answer.

59. The second general consideration has already been mentioned in the context of the first appeal, namely the unreality of the suggestion that the appellant could have used the flat for some other purpose which would have benefitted it. As Mr Joiner emphasised on behalf of the leaseholders in his helpful submissions, the point is a little stronger in this appeal in that the 1981 planning permission pursuant to which the building was converted to its current use is subject to the condition that "the warden's accommodation shall be used incidentally in connection with the main use of the premises". I come back to the fact that it is a characteristic of retirement housing that the presence of a warden or other on-site member of staff is an integral part of the "offer". The need for the landlord to use part of its own property to house that person does not deprive it of the choice to use that part for something else; it made that choice when it decided to provide retirement accommodation and to secure the capital value appropriate to long leases of that type of accommodation.

60. For these reasons I am satisfied that the FTT reached the correct conclusion on the recoverability of the notional rental value of the warden's flat at Batworth Park House.

61. Ms Petrie pursued the appellant's case on estoppel, which had been rejected by the FTT. She relied on the practice, which had been in evidence before the FTT in a witness statement of Mr Barker, of the residents' association (or a committee of residents convened specifically for this purpose) approving the annual service charge budget which always included a rent for the warden's flat as an item of expenditure. I was also shown the 1999 letter in which Dr J. Graham-Evans, writing apparently on behalf of the residents' association, had accepted "the agreed terms in the matter of our liability for the rent on the manager's flat as being £4,950 p.a. less 10% for maintenance phased in over three years in equal increments as from January 1999." The letter was written in response to a letter from the appellant, which was not produced, and it refers additionally to financial arrangements being "finalised by Hobdens", although their role was not identified. As this letter was not before the FTT, and as it is only one part of a chain of potentially relevant correspondence apparently initiated by the appellant, I do not think it right to give it any weight in this appeal.

62. The FTT dealt with the issue of estoppel on the basis that the leaseholders were not aware, or may not have been aware that the cost which appeared in the annual service charge budget was a notional cost. Ms Petrie criticised that reasoning, arguing that an estoppel by convention is based on a shared assumption, communicated between the parties, and applies if the circumstances mean that it would be unjust to allow one party to resile from that assumption whether or not the true facts were known. There is force in that criticism, but the appellant faces other difficulties in the way of its estoppel argument.

63. The suggested estoppel was not foreshadowed in the appellant's statement of case to the FTT and it was raised at the last minute without proper evidence to support it. As a result, there is no evidence before this Tribunal about whom the residents' association

represented, or whether it had power to bind or negotiate on behalf of its members. There is no evidence about what has become of the money collected (other than that 10% of it was to be added to the sinking fund). It is difficult to see on what basis the appellant has acted to its detriment such that it would be unjust to prevent the leaseholders from going back on any convention which had existed. After all, on the view I take of the meaning of the lease, the appellant was not entitled to charge a rent for the warden's accommodation which it was obliged to provide. The willingness of the leaseholders to pay would obviously be a benefit to the appellant, but depriving the appellant of that uncovenanted benefit would not in itself be a "detriment" since it would merely put it in the position it had agreed to be in by taking away a windfall.

64. Ms Petrie also suggested that, if it did not give rise to an estoppel, the annual approval of budgets by the residents' association could amount to an agreement for the purpose of section 27A(4), 1985 Act, the effect of which would be that the FTT had no jurisdiction to make a determination about the years in which such agreements had been reached. That was not a point which had been taken before the FTT and, as with estoppel, the evidential basis for it is lacking. Ms Petrie suggested that the Tribunal should admit further evidence in order to make findings of fact, or should remit the matter to the FTT for it to consider evidence about what had been agreed, by whom, and on whose behalf.

65. The circumstance in which new evidence will be admitted on an appeal are strictly limited. They are not satisfied here as the material could all have been introduced at the hearing before the FTT. No doubt was cast on the FTT's jurisdiction at the hearing before it and the material before this Tribunal does not allow a conclusion to be reached. I am satisfied that the FTT came to the correct conclusion on the main issue argued before it, and there is no reason to remit the matter to it for further consideration.

Disposal

66. For the reasons I have given I am satisfied that, in each case, the FTT correctly interpreted the relevant service charge provisions. In neither case was the appellant entitled to recoup a sum in respect of the rental value of the accommodation provided for its employee.

Martin Rodger QC

Deputy Chamber President

23 July 2020