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Case No: LC-2024-619

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL PROPERTY CHAMBER
FTT Ref: CHI/43UB/LVT/2023/0006

Royal Courts of Justice
Strand, London, WC2A 2LL
25 February 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – VARIATION OF LEASES – whether lease failed to make satisfactory provision for repair of extension constructed by previous lessees – effect of implied surrender and regrant on repairing obligations and extent of demise – s.35, Landlord and Tenant Act 1985 – appeal dismissed

BETWEEN:

WEYCROFT WEYBRIDGE LIMITED

Appellant

-and-

MR IAN WILSON
MRS JILL WILSON

Respondents

Weycroft, 78 Portmore Park Road,
Weybridge

Martin Rodger KC,
Deputy Chamber President

11 February 2025

Mr Michael Mullin, instructed by OWC Solicitors, for the appellant
Mr Richard Clarke, instructed by W. Davies, Solicitors, for the respondents

The following cases are referred to in this decision:

Brickfield Properties Ltd v Botten [2013] UKUT 133 (LC)
Cornish v Cleife [1864] 3 H. & C. 446
Friends Provident Life Office v British Railways Board (1997) 73 P & CR 9
Jenkin R Lewis v Kerman [1971] Ch. 477

Introduction

1. Section 35 of the Landlord and Tenant Act 1987 permits any party to a long lease of a flat to make an application to the First-tier Tribunal (FTT) for an order varying the lease. This appeal arises out of such an order made by the FTT on 1 July 2024, varying the lease of a flat belonging to the respondents, Mr and Mrs Wilson. The variation clarified, as between the respondents and the appellant, their landlord, which of them is to be responsible for the repair and maintenance of the roof of a single storey extension which was added to the respondents' flat by one of their predecessors more than fifty years ago.

2. The FTT varied the respondents' lease to record that the flat roof of the extension is part of the property reserved to the landlord out of the lease and is part of the building which the landlord is required to keep in repair. By the time of the hearing before the FTT the parties were in agreement that the appellant should keep the roof in repair, but its condition had been a matter of dispute between them for some time and the FTT considered that the lack of clarity meant that the lease failed to make satisfactory provision for repair or maintenance and that a variation was justified.

3. Although the parties remained in agreement that the roof should be kept in repair by the appellant, it was granted permission to appeal by the FTT and has pursued the appeal on the grounds that the FTT was wrong to consider that the lease failed to make satisfactory provision for repair; if that ground is made out, the FTT would have had no power to order the variation.

4. At the hearing of the appeal the appellant was represented by Mr Michael Mullin and the respondents by Mr Richard Clarke. I am grateful to them both for their assistance.

The statutory power to vary leases

5. Part IV of the Landlord and Tenant Act 1987, comprising sections 35 to 40, makes provision for the variation of long leases. Section 35 permits an application to be made for variation of an individual lease of a flat which fails to make "satisfactory provision" with respect to repair, insurance, the provision of services, the recovery of expenditure by one party for the benefit of others, or the computation of service charges. Section 36 allows other leases to be varied to achieve consistency with a variation under section 35. Section 37 allows for the variation of a number of leases with the consent of at least 75% of the holders of those leases where the variation is not opposed by more than 10%. Sections 38 and 39 are concerned with the making of orders and their effect on third parties, and section 40 allows for the variation of leases of dwellings other than flats.

6. This appeal is concerned with an application under section 35. The relevant ground under section 35(2) which is relied on is ground (a), which is as follows:

> "(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely—
>
> (a) the repair or maintenance of—

(i) the flat in question, or

(ii) the building containing the flat, or

(iii) any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it; …"

7. By section 38(1), if the grounds of an application under section 35 are established the tribunal may make an order varying the lease. That power is subject to subsections (6) and (7) of section 38; only subsection (6) is relevant to the current application, and it provides as follows:

> "38(6) A tribunal shall not make an order under this section effecting any variation of a lease if it appears to the tribunal –
>
> (a) that the variation would be likely substantially to prejudice –
>
> (i) any respondent to the application, or
>
> (ii) any person who is not a party to the application,
>
> and that an award under subsection (10) would not afford him adequate compensation, or
>
> (b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected."

By section 38(10), where a tribunal makes an order varying a lease it may, if it thinks fit, order payment of compensation to any person, including a party to the lease, whom it considers is likely to suffer loss or disadvantage as a result of the variation.

The Lease and the Deed of Variation

8. "Weycroft" is a substantial house on three floors set in large gardens at 78 Portmore Park Road in Weybridge. Although built around 1900 as a single residence it was later converted into four flats in the late 1950's. The ground floor flat is referred to as Flat 1 and although there are only four flats in total, the first floor flat is referred to as Flat 5.

9. In December 1959 the common parts and main structure of the building were let on a long lease to a management company, the appellant, Weycroft, Weybridge Ltd, which then joined in the leases of individual flats and covenanted to manage the building and provide the usual services.

10. Flat 1 occupies almost the whole of the ground floor of the building. It was originally demised for a term of 99 years by a lease granted in September 1960. The three parties to the Lease were Wessex Development Co Ltd as Lessor, the appellant as Management Company, and a Mr Entwistle, as Lessee.

11. In December 1994 the lease was the subject of Deed of Variation, which extended the term to one of 125 years from 24 June 1993. There were two parties to the Deed, the appellant, which by that stage had acquired the freehold reversion, and Mr Entwistle. The lease of

Flat 1 and its Deed of Variation were the only title documents shown to me. None of the leases of other flats in the building were in evidence, nor was the 1959 lease of the common parts which had been granted to the appellant. From now on I will refer to the lease of Flat 1 simply as "the Lease".

12. The whole building is referred to in the Lease as "the Property" and is described in the First Schedule. The premises demised by the Lease are referred to as "the Premises", an expression defined in clause 1(g) by reference to the Third Schedule. From the Third Schedule the Premises included Flat 1 itself together with a garden, garage and driveway shown on two plans. The garden which forms part of the Premises surrounds the building on three sides. The demise also includes "the ceilings and floors of the said Flat and the joists and beams on which such floors are laid (but not the joists or beams to which any such dwelling is attached)". The "main external structural parts of the Building … including the roof foundations and external parts thereof …" were expressly excepted and reserved out of the demise.

13. The common parts and the external main structural parts of the Property are referred to in the Lease as "the Reserved Property" and are described in the Second Schedule. The Reserved Property includes the roofs, foundations and external walls, "and the joists or beams to which are attached to any ceiling except where the said joists or beams also support the floor of a Flat". The third recital to the Lease explains that the Reserved Property had already been demised by the December 1959 Lease to the Management Company.

14. The effect of the Third Schedule was that, when first demised, the Premises comprised Flat 1 and the garden surrounding it, up to the walls of the building on three sides. It also included the floor and floor joists and the ceiling, but not the ceiling joists which supported the floor of the flat above. It included the interior surfaces of exterior walls, but not the remainder of the exterior walls.

15. The Lease imposed no positive obligations on the Lessor. Responsibility for the upkeep of the Property was divided between the appellant, as Management Company, and the lessees of the individual flats.

16. By clause 4 the Management Company covenanted with the Lessee that it would perform the obligations in the First Part of the Sixth Schedule. By paragraph 1 of the Sixth Schedule it agreed to keep the structure of the Property in repair and to perform and observe the covenants in the Lease of the Reserved Property. Additionally, by paragraph 6, it agreed "To keep the Reserved Property and all fixtures and fittings therein and additions thereto respectively in a good and tenantable state of repair […]."

17. By clause 3(d) the Lessee covenanted to repair "the whole of the Premises and all fixtures and fittings therein and additions thereto" but that obligation was then qualified so that it excluded liability to carry out any repair referred to in the Sixth Schedule.

18. The Lease also included a covenant by the Lessee, at clause 3(n), that he would not make any alteration, improvement or addition to the Premises.

19. Notwithstanding clause 3(n), at some point during the 1960s Mr Entwistle, the original Lessee of Flat 1, built a ground floor extension to Flat 1 at the rear of the building, with a flat roof. The area on which the extension was built was part of the garden included in the Premises demised by the Lease. There is no record of any formal consent for the extension, and it is not known whether, when it was built, the freehold reversion remained with Wessex Development Co Ltd or had already been transferred to the appellant.

20. It is known that by 1994 the freehold reversion to the Lease had become vested in the appellant, because it was party to the Deed of Variation of that year in the capacity of Landlord. The Deed recited that it was supplemental to the Lease and adopted the definition of the Premises in the Lease. It recorded the parties' agreement "that the Lease shall be extended and varied in the manner hereinafter appearing and shall henceforth take effect and be read and construed as if the intended provisions had been contained in the Lease and that save as hereby modified the Lease shall be treated as continuing in full force and effect in all respects." The "intended provisions" were then listed in a Schedule and comprised varying the duration of the term in clause 1 of the Lease to one of 125 years from 24 June 1993 and a small increase in ground rent.

21. The parties to the Deed of Variation did not take the opportunity to add a new plan to the Lease to show the ground floor extension, nor did they refer to the existence of the extension.

The dispute

22. The appellant company is owned in equal shares by the lessees of the four flats in the building, but at some point before 2002 three of the four flats came to be owned by Hayley and Martin Hancock who thereby obtained control of the appellant. The Hancocks do not live in the building but let two of the flats and use Flat 5 on the first floor as an office from which Mrs Hancock runs a business.

23. A window in one of the rooms of the Hancocks' Flat 5, on the first floor, overlooked the ground floor extension to Flat 1. In 2002, without any formal consent from Mr and Mrs Wilson, who by this time had acquired the Lease of Flat 1, the Hancocks enlarged this window to create a door providing access on to the flat roof. They erected railings around the perimeter of the flat roof and laid a fibreglass waterproof membrane on the original surface, on top of which they installed timber decking and finally artificial grass. Since 2002 the Hancocks have made use of the roof of the extension as a roof terrace for themselves and their staff who work in Flat 5.

24. In his evidence to the FTT Mr Wilson complained of a long history of poor relations between himself and his wife and Mrs Hancock in her capacity as director of the appellant. The FTT made no determination in relation to those complaints which included allegations of poor accounting practices and a lack of information concerning service charges and a neglect of proper maintenance of the building, except where it was for the benefit of flats belonging to the Hancocks. Correspondence reflecting these complaints began not later than 2010.

25. The parties fell into the most recent phase of their dispute when water penetration damaged the ceiling of the Wilsons' ground floor extension, eventually causing it to become stained and to bow, requiring part of it to be removed. The cause of the damage has been a matter of disagreement between the parties since at least 2020. The FTT did not determine whether the water penetration was the result of damage to the surface of the flat roof, or was associated with the door opening which had been created in 2002.

26. In June and again in October 2021 the respondents' solicitors told Mrs Hancock that the roof of the extension could not be used as a terrace and asked her to remove the alterations undertaken in 2002 and reinstate the original window of Flat 5. Mrs Hancock refused to comply and, in February 2022, in a response to these requests her solicitors asserted that the extension as a whole did not form part of the premises demised by the Lease of Flat 1.

The application

27. In May 2023 the respondents applied to the FTT for a variation of their Lease under section 35, 1987 Act on the grounds that it failed to make satisfactory provision for the repair and maintenance of Flat 1 or land let with it (section 35(2)(a)(i) and (iii)). The variation they requested was to the definition of the Premises in the Third Schedule. They proposed that the extension and its flat roof be specifically included as part of the Premises. They also proposed that the exceptions and reservations from the demise should not include the roof of the extension. The effect would have been that sole responsibility for maintaining the roof of the extension would have fallen on the respondents themselves.

28. The appellant objected to the proposed variation, on the grounds that the FTT had no power under section 35 to increase the premises demised by the Lease. Referring to *Friends Provident Life Office v British Railways Board* (1997) 73 P & CR 9, they pointed out that, as a matter of law, the addition of premises to a demise took effect as a surrender of the original demise and a regrant by operation of law of the new enlarged demised. That, they suggested, was not a variation within the scope of section 35.

29. The appellant's response to the application was less extreme than its original suggestion that no part of the extension was demised. In a statement of case, it accepted that the extension was part of the demise of Flat 1 as a result of the 1994 Deed of Variation, which was said to have caused a surrender of the whole of the premises demised by the original lease and granted a new lease in the same terms as the original but comprising whole of what was now Flat 1. The new lease was said to be subject to the exceptions and reservations of the main structure as described in the Third Schedule to the original Lease. Specifically, the appellant asserted, the joists and beams to which the ceiling of the extension was attached, and the flat roof above them, were excluded from the demised premises. The effect of the proposed variation would be to add the flat roof and to remove the exclusion of the joists and beams from the demise, which the appellant maintained was not a variation within the scope of section 35.

30. The appellant also asserted that it was clearly responsible for the repair of the flat roof of the extension because it was part of the Reserved Property. There was nothing unsatisfactory about that allocation of responsibility and therefore no basis on which the FTT could vary the lease.

31. After considering the appellant's statement of case, the Wilsons dropped their proposal to vary the definition of the Premises in the Third Schedule to the Lease and limited their suggested variation so that it comprised only the introduction of words into the definition of the Reserved Property in the Second Schedule and the Management Company's obligations in the Sixth Schedule to make it clear that the roof of the extension, including its joists or beams, was part of the Reserved Property, and that the appellant was responsible for keeping it in repair, as it now claimed to be.

32. The parties thus appeared to have achieved a consensus over responsibility for the repair of the roof. Regrettably, however, the Wilsons were not content with that consensus and maintained that there was still an ambiguity which needed to be resolved by a variation of the Lease. That ambiguity was said to be that it might in future be suggested that, by reason of the work done by the Hancocks to create the roof terrace, the surface of the flat roof could be part of the floor of Flat 5. If the roof terrace was a floor of a flat, then it would not be part of the Reserved Property, because the Reserved Property included "the joists or beams to which are attached any ceiling except where the said joists or beams also support the floor of a Flat".

33. In a preliminary decision issued on 28 December 2023, the FTT determined that the variation requested by the Wilsons was one which it had power to make under section 35. That decision recorded the appellant's acknowledgement that the extension was within the demise of Flat 1 and its assertion that the joists and beams supporting the roof, and the roof itself, were part of the Reserved Property.

The FTT's decision

34. In its final decision of 1 July 2024 the FTT said that it has no hesitation in finding that the provisions of the Lease relating to the repair or maintenance of the roof of the extension were not "satisfactory" for the purpose of section 35(2) of the 1987 Act.

35. The factors which led the FTT to its conclusion were the following:

    1. Neither the body of the Lease nor the plan attached to it made any reference to the extension. The plan was incorporated into what the FTT called "the 1994 Lease" (i.e. the regrant by operation of law consequential on the 1994 Deed of Variation) but it was incomplete because it omitted the extension. That omission created uncertainty and a "lack of congruity" between the plan and the configuration of the property, the extent of the demise and the repairing obligations of the Management Company.

    2. Further uncertainty was created by the definition of "Reserved Property" in the Second Schedule from which it was unclear whether additions to the building formed part of it or not. Nothing clearly showed whether the roof terrace was part of Flat 5 or was part of the Reserved Property, and "to the uninitiated observer" the terrace appeared to be part of Flat 5.

    3. Separately, it was unclear whether the membrane, decking and artificial grass added to the flat roof were part of the roof, or were chattels, or whether parts of the roof which were not beams or joists were part of the Reserved Property. It was unclear whether

these were "additions" to the Reserved Property so as to fall within the Management Company's repairing obligation. It was not known whether Flat 5 had an easement or licence over the roof, which gave rise to further questions. Nor was it clear what rights of access Flat 1 had to the roof.

4. Because of this uncertainty an assignee of one of the leases might in future wish to argue about the extent of the demise of Flat 1, and responsibility for repairs to the roof, as the Hancocks had initially done. In summary, the FTT concluded that "The provisions of the Lease relating to repair and maintenance are not readily clear or workable."

36. Having decided that the threshold condition in section 35(2)(a) was met, the FTT considered whether it should exercise its discretion to order a variation of the Lease. It referred to section 38(6) and noted that it had not been suggested that the proposed variation would cause prejudice to the appellant. It considered that the changes in the physical layout of the building and of Flat 5 since the Lease was granted made this a "paradigm case" for the exercise of its discretion. It therefore ordered that the Second Schedule to the Lease of Flat 1 be varied to include "the flat roof (including the parts currently constructed as a terrace adjacent to Flat 5) and the joists or beams thereof" as part of the Reserved Property and that the Seventh Schedule be varied to add the flat roof and terrace to the areas which the appellant is required to keep cleaned and in good order.

The appeal

37. This Tribunal granted the appellant permission to appeal on the single ground that the FTT had been wrong to find that the Lease failed to make satisfactory provision for the repair or maintenance of Flat 1, or that responsibility for the repair of the roof was unclear.

38. Mr Mullin and Mr Clarke agreed that the question whether a lease failed to make satisfactory provision for any of the matters in section 35(2) should be determined by reference to the circumstances existing at the date of determination, and not at the date it was originally granted. In *Brickfield Properties Ltd v Botten* [2013] UKUT 133 (LC), the Tribunal (HHJ Huskinson) recognised that a relevant defect need not yet have caused a problem, anticipating the possibility that "the drafting of a lease plus the circumstances which arise in that particular case combine together to produce a situation where it is foreseen that at some future date there will arise a defect in the lease which is not presently apparent".

39. In support of the appeal, Mr Mullin submitted that the flat roof of Flat 1 was plainly part of the Reserved Property when the Deed of Variation was entered into in 1994. That had been common ground between the parties. It was within the words of the Second Schedule ("the external main structural parts of the Building forming part of the Property including the roofs foundations and external parts" and "the joists or beams to which are attached any ceiling except where the said joists or beams also supported the floor of a Flat"). The roofs of the building were expressly excluded from the demised premises and the flat roof did not cease to be excluded because the Hancocks had made use of it. When the Deed of Variation was entered into in 1994 the flat roof was not being used as a terrace for the benefit of Flat 5. Its use as a terrace since 2002 did not alter what was demised by

the lease of Flat 5 or what was reserved to the appellant. The joists or beams which supported the ceiling of the extension did not support the floor of Flat 5, they supported only the flat roof which could not sensibly be described as a floor. A floor was an internal feature. The effect of the Lease was therefore that the appellant was obliged by paragraph 6 of Sixth Schedule to keep in repair the Reserved Property, including the roof terrace and the joists which support it.

40. Mr Mullin suggested that the fact that the extension was not included in the Lease plan was of no significance because the plan, which was incorporated into the Deed of Variation in 1994, was described as being for the purposes of identification only and did not prevail over the express terms of the Lease. There was no ambiguity about whether the flat roof was within the demise of Flat 5; that had never been suggested by the appellant. Nor was there ambiguity about the features which had been added to the roof by the Hancocks; the appellant's repairing obligation extended to the Reserved Property "and all fixtures and fittings therein and additions thereto".

41. Mr Clarke submitted that there was no error in the FTT's assessment. The uncertainty over the status of the extension and the rights and obligations of the parties was clear and had given rise to the dispute. The FTT's variation was consistent with the position eventually agreed between the parties, but the consensus might not continue, especially in the event of an assignment of one of the leases or the freehold.

Discussion and conclusion

42. The consensus between the parties was that the effect of the 1994 Deed of Variation was to incorporate the extension into the demise of Flat 1, but to cause the structure and exterior of the extension, including the roof, to become part of the Reserved Property. I have doubts about both elements of that consensus.

43. The Premises comprised in the original Lease included the area of garden on which the extension was constructed a few years later. Leasehold ownership of the garden carried with it ownership of the airspace above the garden and the soil below the garden. The extension itself was therefore wholly within the demise from the moment of its construction.

44. The question then arises who, before the Deed of Variation of 1994, was obliged to keep the extension in repair? The applicable principle is stated in *Woodfall: Landlord and Tenant*, at 13.061, as follows:

> "Covenants to repair and leave in repair will generally extend to all buildings erected during the term. Each case depends, however, on the terms of the particular covenant. 'Where there is a general covenant to repair and keep and leave in repair, the proper inference from that is that the party undertakes to repair newly erected buildings; on the other hand where there is a particular covenant to repair demised buildings, then no such liability arises.'"

The passage quoted by the authors is from *Cornish v Cleife* [1864] 3 H. & C. 446 in which three houses were demised together with a field and the tenant agreed to repair the houses.

Bramwell B held that while the tenant's covenant would oblige him to repair any extension to the houses themselves, it did not require him to repair new houses built on the field. The new houses had become part of the demised property, but as a matter of construction the repairing covenant was held not to extend to wholly new buildings.

45. The answer in this case begins in clause 3(d) of the Lease, by which the Lessee covenanted to repair "the whole of the Premises and all fixtures and fittings therein and additions thereto" subject to the qualification excluding liability to carry out any repair referred to in the Sixth Schedule. The obligation to repair the whole of the Premises and additions thereto meant that the Lessee was required to repair the extension, which was an addition to the Premises. But what about the exclusion of repairs referred to in the Sixth Schedule? The Sixth Schedule contains covenants by the Management Company i.e. the appellant. Does the Sixth Schedule oblige the Management Company to repair any part of the extension? If it does, it would exclude that part from the Lessee's obligation under clause 3(d).

46. There are two important preliminary points about the repairing obligations of the Management Company in the Sixth Schedule. First, those obligations were expressed to be in respect of the Reserved Property; and secondly, in 1959 the Reserved Property was demised to the Management Company. The 1959 demise is recited in the third recital at the beginning of the Lease: "the Lessor demised the Reserved Property to the Management Company for a term co-terminous with the term created by this present Lease". No copy of the lease of the Reserved Property is available, but it may be assumed from the recital that the property demised by it was the same property as is defined as the Reserved Property in the Second Schedule to the Lease of Flat 1, namely, the internal common parts and "the external common parts of the Building forming part of the Property including the roofs foundations and external parts thereof … and the joists or beams to which are attached any ceiling except where the said joists or beams also support the floor of a Flat."

47. The relevant parts of the Sixth Schedule are paragraphs 1 and 6. Paragraph 1 obliges the Management Company:

> "To keep the structure of the Property in such state of repair as shall be consistent with the due fulfilment of the terms of this Lease in that respect including external painting cleaning of the stonework and cleaning and re-pointing of the external brickwork and otherwise perform and observe the covenants in the Lease of the Reserved Property as far as they relate to those matters."

48. So far as relevant, paragraph 6 of the Sixth Schedule obliges the Management Company:

> "To keep the Reserved Property and all fixtures and fittings therein and additions thereto respectively in a good and tenantable state of repair decoration and condition including the renewal and replacement of worn or damaged parts […]"

The requirement for two separate covenants is presumably because the Reserved Property includes more than just the structure of the Property and extends to non-structural elements of the common parts.

49. I read paragraph 1 of the Sixth Schedule as applying only to the Reserved Property as it was demised in 1959. It is true that the opening words refer in general terms to "the structure of the Property" but the clause continues, after identifying specific items, with the words "and otherwise perform and observe the covenants in the Lease of the Reserved Property". Those words suggest that the obligation was intended to duplicate the covenants in the lease of the Reserved Property and did not extend their scope. The Management Company was assuming the same obligations to the Lessee as it had already assumed to the Lessor through the covenants in the lease of the Reserved Property. The covenants in that lease may be assumed to apply only to the Reserved Property as demised to the Management Company. The purpose of demising part of the building to a Management Company, and then having it covenant to keep that part in repair, was presumably to give the Management Company possession of those parts of the building for which it was to be responsible, and, just as importantly, to make it clear that the Lessor was not in possession and therefore could not be responsible for the consequences of any defect in those parts. I do not therefore consider that before 1994 paragraph 1 of the Sixth Schedule required the Management Company to repair the structure of the extension which had not existed at the time of the original demise.

50. Paragraph 6 is less clear, in that as well as covering the Reserved Property as defined in Schedule 2 it also obliges the Management Company to keep in repair any "additions" to the Reserved Property. But it is difficult to see how additions to the Reserved Property are capable of including additions to parts of the building which were not demised to the Management Company. The extension constructed in the 1960s was an addition to the building, and an addition to Flat 1, but it was not an addition to the property demised by the 1959 Lease of the Reserved Property. The whole of the space occupied by the extension, and the new structure created there, remained part of the premises demised by the Lease of Flat 1.

51. It is not known whether the lease of the Reserved Property imposed any obligation on the Management Company to repair any additions or alterations to the Reserved Property. It would be inconsistent with the original pattern that the Management Company was responsible for parts of the building demised to it to suppose that it might become liable to repair some future addition to the building which was not demised to it. It is not impossible that the Reserved Property includes such an obligation, but it cannot be assumed that it does. Nor do I think it follows from the general principle that anything attached to the building becomes part of the building that the structure of an extension built by one tenant should be added to and treated as part of the structure of the building which had previously been demised to a different tenant.

52. It is not known whether anything was agreed about who should repair it the extension at the time it was built in the 1960s. In the absence of a licence for alterations or other similar agreement it cannot be assumed that the Management Company was consulted about the alteration or agreed to assume responsibility for it or that any other any change was made to the responsibilities described in the Lease.

53. It therefore seems to me that the better view is likely to be that nothing in the Sixth Schedule obliged the Management Company to repair parts of Flat 1 which did not exist in 1959 and which were subsequently created by alterations carried out wholly within the Premises demised by the Lease of Flat 1. On that assumption, the Lessee's repairing obligation in clause 3(d) of the Lease extended to the whole of the extension, because it was an addition to the premises within clause 3(d) and because no part of it was within the obligations of the Management Company in paragraphs 1 or 6 of the Sixth Schedule.

54. The next question is whether the obligations of the parties change in 1994 when the Deed of Variation was executed. That depends on the legal doctrine of implied surrender and re-grant and on the terms of the 1994 Deed of Variation.

55. Both parties recognised the principle that a purported variation of a lease by extending the term operates as a surrender of the original lease and the grant of a new lease. It is not possible to convert an existing estate in land into a different estate by adding more years to it, so the effect of an agreement to that effect is the implied surrender of the existing lease and the grant of a new lease for the longer term (*Jenkin R Lewis v Kerman* [1971] Ch. 477; *Woodfall: Landlord and Tenant* 17.026).

56. An implied surrender and regrant does not depend on the actual intention of the parties, it takes place independently of their intention. But the law only goes further than the parties' intention where there is no other way of achieving the object of the transaction they have entered into. In *Friends Provident Life Office v British Railways Board* [1996] 1 All ER 336 the Court of Appeal held that a deed which substantially varied the terms of a lease so as to increase the rent and alter the covenants concerning use and alienation did not have the effect of a surrender and re-grant. As Sir Christopher Slade explained at 350d:

> "… the authorities establish that where a landlord and tenant enter into an agreement which varies the terms of the subsisting tenancy but shows a clear intention not to create a new tenancy, the court will give effect to such intention, unless the only way by which the law can give effect to the arrangements made between the parties is to imply the surrender of the old tenancy and the creation of a new one."

57. It follows from the respect which the law affords to the parties' intention that an implied surrender and regrant will not change any other aspect of their relationship, or any other terms of their agreement, unless it is necessary to do so to achieve the variation they wish to bring about.

58. The Deed of Variation of 31 December 1994 was made between the appellant, as Landlord, and the original tenant, Mr Entwistle, and is expressed to be supplemental to the Lease. The substance of the agreement is contained in clause 2.3 which provides:

> "The Landlord and Tenant agreed that the Lease shall be extended and varied in manner hereinafter appearing and shall henceforth take effect and be read and construed as if the intended provisions had been contained in the Lease and that save as hereby modified the Lease shall be treated as continuing in full force and effect in all respects."

59. The only variations identified in the Schedule of "intended provisions" were the extension of the term and an increase in the ground rent. As clause 2.3 made clear, the parties intended that in all other respects the Lease was to be treated as continuing in full force and effect. Those other respects included the allocation of responsibility for repairing the Premises.

60. Nothing in the Deed of Variation suggests that the parties intended any change in their respective repairing obligations. No reference was made to the Management Company's obligations, to the Lease of the Reserved Property, or to the extension. There was no need to add the extension to the demised premises, since it was already included within them. The Deed of Variation does not provide for the surrender of any part of the Premises to the appellant; specifically, it does not contemplate a surrender of the external structure or roof of the extension.

61. In my judgment, therefore, the twin propositions relied on by Mr Mullin and acquiesced in by Mr Clarke, namely, that the extension became part of the Premises in 1994 and at the same time the structure of the extension and its roof became part of the Reserved Property, cannot be stated with any confidence. If they are true statements, it is because of something in the lease of the Reserved Property or in a licence for alterations, but the 1959 Lease is not available and it is not known if any licence was ever executed. On the basis of the information which is available, both propositions appear to be wrong. The extension has always been part of the Premises and its walls, roof, joists and beams remained outside the Reserved Property, at all times both before and since 1994.

62. This is not how the parties have understood their rights and obligations, nor is it how the FTT analysed the effect of Lease or the Deed of Variation. But the scope for uncertainty over the true position was at the heart of the FTT's decision, and the availability of an entirely different analysis simply lends further support to its determination.

63. Like the FTT, I have no doubt that this is a case in which the Lease can clearly be said not to make satisfactory provision with respect to the repair of Flat 1. I can summarise my own reasons briefly.

64. First, for the reasons I have given it is not clear on the face of the documents whether the appellant or the respondent is responsible for keeping the structure of the extension in repair. The better view is likely to be that the respondents are responsible, but documents which are not currently available (in particular, a licence for alterations) may place responsibility on the appellant.

65. Secondly, the Lease does not clearly allocate responsibility for repairing the structure of the extension in the way the parties have now agreed it should be allocated; since the parties' interpretation of the Lease cannot currently be shown to be correct, and is probably wrong, the only way responsibility can be conferred on the appellant as the parties would like it to be, is for the Lease to be varied.

66. Thirdly, the lack of clarity over ownership of the extension and responsibility for its repair has been a source of dispute between the parties and might be again in future.

67. Fourthly, if the respondents are liable to repair the structure of the extension, that would be inconsistent with the pattern of liability for the rest of the building, which lies with the appellant as Management Company. That would not ordinarily be a significant consideration but, in this case, the poor relationship between the parties and the possibility that access might be required through Flat 5 to carry out work to the roof mean that some weight should be given to it.

68. In agreement with the FTT, though not for identical reasons, I have therefore concluded that the Lease fails to make satisfactory provision for the repair of Flat 1. The FTT considered that, if the threshold condition was satisfied, the case for exercising its discretion in favour of making the proposed variation was strong. There has been no criticism of that conclusion.

69. The FTT made the variations requested by the respondents but those variations are not entirely consistent with the conclusion I have reached about the effect of the Lease and the Deed of variation. In particular, they proceed on the basis that no part of the Reserved Property is also part of a Flat which, in the case of the extension, is not the case since the whole is within the demise of Flat 1. I would direct that the Lease be varied as follows (the parties have had the opportunity to comment and have not demurred from this formulation:

In the definitions in recital (1)

(f) "The Reserved Property" means ~~those parts of the Property which are not included in the Flats being~~ those parts of the Property which are more particularly described in the Second Schedule hereto

In the definition of Reserved Property in the Second Schedule

"… AND SECONDLY ALL THAT the external main structural parts of the Building forming part of the Property including the roofs foundations and external parts thereof and the ground floor extension to the Premises …"

In paragraph 6 (not paragraph 7) of the Sixth Schedule

"To keep the Reserved Property and all fixtures and fittings therein and additions thereto including the external main structural parts, foundations, roof and external parts of the ground floor extension to the Premises, and the joists and beams of the roof thereof, in a good and tenantable state of repair decoration and condition including the renewal and replacement of worn or damaged parts …"

Disposal

70. For these reasons I allow the appeal and I will make an order varying the Lease in the manner indicated above. If the parties (or Mr and Mrs Hancock) wish to agree that the other leases of flats in the building should be varied under section 36 so that they are

consistent with the variations to the Lease of Flat 1, they should agree a suitable draft and submit it for consideration within 14 days.

Martin Rodger KC,
Deputy Chamber President
25 February 2025

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.