Neutral Citation No.: [2021] EWHC 2621 (Ch)

Claim No: PT-2020-000077

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BIRMINGHAM DISTRICT REGISTRY

Priory Courts
33 Bull Street
Birmingham, B4 6DS

Date: 23 September 2021

- -

Before HHJ Richard Williams
(sitting as a High court Judge)

Between:

STONECREST MARBLE LIMITED

Claimant

And

SHEPHERDS BUSH HOUSING ASSOCIATION LIMITED

Defendant

- -

Paul Stafford (instructed by Newhall Solicitors LLP) for the **Claimant**
Henry Webb (instructed by Winckworth Sherwood LLP) for the **Defendant**

Hearing date: 28 June 2021
(Draft judgment circulated to the parties' legal representatives by email dated 17 September 2021)

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JUDGMENT

Introduction and background

1. This is my judgment following the remote trial of 3 preliminary issues, although counsel for the claimant describes the principal question as:

> "the circumstances in which a landlord may incur any liability to a tenant, whether in the tort of nuisance or in negligence, as a result of its failure to inspect, cleanse or repair any parts of the building remaining under its control, or under an express term in the lease for breach of quiet enjoyment, for damage caused by water ingress from the retained premises which renders the demise materially unusable."

2. Stonecrest Marble Limited ("***C***"), the tenant, is a company specialising in the sale to the public of tiles and tiling products for use in residential premises.

3. Shepherds Bush Housing Association Limited ("***D***"), the landlord, is a regulated social housing provider in the London area, although some of the buildings comprising D's housing stock also contain commercial units.

4. D is the long leasehold owner of 7 Townmead, Wandsworth Bridge Road, London, which comprises (i) a ground floor commercial unit ("***the Property***") and (ii) residential units extending over the remaining first to third floors of the building ("***the Retained Part*s**").

5. By a lease dated 9th October 2015 ("***the Lease***"), D demised the Property to C for a term of 10 years ending on 8th October 2025 and to be used solely for "*the sale display and storage of tiles and flooring accessories" ("**the Permitted Use**").* The initial rent was £28,000 per annum, although the Lease further reserved as rent amongst other things a service charge and insurance.

6. By order dated 23 November 2020 it was directed that the following matters be heard together as preliminary issues ("***the Preliminary Issues***"):

    a. Whether the terms of the Lease exclude any liability of D towards C to inspect, cleanse and/or maintain the gutter at the building of which the Property forms part ("***Preliminary Issue 1***")

    b. Whether D is legally obligated to take steps to inspect and clear the guttering at the building of which the Property forms part (upon notification by C as to the condition of the guttering or otherwise) so as to prevent the occurrence or continuance of any nuisance to those premises ("***Preliminary Issue 2***"); and

    c. Whether, for the purposes of the rent suspension provisions in the Lease, strictly on the assumption that the Property was damaged by water ingress, this a risk against which D was obliged to insure under the Lease. ("***Preliminary Issue 3***").

Joint Statement of Assumed Facts

7. The following facts are agreed as being assumed for the purpose of this trial of the Preliminary Issues and for that purpose only:

a. That at all material times the Lease was subsisting and that there had been no surrender or other event determining the same;

b. That at the relevant time the Insurance Policy terms put in place in May 2018 (under which Aviva Insurance Limited is the Insurer and the D is the Insured) were in force;

c. That at least one incident of water ingress to the Property occurred;

d. That the cause of the water ingress was the blockage by the gradual accumulation of debris in a drainage gutter in that part of the building within the possession of D above the Property;

e. That C had done nothing to cause or to contribute to the water ingress;

f. That C had done nothing to void any insurance claim by the D or any party in respect of the water ingress;

g. That the water ingress was such as to cause damage to the Property;

h. That the water ingress was such as to render the Property materially inaccessible or unusable by the C for the Permitted Use.

Admitted facts

8. C invites the court also to take into consideration the following facts admitted in D's Defence:

a. On 18.9.17, C reported to D for the first time that there was water ingress into the Property;

b. There was some further water ingress into the Property on a limited number of occasions between 18.9.17 and 19.11.19, during periods of heavy rain. When this occurred, it led to some pooling on the floor within the Property;

c. The parties' surveyors conducted a joint inspection of the building and the Property on 31.7.19;

d. Both parties' surveyors identified the cause of the water ingress was a blocked rainwater downpipe which led to water overflowing from the gutter during periods of heavy rain;

e. C's surveyors' report was provided to D's solicitors on 9.8.19; and

f. The downpipe was fully unblocked on 15.11.19.

Material provisions in the Lease

9. The key provisions in the Lease so far as relevant to determination of the Preliminary Issues are as follows:

"AGREED TERMS

1. **Interpretation**

The following definitions and rules of interpretation apply in this lease.

1.1 Definitions:

…….

Annual Rent: rent at an initial rate of £28,000 (Twenty Eight Thousand Pounds) per annum and then as revised pursuant to this lease and any interim rent determined under the LTA 1954.

……….

Common Parts: the roads, paths, loading and bin areas, Service Media and other parts of the Estate other than the Property and the Lettable Units.

……..

Insurance Rent: the aggregate in each year of the:

(a) gross cost of the premium before any discount or commission for the insurance of**:**

(i) the Property, other than any plate glass, for its full reinstatement cost (taking inflation of building costs into account) against loss or damage by or in consequence of the Insured Risks, including costs of demolition, site clearance, site protection and shoring-up, professionals' and statutory fees and incidental expenses, the cost of any work which may be required under any law and VAT in respect of all those costs, fees and expenses; and

(ii) loss of Annual Rent from the Property for three years;

(b) a fair proportion of the gross cost of the premium before any discount or commission for the insurance of:

(i) the Common Parts for their full reinstatement cost (taking inflation of building costs into account) against loss or damage by or in consequence of the Insured Risks, including costs of demolition, site clearance, site protection and shoring-up, professionals' and statutory fees and incidental expenses, the cost of any work which may be required under any law and VAT in respect of all those costs, fees and expenses; and

(ii) public liability in relation to the Common Parts; and

(c) any insurance premium tax payable on the above**.**

Insured Risks: means fire, explosion, lightning, earthquake, storm, flood, bursting and overflowing of water tanks, apparatus or pipes, impact by aircraft and articles dropped from them, impact by vehicles, riot, civil commotion and any other risks against which the Landlord decides to insure against from time to time and Insured Risk means any one of the Insured Risks.

………

Permitted Use: the sale display and storage of tiles and flooring accessories within Class A1 of the Town and Country Planning (Use Classes) Order

1987 or such use within Class A1 of the Town and Country Planning (Use Classes) Order 1987 as the Landlord may consent to, such consent not to be unreasonably withheld where the proposed additional or alternative use is acceptable having regarding to the principles of good estate management.

………

Property: the ground floor shop at premises in Wandsworth Bridge Road as shown edged red on the Plan but excluding any Service Media in or under or over that unit…..

………

Service Charge: a fair proportion of the Service Costs.

Service Costs: the costs listed in clause 8.2.

Service Media: all media for the supply or removal of heat, electricity, gas, water, sewage, air-conditioning, energy, telecommunications, data and all other services and utilities and all structures, machinery and equipment ancillary to those media.

Services: the services listed in clause 8.1.

………..

2. Grant

2.1 The Landlord lets with limited title guarantee the Property to the Tenant for the Contractual Term.

……..

2.3 The grant is made with the Tenant paying the following as rent to the Landlord:

(a) the Annual Rent and all VAT in respect of it;
(b) the Service Charge and all VAT in respect of it;
(c) the Insurance Rent;
(d) all interest payable under this lease;
(e) all other sums due under this lease.

..……..

8. Services and Service Charge

8.1 The Services are:

(a) cleaning, maintaining and repairing the Common Parts including all Service Media forming part of the Common;
(b) lighting the Common Parts and cleaning, maintaining, repairing and replacing lighting machinery and equipment on the Common Parts;
(c) cleaning, maintaining, repairing and replacing refuse bins on the Common Parts;
(d) cleaning, maintaining, repairing and replacing signage for the Common Parts;
(e) cleaning, maintaining, repairing, operating and replacing security machinery and equipment (including closed circuit television) on the Common Parts,;
(f) cleaning, maintaining, repairing, operating and replacing fire

prevention, detection and fighting machinery and equipment and fire alarms on the Common Parts;

(g) cleaning, maintaining, repairing and replacing a signboard showing the names and logos of the tenants and other occupiers at the entrance to the Estate;

(h) maintaining the landscaped and grassed areas of the Common Parts;

(i) supply cold water to the Property; and

(j) any other service or amenity that the Landlord may [in its reasonable discretion provide for the benefit of the tenants and occupiers of the Estate.

8.2 The Service Costs are the total of:

(a) the whole of the costs of:

(i) providing the Services;

(ii) the supply and removal of electricity, gas, water, sewage and other utilities to and from the Common Parts;

(iii) complying with the recommendations and requirements of the insurers of the Estate (insofar as those recommendations and requirements relate to the Common Parts);

(iv) complying with all laws relating to the Common Parts, their use and any works carried out at them, and relating to the use of all Service Media, machinery and equipment at or serving the Common Parts and to any materials kept at or disposed of from the Common Parts;

(v) complying with the Third Party Rights insofar as they relate to the Common Parts; and

(vi) taking any steps (including proceedings) that the Landlord considers necessary to prevent or remove any encroachment over the Common Parts or to prevent the acquisition of any right over the Common Parts (or the Estate as a whole) or to remove any obstruction to the flow of light or air to the Common Parts (or the Estate as a whole);

(b) the costs, fees and disbursements (on a full indemnity basis) of:

(i) managing agents employed by the Landlord for the carrying out and provision of the Services or, where managing agents are not employed, a management fee for the same; and

(ii) accountants employed by the Landlord to prepare and audit the service charge accounts;

(c) all rates, taxes and impositions payable in respect of the Common Parts, their use and any works carried out on them (other than any taxes payable by the Landlord in connection with any dealing with or disposition of its reversionary interest in the Estate); and

(d) any VAT payable by the Landlord in respect of any of the items mentioned above except to the extent that the Landlord is able to recover such VAT.

8.3 Subject to the Tenant paying the Service Charge, the Landlord shall use its reasonable endeavours to repair, maintain, clean and light the roads, paths

and parking areas on the Common Parts. The Landlord may, but shall not be obliged to, provide any of the other Services. The Landlord shall not be obliged to carry out any repair where the need for that repair has arisen by reason of any damage or destruction by a risk against which the Landlord is not obliged to insure.

……

9. Insurance

9.1 Subject to clause 9.2, the Landlord shall keep the Property and the Common Parts (other than any plate glass at the Property or the Common Parts) insured against loss or damage by the Insured Risks for the sum which the Landlord considers to be its full reinstatement cost (taking inflation of building costs into account). The Landlord shall not be obliged to insure any part of the Property installed by the Tenant.

9.2 The Landlord's obligation to insure is subject to:

(a) any exclusions, limitations, excesses and conditions that may be imposed by the insurers; and

(b) insurance being available in the London insurance market on reasonable terms acceptable to the Landlord.

9.3 The Tenant shall pay to the Landlord on demand:

(a) the Insurance Rent;

(b) any amount that is deducted or disallowed by the insurers pursuant to any excess provision in the insurance policy; and

(c) any costs that the Landlord incurs in obtaining a valuation of the Property for insurance purposes and a fair proportion of any costs that the Landlord incurs in obtaining a valuation of the Estate for insurance purposes.

……

9.5 The Landlord shall, subject to obtaining all necessary planning and other consents, use all insurance money received (other than for loss of rent) in connection with any damage to the Property or the Common Parts to repair the damage for which the money has been received or (as the case may be) in rebuilding the Property or the Common Parts, as the case may be. The Landlord shall not be obliged to:

(a) provide accommodation or facilities identical in layout or design so long as accommodation reasonably equivalent to that previously at the Property or the Common Parts is provided; or

(b) repair or rebuild if the Tenant has failed to pay any of the Insurance Rent; or

(c) repair or rebuild the Property or the Common Parts after a notice has been served pursuant to clause 9.7 or clause 9.8.

9.6 If the Property is damaged or destroyed by a risk against which the Landlord is obliged to insure so as to be unfit for occupation and use or if the Common Parts are damaged or destroyed by a risk against which the Landlord is obliged to insure so as to make the Property inaccessible or unusable then, unless the policy of insurance in relation to the Property or the Common Parts has been vitiated in whole or in part in consequence of

any act or omission of the Tenant, any undertenant or their respective workers, contractors or agents or any other person on the Property or the Common Parts with the actual or implied authority of any of them, payment of the Annual Rent, or a fair proportion of it according to the nature and extent of the damage, shall be suspended until the Property has been reinstated and made fit for occupation and use or the Common Parts have been reinstated so as to make the Property accessible or useable (as the case may be), or until the end of three years from the date of damage or destruction, if sooner.

……..

26. Repairs

26.1 The Tenant shall keep the Property clean and tidy and in good repair and condition and shall ensure that any Service Media within and exclusively serving the Property is kept in good working order.

26.2 The Tenant shall not be liable to repair the Property to the extent that any disrepair has been caused by an Insured Risk, unless and to the extent that:

(a) the policy of insurance of the Property has been vitiated or any insurance proceeds withheld in consequence of any act or omission of the Tenant, any undertenant or their respective workers, contractors or agents or any person on the Property with the actual or implied authority of any of them; or

(b) the insurance cover in relation to that disrepair is excluded, limited, is unavailable or has not been extended, as mentioned in clause 9.2.

26.3 The Tenant shall keep the external areas of the Property in a clean and tidy condition and not allow any rubbish or waste to be left there.

26.4 The Tenant shall clean all windows at the Property as often as is necessary.

……..

31. Use

31.1 The Tenant shall not use the Property for any purpose other than the Permitted Use.

……

38. Landlord's Covenant for Quiet Enjoyment

The Landlord covenants with the Tenant, that, so long as the Tenant pays the rents reserved by and complies with its obligations in this lease, the Tenant shall have quiet enjoyment of the Property without any interruption by the Landlord or any person claiming under the Landlord except as otherwise permitted by this lease."

Summary of the contractual scheme for repair and insurance of the Property and Retained Parts

10. By clause 26.1 of the Lease, C covenanted to keep the Property clean and tidy and in good repair and condition.

11. By clause 8.3 of the Lease:

    a. D covenanted to use its reasonable endeavours to repair, maintain, clean and light the roads, paths and parking areas on the Common Parts;

    b. D is entitled, but is not obliged, to provide any of the other Services; and

    c. D is not obliged to carry out any repair where the need for that repair has arisen by reason of any damage or destruction by a risk against which D is not obliged to insure.

12. By clauses 9.1 and 9.2 of the Lease, D is obliged to insure against the Insured Risks, which include "*flood…..and overflowing of water....apparatus*", but subject to any exclusions imposed by the insurer. D's policy of insurance expressly excluded indemnification in respect of damage caused by or consisting of:

    a. Gradual deterioration or wear and tear; or

    b. Faulty workmanship, operating error or omission by D or any employee.

13. By clause 9.5 of the Lease, D is obliged to use all insurance money received to repair the Property or the Common Parts.

14. By clause 9.6 of the Lease, payment of the rent is suspended if the Property is damaged or destroyed by a risk against which D is obliged to insure so as to be unfit for occupation and use.

Preliminary Issues 1 and 2

<u>The Particulars of Claim</u>

15. The Particulars of Claim allege as follows:

    "4. The Lease did not contain an express clause requiring the Defendant to give Quiet Possession of The Premises to the Defendant but the same was implied by virtue of the demise by the Defendant to the Claimant of The Premises and by the principle of law that a Lessor may not derogate from its grant.

    5. Furthermore, to the extent that the Defendant has committed a Common Law Nuisance by omission or by commission it has at all times been liable to the Claimant in accordance with established principles of the Common Law Tort of Nuisance and moreover, as the party which at all times has remained in control of the common parts of the building within which The Premises are situated, the Defendant has owed to the Claimant a Tortious Duty of Care not to be negligent, either by omission or by commission, in regard to the maintenance

and care of those parts of the building within which The Premises are situated which have remained within its control.

6. The Defendant has breached the implied provision of the Lease by which it had to allow to the Claimant Quiet Enjoyment of The Premises and further or alternatively, at Common Law is liable to the Claimant under the Tort of Nuisance and/or Negligence in that from a date prior to August 2017 until 15th November 29019 it allowed a rainwater downpipe in the building to become and to remain blocked by an accumulation of debris as a result of which The Premises became subject to repeated and frequent episodes of flooding as a result of which The Premises could not be used for the Permitted Use under the Lease or for any other purpose because any stock in or around The Premises was liable to repeated damage by reason of ingress of water."

16. Despite what is alleged at paragraph 4 of the Particulars of Claim, the Lease does in fact contain an express covenant at clause 38 requiring D to give C quiet enjoyment of the Property. In summary, Preliminary Issues 1 and 2 arise out of C's claims that D is liable to C:

    a. For breach of the express covenant in the Lease for quite enjoyment, or

    b. in tort (nuisance or negligence) as a result of its failure to inspect, cleanse or repair those parts of the building remaining in its control

    for damage caused by water ingress from the Retained Parts which rendered the Property materially unusable. Save for the alleged breach of the covenant for quiet enjoyment, C does not allege any breach of the express terms of the Lease. Nor does C allege that any term should be implied into the Lease so as to impose an obligation upon D to repair or keep in repair the guttering.

Juristic basis of any liability

17. In ***Cockburn v Smith*** [1924] 2 KB 119 the landlords owned a block of flats and were found liable to the top floor tenant for damage suffered by her as a result of water ingress caused by a defect in the guttering of the roof of the building of which the landlords retained control. The landlords had notice of the defects, but were dilatory and negligent in remedying them. Bankes LJ held [at 129] that;

    "the question is what duty the landlords owed to the plaintiff in relation to this defective guttering. It cannot now be suggested that there was any agreement express or implied which can accurately be described as an agreement to repair the roof or guttering; but there is a line of authorities to show that a landlord is under an obligation to take reasonable care that the premises retained in his occupation are not in such a condition as to cause damage to the parts demised to others."

    Scrutton LJ considered that the landlord's duty was based on "that modified doctrine of Rylands v Fletcher…which is applicable where he retains in his control an artificial construction which becomes a source of danger to his tenant." Bankes and Sargant LJJ preferred not to decide whether the relevant duty arose out of an implied contract between the parties or whether it was an instance of the duty

imposed by law upon an occupier of premises to take reasonable care that the condition of the premises does not cause damage.

18. In ***Duke of Westminster v Guild*** [1985] QB 688, the tenant claimed damages in respect of loss suffered by him through the landlord's failure to repair a drain which he claimed the landlord was bound to repair and which in part ran below the property retained by the landlord. It was held that there were no special factors requiring the lease to be construed to give it business efficacy by imposing on the landlords an obligation to carry out repairs. It was further held that "a mere act of omission on the part of a landlord is capable of constituting a breach of the covenant for quiet enjoyment, if, but only if, there is a duty to do something….In the present case, for the reasons given earlier in this judgment, we are of the opinion that no relevant duty fell on the plaintiffs. The express covenant for quiet enjoyment and implied covenant against derogation from grant cannot….be invoked so as to impose on [the landlords] positive obligations to perform acts of repair which they would not otherwise be under any obligation to perform." However, having considered the relevant authorities, including ***Cockburn v Smith***, it was further held that there is a general principle, summarised accurately in ***Woodfall, Landlord and Tenant***, that:

> "Where the lessor retains in his possession and control something ancillary to the premises demised, such as a roof or staircase, the maintenance of which in proper repair is necessary for the protection of the demised premises or the safe enjoyment of them by the tenant, the lessor is under an obligation to take reasonable care that the premises retained in his occupation are not in such a condition as to cause damage to the tenant or to the premises demised."

19. ***Dilapidations – The Modern Law & Practice*** (6th edn 2018) Dowding & Reynolds states [at 19 – 19] that the nature of the obligation is such that it only arises where the defect in the retained parts results in damage. "In other words, the obligation concerns not the maintenance of the retained part itself, but only the effect which a failure to maintain it may have on the tenant or the demised premises. Provided no damage to the tenant or the demised premises will be caused, it is no breach of the obligation for the landlord to allow the retained part to become out of repair."

20. In ***Gavin & Anor v Community Housing Association Limited*** [2013] EWCA Civ 580 Patten LJ held [at 31] that the obligation to take reasonable care arises in contract as an implied term, rather than in tort. However, "the precise juristic basis of liability may not matter in cases where…the parties have a contractual relationship under the terms of the lease. Whether the duty imposed on the landlord to take reasonable care of the retained premises arises in tort or contract, the court has still to consider whether the express scheme of repair or insurance imposed by the lease excludes any other form of liability which the law might otherwise impose."

21. In my judgment:

    a. Following the decision in ***Duke of Westminster v Guild***, in the absence of any express or implied obligation under the Lease that D repair or keep in repair the Retained Parts (and none are pleaded in the present case), C cannot invoke the covenant for quiet enjoyment as an alternative means of imposing a positive obligation on D which they would not otherwise be obliged to perform. That principle was not apparently doubted in ***Gavin & Anor v Community Housing Association Limited*** in circumstances where

(i) the leases under consideration in that case also included express covenants that the tenants should have quiet enjoyment of the demised premises and (ii) Patten LJ undertook an exhaustive analysis of the nature of the landlord's liability (if any) to repair the retained part of the building;

b. Subject to the express terms of a lease, there is no doubt that a landlord of a multi-occupied building owes a duty to take reasonable care to ensure that the parts retained by them do not cause damage to the demised premises, although in the older authorities it was not entirely clear whether that duty lay in contract by way of an implied term or in tort. In the present case C has only pleaded a claim in tort, but it is submitted on behalf of C that this matters not, since, relying upon ***Henderson v Merret Syndicates Ltd*** [1995] 2 AC 145, a party to a contract may rely upon a tort committed by the other party, as long as doing so is not inconsistent with the express or implied terms of the contract;

c. However, I agree with the submission made on behalf of D that any uncertainty over the precise juristic basis of the obligation has now been resolved by Patten LJ when he held in ***Gavin & Anor v Community Housing Association Limited*** that the landlord's duty to take reasonable care of the retained parts arises in contract as an implied term, rather than in tort. Whilst Patten LJ said [with my emphasis added] that ultimately the precise juristic basis of liability <u>may</u> not matter where the parties have a contractual relationship under the lease, this is a case where in my view it does matter, since by virtue of clause 8.3 of the Lease D is expressly not obliged to carry out any repair where the need for that repair has arisen by reason of damage caused by a non-insured risk. In their Response To The Request For Further Information, C confirmed that it is not alleged that the accumulation of debris in a rainwater downpipe was a risk against which D was obliged to insure against under the Lease (although it was averred that the accumulation of debris was an aspect of and cause of two Insured Risks being flood and overflowing of water apparatus). An implied term can only be incorporated if it is not inconsistent with the express terms of the contract, which no doubt explains why C has not sought in this case to allege that D was under an implied contractual obligation to repair or keep in repair the Retained Parts. Further to impose in the alternative a tortious duty would necessarily be inconsistent with the express terms and contrary to the rule in ***Henderson v Merret Syndicates Ltd***; and

d. Therefore, I do not consider that there is any juristic basis for imposing upon D any liability whether under the express covenant of quiet enjoyment or in tort to repair or keep in repair the guttering.

<u>Did the parties intend the Lease to provide a comprehensive scheme of repair/insurance ?</u>

22. It is not disputed that ***Gavin*** is binding authority that where there is a comprehensive scheme for repair and insurance for both the demised and retained parts then there is no reason to impose on a landlord either an implied covenant to repair the retained parts or any similar duty in tort. In the event that I am wrong that there can be no juristic basis for imposing any liability in tort in the present case, I must consider whether or not the express scheme of repair and insurance imposed by the Lease excludes any other form of liability which the law might otherwise impose. It is submitted on behalf of C that the present case is distinguishable from

Gavin on the facts. It is submitted on behalf of D that the present case is *a fortiori* to ***Gavin***, and so binding upon me on the facts**.** It is therefore necessary to consider the decision in ***Gavin*** in some detail.

23. In his judgment, Patten LJ set out the background to the appeal as follows:

> 2. Ms Flores is the tenant of commercial premises at 104, Cromer Street, London, WC1 ("104") under a lease from the Respondent, Community Housing Association Limited ("CHAL"), dated 8th June 2000. Together with Ms Cracy she is also the tenant of adjoining premises at 106/108 Cromer Street ("106") under a lease from CHAL dated 17th March 2005. The lease of 104 was granted for a term of 6 years from 8th June 2000 at an initial rent of £5,500 per annum subject to review. The lease of 106 was granted for a term of two years from 8th April 2004 and was then extended on 17th March 2005 for a term until 7th April 2014 at an initial rent of £9,000 per annum again subject to review.
>
> 3. The demise under both leases comprised the ground floor and basement of the premises including internal plaster; ceiling and floor coverings; doors and windows; and all conduits within the demised premises. It did not extend to any part of the upper floors of 104 and 106 which have been converted into residential flats and have been let as such by CHAL. Nor did it include the soil pipes on the rear wall of the building which serve the upper part of the premises.
>
> 4. Under both leases the tenants covenanted to put and keep the demised premises in good and substantial repair, decoration and condition (clause 5(6)(b)) and to decorate them every three years (clause 5(6)(c)) but there is no corresponding covenant by CHAL as landlord to repair those parts of the building which it has retained. Instead its only express covenants are that the tenant should have quiet enjoyment of the demised premises (clause 7(1)) and an insurance covenant (clause 7(2)) which (so far as material) is in these terms:
>
> > "To insure the Demised Premises and the Development in an insurance office of good repute or at Lloyds against the Insured Risks and in the event of the Demised Premises being destroyed or damaged by any of the Insured Risks the Landlord shall with all convenient speed (subject to the availability of all necessary labour and materials and the obtaining of all necessary permissions) lay out and apply in rebuilding repairing or otherwise reinstating the Demised Premises all monies received by virtue of such insurance other than monies received in respect of loss of rent Provided that the Landlord shall be under no liability to the Tenant hereunder if the insurance money under any policy of insurance effected by the Landlords shall be wholly or partially irrecoverable in the circumstances set out in 5(22) above….".
>
> 5. The "insured risks" are defined by clause 1(11) to mean:
>
> > "loss or damage by or in consequence of fire and such other risks as the Landlord may deem desirable or expedient including three years loss of rent and architects and surveyors fees and demolition clearance and similar expenses."

6. Clause 5(22) provides that:

> "In the event of the Demised Premises or the building in which they are situate or any neighbouring premises or any of them or any part thereof being destroyed or damaged by any of the Insured Risks and the insurance money under any policy of insurance effected thereon by the Landlord being by reason of any act neglect default or omission of the Tenant wholly or partially irrecoverable forthwith in every such case to pay to the Landlord on demand the cost of rebuilding and reinstating the building or buildings so destroyed or damaged such rebuilding works to be carried out by and in accordance with the requirements of the Landlord and the Tenant being allowed towards the expenses of so doing (upon such rebuilding and reinstatement being completed) the amount (if any) actually received by or on behalf of the Landlord (other than in respect of loss of rent) under any such insurance as aforesaid in respect of such destruction or damage."

7. Under the heading "Landlord's Liability" clause 6(5)(a) also provides that:

> "In any case where the facts are or should reasonably be known to the Tenant and not reasonably known by the Landlord the Landlord shall not be liable to the Tenant in respect of any failure of the Landlord to perform any of its obligations to the Tenant hereunder whether express or implied unless and until the Tenant has notified the Landlord of the facts giving rise to the failure and the Landlord has failed within a reasonable time to remedy the same."

8. In addition to these provisions clause 6(3) of each lease contains a cesser of rent clause in the following terms:

> "If the Demised Premises or any part thereof shall be destroyed or so damaged by fire or any other risk for which the Landlord is indemnified under the insurance of the Demised Premises so as to be unfit for occupation or use then unless the insurance of the Demised Premises shall have been vitiated by the act neglect default or omission of the Tenant the rent hereby reserved or a fair and just proportion thereof according to the nature and extent of the damage sustained shall be suspended and cease to be payable until the Demised Premises or damaged portion thereof shall have been reinstated or made fit for occupation or until the third anniversary of such destruction or damage whichever shall be the sooner."

9. There is also the usual proviso for re-entry in the event of rent being unpaid for 21 days or of any breach of the tenant's covenants: see clause 6(1).

10. The appellants fitted out the demised premises at some expense for use as gallery space and, as part of their business, let out part of the area for exhibits and other commercial events. But on at least four occasions between April 2004 and June 2005 the interior of the demised premises was damaged by the ingress of water and on two occasions sewage from the parts of the building retained by CHAL. The judge found that in April 2004 gaps between the glass pavement lights above the basement of 106

let water through. They were repaired in September 2004 and in January 2006 an insurance payment of £150 was made in respect of the damage. In September 2004 one of the soil pipes carrying sewage from the flats above leaked and sewage permeated the rear wall of 104. The leak was remedied by the landlord's contractors on 31st January 2005 and part of the wall was then replaced. A further insurance payment was made in respect of the damage.

11. On 7th February 2005 there was then another leak from a stack pipe on the rear wall of 106 which was repaired on 26th April 2005. Again this would have resulted in an insurance payment but for the excess on the policy of £100. Finally on 24th June 2005 water from a tap or leaking pipe in one of the flats above 104 inundated the demised premises about a week before an art exhibition was due to be held. It necessitated the replacement of the ceiling (which was completed in October 2005). The cost of those works was met by the insurers and the appellants received a cheque direct from the insurers of £3,141.65 for this leak plus the other matters referred to.

12. The judge found that all of these leaks (including the defective pavement lights) emanated from the premises retained in the ownership of CHAL. But, in the absence of any express repairing covenant in respect of its adjoining premises, CHAL contended that it had no liability to the appellants beyond being required to lay out payments received from the buildings insurance it had taken out pursuant to clause 7(2) of the leases in the repair of the damage to the demised premises which had been caused. It is common ground that this was done.

13. Until June 2008 the appellants continued to pay the rent due under both leases but the rent due on the June quarter day was not paid and, as a result, CHAL served notices in respect of both leases that unless payment was received within 7 days it would proceed to re-enter and forfeit the leases. The rent due on 29th September also went unpaid and the landlord served further notices of its intention to forfeit the leases. The appellants responded through their solicitors to the effect that they had no liability for rent for those quarters because they had continued to pay rent in 2005 when the demised premises had been unfit for occupation within the meaning of the cesser of rent clause contained in clause 6(3) of the two leases. As a consequence, they contended that they were entitled to recover the rent paid (but not due) during this period and to set off the relevant amount against the rent due in September and October 2008.

14. On 29th October 2008 CHAL re-entered 104 and 106 and changed the locks. On 4th November Wilkie J. granted the appellants an injunction *ex parte* requiring CHAL to allow them back into possession and this injunction was continued until trial by Christopher Clarke J. on 14th November. The landlord's case at the *inter partes* hearing (and on this appeal) is that the appellants have no claim in restitution or otherwise to recover the rent which they paid in 2005 even if (which is denied) the premises were unfit for occupation in that period. Judge Cowell found at the trial that the cesser of rent clause had never come into operation because, as he put it, there was never an occasion when the premises were wholly unfit for occupation and use. That conclusion is challenged in one of the grounds of appeal on the basis that the judge failed to give any

consideration to whether "any part" of the demised premises became unfit for use.

15. The appellants' claim for damages was issued on 3rd December 2008 and eventually came to trial on 12th July 2010. It sought to recover damages for financial loss consequent on the disrepair to their premises caused by the leaks I have mentioned. This was said to have run into many hundreds of thousands of pounds in the form of lost business and at one point the damages claim exceeded £2m. In order to succeed in a claim for this type of loss the appellants must establish a breach of duty on the part of CHAL whether in contract or in tort arising from the various leaks which occurred. The basis of such liability is said to be an implied obligation to keep the retained parts in repair or alternatively a common law duty as adjoining occupier to remedy any defect in those premises which was capable of causing damage to the demised premises.

16. Judge Cowell accepted that there was a duty on the part of CHAL to remedy any defects in the retained premises which would cause damage to the demised premises at 104 and 106. He based this on the decision in ***Hargroves, Aronson & Co v Hartopp*** [1905] 1 KB 472 which was approved by this court in ***Cockburn v Smith*** [1924] 2 KB 119. The scope of that duty was, he held, to take reasonable care to remedy defects in the retained premises which the landlord knew had caused, or were likely to cause, damage to the premises demised to the tenants. Absent negligence, the duty to repair only arose once the landlord was aware that damage had been caused.

17. The judge found that there was no breach of duty in respect of the leak from the soil pipe at the rear of 104 because the landlord had acted reasonably in attempting to trace the source of the leak once the damage it was causing had been notified. He also found that the flood caused by the leak in the flat above 104 in June 2005 was an unforeseeable accident and that repairs were carried out promptly. But he did hold CHAL liable for breach of duty in relation to the leak from the soil stack pipe at the back of 106 in 2005 not because it ought to have been aware that the pipe was leaking but because, once alerted to the damage, it could and should have remedied the leak by 8th April 2005 at the latest. Its failure to carry out the repairs until 26th April was therefore actionable.

18. In relation to the claim based on the leaking pavement lights at 106, the judge was asked to consider three separate periods. The occasion of the first leaks at the time of the grant of the first lease in 2004; a second period of leaks between June and October 2006; and a third period between May and June 2008. The judge accepted that the problems with the pavement lights were covered by the principle of caveat lessee which I will come to later. But if wrong about that he held that the leak in 2004 could have been easily remedied by the tenant and was within their duty to mitigate. The cost of repair was later met by insurance. In relation to the leaks in 2006, the judge held that there was no culpable delay on the part of CHAL and that when it appeared that the repairs would not be covered by insurance then the work was done at the landlord's expense. Again the judge held that the tenants should have carried out repairs themselves earlier as part of a duty to mitigate. The judge also decided that there had been no breach of duty in respect of the leaks in 2008

because at no time did CHAL know or have the means of knowing where the leak was coming from.

19. In summary then the judge found that only one breach of duty sounding in damages had been established and that related only to the three weeks in April 2005 when there was a delay in remedying the leak to the soil stack at 106. For this he awarded the tenants the sum of £100. Since this was obviously insufficient to extinguish the arrears of rent he declared in his order that both leases had been forfeited by the landlord's re-entry on 29th October 2008 and ordered the appellants to deliver possession of the premises at 104 and 106 forthwith. They were ordered to pay mesne profits in a sum which represents the market rent of the premises from the forfeiture of the leases until possession and to pay the costs of the action to be assessed on an indemnity basis. He also refused permission to appeal."

24. Patten LJ concluded that:

"42. Although there is no express repairing covenant imposed on the landlord, the repair of the structure of the building is catered for through the provisions of clause 7(2). In the face of these provisions there is no reason based on necessity or business efficacy to alter the balance of the scheme by imposing an implied covenant to repair on the landlord, let alone one under which his liability to repair is made absolute. If one applies the modern approach to the implication of terms as a process of construction (see ***AG of Belize v Belize Telecom*** [2009] 1 WLR 1988) to do so would be to seek to improve the contract from the point of view of the tenant rather than to give it the meaning and effect which both parties must have intended given the terms and structure of their contract. The reasonable man looking at the matter with all the relevant background information would not in my view assume that the only meaning which could reasonably be given to the contract was that CHAL should be responsible for any defects in the repair of the retained parts irrespective of any negligence on its part.

43. For much the same reasons, the existence of what the parties obviously intended should be a comprehensive scheme for the repair of both the demised and the retained parts of the building is sufficient to exclude from their legal relationship any liability at common law in tort which the landlord might otherwise be subject to in relation to its retained premises.

44. It follows from this that the judge was wrong in my view to have held that CHAL even came under a duty to repair the retained parts including the stack pipes and the pavement lights and therefore to award the tenants damages of £100 for the breach which he found to be proved. In these circumstances, it is unnecessary to consider the landlord's alternative argument in relation to the pavement lights that they were covered by the principle of caveat lessee. The issue of quantum does not therefore arise but I observe that although the judge is criticised for his award of a nominal £100 for loss of profit in the three week period in April 2005, the independent joint expert (Mr Hall) reported that there was no evidence that, but for the delay in repairing the leak, the tenants' business would have earned income in the relevant period."

C's submissions

25. The Lease and insurance policy give rise to the following observations:

    a. Although C has to pay the Insurance Rent, C was given no right under the Lease to see D's insurance policy and did not see it. C still has not seen it and has only seen the disclosed extract;

    b. C knows what the Insured Risks are, that they include damage from overflowing pipes, and that D must insure them for both the Property and Common Parts under clause 9.1 of the Lease;

    c. In view of the discretion given to D under clause 8.3 of the Lease, C does not know which Services D will make reasonable endeavours to repair or maintain. C therefore does not know what D's contractual duties are to repair and maintain; and

    d. Nor does C know the extent of what is or what is not insured under D's insurance policy for which it is paying by way of Insurance Rent, or what exclusions to the policy apply.

26. Further, the Lease and the insurance policy together can be read as meaning that D does not have to insure against damage caused by overflowing pipes if the damage was caused by any of gradual deterioration or wear and tear [and] faulty workmanship, operating error or omission by [the Landlord] in relation to those pipes, such as failing to inspect and clean them. That appears to be the reading on which D relies, but it was not a reading open to C, who did not know the extent of what is or what is not insured under D's insurance policy for which it is paying by way of the Insurance Rent.

27. C could, in principle, take out this insurance itself. However, there would be major practical difficulties concerning the extent and level of cover, because C is given no right under the Lease to see D's insurance policy, was never shown it, and had no knowledge of what D's insurance policy contains.

28. Whether D is or is not insured by reason of its failure to inspect or cleanse and maintain the guttering, the asymmetry of knowledge as to the contents of the insurance policy puts C at a major disadvantage. That is because it is unaware of the gaps in D's policy arrangements and has no right under the Lease to enter on, inspect and maintain the Retained Parts which it would need to do if it tried to seek insurance itself to cover those gaps.

29. This could not possibly be an agreement intended by the parties for a comprehensive, insurance backed, scheme of repair for the demised and retained premises of the kind referred to by Patten LJ in Gavin at [42] – [43] - especially as:

    a. On D's own case the failure to inspect and cleanse the pipes excluded the circumstances from insurance cover. In ***Gavin***, save for one minor incident, all the leaks were unforeseeable or attended to in a reasonable period of time. By contrast in the present case, all the leaks were foreseeable after first notification in 2017, but nothing was then done to rectify the problem for some 2 years;

b. In ***Gavin*** insurance monies were paid out because the damage amounted to insured risks under the relevant policy whereas in the present case the damage fell within the exceptions under the insurance policy, which applied consequent upon D's own negligence; and

c. In ***Gavin*** it was held that the rent suspension clause did not come into operation because there was never an occasion when the demised premises became uninhabitable/unusable. However, in the present case, it is an assumed fact that the water ingress was such as to render the Property materially inaccessible or unusable for the Permitted Use.

The present case is therefore distinguishable from Gavin on the facts, and so the reasoning of Patten LJ that there can be no liability in tort does not apply.

30. In these circumstances the contractual relationship of the Lease is no bar to liability in the tort of negligence or nuisance in respect of damage to the Property caused by water ingress from the Retained Parts which D failed to keep properly maintained and in good repair.

31. Further, in the contractual context of the Lease, D assumes the responsibility of arranging adequate insurance and C has to rely on D for doing that professionally and properly. D did not do that if its conduct in failing to inspect and cleanse the downpipe (whether through its understanding of the discretion under clause 8.3 or otherwise) brought it within the exception to the insurance policy so that the loss to C was not insured at all.

D's submissions

32. In Gavin the lease terms were very similar to those in the present case. The material terms there were that (see para [4]):

    a. The tenants covenanted to put and keep the demised premises in good and substantial repair, decoration and condition;

    b. There was no express covenant by the landlord to repair the retained part of the building;

    c. The landlord gave an express covenant for quiet enjoyment; and

    d. The landlord covenanted to insure the demised premises and the building against specified insured risks.

33. There was also a rent suspension clause in similar terms to that in the present case (para [8]).

34. In precisely the same manner as in ***Gavin***, in the present case there is no express obligation by D to repair the Retained Parts (save in this case for those elements of the Common Parts which provide access to the Property), and there is a covenant to insure the building against Insured Risks. That scheme of repair and insurance excludes the imposition of any further liability.

35. It should also be noted that a scheme of repair as in ***Gavin*** and in ***Gordon v Selico Co Ltd*** [1985] 2 EGLR 79 does not necessarily imply that the tenant might never suffer any consequential loss arising out of disrepair. For example in ***Gavin*** the

tenant did suffer irrecoverable loss of business as a result of delay in the repair of the soil stack; and in ***Gordon v Selico***, it was accepted by Slade LJ that "*the scheme might not always suffice to give the lessees necessary and timely protection.*" However, this does not detract from the proposition that an express covenant in a lease by the tenant to repair, and by the landlord to insure and lay out the insurance money, constitutes a complete scheme, which prevents the imposition of any further liability.

36. C concedes that accumulation of debris in the gutter is not an Insured Risk. One does not need to see the policy terms to know that an insurer will not insure against damage caused by gradual deterioration/wear and tear.

Analysis and conclusion

37. C seeks to distinguish ***Gavin*** on the facts because the damage in the present case was caused by an uninsured risk, since it fell within the exceptions under the policy of insurance due to D's negligence. However, in ***Gavin*** the trial judge had found:

    a. The landlord was negligent in "relation to the leak from the soil stack pipe…in 2005 not because it ought to have been aware that the pipe was leaking but because, once alerted to the damage, it could and should have remedied the leak by 8 April 2005 at the latest. Its failure to carry out the repairs until 25 April was therefore actionable"; and

    b. "In relation to the leaks in 2006….there was no culpable delay on the part of CHAL and that when it appeared that the repairs would not be covered by insurance then the work was done at the landlord's expense."

    Notwithstanding those findings of the trial judge that (i) there was culpable delay on the part of the landlord in carrying out some repairs and (ii) other repairs were not covered by insurance, Patten LJ concluded that the insurance scheme for repair was sufficiently comprehensive to exclude any tortious liability which the landlord might otherwise be subject to in relation to the retained premises.

38. C further seeks to distinguish ***Gavin*** because of the lack of knowledge by C as to what precise risks were or were not insured against. However, in my judgment the terms of the leases in Gavin gave rise to even greater asymmetry of knowledge as to the extent of the applicable insurance cover, since they conferred upon the landlord even greater discretion than in the present case. In ***Gavin*** the landlord was only required to insure against one specific risk ("fire") "and such other risks as the Landlord may deem desirable or expedient". In the present case the Lease defines Insured Risks by reference to 14 named risks and "any other risks against which the landlord decides to insure against from time to time".

39. It is submitted on behalf of C that the insurance scheme for repair of the Retained Parts is neither comprehensive nor effective. However, the task for the court is not to consider with the benefit of wisdom of hindsight the practical effectiveness of the scheme, and then seek to fill any resulting gaps by importing liability at common law. To do so runs the risk of seeking to improve the position of C as tenant rather than seeking to give the Lease the meaning and effect which the parties must have intended. I agree with the submission made on behalf of D that incomplete protection does not of and by itself mean that the parties did not intend the Lease to provide a comprehensive scheme of repair and insurance. In ***Gordon v Selico Ltd*** it was held that "The repair and maintenance scheme provided by this lease is a very

cumbersome one and we agree with the learned judge that, even if the lessors and their agents were duly to carry out their obligations, the scheme might not always suffice to give the lessees necessary and timely protection…Nevertheless, on a reading of the lease, we feel little doubt that it was intended, by all parties, to provide a comprehensive code in regard to repair and maintenance of the block."

40. The Lease is a sophisticated and detailed document, which runs to 48 pages and which was professionally drafted. So far as the quality of the drafting, it does not lack clarity and it is neither illogical nor incoherent. The Lease in clear and unambiguous terms provides that (i) C is responsible for keeping the Property in good repair and condition (ii) D expressly has no obligation to repair in circumstances where D has no obligation to insure, (iii) D is obliged to insure the Property against loss or damage caused by a relatively long list of named risks, but subject to any exclusions, limitations, excesses and conditions that may be imposed by the insurers and (iv) D is obliged to use the insurance monies received to repair the Property. In my judgment:

    a. The present case is not distinguishable on the facts from ***Gavin***, which is binding upon me; and

    b. The parties intended that the Lease provide a comprehensive scheme for the repair of both the Property and the Retained Parts sufficient to exclude from their legal relationship any liability at common law in tort that D might otherwise be subject to in relation to the Retained Parts.

Preliminary Issue 3

Submissions

41. It is submitted on behalf of C that:

    a. Clause 9.6 of the Lease provides that if "the Property is damaged….by a risk against which D is obliged to insure so as to be unfit for occupation and use or if the Common parts are damaged…by a risk against which D is obliged to insure so as to make the Property inaccessible or unusable then… payment of the Annual Rent, or a fair proportion of it according to the nature and extent of the damage, shall be suspended until the Property has been reinstated and made fit for occupation and use…..;

    b. Clause 9.6 has to be read as if Insured Risks include those mentioned in Clause 1.1 of the Lease and do not exclude matters due to D's own default and excepted by insurers in policy wording that C, as tenant, is unaware of. More generally, the clause must be interpreted in the context of the Lease as a whole;

    c. If the rent is not suspended, C is liable for rent while unable to use the Property at all and has no right under the Lease to access the Retained Parts to effect repairs, and D remains in breach of the covenant of quiet enjoyment. That would be an intolerable and ridiculous state of affairs, and not one which the parties could have contemplated when entering into the Lease; and

    d. A party to a contract cannot rely upon its own default. The covenant of quiet enjoyment is broken "if the landlord…..does anything that substantially

interferes with the tenant's ordinary unlawful enjoyment of the demised premises." – Megarry & Wade, The Law of Real Property, 9th edn, at 18-007.

42. It is submitted on behalf of D that:

a. C contends that: (i) the Property has been damaged; (ii) by a risk against which the Defendant is obliged to insure; and (iii) so as to be unfit for occupation or use. Given the Joint Statement of assumed Facts, issues (i) and (iii) are to be assumed as correct for present purposes. The issue is as to whether water ingress damage to the Property which arises from the accumulation of debris in the blocked gutter is "*a risk against which the Defendant is obliged to insure*";

b. This depends upon Clauses 9.1 and 9.2 of the Lease, which set out D's insurance obligation. It comprises:

i. Insurance by loss or damage against the Insured Risks; but subject to

ii. Any exclusions, limitations, excesses and conditions that may be imposed by the insurers; and

iii. The relevant insurance policy terms, which set out the exclusions imposed by the D's insurers state that:

"*We will not indemnify You in respect of*

a. Damage caused by or consisting of

1. an existing or hidden defect
2. gradual deterioration or wear and tear
3. frost or change in the water table level
4. faulty design or faulty materials used in its construction
5. faulty workmanship, operating error or omission by You or any Employee

However, We Will indemnify You in respect of any subsequent Damage which results from a cause not otherwise excluded."

c. It is plain that the blockage by the accumulation of debris in the gutter "*consists of*" "*gradual deterioration*". D was therefore obviously not insured against the cost of the repair required to unblock the gutter. Further, C accepts that D was not obliged to insure against the gradual accumulation of debris.

d. However, the exclusion imposed by the D's insurers (for obvious reasons) does not simply extend to damage which "*consists of*" gradual deterioration, but also to damage "*caused by*" gradual deterioration. In the present case, it is common ground in the Joint Statement of Assumed Facts that the water ingress to the Property was caused by the accumulation of debris in the gutter. It necessarily follows from this that any damage to the Property was caused by "*gradual deterioration*". Therefore D was not, and was not required to be, insured against such a risk.

e. It is no coincidence that the rent suspension provision is linked to the insurance as it flows as part of the same scheme. Payment of rent is only suspended where D knows that it is insured against the cost of repairs and the loss of rent.

Analysis and conclusion

43. Over recent years, there have been a number of higher authorities dealing with the principles applicable to the interpretation of commercial agreements such as the Lease: ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 WLR 896; ***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] 1 AC 1101; ***Re Sigma Finance Corp*** [2010] 1 All ER 571; ***Rainy Sky SA v Kookmin Bank*** [2011] 1 WLR 2900; ***Arnold v Britton*** [2015] AC 1619; and ***Wood v Capita Insurance Services Ltd*** [2017] AC 1173. The principles outlined in those authorities were helpfully summarised by Popplewell J (as he then was) in ***Lukoil Asia Pacific Limited v Ocean Tankers Limited*** [2018] EWHC 163 (comm) as follows:

> "8. The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting the contract, give more or less weight to elements of the wider context in reaching its views as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract so long as the court balances the indications given by each."

44. The rent suspension clause 9.6 of the Lease is triggered "If the Property is damaged…by a risk against which the Landlord is obliged to insure".

45. Clause 9.1 of the Lease provides that "Subject to clause 9.2, the landlord shall keep the Property and the Common Parts….insured against loss or damage by the Insured Risks".

46. Clause 1.1 of the Lease defines Insured Risks as including "overflowing of water…apparatus".

47. Clause 9.2 of the Lease provides that the "Landlord's obligation to insure is subject to…any exclusions, limitations, excesses and conditions that may be imposed by the insurers".

48. The relevant insurance policy terms include an exclusion in respect of "Damage caused by or consisting of….gradual deterioration".

49. In my judgment, from a textual analysis, the meaning of this language is clear and unambiguous in that D was not obliged to insure against damage caused to the Property by water overflowing from the gutter due to a blockage in the rainwater downpipe from the gradual accumulation of debris.

50. As already stated, the Lease is a detailed document, which runs to 48 pages and which was professionally drafted. The parties to the Lease were commercially sophisticated. Therefore, significant weight must be attached to the language that the parties have chosen to express their agreement.

51. It is submitted on behalf of C that I ought to reject the natural meaning of Clauses 1.1, 9.1, 9.2 and 9.6 of the Lease as correct when those provisions are considered in their wider documentary and commercial context. In doing so, Clause 9.6 has to be read as if Insured Risks include those mentioned at Clause 1.1 but excluding matters excepted by insurers as a result of D's own default, since otherwise:

    a. If the rent is not suspended, C remains liable for rent while unable to use the Property at all and has no right under the Lease to access the Retained Parts to effect repairs;

    b. D remains in breach of the covenant of quiet enjoyment; and

    c. That would be an intolerable and ridiculous state of affairs, and not one which the parties could have contemplated when entering into the Lease.

52. However, the words "Insured Risks" do not appear anywhere in Clause 9.6, which only refers to D's obligation to insure. The extent of D's obligation to insure is dealt with at clause 9.1 of the Lease, which is expressly subject to Clause 9.2. It is submitted on behalf of C that the parties cannot have intended that D be entitled to rely upon D's own default/negligence, but I have already determined that D had no liability to C whether under the covenant of quiet enjoyment or in tort to repair or keep in repair the guttering.

53. Clause 8.3 of the Lease expressly records that D shall not be obliged to carry out any repair where the need for that repair has arisen by reason of any damage caused by a risk against which D is not obliged to insure. Clause 9.5 provides that D shall use all insurance money received to repair the damage for which the money was received. It makes commercial sense, at least from D's perspective, that payment of the rent is only suspended where D is insured against the cost of repairs and the loss of rent. In my judgment, the meaning derived from a contextual analysis is consistent with the meaning derived from a textual analysis.

54. A court should not reject the natural meaning of contractual provisions as correct simply because it appears to be imprudent for one of the parties to have agreed to those contractual provisions, even ignoring the benefit of wisdom of hindsight. It is not the function of a court when interpreting a contract to relieve a party from a bad bargain – ***Arnold v Britton*** per Lord Neuberger PSC at para 20. In my judgment,

C's proposed construction favours an interpretation that is influenced by what has happened after the event so as to improve the bargain actually made.

55. Therefore, I conclude that D was not, and was not required to be, insured against the risk of damage to the Property by water ingress caused by the gradual accumulation of debris in the gutter, which fell within the exclusions imposed by D's insurers.

Overall conclusion

56. In conclusion, the Preliminary Issues are answered as follows:

    a. Yes – the terms of the Lease do exclude any liability of D towards C to inspect, cleanse and/or maintain the gutter at the building of which the Property forms part;

    b. No – D is not legally obligated to take steps to inspect and clear the guttering at the building which the Property forms part (upon notification by C as to the condition of the guttering or otherwise) so as to prevent the occurrence or continuation of any nuisance to the Property; and

    c. No – for the purposes of the rent suspension provision in the Lease, D was not obliged to insure against the risk of damage to the Property by water ingress caused by the gradual accumulation of debris in the gutter.