IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 331 (LC)
Case No: LRX/43/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – RESIDENTIAL – SERVICE CHARGES – LIABILITY FOR CONTRIBUTION TO COST OF REPLACING DISTRICT HEATING SYSTEM

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

BETWEEN:

LONDON BOROUGH OF SOUTHWARK

Appellant

- and -

(1) MICHAEL SINCLAIR ROYCE
(2) VIVIANE LAURE NICOUE **Respondents**

Re: 8 and 68 Carlton Grove,
Peckham,
London, SE15 2UE

His Honour Judge David Hodge QC

Royal Courts of Justice
on
22 October 2019

Mr Christopher Heather QC and **Mr Faisel Sadiq** (instructed by the London Borough of Southwark) appeared for the appellants

Miss Amanda Gourlay (instructed under the Bar's Direct Public Access Scheme) for the respondents

The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36, [2015] AC 1619
Contractreal Ltd v Davies [2001] EWCA Civ 928
Haringey (London Borough of) v Ahmed [2017] EWCA Civ 1861
Joint London Holdings Ltd v Mount Cook Land Ltd [2005] EWCA Civ 1171, [2005] 3 EGLR 119
Plough Investments Ltd v Manchester CC [1989] 1 EGLR 244
Southwark (London Borough of) v Paul [2013] UKUT 375 (LC)

DECISION

Introduction

1. This is an appeal by the London Borough of Southwark, as landlord, against the Decision dated 21 January 2019 of the First-Tier Tribunal Property Chamber (Residential Property), following a hearing on 20 and 21 August and 10 and 11 December 2018, determining the liability for, and the reasonableness of, service charges payable by the first and second respondents as the tenants of residential flats at 8 and 68 Carlton Grove, Peckham, London SE15 2UE which form part of the appellant's Carlton Grove Estate. The service charges relate to the replacement of underground pipe work for the supply of heating to the respondents' flats. The appeal is brought with the permission of the FTT (Judge Carr) dated 7 March 2019 on the basis that some of the submissions made in the request for permission to appeal appeared to be arguable and the issues raised by the appellant were of potentially wide implications so that it was right for them to be considered afresh by an appellate body. Pursuant to a Directions Order dated 15 April 2019 of the Deputy Chamber President (Martin Rodger QC) the appeal is to be conducted as a review of the decision of the FTT under the Tribunal's standard procedure. The appellant is represented by Mr Christopher Heather QC and Mr Faisel Sadiq (of counsel). The respondents are represented by Miss Amanda Gourlay (also of counsel) who was recently instructed under the Bar's Direct Public Access Scheme. The hearing of the appeal took place in London on 22 October 2019.

Background

2. The Carlton Grove Estate was constructed in the 1970s. Heating has been provided to the flats on that Estate by means of a district heating system ("DHS") since then. The DHS also provides heating and hot water to dwellings on the adjoining Acorn Estate which was constructed in the 1960s, before the Carlton Grove Estate. The DHS comprises a boiler house which produces hot water that is pumped to individual properties on both Estates via a network of flow and return pipes. The properties on each estate comprise a mixture of secure/introductory tenancies and long leases granted pursuant to the right to buy. The original boiler house (known as the Acorn Boiler House) was located on the perimeter of the adjoining Wood Dene Estate. The Wood Dene Estate was demolished prior to its land being sold to Notting Hill Housing Group ("NHHG") in 2014 for redevelopment, but the Acorn Boiler House remained in operation on a temporary basis. As part of the redevelopment, and pursuant to an agreement with the appellant, NHHG constructed an energy centre which was designed to house replacement boilers for the Carlton Grove Estate and the Acorn Estate, as well as providing energy for NHHG. The appellant leases half of the energy centre from NHHG on a 250 year lease at a peppercorn rent. The appellant was not charged by NHHG for the cost of constructing the building but was responsible for the interior fit-out of its part and will pay half of the maintenance costs of the shell of the building.

3. In 2014 the appellant replaced and re-routed the underground pipe work which provides heating to the Carlton Grove Estate. Grant monies were available to the appellant to cover the cost of these works and it was not necessary either to consult or to seek contributions from lessees on either the Carlton Grove Estate or the Acorn Estate. In September 2016 the appellant entered

into a contract for the installation of boilers, pumps and control equipment into the energy centre to replace the existing Acorn Boiler House following a consultation process under s.20 of the LTA 1985. The contract sum was £546,645, of which £454,836 was rechargeable to long lessees. There are 280 properties benefiting from the works so the proportion attributable to each of the respondents is 1/280, amounting to £1,986 per flat (after the addition of professional and management fees).

4. Following another consultation process the appellant has commenced a major works programme to replace the underground pipe work that provides the heating and hot water to the Acorn Estate. The appellant has entered into a contract with Mitie Property Services (UK) Ltd for a contract price of £2,982,077. Works commenced in January 2018. Lessees on both the Carlton Grove Estate and the Acorn Estate are being asked to contribute (by way of service charge) towards the costs of replacing this pipe work. There are 284 properties benefiting from the works so the proportion attributable to each of the respondents is 1/284. This amounts to £12,296.44 for each of them. The appellant sought to recover the costs of the contracts to replace both the boilers and the pipework from the respondents in the county court which transferred the proceedings to the FTT.

The Decision of the FTT

5. By its decision the FTT determined that: (1) the respondents were liable to contribute to the new boiler contract; (2) the amount payable by each of the respondents should be reduced to £1,786.09 on the basis that there was insufficient evidence to support an equal apportionment of the costs; (3) nothing should be payable by the respondents towards the costs of replacing the underground pipe work on the Acorn Estate; (4) the appropriate statutory consultation procedure had been carried out; and (5) it was just and equitable to make an order under s.20C of the Landlord & Tenant Act 1985. The appellant only appeals against determination (3).

6. So far as relevant to this appeal, the FTT concluded that: (1) the Acorn Estate and the Carlton Grove Estate had two separate systems of pipe work and (2) it was not a reasonable interpretation of the respondents' leases that they should have to contribute to the maintenance or replacement of the pipe work serving the Acorn Estate. The FTT's reasons are set out at paras 42-46 of its Decision. In summary, these were: (a) There never was a complete integrated system of pipe work because the Carlton Grove Estate was built later than the Acorn Estate. (b) It was possible to isolate sections of the pipe work including the whole of the Carlton Grove Estate. (c) That estate received only heating whereas the Acorn Estate received both heating and hot water. (d) The Carlton Grove Estate pipe work had been replaced as a totally separate project. (e) If there was one system, there would be a flow of heating around both estates. Instead, each estate was serviced independently

The leases

7. The first respondent's lease of Flat 8 is dated 13 May 2002. The second respondent's lease of Flat 68 is dated 23 August 2010. Both leases are in materially the same terms (save that the

Flat 68 lease omits the word *"central"* in front of *"heating"* in the list of services, although nothing turns on this). The definition of *"services"* includes the provision of *"[central] heating"*. By clause 2(3)(a) the tenant covenants to pay the Service Charge Contributions set out in the third schedule. By para 6(1) of the third schedule, the Service Charge payable by the tenant is a fair proportion of the costs and expenses set out in para 7. Para 7 provides that: *"The said costs and expenses are all costs and expenses of or incidental to (a) The carrying out of all works required by sub-clause (2) to (4) inclusive of Clause 4 of this Lease (b) Providing the services hereinbefore defined (c) Insurance under sub-clause (6) of Clause 4 of this Lease …"*. Clauses 4 (2) to (4) are landlord's covenants (in fairly standard form) to keep in repair the structure and exterior of the flat and the building, to keep in repair the common parts, and to paint the exterior of the building and the common parts. Clause 4(5) reads: *"To provide the services more particularly hereinbefore set out under the definition of 'services' to or for the flat and to ensure so far as practicable that they are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services."*

The evidence

8. The FTT received and heard evidence from six witnesses on behalf of the appellant, and both of the respondents also gave evidence. Counsel for both parties to the appeal agreed that the evidence which is directly relevant to this appeal was principally contained in the first witness statement (dated 12 July 2018) of Mr John Marenghi, who is employed by the appellant as a senior mechanical engineer responsible for the repair and maintenance of the DHS. At paras 6-8 of his first witness statement he said that:

> 6. *There are regular burst pipes, leaks and other faults which cause major outages of heating and hot water to residents…*
>
> 7. *Each time we have a burst or leak on the network, the system loses pressure which causes the plant to shut down. The reason for this is to protect the main plant and other major components (such as the pumps) from damage as pressure loss is an indicator that the system is low on water. As such, bursts on the network affect everyone connected to the system.*
>
> 8. *The failing pipe work being replaced under this contract is located on the Acorn Estate, however, failure to replace the pipes will impact upon all residents who are on the district heating system, i.e. Carlton Grove Estate residents. In practical terms, there can be a leak on the primary pipe work on the Acorn Estate and this will cause a failure to Carlton Grove supply network. The same would apply if there was a leak on the primaries supplying Carlton Grove Estate; this would bring down all of Acorn Estate also. If a leak occurs on the primary side within either estate, not only will the residents of that estate suffer, but so will the residents of the other estate. In fact, although both Acorn Estate and Carlton Grove Estate are divided geographically, they are joined mechanically and both depend on each other.*

Mr Marenghi also produced a diagram (at Exhibit JM2) showing the proposed layout of the pipe works which the FTT attached to their decision as Appendix 2. (A better-quality colour copy is at p.434 of the second hearing bundle.)

9. Ms Louise Turff, the Head of Homeownership within the appellant's Finance and Governance Department, gave similar evidence at paras 6-8 of her second witness statement dated 12 October 2018:

> *6. … The system is a closed circuit heating system which is relevant to and benefits properties on both the Acorn Estate and the Carlton Grove Estate.*
>
> *7. … If a leak occurs on the primary side within either estate, not only will the residents of that estate suffer, but so will the residents of the other estate. Both the Acorn Estate and Carlton Grove Estate are served by the one system, they are joined mechanically and both depend on each other.*
>
> *8. Both Acorn and Carlton Grove are on one pressurised system and any burst pipe or leak causes the system to lose pressure which causes the whole plant to shut down. … This means burst pipes and leaks on the network affect everyone connected to the system, including 8 and 68 Carlton Grove."*

In her oral submissions, Miss Gourlay made the valid points that Ms Turff is not a mechanical engineer and that her evidence was not truly independent, being derived in part from the evidence of Mr Marenghi and in part from the reports of Mr Moore.

10. Expert evidence was given by Mr Stephen Moore, a chartered engineer. In the course of her oral submissions, Miss Gourlay drew attention to his two underlying reports. She referred specifically to para 1.04 of the first report (dated 27 January 2013), describing the distribution of heating and hot water from the boilers to the Estates in a way which was said to differentiate between *"the main estate area"* and the Carlton Grove Estate. Miss Gourlay also drew the Tribunal's attention to the sixth paragraph within para 3.01 of Mr Moore's second report (dated 12 February 2013) which was said to indicate that the circuit which served the Carlton Grove Estate circulated hot water in a different way to *"the main system"* (serving the Acorn Estate) during the summer time. Paragraph 3.07 of Mr Moore's second report also referred to the Acorn Estate and the Carlton Grove Estate as being served by separate *"circuits"*. Miss Gourlay also pointed out that para 12 of Mr Moore's witness statement dated 13 July 2018 (cited in the appellant's skeleton argument) provides no assistance in determining whether there was any degree of connectivity between the circuits serving the two estates. The appellant points out that the FTT had recorded that it had heard evidence from Mr Marenghi, Ms Turff and Mr Moore and that it had made no criticism of their evidence. Indeed, the FTT had recited the entirety of para 8 of Mr Marenghi's first witness statement at para 29 of its Decision.

The appeal

11. The appellant appeals on three grounds: (1) The FTT failed to have regard to paragraph 7(2) of the third schedule to the Lease. (2) The FTT was wrong to find that the DHS comprised two systems and not one system. (3) The FTT was wrong to take into account the fact that the Carlton Grove Estate received heating but not hot water from the DHS. The respondents have each served a respondent's notice and grounds of response (in the same terms), settled by counsel previously instructed by them, opposing the appeal.

The appellant's submissions

12. On the first ground of appeal (the failure to have regard to para 7(2) of the third schedule to the Lease), the appellant points out that this provides the contractual basis upon which the respondents are liable to pay for the replacement of the pipe work serving the Acorn Estate. This paragraph was expressly referenced by the appellant's counsel before the FTT, both in his first skeleton argument (at paras 4(g) and 22(h)) and also extensively in oral submissions, but no express reference was made to this paragraph in the FTT's decision. The FTT is said to have failed to have any or any proper regard to this highly material provision governing contractual liability. The FTT had incompletely paraphrased the opening words of para 7(2) at para 27 of its Decision (omitting what are said to be the key words *"... or incidental to ..."* after *"of"*). This was said to be the genesis of the FTT's error: it failed to ask itself whether the costs and expenses of replacing the pipe work on the Acorn Estate were incidental to providing [central] heating on the Carlton Grove Estate. If it had asked itself the correct question, it is said that it could have come to only one answer in the light of Mr. Marenghi's evidence. Reliance was placed on observations of this Tribunal (HHJ Walden-Smith and Mr Andrew Trott FRICS) in *Southwark (London Borough of) v Paul* [2013] UKUT 0375 (LC) (construing identical words: see para 14) at para 38: *"The words used in paragraph 7 of the Third Schedule to the leases are to be widely construed and there is no justification to limit the ambit of the costs and expenses."* The inclusion of the words *"or incidental to"* were said to be consonant with the appellant's obligations by way of the landlord's covenant at clause 4(5) *"to provide the services and to keep in repair any installation connected with the provision of those services"*. This was a broadly drawn covenant which dovetailed with the breadth of the obligation in para 7(2). Relying on observations of Scott J in *Plough Investments Ltd v Manchester CC* [1989] 1 EGLR 244 at 247M, the appellant submits that if the pipes on the Acorn Estate are out of repair, the appellant has not only the obligation, but also the right, to repair them; and it is consistent that there should be a corresponding liability for the respondents to pay a service charge. In her oral submissions, Miss Gourlay disputed that the phrase *"connected with"* should be equated with the phrase *"incidental to"*.

13. At the time the respondents' leases were granted (pursuant to the right to buy) in 2002 and 2010, the Acorn Estate already existed, and the properties on the Carlton Grove Estate were already connected to the DHS. References in the lease to *"services"* should be construed against that factual matrix. The maintenance of pipes on the Acorn Estate is therefore *"incidental to"* the provision of a service (heating) which was already in existence at the date of the respective grants. The corollary of the respondents' liability is said to be that lessees of flats on the Acorn Estate have a contractual liability to pay for the costs of repairs to the pipework on the Carlton Grove Estate because the leases of flats on the Acorn Estate are materially the same as those for the flats on the Carlton Grove Estate.. That they did not have to do so in 2014 (and nor did the lessees of the Carlton Grove Estate) was due only to the fact that a grant was available for the works. The lessees across both the estates have received the benefit of that grant. It is said that the FTT's observations to the contrary (at para 47 of its Decision) were made in error, without having seen or considered any of the leases of flats on the Acorn Estate. It is said that the FTT has overstepped the mark in purporting to give a decision as to the future on a matter which was not in issue between the parties before it, and which would affect non-parties to the reference.

14. On the second ground of appeal (that the FTT was wrong to find that the DHS comprised two systems and not one), the appellant submits that this was not a finding that was open to the FTT on the evidence that was before it. In addition to the evidence of Mr. Marenghi (recited above), the FTT had the evidence of Ms. Turff to like effect. The FTT made no criticism of this evidence, and neither witness was gainsaid. Despite that, the FTT accepted submissions from the respondents which were not supported by the evidence. It is said that in reaching its decision the FTT appears to have misunderstood and/or placed excessive weight upon Mr. Marenghi's diagram (JM2) which is appended to the Decision. It is said that the observation recorded at para 40 that JM2 *"indicates two completely separate circuits of pipe work to each estate"* does not support the conclusion that there are *"two separate systems of pipe work"*. Mr Marenghi said that the circuits are *"joined mechanically"*: they meet at the boiler, which they share, and are plainly not separate. JM2 illustrates this fact, not that they are separate systems. The appellants submit that one cannot equate *"two separate circuits"* with *"two separate systems"*.

15. The FTT's reasoning is said to be flawed for four reasons: (1) The fact that the Carlton Grove Estate was built later than the Acorn Estate does not lead to the conclusion that there never was a complete integrated system. There is no logical reason why an existing system cannot be added to at a later date to produce an *"integrated system"*. The evidence of Mr. Marenghi points plainly towards that having been done. What is material is what existed at the date of grant of the respondents' leases (in 2002 and 2010). By then it was one system. (2) The fact that it is possible to isolate sections of the pipe work does not point towards there being two systems. JM2 shows four valve chambers (marked VC1 – VC4). VC4 enables the Carlton Grove Estate to be isolated. VC1 enables the entire Acorn Estate to be isolated. VC2 enables the western part and north-western parts of the Acorn Estate to be isolated. VC3 makes provision for an extension to any new development. The ability to isolate parts enables repairs and replacements of parts without affecting the whole. It is said that that does not support the conclusion that the Carlton Grove Estate and the Acorn Estate have more than one system. By the same token, it is said that the existence of VC2 does not point towards the Acorn Estate being comprised of two separate sub-systems. Nor does the fact that there are also isolation valves at each property on the Acorn Estate to separate the heating from the hot water mean that the properties are not part of the same system. (3) The replacement of the pipe work on the Carlton Grove Estate as a separate project in 2014 (funded by a grant) does not support the conclusion that it is a separate system. It was simply the product of the need to repair or replace different parts at different times, coupled with the physical ability to isolate one part from the other. (4) As a matter of logic, there is said to be no need for a flow of heating around both estates for there to be one system. The estates are *"mechanically joined"*, and a leak in one affects the other. The FTT noted Mr. Marenghi's evidence in their decision at para 29 that *"… there can be a leak on the primary pipe work on the Acorn Estate and this will cause a failure to Carlton Grove supply network"*. For all of these reasons, the appellant submits that the FTT's conclusion that there were two separate systems was not a conclusion that was open to a reasonable tribunal properly directing itself. The appellant does not say that simply because two separate heating systems have some shared components, they are necessarily one system. Rather, the appellant maintains that because the two pipe networks meet and are joined at the boiler room, and for all the reasons given by Mr. Marenghi, they are inextricably part of a single system.

16. Addressing points raised by the respondents in their grounds of response, the appellant submits that: (1) The absence of any reference to the Acorn Estate in the respondents' leases is not determinative given that (a) the DHS already existed and was part of the Acorn Estate at the time the leases were granted on the Carlton Grove Estate, (b) there is a single DHS via which the *"services"* are provided, and (c) the appellant is entitled to recover for costs that are *"incidental to"* providing the *"services"*. (2) The principle of contra proferentem (not raised below) is of no application to the question of whether there is one or two district heating systems. In any event, it is trite law that that the principle applies only where there is ambiguity: see *Joint London Holdings Ltd v Mount Cook Land Ltd* [2005] EWCA Civ 1171, [2005] 3 EGLR 119 CA at para 67 per Etherton J. There is said to be nothing ambiguous about para.7(2) of Schedule 3.

17. Turning to the third ground of appeal (taking into account the fact that the Carlton Grove Estate receives heating but not hot water from the DHS), the appellant submits that the FTT was wrong to take account of the fact that the DHS provides only heating to the respondents whereas it provides heating and hot water to the dwellings on the Acorn Estate. The mechanics of that difference were explained by Mr. Marenghi at para 3 of his second witness statement (dated 15 November 2018):

> *"… the system is designed as a two pipe circuit so the main primary flow and return branches off to each dwelling and splits inside the property to heat both the hot water cylinder and radiators."*

The plan JM2 shows the two pipes which go to each estate: there are no separate pipes for the hot water supply until the split which occurs inside each property on the Acorn Estate. This was explained Mr Moore's first report where (at para 1.05) he stated:

> *"In general within the main estate area [the Acorn Estate] when the heating flow and return enter a property isolation values can be found. From these valves the system splits to serve the HWS primaries serving the cylinder and the heating system."*

Mr. Moore gave evidence to the FTT which was apparently accepted without criticism. The factual position is therefore said to be that the same flow and return pipes provide the same hot water to each estate. The different use that the water is put to on each estate is the result of a split within each dwelling on the Acorn Estate. If the pipe work serving both estates forms part of a single integrated system, the fact that some lessees receive more from the system than others should have no bearing on the construction of the leases. The extent to which the lessees of the two estates benefit differently from a common system is said not to be germane to the question whether or not there is a common system, although it might be relevant to the quantum of any contributions towards the maintenance of that system and the quantum of any charges payable for the supply of heating/hot water. Further, it is said that this analysis again ignores the express wording of para.7(2), i.e. *"incidental to"*. The appellant submits that the FTT therefore took into account an irrelevant consideration when it construed the leases.

18. For all of these reasons, the appellant submits that the appeal should be allowed.

The respondents' submissions

19. Although her written skeleton argument addressed the grounds of appeal in the same order as the appellant, in her oral submissions Miss Gourlay dealt first with the factual evidence concerning the nature of the heating system and the second and third grounds of appeal before applying her conclusions on these matters to the terms of the lease. She submits that the direct evidence about mechanical matters, the asserted co-dependency of the two pipe work systems, and the degree of connectivity between the two estates, were all to be found in Mr Marenghi's first witness statement and that Ms Turff's evidence was entirely derivative. Having analysed the evidence, Miss Gourlay submits that it supported the FTT's conclusion that the heating system which served the Acorn Estate was separate from the heating system which served the Carlton Grove Estate and the respondents' properties. The Acorn Estate pipe work was not required for the residents of the Carlton Grove Estate to receive their heating. It was absurd to argue that just because a system has some shared components – in this case the boiler – then all further pipes and conduits, no matter how far removed, were necessarily part of the same system in the context of liability for repairs. That could lead to an unfair and unintended conflation of separate services, serving separate properties, solely because they shared a common source. Similarly, the fact that damage to one part of the Acorn Estate system could impact on the efficiency of the Carlton Grove system, or the fact that repairs to the former might require turning off the Carlton Grove system, did not mean that the two systems were actually one. Mr Marenghi's evidence was to the effect that a leaking pipe could be isolated, the leak repaired, and the pipe work brought back online. That isolation allowed the appellant to continue to provide heating to the remainder of the estates pending repairs to the damaged pipework. Were a leak to occur to a significant supply pipe, such as the branch travelling to the Acorn Estate, that pipe, and indeed the entire Acorn Estate, could be isolated from the Carlton Grove Estate supply. In those circumstances, the appellant was able to provide the services as covenanted for in the respondents' leases. There was no need for the Acorn Estate to be online in order for the Carlton Grove Estate to enjoy the provision of heating from the appellant.

20. Miss Gourlay took the Tribunal to the judgment of Hamblen LJ (with which the other member of the Court of Appeal, Lewison LJ, had agreed) in *Haringey (London Borough of) v Ahmed* [2017] EWCA Civ 1861 at paras 29-31. An appellate court will only rarely interfere with findings of fact made at a trial or hearing and this applies both to findings of primary fact and to inferences to be drawn from them as such. The decision of the FTT was based upon its findings of fact and its decision could only be interfered with on appeal *"where a critical finding of fact is unsupported by the evidence or where the decision is one which no reasonable judge could have reached"*. That was not the case here. The FTT had been entitled to reach the decision that it had. The appellant was seeking to overturn a finding of fact and there was insufficient evidence to support its challenge and ample material on which the FTT had been entitled to found its decision. The only direct evidence had been a couple of paragraphs of Mr Marenghi's first witness statement. On the evidence as a whole, the FTT had been correct to conclude (at para 40 of its Decision) that there were *"two separate systems of pipe work, one providing the heating to the Carlton Grove Estate and one providing the heating and hot water to the Acorn Estate"*. The appellant had criticised the FTT for having placed *"excessive weight"* upon Mr Marenghi's diagram but that was not sufficient to justify overturning a finding of fact. Even Mr Marenghi had acknowledged that the Acorn Estate and the Carlton Grove Estate were *"divided geographically"*

and such geographical separation was a relevant factor in determining the respondents' liability to contribute to the cost of replacing pipe work on the Acorn Estate. If the Acorn Estate did not exist, the Carlton Grove Estate would still receive heating (and vice-versa). Indeed, the Acorn Estate had existed before the Carlton Estate had been *"bolted on"*. The two heating pipe work systems were physically separate; they could be independently replaced, and any leak in one system could be isolated from the other. There were significant differences in the way the two systems operated. The residents of the Carlton Grove Estate could quite happily live with the existing pipe work on the Acorn Estate. As for the third ground of appeal, the fact that Carlton Grove received heating, but not hot water, from the DHS was simply one element of the FTT's overall reasoning which it had been entitled to take into consideration because the circuit which served the Carlton Grove Estate circulated hot water in a different way to *"the main system"* (serving the Acorn Estate) during the summer time. Miss Gourlay emphasises that the appellant has a high hurdle to overcome on this appeal. The FTT had been correct to find that there were two separate systems of pipe work. The two systems were acknowledged to be geographically divided; and they were not inextricably linked because they could be contained and operate separately from each other. In any event, the real issue before the FTT was not whether there was one pipe work system or two; the FTT had been required to consider the evidence, make findings of fact, and then relate them to the terms of the relevant leases.

21. In his reply, Mr Heather accepted that with the minor addition of Ms Turff's evidence (which he accepted did not carry the same weight), paras 7 and 8 of Mr Marenghi's first witness statement was the only evidence on which the FTT could have based its decision. However, the appellant's contention was that the FTT had differed from his evidence in its conclusion and that was why it had fallen into error. Mr Heather accepts that the applicable law is correctly stated in *Haringey (London Borough of) v Ahmed* [2017] EWCA Civ 1861. However, he submits that the FTT's finding and conclusion as to the existence of two separate systems of pipe work is not supported by the evidence that was before the FTT. As a result, the FTT made findings of fact that no reasonable tribunal, properly directing itself, could have made. Thus, the case falls squarely within the *Haringey* principles.

22. Miss Gourlay points out that the respondents' leases give no indication whatsoever that the service charge might include a liability to meet the cost of work done on another, pre-existing, estate. Had it been the appellant's intention to spread the costs across the two estates, the language of the relevant leases should have made that clear. It could not have been within the contemplation of the parties to the relevant leases that the lessees should be required to contribute towards the costs of works on another Estate. Were the appellant to construct a new housing estate and tap into the existing heating system, it should not be said that the lessees of the Carlton Grove Estate should thereafter contribute towards any repairs to the new pipes serving this new housing estate. In his reply, Mr Heather emphasised that nothing in the relevant leases refers to geography. He submits that the situation of the flats is not a relevant factor when determining whether the costs of replacing the pipe work are incidental to the provision of heating. He points out that the boiler house itself is situated on a third estate. In his reply, Mr Heather accepted that the rights granted to lessees on the Carlton Grove Estate do not extend to the Acorn Estate. However, he points to the terms of clause 4(5). The effect of this covenant is said not to depend upon location. If pipe work on the Acorn Estate is out of repair and the appellant does not fix it,

residents on the Carlton Grove Estate could complain to the appellant and seek to enforce compliance with the obligation imposed on the appellant by the second limb of clause 4(5).

23. Miss Gourlay proceeded to consider the terms and the true interpretation of the relevant leases in the light of the facts. She reminds the Tribunal of the principles governing the interpretation of a written document, as explained by Lord Neuberger PSC in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at para 15. The FTT's decision was said to be consistent with those principles: a reasonable person, considering the position of the parties at the date when the leases were granted, and applying commercial common sense, would not have expected the tenant to be required to contribute towards the costs of replacing pipe work on the geographically separate Acorn Estate.

24. Miss Gourlay first considered the scope of the covenant to pay for *"services"* imposed by para 7(2) of the third schedule. Para 7(1) imposed an obligation to pay all costs and expenses of or incidental to the carrying out of all works required by clauses 4(2) to (4). There was no reference to clause 4(5). By contrast, para 7(2) did not require the lessee to pay all costs and expenses of or incidental to all services provided and works required by clause 4(5) but merely *"of or incidental to … providing the services hereinbefore defined"*. Miss Gourlay contended that the definition of *"services"*, the careful wording of paras 7(1) and (2), and the omission of clause 4(5) from the costs towards which the lessees must contribute together operated to limit the scope of the *"services"* towards which the lessees were required to contribute so as to prevent the appellant from imposing an unlimited liability on the respondents (and other lessees) to contribute towards the costs of keeping in repair *"any installation connected with the provision of those services"*. Miss Gourlay referenced the second holding in the headnote to *Plough Investments Ltd v Manchester CC* [1989] 1 EGLR 244 that there was no justification for implying into leases, which already included several specific rights of entry, an additional right of entry. Likewise, the appellant was not entitled to seek to imply into the subject leases a further right of recovery by way of service charge in addition to the rights already expressly conferred. The draftsman of the relevant leases had expressly and deliberately chosen to omit any liability to contribute towards the costs and expenses of or incidental to the works of repair contemplated by the second limb of clause 4(5).

25. In his reply, Mr Heather emphasised that the final limb of clause 4(5) was very broadly phrased and that it was the breadth of that obligation that was reflected in para 7(2) of the third schedule to the lease. He accepted that para 7(1) did not extend to clause 4(5) and that para 7 therefore drew a distinction – for reasons not immediately apparent – between the landlord's standard repair and decoration covenants and its separate obligation to provide services. However, this latter obligation was covered by para 7(2), which imposed a free-standing obligation on the part of the lessees to contribute towards *"the costs and expenses of or incidental to … providing the services"* (as defined), which included providing [central] heating. The appellant submits that these extend to the capital costs and expenses of providing new boilers and pipes as well as maintenance and fuel costs. The wording is said to be clear; and the fact that para 7 of the third schedule distinguishes between the carrying out of works of repair/decoration and the provision of services does not affect the position.

26. Miss Gourlay then addressed the appellant's arguments on the meaning of the phrase *"or incidental to"*. She submits that in the context of liability for repairs, those words did not carry any special legal meaning. They should be given the ordinary dictionary meaning of *"ancillary to"* or *"associated with"*. They should not be regarded as a sweeping-up clause empowering the appellant to recover costs not otherwise recoverable under the lease. To do so in order to expand the scope of the works for which the respondents must pay was said to create uncertainty as to the scope of the lessees' liability. In *Southwark (London Borough of) v Paul* [2013] UKUT 0375 (LC) this Tribunal held that the phrase *"incidental to"* was apt to include overhead costs incurred in the maintenance and management of the building and the estate. The appellant now invited the Tribunal to treat that phrase as embracing a range of activity that constituted direct repair work. In doing so, it was seeking to extend the meaning beyond that which would be understood by any reasonable person. In *Contractreal Ltd v Davies* [2001] EWCA Civ 928, when considering the phrase *"incidental to"* in the context of a clause relating to the recovery of legal costs relating to the forfeiture of a lease, Arden LJ observed (at para 36) that:

> *"Normally the natural meaning of the word 'incidental' is to denote a lesser or subordinate sum, whereas on this argument the incidental costs are a very substantial sum indeed."*

The expression *"incidental to"* could not be equated with *"significant"* costs. The two expressions were uneasy bedfellows. Miss Gourlay points out that the appellant had demanded some £1,986 from the respondents in connection with the boiler replacement but some £12,296 for the replacement of the pipes on the Acorn Estate. The latter costs were significant, not minor, and thus not *"incidental*". To treat such costs as recoverable would open the floodgates to the recoverability of all manner of tangentially related costs having a minimal bearing on the actual services provided to the lessees. Because of their amount, the costs of replacing the pipe work within the Acorn Estate could not be said to be *"incidental to"* the costs of replacing the boiler or providing heating. Miss Gourlay points out that in para 13 of its grounds of appeal, the appellant asserts that the replacement of the old and failing pipe work on the Acorn Estate was a matter that would have *"a significant impact"* on the supply of heating to lessees on the Carlton Grove Estate.

27. In his reply Mr Heather drew the Tribunal's attention to para 41 of *Contractreal* where Arden LJ pointed out that the authorities showed that

> *"… the expression 'of and incidental to' is a time-hallowed phrase in the context of costs and that it has received a limited meaning and, in particular that the words 'incidental to' have been treated as denoting some subordinate costs to the costs of the action."*

He submits that it is in the context of legal costs that the phrase *"incidental to"* has received a limited meaning. Further, the phrase qualifies the costs and expenses of providing services over many years if not decades. Any comparison should be between the costs of providing the replacement pipe work and the costs of providing heating over the past 20 or 30 years. Para 13 of the grounds of appeal was directed to the substantiality of the impact of disrepair of the pipe work on the supply of heating to the Carlton Grove Estate and not to the extent of the required repairs. The costs of such repairs were *"incidental to"* the provision of heating.

The Tribunal's determination

28. The Tribunal agrees with Miss Gourlay that it should first address the factual evidence concerning the nature of the heating system and the second and third grounds of appeal before applying its conclusions on these matters to the terms of the relevant leases.

29. For the reasons advanced by Miss Gourlay, the Tribunal concludes that the FTT was entitled, on the evidence (as summarised at paras 8-10 above), to reach the finding that it did at para 40 of its decision: that there were two separate systems of pipe work, one providing heating to the Carlton Grove Estate and the other providing heating and hot water to the Acorn estate. Indeed, Mr Moore's second report (referenced at para 10 above) had referred *to "two main circuits"*. The FTT expressly cited the relevant part of Mr Marenghi's evidence at para 29 of its Decision, including his conclusion that *"... although both Acorn Estate and Carlton Grove Estate are divided geographically, they are joined mechanically and both depend on each other.* However, despite the joinder of the two systems mechanically at the boiler, and their limited inter-dependence, by reason of the factors identified at paras 43 to 46 of its decision the FTT concluded that there were in fact two separate systems of pipe work. The Tribunal does not consider that any of those factors was entirely irrelevant to the conclusion that the FTT reached at para 40 of its decision; and the weight to be attached to each of those factors was a matter for the FTT. The Tribunal would agree with the appellant to the extent that it would not have attached any particularly great weight to the fact that the Carlton Grove Estate received heating but not hot water from the DHS; but for the reasons pointed out by Miss Gourlay at para 20 above this was not an entirely irrelevant consideration; and the FTT never suggested that it regarded it as determinative. The fact that Carlton Grove received heating but not hot water from the DHS was simply one element of the FTT's overall reasoning that it had been entitled to take into consideration because the circuit which served the Carlton Grove Estate circulated hot water in a different way to *"the main system"* (serving the Acorn Estate) during the summer time. That disposes of the third ground of appeal.

30. The Tribunal accepts Miss Gourlay's submissions (summarised at para 20 above) that the geographical separation of the Acorn Estate and the Carlton Grove Estate was a relevant factor to which the FTT was entitled to have regard in determining the respondents' liability to contribute to the cost of replacing pipe work on the Acorn Estate. If the Acorn Estate did not exist, the Carlton Grove Estate would still receive heating (and vice-versa). Indeed, the Acorn Estate had existed before the Carlton Estate had been *"bolted on"*. The two heating pipe work systems were physically separate; they could be independently replaced, and any leak in one system could be isolated from the other. There were significant differences in the way the two systems operated. The residents of the Carlton Grove Estate could quite happily live with the existing pipe work on the Acorn Estate. The Tribunal considers that, despite the evidence of Mr Marenghi and Ms Turff, it was open to the FTT to find that *"there never was a complete integrated system"* because *"the evidence indicated that it was possible to isolate sections of the pipework including that serving the Carlton Grove Estate"*. At para 41(2) of its skeleton argument, the appellant does not take issue with the fact that *"it is possible to isolate sections of the pipework"*, enabling *"repairs and replacements of parts without affecting the whole"*. As a result, the Tribunal considers that the FTT's finding at para 40 of its Decision cannot *"... be said to be unsupported by the evidence*

and the decision is certainly not one that no reasonable [tribunal] could have reached". That disposes of the second ground of appeal.

31. Having concluded that the FTT was entitled to find that there were two separate systems of pipe work, the Tribunal concludes that the FTT's incomplete paraphrasing of para 7(2) of the third schedule in para 27 of its Decision did not lead the FTT to fall into error in its approach to the construction of that paragraph, which it clearly recognised as the relevant charging provision of the relevant leases (because it was cited as one of *"the relevant clauses of the lease"*: see para 24 of the Decision). Once the separate nature of the two systems is established, the costs and expenses of replacing the separate heating and hot water system serving only the Acorn Estate cannot sensibly or properly be characterised as a cost or expense *"incidental to"*, still less a cost or expense *"of"*, providing heating to the properties on the Carlton Grove Estate. The Tribunal accepts the point made by the respondents at para 4 of their grounds of response that, stripped of the suggestion that the FTT failed to refer to para 7(2), the first ground of appeal is effectively a re-statement of the second ground, namely that the heating system was one system and not two. The costs and expenses of replacing a heating system that does not serve the properties the subject of the relevant leases cannot properly be regarded as being in any way ancillary to, or associated with, or even connected with the provision of heating to those properties. To hold that they were would, in the Tribunal's judgment, be *"a case of the tail wagging the dog"* (as Arden LJ put it at para 36 of *Contractreal*.

32. For the sake of completeness, the Tribunal records that had it found that the replacement of the pipe work in the Acorn Estate was incidental to the provision of heating to the Carlton Grove Estate, it would have rejected Miss Gourlay's submission (recorded at para 24 above) that it was not recoverable under para 7(2) because that provision contains no reference to the latter part of clause 4(5), which is not specifically identified in para 7(2). The Tribunal would have accepted the submissions of the appellant (in its oral reply and recorded at para 25 above) that para 7(2), imposes a free-standing obligation on the part of the lessees to contribute towards *"the costs and expenses of or incidental to … providing the services"* (as defined), which includes the provision of [central] heating. However, in the light of the Tribunal's conclusion that the FTT was entitled to regard the heating systems serving the Acorn Estate and the Carlton Grove Estate as separate systems, its success on this point of construction does not assist the appellant.

33. Both counsel were in agreement that had the Tribunal been minded to allow this appeal, it would have been necessary to remit the matter to the FTT for it to reconsider the reasonableness of the appellant's apportionment of the costs and expenses of replacing the pipe work in the Acorn Estate. In the light of the Tribunal's decision, this will not be necessary.

Decision

34. For the reasons set out above, this appeal is dismissed. At the hearing, the Tribunal did not hear any submissions on the respondents' application to grant them orders under s.20C of the Landlord & Tenant Act 1985 and para 5A of Schedule 11 to the Commonhold & Leasehold Reform Act 2002. In the light of the disposal of this appeal, it may be difficult for the appellant to

resist such orders; but, if necessary, the Tribunal will invite written submissions in relation thereto and on costs generally.

David R. Hodge

Judge Hodge QC

4 November 2019