Neutral Citation Number: [2020] EWHC 960 (QB)

Case No: QA-2019-000286

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISON
HIGH COURT APPEAL CENTRE, ROYAL COURTS OF JUSTICE
ON APPEAL FROM THE COUNTY COURT AT OXFORD
ORDER OF MR RECORDER BERKLEY QC DATED 25 SEPTEMBER 2019
COUNTY COURT CASE NUMER: D70OX028
APPEAL REF: QA-2019-000286

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2020

Before :

THE HONOURABLE MRS JUSTICE TIPPLES

- -

Between :

DR STEFAN KAZIMIERZ PIECHNIK	**Appellant/ Defendant**
- and -	
OXFORD CITY COUNCIL	**Respondent/ Claimant**

- -
- -

Mr Joshua Dubin (instructed as direct access counsel) for the **Appellant**
Mr Justin Bates and Miss Kimberley Ziya (instructed by **Knights Professional Services Ltd**) for the **Respondent**

Hearing date: 27 February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10am on Monday 27th April 2020.

The Honourable Mrs Justice Tipples DBE:

Introduction

1. This is an appeal from the order of Mr Recorder Berkley QC made on 25 September 2019 following the trial of two preliminary issues in the Oxford County Court.

2. The appeal arises in the context of a long-running dispute between Oxford City Council ("**the claimant**") and Dr Stefan Piechnik ("**the defendant**") in relation to major works carried out by the claimant at a residential tower block in Headington, Oxford known as Plowman Tower. The defendant owns a flat in Plowman Tower and is an academic at Oxford University. These works have given rise to proceedings between the parties in both the First-tier Tribunal Property Chamber (Residential Property) ("**the FTT**") and the Oxford County Court.

3. The claimant is the freehold owner of Plowman Tower, which was built in the 1960s. It is a 15-storey building made up of 85 flats, most of which are used to provide social housing. However, 16 flats have now been sold under the "Right to Buy Scheme" contained in the Housing Act 1985 ("**the HA 1985**"). One of these flats is Flat 57 ("**the premises**"), which is located on the 10th floor. It is a two-bedroom flat, with a kitchen, bathroom and living room leading onto a balcony. On 18 February 2003 the claimant granted a long lease of the premises ("**the Lease**") to a Mr D A Elliott ("**the Tenant**"). On 4 September 2012 the defendant purchased the Tenant's interest in the Lease and the defendant is now the registered leasehold proprietor of the premises with title number ON239542.

4. Between 2012 and 2016 the claimant developed a plan of remedial and other works to its housing stock, which included works to Plowman Tower ("**the Major Works**"). In January 2016 the claimant served a service charge consultation notice in respect of the Major Works. The estimated service charge was £44,462.04 per flat. The defendant, and other flat owners, formed themselves into an interest group called "The Oxford Tower Block Leaseholders' Association" ("**the Association**") and argued, amongst other things, that they were not liable to pay for works which were improvements rather than repairs or maintenance under their long leases. The defendant was at one point the chairman of the Association.

5. In September 2016 the claimant issued proceedings in the FTT "to determine the reasonableness and payability of service charges and administration charges". The FTT held that a substantial part of the Major Works was not works of repair or maintenance and were not therefore recoverable as service charges under the long leases. The FTT's decisions were dated 27 February 2017, 4 October 2017 and 30 July 2018 and were not appealed. In the meantime, in November 2016 the claimant began the Major Works in relation to Plowman Tower.

6. The claimant's case is that the defendant is required under the Lease to give access to the premises for the following works, which form part of the Major Works, namely: (a) works to the ventilation in the kitchen and bathroom; (b) the installation of a sprinkler system; (c) provision of new electric sockets/isolation switches; (d) provision of new water boiler insulation; (e) provision of new digital aerial socket in the bedroom and

lounge; (f) provision of new windows in the premises, including new windows to enclose the balcony; (g) provision of external cladding and insulation; and (h) an option to have the heaters changed. These works are referred to by the defendant as "**the Disputed Works**", and that definition has been adopted by the parties.

7. The defendant refused to give the claimant access to the premises in order to carry out the Disputed Works. On 5 July 2017 the claimant issued proceedings in the Oxford County Court seeking, amongst other things, a mandatory injunction against the defendant requiring him to provide the claimant with access under the terms of the Lease to the premises in order to carry out the Disputed Works.

8. The claimant also made an application for interim mandatory relief against the defendant, which was resolved at the first hearing on 24 July 2017 with each party giving undertakings. Based on those undertakings the court ordered that the application, and the proceedings, be adjourned generally to be struck out if not restored within 12 months. The recitals to the order also recorded that the agreement between the parties that day was "without prejudice to any other legal rights or remedies in these or any other proceedings".

9. The defendant undertook that "for a period of 9 months commencing on 24 July 2017 or until the works referred to in schedule 3 have been completed (whichever is the sooner): (a) to give access to the claimant and workmen, contractors and persons authorised by the claimant to [the premises]; (b) permit the performance of all works believed by [the Claimant] to be permitted by [the Lease] as identified in schedule 3 together with all ancillary matters arising out of such works." Schedule 3 is a detailed 4-page schedule of works to be carried out to the individual flats in Plowman Tower. The claimant provided the usual cross-undertaking in damages.

10. The claimant substantially completed the Major Works at Plowman Tower in July 2018.

11. On 19 July 2018 the defendant applied to restore the claimant's claim in the Oxford County Court. The claim was restored by an order dated 8 August 2018 and the defendant served a defence and counterclaim on 18 September 2018.

12. The defendant's case is that the claimant does not have any right to enter the premises to carry out the Disputed Works, these works have been carried out in breach of the terms of the Lease and the covenant of quiet enjoyment and, as a result, he has suffered loss, damage, injury, distress and inconvenience. Further, the defendant seeks by his counterclaim (i) an order requiring the claimant to make good all the damage to the premises caused or occasioned by the Disputed Works, and to restore the premises to the condition it was in before the Disputed Works were carried out; (ii) an order requiring the claimant to remove cladding and any other decorative finishes from the external walls of Plowman Tower, and to make good thereafter; (iii) alternatively damages in lieu of injunctive relief; (iv) damages for loss of amenity and special damages exceeding £25,000; (v) aggravated and exemplary damages not exceeding £15,000; (vi) interest and costs. The claimant served a reply and defence to counterclaim on 15 October 2018, and maintains that it has rights of access under the Lease to carry out all the Disputed Works to the premises.

13. The proceedings in the Oxford County Court do not involve any dispute in relation to the defendant's liability to pay the service charge, which has been dealt with by the FTT.

14. On 5 March 2019 there was a costs and case management conference at which District Judge Matthews ordered the trial of the following preliminary issue, namely:

> "Whether the Lease of 57 Plowman Tower, Westlands Drive, Headington OX3 9RA ("the Property") dated 18 February 2003 can be construed so as to give the Lessor the right to enter the Property (a right of access) for the purpose of carrying out works of improvement which are not works of repair, further or alternatively whether it contains an implied term of covenant to that effect".

This is referred to as "Question One".

15. The parties then agreed upon a second preliminary issue to be determined, namely:

> "Whether the decisions of the First-tier Tribunal dated 22 February 2017, 4 October 2017 or 30 July 2018 or all of them in *Oxford City Council v Respondent Leaseholders of 54 Flats*, case ref CAM/38UC/LSC/2016/0064, bind the Court to determine that the Disputed Works identified at paragraphs 5(a)-(h) and 14(a)-(k) of the defendant's defence and counterclaim dated 18 September 2018 are works of improvement which are not works of repair, within the meaning of Question One".

This is referred to as "Question Two".

16. On 31 July 2019 Mr Recorder Berkley QC heard the trial of the preliminary issues and handed down a written judgment on 25 September 2019. The recorder's judgment makes it clear that his function was "to decide the points of principle which Question One and Question Two raise" and that he was "not required to determine any factual issues as such". The parties provided the recorder with an agreed statement of facts in order to determine the issues and there was no disputed or oral evidence at the hearing.

17. The recorder's answers to the two questions are set out in the order in the following terms:

> "(1) The answer to Question One is that the Lease does give the claimant the right to enter the premises for the purpose of carrying out works of improvement which are not works of repair, to the extent set out in the reasoned judgment.
>
> (2) The answer to Question Two is that the FTT Decisions are binding upon the parties but only to the extent that they have determined that any of the Disputed Works are improvements rather than repairs."

18. On 19 December 2019 Mr Justice Stewart granted the defendant permission to appeal against the recorder's decision.

19. The defendant maintains that: (1) the answer to Question One is that the Lease does not give the claimant the right to enter the premises for the purposes of carrying out works of improvement which are not works of repair or maintenance; and (2) the answer to Question Two is that the FTT decisions are binding upon the parties.

20. I can only determine the preliminary issues on this basis if I am satisfied that the recorder's decision was wrong: CPR Part 52.21.

21. I was told by Mr Dubin, the defendant's counsel, the idea behind the two questions was that, having identified the true construction of the Lease, and the effect of the FTT decisions, it will be for the trial judge to make factual findings to determine the nature of the Disputed Works and whether the claimant has any right to enter the defendant's premises and carry out them out. For my part, I do not think these two questions are preliminary issues at all, as they are not decisive or potentially decisive issues and, whatever the outcome, the parties accept there is still going to be a trial of the claimant's case. I therefore have my doubts as to the usefulness of carving these questions out to be heard first, when ultimately it is up to the trial judge to consider each element of the Disputed Works and decide whether they are permitted under the Lease. Having said that, it is these questions that the recorder was required to answer, and it is the answers to those questions which are the subject matter of this appeal.

22. I will turn now to the provisions of the Lease, the decisions of the FTT and the recorder's decision.

The Lease

Relevant provisions of schedule 6 to the HA 1985

23. The claimant granted the Lease pursuant to a right to buy under the HA 1985. The Lease is therefore required to conform with Parts I and III of Schedule 6 to the HA 1985: section 139(1). I need to set these provisions out as they are relevant to the claimant's argument in relation to the "Extended Right of Access" held by the recorder to exist in answer to Question One.

24. Paragraph 1 of Part I provides that:

> "the … grant shall not exclude or restrict the general words implied under section 62 of the Law of Property Act 1925, unless the tenant consents or the exclusion or restriction is made for the purpose of preserving or recognising an existing interest of the landlord in tenant's incumbrances or an existing right or interest of another person".

25. Paragraph 2 of Part I provides that:

> "*Rights of support, passage of water, etc*
>
> 2.-
>
> (1) The conveyance or grant shall, by virtue of this Schedule, have the effect stated in sub-paragraph (2) as regards—
>
> (a) rights of support for a building or part of a building;

(b) rights to the access of light and air to a building or part of a building;
(c) rights to the passage of water or of gas or other piped fuel …;
(d) rights to the use or maintenance of cables or other installations for the supply of electricity, for the telephone ….

(2) The effect is –
(a) to grant with the dwelling-house all such easements and rights over other property, so far as the landlord is capable of granting them, as are necessary to secure to the tenant as nearly as may be the same rights as at the relevant time were available to him under or by virtue of the secure tenancy or an agreement collateral to it, or under or by virtue of a grant, reservation or agreement made on the severance of the dwelling-house from other property then comprised in the same tenancy; and
(b) to make the dwelling-house subject to all such easements and rights for the benefit of other property as are capable of existing in law and are necessary to secure to the person interested in the other property as nearly as may be the same rights as at the relevant time were available against the tenant under or by virtue of the secure tenancy or an agreement collateral to it, or under or by virtue of a grant, reservation or agreement made as mentioned in paragraph (a)." (*underlining added*)

(3) This paragraph—
(a) does not restrict any wider operation which the conveyance or grant may have apart from this paragraph; but
(b) is subject to any provision to the contrary that may be included in the conveyance or grant with the consent of the tenant."

26. The claimant's case is that paragraph 2(2)(b) of Part I of Schedule 6 relates to rights of access to a building or part of a building and is not limited, as the words provide, to "the rights to the access of light and air to a building or part of a building". This, in my view, is a complete misreading of paragraph 2(2)(b) and is wrong. This sub-paragraph has nothing whatsoever to do with rights of entry or access to the premises. Rather, as the wording of the sub-paragraph makes clear, it is concerned with "rights to the access of light and air to a building or part of a building" (underlining added), and the underlined words cannot be ignored in order to give effect to the sub-paragraph in a completely different way.

27. Paragraph 14 of Part VI provides that:

"14.-
(1) This paragraph applies where the dwelling-house is a flat.

(2) There are implied covenants by the landlord—
(a) to keep in repair the structure and exterior of the dwelling-house and of the building in which it is situated (including drains, gutters and external pipes) and to make good any defect affecting that structure;
(b) to keep in repair any other property over or in respect of which the tenant has rights by virtue of this Schedule;

> (c) to ensure, so far as practicable, that services which are to be provided by the landlord and to which the tenant is entitled (whether by himself or in common with others) are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services; …"

28. The claimant's case is that there must be an implied right of access which is sufficient to enable those implied covenants to be discharged by it as the landlord. However, whether any such implied rights are relevant in the present context, depends on the findings of fact of the trial judge.

The terms of the Lease

29. The demise, contained in clause 1 of the Lease, provided that:

> "1. IN CONSIDERATION of the sum of FORTY THREE THOUSAND SIX HUNDRED AND EIGHTY POUNDS (£43,680.00) now paid by the Tenant to the Council (the receipt whereof the Council acknowledges) being the sum which the parties have agreed is the price payable under Part V of the Housing Act 1985 and in consideration also of the rents and covenants by the Tenant and conditions reserved and contained in this Lease and those implied by statute the Council GRANTS to the Tenant with Full Title Guarantee THE PREMISES [Flat 57, Plowman Tower as defined in the First Schedule to the Lease] TOGETHER with the easements rights and privileges mentioned in the Second Schedule but EXCEPT AND RESERVED to the Council as mentioned in the Third Schedule TO HOLD the premises to the Tenant from the date of this Lease for a term of years expiring on the Eighteenth day of January Two thousand one hundred and thirteen ("the term") SUBJECT to (i) the restrictions and stipulations contained in the Fourth Schedule (ii) the Charge referred to in Clause 2 YIELDING AND PAYING during the term the yearly rent of TEN POUNDS without deduction payable in advance on the First day of April in every year the first payment or proportion thereof as the case may be to be paid on the date of this Lease."

30. Clause 1 makes it clear that the claimant's grant of the premises to the Tenant was, amongst other things, subject to the restrictions and stipulations contained in the Fourth Schedule. This is reflected in clause 3 in which the Tenant, and his successors in title, covenant to perform and observe the stipulations set out in the Fourth Schedule. Clauses 3 and 4, so far as material, provided that:

> "3. THE TENANT TO THE INTENT that this covenant may so far as possible bind all persons who now are or may become entitled to any estate or interest in the whole or part of the premises but not so as to bind the Tenant or any such person after he or they shall have parted with all their estate and interest covenants with the Council that the Tenant and his successors in title will perform and observe the stipulations set out in the Fourth Schedule PROVIDED THAT …

> 4. THE TENANT for himself and his successors in title FURTHER COVENANTS with the Council (and with and for the benefit of the owners lessees and occupiers from time to time during the term granted by this Lease of the other premises comprised in the building ("the building") of which the premises form part as follows:-
>
> 4.1 To pay the Council for each year ending on the thirty first day of March of the term ("the year") a sum being the Tenant's contribution ("the contribution") towards the annual costs expenses insurance outgoings and matters (including Value Added Tax where applicable) as mentioned in the Fifth Schedule ("the service charges"); …"

31. Further, at clause 5 the Tenant covenanted that:

> "AT the expiration or sooner determination of the term to peaceably surrender and yield up to the Council ALL AND SINGULAR the premises painted repaired cleansed maintained and kept as mentioned below TOGETHER with all additions and improvements made in the meantime and all fixtures of every kind in or upon the premises or which during the term may be affixed or fastened to or upon the premises EXCEPT tenants' fixtures which the Tenant shall be at liberty to remove but making good all damage caused to the premises."

32. The landlord's covenants are contained in clause 7. The covenant of quiet enjoyment is at clause 7.1 which provides:

> "7. THE COUNCIL covenants with the Tenant as follows:-
>
> 7.1 The Tenant paying the rent reserved and paying to the Council the contributions covenanted to be paid in Clause 4 and performing and observing the several covenants conditions and agreements on the Tenant's part contained in this lease shall peaceably hold and enjoy the premises during the term without any interruption by the Council or any person rightfully claiming under or in trust for the Council."

33. The landlord's covenant to maintain the building is at clause 7.3 and provided:

> "The Council will at all times during the term maintain the external main walls foundations and roof of the building the party walls and party floors and ceilings not included in this demise and the pipes including water drainage gas supply pipes television cables and electric supply cables (excluding meters) serving the building and used in common with the owners lessees or occupiers of the other flats in the building main entrance passages landings staircase stores and drying areas and the lift(s) enjoyed or used by the Tenant in common with the other owners lessees or occupiers of the other flats in the building and (where applicable) the accessways paths forecourts car parking areas landscaped areas boundary fences and walls adjoining the building and being part of the Estate in good and substantial repair and condition except as regards damage caused by or resulting from any act or default of the Tenant PROVIDED ALWAYS AND IT IS EXPRESSLY AGREED

> that the Council shall not in any way be held responsible or liable for any damage caused by any neglect or failure to effect such maintenance or in respect of any damage caused by any defects or any want of repair to the whole or any part of the building garden fences or walls the lift(s) or in or to any such pipes cables wires drainage services or apparatus unless and until notice in writing of any such neglect failure want of repair or defect has been given to the Council by or on behalf of the Tenant and the Council."

34. It is common ground between the parties that the landlord's absolute duty to perform these functions is accompanied by an implied right of access: see *Woodfall: Landlord and Tenant* at para 13.068. Further, it is the claimant's case that this covenant could (depending on the facts) cover some of the Disputed Works as the covenant to "maintain" is broader than a covenant to "repair": see, for example, *Assethold Ltd v Mr N M Watts*, Martin Rodger QC, Deputy President of Upper Tribunal (Lands Chamber) [2015] L & TR 15 at [45]-[49].

35. Turning now to the relevant schedules to the Lease. The Third Schedule is entitled "(Exceptions and Reservations in favour of the Council)" and paragraph 1 provides:

> "All wires cables pole brackets fixtures fittings repeater kiosks and other similar equipment on over or along to and/or against the premises for the diffusion of messages broadcasts programmes and entertainments (including television programmes) broadcast from any authorised broadcasting station and the right to enter on the premises on reasonable notice being given and in a good workmanlike manner to renew inspect repair maintain and remove the wires cables poles brackets fixtures fittings repeater kiosks and other similar equipment the persons exercising this right making good at their own expense and as soon as reasonably possible all damage caused."

36. The Fourth Schedule is entitled "(Restrictions and Stipulations referred to in Clause 3 hereof)" and is made up of 27 separate paragraphs. The relevant paragraphs for present purposes are 8, 12 and 24 which provide:

> "8. To permit the Council and its Surveyor or agents with or without workmen and other upon 2 days previous notice in writing (except in the case of emergency) at all reasonable times to enter into and upon the whole or any part of the premises to view and examine the state of repair and condition of the same and give or leave on the premises notice in writing to the Tenant of all defect sand wants of reparation found for which the Tenant is liable AND the Tenant shall within the period of three calendar months after giving or leaving of such notice and the covenant to that effect in the Lease PROVIDED ALWAYS that if the Tenant shall at any time make default in the performance of any of the covenants contained in this Lease for or relating to the repair of the whole or any part of the premises or if the defects or wants of reparation specified in the notice given or left are not remedied by the Tenant within the period required in the notice it shall be lawful for the Council (but without prejudice to the right of re-entry in Clause 8.1[)] to enter upon the whole or any part of the premises and repair them at the expense of the Tenant in accordance with the covenants and provisions of this Lease and the costs and expenses of

such repairs incurred by the Council or its agents shall be repaid by the Tenant to the Council on demand

…

12. To permit the Council and its Surveyor or Agent and (as respects work in connection with the premises and any neighbouring or adjoining premises) their lessees or tenants with or without workmen and others at all reasonable times during the term on giving 2 days previous notice in writing (or in the case of emergency without notice) to enter into and upon the whole or any part of the premises

[1][1] for the purposes of repairing any part of the said building or any other adjoining or contiguous premises and

[2] for the purposes of making repairing maintaining supporting rebuilding cleansing lighting and keeping in order and good condition all roofs foundations sewers drains pipes cables watercourses gutters wires televisions aerials and associated apparatus (if any) or other structure or other conveniences belonging to or serving or used for the whole or any part of the Building AND ALSO

[3] for the purposes of laying down maintaining repairing and testing drainage gas and water pipes and electric wires and cable television aerials and associated apparatus (if any) and

[4] for similar purposes

the Council its lessees or tenants (as the case may be) making good all damage caused to the premises

…

24. To repair maintain and uphold and keep the premises as to provide all necessary support shelter and protection to those parts of the building not comprised in this demise and to afford to the Council the owners lessees or occupiers or the neighbouring and adjoining premises access for the purpose and subject to the conditions set out in sub-clause 12 of this Schedule"

37. The claimant's case is that paragraph 12 of the Fourth Schedule is "quite a broad covenant" which permits entry to the premises for the four different categories of purposes identified in the numbered square brackets above. Further, the claimant maintains that, whilst it all depends on the facts found at trial, it is conceivable that this paragraph would be sufficient for many of the Disputed Works.

38. The Fifth Schedule is entitled "(Annual costs expenses insurance outgoings and matters (including VAT where applicable) referred to in Clause 4.1)" and is made up of 10

[1] Sub-paragraphs with the numbers [1] to [4] added.

separate paragraphs. For example, paragraph 8 provides: "The repair maintenance decoration and renewal (as the case may be) of the main structure of the building (and external store block) including roof chimney stacks (if any) gutter rainwater pipes vent pipes window frame balconies (if any) entrance doors and foundations."

The decisions of the FTT

39. The proceedings in the FTT were entitled *Oxford City Council v Respondent Leaseholders of 54 Flats CAM/38UC/LSC/2016/0064* and were issued by the claimant under section 27A of the Landlord and Tenant Act 1985 ("**the LTA 1985**") to determine to what extent the Major Works were recoverable under the service charge provisions of the long leases.

40. On 20 December 2016 the FTT made an order for directions following a pre-hearing review. The second recital to that order was in these terms "AND UPON both counsel agreeing that subject to any appeal process to the Upper Tribunal they would accept the jurisdiction of this Tribunal on legal issues related to the interpretation of the Lease rather than issue separate proceedings in the county court". Counsel in question were Mr Bates, who appeared for the claimant, and Mr Fraser, who appeared for the Association. The defendant, by that time, was no longer the chairman of the Association, and was representing himself. There were also other self-represented individual respondents at the hearing. The agreement set out in the second recital appears to be an agreement between the parties represented by Counsel. However, by reason of the arguments advanced on this appeal, I understand that the defendant maintains he is also bound by this agreement (see ground 4 and paragraph 67 below).

41. On 27 February 2017 the FTT issued a determination on a number of specific legal issues. In summary the FTT decided that:

    a. the service charge provisions in the leases were not void, and the service charge demands were validly made;

    b. the statutory consultation in the LTA 1985 been complied with;

    c. Schedule 6 of the HA 1985 limited service charges to the provision of services to which the tenants were contractually entitled under their leases; and

    d. some elements of the service charges demanded were outside the service charge regime in the leases and some were not, which would require determination on the evidence.

42. On 4 October 2017 the FTT issued its main decision and concluded that a large part of the Major Works consisted of works of "improvements" rather than works of "repair or maintenance".

43. The FTT rejected the claimant's argument that the rights set in paragraph 12 of the Fourth Schedule to the Lease gave the claimant additional rights to repair and maintain "that are set out in the main covenant at clause 7.3". The FTT explained:

> "[16.] … this assertion is based on the premise that any service or work mentioned in Schedule 4, paragraph 12, is the subject of an implied covenant that the tenants have to pay towards such service or work as part of the service charges.
>
> [17.] The Tribunal does not accept that proposition. Schedule 4 simply imposes restrictions and stipulations on the tenants. Paragraph 12 gives the [claimant] rights to enter the demise to carry out certain works. If some of those works are not included in the covenant to repair and maintain, the paragraph does not mean that those works, by definition, can be subject to further service charges. The paragraph only gives the [claimant] rights to enter the demise and make good all damage caused. It does not involve a covenant to do any more works or provide any more services than make good any damage it has caused at its own cost."

44. The FTT also held that "whatever the laudable intentions of [the claimant] may have been when starting upon these works, the fact of that matter is that they knew or ought to have known that much of the work involved improvements to the building and the cost of such improvements would not be recoverable from the long leaseholders" (para [58]). Further, the invitation to tender document specified that each contractor's tender must include the following works, namely "the new ventilation system, the fire detection system, the sprinkler system, enclosing the balconies, asbestos removal, signage, cladding, replacement windows and insulation upgrade". The FTT held that "on any view these are all "upgrades" as described by the [claimant's] expert, or, in other words, things that were not there before and, therefore, improvements. If one adds to that by recording that there is no evidence that any of these upgrades are required by Statute or Regulation, none of them involve any investigation or analysis of any reports or faults and none of them involve a proper cost/benefit investigation, the case for taking them out of the service charge regime is overwhelming" (paras [63]-[64]).

45. This meant that a substantial part of the costs of the Major Works were not recoverable under the service charge provisions of the long leases. The claimant agreed to recalculate the service charge demands and, in the event the arithmetic was not agreed by any respondent to the proceedings, they had liberty to apply to the FTT to resolve the issue. The arithmetic was not agreed, and the proceedings were restored to the FTT. On 30 July 2018 the FTT determined that the defendant was required to pay £2,640.85 of the £48,766.76 originally demanded by the claimant in respect of the Major Works.

46. The proceedings in the FTT have now concluded and have not been appealed.

The recorder's decision

47. The recorder considered the relevant provisions of the Lease, the claimant's repairing obligations under the Lease, and the Tenant's Covenants. Having done so, he concluded that:

> "[45.] The Tenant's covenant to permit access [under paragraph 12 of the Fourth Schedule] is not coextensive with and is likely to be significantly wider

> than the claimant's repairing obligations [under clause 7.3] even as extended by the implied terms derived from [paragraph 14 of Schedule 6 of] the [HA 1985].
>
> [46.] In my judgment under the relevant Lease the defendant would be under an obligation to permit the Claimant access for purposes which went beyond the express or implied repairing obligations …
>
> [48.] So we have established thus far rights of entry which arise under one or more of the following three sources:- (1) a counterpart to the duty to perform the covenant in clause 7.3; and (2) a counterpart to the duty to perform the implied covenants imposed by [the HA 1985]; and (3) arising from the corresponding duty to permit access expressly covenanted for by the Tenant in paragraph 12 of the Fourth Schedule.
>
> [49.] I consider that the Trial Judge will be able to take each of the items of Disputed Works and determine whether or not such Works fall within the ambit of those specific rights of entry."

48. The recorder then considered whether the claimant could enter the premises for the purposes of carrying out so-called "beneficial works", which works "are not in performance either of clause 7.3 or the implied covenants imposed by [the HA 1985], or in respect of works for which access has not been specifically covenanted in paragraph 12 [of the Fourth Schedule]" (paragraph [56]). He concluded that "there is a limited basis for implying such a right but such right has to be circumscribed and is not wide or free-ranging or based on a general management power in a portmanteau sense" (paragraph [57]) and explained that it is limited because (paragraph [58]):

> "(1) In the case of this Lease the parties granted to each other specific rights and privileges and made express reservations, which should form the basis for their contractual rights and obligations, subject only to the implied rights imposed by statute under [the HA 1985], which were no doubt intended to protect the interests of the Tenant as he moved from his protection as a secured tenant into the private sector.
>
> (2) I do not regard that there is any need to imply any other terms in order to give business efficacy to the Lease.
>
> (3) The covenant for quiet enjoyment in the domestic context is in effect a contractual expression of the Tenant's right to a home life and privacy and should not be lightly interfered with, save as provided for in the Lease."

49. The recorder then said that, whilst bearing those points in mind, he accepted that "under a secure tenancy a landlord might have an implied right to enter the demise to carry out works to avoid injury". He then referred to *McAuley v Bristol* [1992] QB 134 and *Lee v Leeds CC* [2002] 1 WLR 1488, CA and concluded that:

> "[63.] In my judgment there is a limited right of access which arises independently from the express terms of the Lease or the implied term derived from statute, where the Tenant's refusal of access interferes with powers

> otherwise available to the Landlord and which the Landlord wishes to exercise so as to avoid the risk of death or personal injury or to remedy a state of affairs which is injurious to health. That far I am able to go, in eroding the tenant's right to quiet enjoyment in the context of Question One, but no further. It seems to me that such limited right of access is impressed upon the grant of lease, by virtue of paragraph 2(2)(b) of the Schedule 6 to the [HA 1985], it being a right which was available against the tenant, under or by virtue of the existing secure tenancy, for the benefit of other property.
>
> [64.] Without wishing myself to make any factual finding, the Claimant might seek to persuade the Trial Judge that the introduction of specific fire precaution measure was necessary to avoid the risk of death or personal injury or to remedy a state of affairs which was injurious to health."

50. The recorder then answered Question One as follows (paragraph [65]):

> "(1) The Lease does give the claimant the right to enter the premises for the purpose of carrying out works of improvement which are not works of repair, because:
>
> (a) clause 7.3 includes obligations to carry out specified works irrespective [or] independent of whether they [were] works of repair, as such ("**the Express Duties**").
>
> (b) the claimant has duties to carry out works in accordance with the implied terms imposed by the [HA] 1985 which might be wider than the repairing covenant at clause 7.3 ("**the Implied Duties**");
>
> (c) in order to facilitate the performance by the claimant of the Express Duties and the Implied Duties there is a corresponding right of access ("**the Implied Right of Access**"); and
>
> (d) in addition to the Implied Right of Access, the Tenant has covenanted in clause 3 and paragraph 12 of the Fourth Schedule to permit access for works which are not necessarily works of repair ("**the Express Right of Access**");
>
> (e) in addition to the Implied Right of Access and the Express Right of Access, the claimant has the right to enter the premises for the purposes of carrying out works in order to avoid the risk of death or personal injury, or to remedy a state of affairs which is injurious to health ("**the Extended Right of Access**").
>
> (2) The Trial Judge will have to consider each of the disputed items to determine whether or not they fall within the ambit of the Implied Right of Access or the Express Right of Access or the Extended Right of Access, as formulated. I have not expressed any view."

51. As to Question Two, the recorder concluded that "the short answer to Question Two is that the FTT decisions are binding upon the parties but only to the extent that they have

determined that any of the Disputed Works are improvements rather than repairs" (paragraph [69]).

The grounds of appeal

52. The defendant appeals the recorder's decision on Question One on the following grounds (which adopts the definitions used by the recorder at paragraph 63 of his judgment):

    a. Ground 1: The learned recorder made an error of law, in that he has failed to identify the extent of any qualification on the apparently wide words of the entry clause (the Express Right of Access) at paragraph 12 of the Fourth Schedule to the Lease which is consistent with the Lease's covenant for quiet enjoyment.

    b. Ground 2: The learned recorder has made an error of law in finding (at paragraph 63 of the judgment) that the Extended Right of Access is implied into the Lease by virtue of paragraph 2(2)(b) of Schedule 6 to the HA 1985.

    c. Ground 3: Further or alternatively to Ground 2, there is no scope for implying into the Lease the Extended Right of Access for any other reason.

53. The defendant appeals the recorder's decision on Question Two on the basis that his finding that the relevant decisions of the FTT in *Oxford City Council v Respondent Leaseholders of 54 Flats*, CAM/38UC/LSC/2016/0064 are binding upon the parties, but only to the extent that they have determined that any of the Disputed Works are improvements rather than repairs, should have extended to all the Tribunal's decisions relating to the interpretation of the Lease; such omission amounts to an error of law. This was ground 4 of the Appellant's Notice.

Ground 1: Is the right of access at para. 12 of the Fourth Schedule qualified by the covenant of quiet enjoyment?

The arguments

54. The defendant does not dispute the existence of the "Express Duties", "the Implied Duties" or "the Implied Right of Access" (save that he contends they do not go further than the repair and maintenance obligations) which the recorder identified in answer to Question One.

55. The defendant accepts that paragraph 12 of the Fourth Schedule does include an "Express Right of Access", however he contends that this right is qualified by the covenant of quiet enjoyment in clause 7.1. He makes these submissions in light of the decision in *Yeoman's Row Management Ltd v Boentein-Meyrick* [2002] EWCA Civ 860, [2002] 2 EGLR 39 (which was cited before the recorder but not mentioned in his judgment). The defendant maintains that the right in paragraph 12 of the Fourth Schedule must be read in light of the claimant's repair and maintenance obligations in clause 7.3 and, ultimately, should not exceed what is necessary to comply with those obligations. He says otherwise, in light of the wide wording in paragraph 12, the claimant would be permitted to enter the premises to do whatever works it likes, even

if they are works of improvement which the claimant is not obliged to do, are excessive, unreasonable or lengthy. The defendant submits this contravenes the covenant for quiet enjoyment contained in clause 7.1 and, as a result, would amount to a derogation from grant.

56. The claimant submits that the recorder was right in relation to his conclusion on "the Express Right of Access" and, in any event, he did not find that there was an unlimited or unqualified right of access in paragraph 12 of the Fourth Schedule. The Claimant submits that the broad words of the Express Right of Access, and the different terminology used compared to the repair and maintenance obligations in clause 7.3 mean that the rights of access in paragraph 12 are not in principle co-extensive (or at least not co-terminous) with the obligations in clause 7.3.

Discussion

57. The recorder was, in my view, correct to identify "the Express Right of Access" under paragraph 12 of the Fourth Schedule in his answer to Question One.

58. I do not agree with the defendant's submissions that, on the true construction of the Lease, the rights of access in paragraph 12 of the Fourth Schedule should be qualified in some way by the covenant of quiet enjoyment in clause 7.1. This is because:

    a. The demise of the premises in clause 1 of the Lease is subject to the restrictions and stipulations contained in the Fourth Schedule.

    b. The Tenant, and now the defendant, covenanted with the claimant that he will "perform and observe the stipulations set out in the Fourth Schedule": clause 3.

    c. Those stipulations include paragraph 12 of the Fourth Schedule which is a broad covenant. This is because it permits entry in order to: (i) repair any part of the building; (ii) make, repair, maintain, support, rebuild, clean, light, keep in order and good condition, amongst other things, pipes, television aerials or any other convenience which belongs to or serves or is used by any part of the building; (iii) lay down, maintain repair and test drainage, gas, water pipes, electric wires and cable, television aerials and associated apparatus; and (iv) for any similar purposes.

    d. The claimant's covenant of quiet enjoyment is on the basis that the Tenant, and now the defendant, pays the rent reserved and contributions covenanted and performs and observes "the several covenants conditions and agreements in the Tenant's part contained in this Lease": clause 7.1. The covenant included the covenant to perform and observe the stipulations set out in the Fourth Schedule, which are all clearly set out.

    e. Therefore, the demise of the premises is subject to the claimant's rights of access in paragraph 12 of the Fourth Schedule and defendant's covenant to provide such access is expressly cross-referred to and recognised in clause 7.1. In these circumstances, it is not a derogation from grant on the part of the claimant for it to rely on the width of the rights of access to the premises

expressly provided for in paragraph 12 of the Fourth Schedule to the Lease. The decision in *Yeomans Row Management Ltd v Bodentien-Meyrick* does not assist the defendant. This is because the terms of the lease in that case were very different to the present circumstances and, in any event, the case turned on its own particular facts: per Parker LJ at para [18].

f. Further, there is no basis for reading paragraph 12 of the Fourth Schedule as being subject to clause 7.3 of the Lease. Rather, there is no reason why the rights of access in paragraph 12 of the Fourth Schedule cannot go beyond the obligations in 7.3, for example to allow the claimant access to discharge its obligations to other tenants (which may exceed or be different to the obligations contained in paragraph 7.3 of this lease).

59. I therefore agree with recorder's conclusion that the Tenant's covenant to permit access under paragraph 12 of the Fourth Schedule is not co-extensive with its repairing obligation under clause 7.3 of the Lease. Rather, paragraph 12 of the Fourth Schedule expressly provides wider rights of access to the claimant than under clause 7.3.

Grounds 2 and 3: Is there an "Extended Right of Access" implied into the Lease?

The arguments

60. The claimant sought to up-hold the recorder's decision on this point. The claimant submitted that the day before the Tenant exercised his right to buy the premises under the HA 1985, the claimant was entitled to lawfully enter the premises for the purposes of carrying out works which were intended to remedy a problem which posed a danger to health. The claimant said it had an implied right to do so by reason of the following line of authorities: *Mint v Good* [1951] 1 KB 517 at 521, CA; *McAuley v Bristol City Council* [1992] QB 134, CA at 151; *Lee v Leeds City Council* [2002] 1 WLR 1488, CA at [78] to [79]. Then, the claimant submitted, this implied right falls within the ambit of paragraph 2(1)(b) of Part I of Schedule 6 to the HA 1985 and, by reason of paragraph 2(2)(b) of Part 1 of Schedule 6, the Lease is now subject to the very same right. The claimant did not rely on any other basis to imply the alleged right into the Lease, and it accepted that if the alleged right did not fall within paragraph 2(1)(b), then the claimant's argument was doomed to fail.

61. The defendant submitted that the claimant's argument was based on a mis-reading of paragraph 2(1)(b) of Part I of Schedule 6 to the HA 1985 and, in any event, there is no sufficient justification to imply any such term into the Lease, and directed my attention to *Plough Investments Ltd v Manchester City Council* [1989] 1 EGLR 244, Scott J at 248E-G.

Discussion

62. The claimant's argument is, in my view, misconceived. Paragraph 2(2)(a) of Part 1 of Schedule 6 to the HA 1985 is directed at "rights to the access of light and air to a building or part of a building". This paragraph in Schedule 6, as I have explained at paragraph 26 above, has nothing whatsoever to do with rights of entry to a building or part of a building in order to carry out works.

63. I therefore agree with the defendant that the recorder was wrong to find that "the claimant has the right to enter the premises for the purposes of carrying out works in order to avoid the risk of death or personal injury, or to remedy a state of affairs which is injurious to health", which he described as "the Extended Right of Access". There is no such right or "extended right" implied into the Lease.

Ground 4: Do the FTT decisions give rise to an estoppel by convention?

The arguments

64. The defendant maintains that, in answer to Question Two, the recorder should have held that all the FTT's decisions in relation to the interpretation of the Lease were binding upon the parties.

65. The parties, as I have mentioned above, agreed between themselves to add this question as a preliminary issue (see paragraph 16 above). The defendant, in his defence and counterclaim, did not plead any point based on estoppel in relation to the proceedings before the FTT, and did not seek any relief in respect of any estoppel arising out of the decisions of the FTT. Further, the defendant's skeleton argument does not identify with any clarity the legal basis of this ground of appeal. I therefore asked Mr Dubin, counsel for the defendant, about this at the hearing and he told me he was relying on the doctrine of estoppel by convention and referred to *Mears Limited v Shoreline Housing Partnership Limited* [2015] EWHC 1396 (TCC), Akenhead J at para [51].

66. The editors of *Snell's Equity* (34th Edition; 2019) record at para 12-011 that it has been stated that "the circumstances in which an estoppel by convention is likely to arise are likely to be rare and the facts unusual". In *HMRC v Benchdollar Ltd* [2009] EWHC 1310 (Ch), Briggs J (as he then was) identified at paragraph [52] the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings as follows: (i) it is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them; (ii) the expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it; (iii) the person alleging the estoppel must in fact have relied upon the common assumption, to a significant extent, rather than merely upon his own independent view of the matter; (iv) that reliance must have occurred in connection with some subsequent mutual dealing between the parties; (v) some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

67. The starting point for the defendant's submission is the agreement made between counsel at the pre-hearing review in the FTT on 20 December 2016 that "… they would accept the jurisdiction of this Tribunal on legal issues related to the interpretation of the Lease rather than issue separate proceedings in the county court" (see paragraph 40 above). The defendant submits that it is this agreement which forms the shared or

common assumption between the parties necessary to give rise to an estoppel by convention. That agreement he says, was communicated and relied on by the parties, and the FTT made findings that (i) there was no disrepair at the premises, and (ii) there was no statutory or regulatory need to carry out any repairs at the premises. In these circumstances, he submits the FTT's decisions are binding in respect of all matters relating to the interpretation of the Lease.

68. The claimant, on the other hand, maintains that the recorder's answer to Question Two is correct. The claimant submitted this is because the FTT decides questions of service charge liability (section 27A of the LTA 1985). The FTT does not decide any issues relating to rights of access. Therefore any decision by the FTT about whether an item of work is a repair or an improvement is made in the context of establishing liability to pay a service charge, not about whether a landlord has a right of access to do the work or not. Therefore, the decisions of the FTT in this case have nothing whatsoever to do with any legal issues relating to rights of access under the Lease.

Discussion

69. The agreement made between the parties, and recorded in the Order in the FTT dated 20 December 2016, was made in the context of the proceedings under section 27A of the LTA 1985 to determine the liability of the defendant, and others, to pay service charges. The parties were therefore agreeing to accept the jurisdiction of the FTT on legal issues relating to the interpretation of the Lease, in the context of the proceedings under section 27A. This was not, however, an agreement that the FTT had jurisdiction to determine any legal issues in relation to the interpretation of the Lease, irrespective of whether the legal issue in relation to interpretation had anything to do with the section 27A proceedings. Indeed, as Mr Bates, counsel for the claimant, pointed out the FTT does not have any jurisdiction or power to determine the scope of the claimant's rights of access to the premises under the Lease and, unsurprisingly, did not make any determinations in relation to any such rights in its decisions.

70. In these circumstances, it seems to me to be clear that there was no common assumption between the claimant and the defendant that the decisions of the FTT would be binding in respect of all matters relating to the interpretation of the Lease and there is no basis on which the defendant's argument based on estoppel by convention can get off the ground. The recorder's answer to Question Two is correct.

Conclusion

71. The recorder answered Question One correctly, except he was wrong to imply "the Extended Right of Access" into the Lease. The defendant's appeal is therefore allowed in part as the Lease does not give the claimant the right to enter the premises for the purposes of carrying out works in order to avoid the risk of death or personal injury, or to remedy a state of affairs which is injurious to health.