DILAPIDATIONS ASSOCIATION

This is Summary of *City of London v Various Leaseholders of Great Arthur House by* **New Square Chambers**. Although primarily a service charge case this has some interesting points for members to consider.

NEW SQUARE Chambers

Interpreting repairing covenants - 'construing' rather than 're-writing': City of London v Various Leaseholders of Great Arthur House [2021] EWCA Civ 431

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Date of Decision: 25 March 2021
Court: Court of Appeal
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Summary

It remains to be seen whether this case will have any broader implications beyond the parties given that the matter turned on a delicate interpretation of the specific repairing covenant found in the lease. Nevertheless, the decision serves as an excellent guide for practitioners on the court's approach when it comes to interpretating a lease.

Facts

The building in question was Great Arthur House which consisted of 120 flats held under leases originally granted pursuant to the right to buy scheme. Two sections of the building were clad in curtain wall glazing, contained by a framework of aluminium sections. Unfortunately, defects relating to the building were found which included, inter alia, the failure to make allowance for thermal movement of the aluminium framework. In other words, the hot and cold weather caused the aluminium framework to expand and shrink creating deformities. This failure caused the cladding to leak.

The City of London, being the landlord, undertook a scheme of works beginning in February 2016 which concluded in 2018, to address the problems.

The works cost approximately £8 million. The landlord sought to pass on the full cost of works to the lessees under the terms of the lease resulting in a potential bill of over £72,000 per flat. It was those works which were the subject of the dispute. The Upper Tribunal Lands Chamber (Fancourt J, President) rejected the landlord's argument that it was entitled to defray those costs through the service charge.

Great Arthur House, Goswell Road in 2019 following the recladding scheme of works

Discussion

Under the terms of the lease, the lessees were required to pay to the landlord a reasonable part of the costs of carrying out "specified repairs". The expression "specified repairs" was defined by the leases as meaning:

"… repairs carried out in order:

(i) to keep in repair the structure and exterior of the premises and of the Building in which they are situated (including drains gutters and external pipes) not amounting to the making good of structural defects;

(ii) *to make good any structural defect of whose existence the Corporation has notified the tenant in the notice served pursuant to [statutory requirements] which therein stated the Corporation's estimate of the amount (at then current prices) which would be payable by the tenant towards the costs of making it good (such defects being listed in the Fourth Schedule hereto) or of which the Corporation does not become aware earlier than ten years after the grant hereof…."*

The nature of the remedial works involved a defect in the building that had been there from the time it was constructed. As this defect had caused damage to or deterioration in the subject matter of the covenant, the works were considered to be a type of repair. This observation is consistent with the fact and degree approach as set out in *Ravenseft Properties Ltd v Davstone (Holdings) Ltd [1980] QB 12* which overturned the earlier so called "doctrine of inherent defect". This doctrine was to the effect that where wants of reparation arise which are caused by some inherent defect in the premises demised, the results of the inherent defect can never fall within the ambit of a covenant to repair.

However, the relevant question in this case was not so much whether the scheme of works fell within the definition of repairs per se (it did), but whether the landlord could require the lessees to pay for those repairs under paragraph (i) of the definition of *'specified repairs'*. It would seem from the decision that if the works fell within paragraph (ii), those costs would not be recoverable, presumably because the tenants had either not been notified about the costs of the works prior to taking the lease or the landlord had been made aware of the defects earlier than ten years after the grant.

The difficulty for the landlord was that paragraph (i) of the definition seemed to exclude any type of repair where a component of the works included *'making good structural defects.'* As the landlord was required to make good a defect that had existed at the time of construction, it appeared that this type of work more appropriately fell within paragraph (ii) and so the costs would not be recoverable.

The landlord relied upon an earlier decision of *Payne v Barnet LBC (1997) 30 HLR 295* and sought to persuade the court that there was a *"bright line"* distinction between repair on the one hand and works to make good inherent defects on the other. The landlord emphasised this distinction to argue that the scheme of works, despite including structural defect remedies, stood on the side of repairs *(and therefore paragraph (i)*). To buttress this argument, the landlord also argued that if the purpose of carrying out the work was to repair the structure or exterior of the building, then the fact that the work also made good a structural defect did not exclude that work from being a repair.

The Court of Appeal considered it to be relevant, up to a point, to interpret the definition clause against the Housing Act 1980, being the legislative framework for right to buy in force when the first of the leases was granted. However, as the lease defined its own terms, the court considered those terms, and not the legislation, as controlling the meaning of *'specified*

repairs.' To that extent, the Court of Appeal emphasised the significance of the carve out provision as contained within paragraph (i) of the definition clause itself *(…. not amounting to the making good of structural defects)*. This provision was clear enough to exclude from paragraph (i) any scheme which included the remedying of structural defects which, in practical terms, prevented the costs of the scheme from being passed onto the lessees. To that extent, the court agreed with the lessees' submission: *"As Mr Baker submitted, [the landlord's] formulation replaces the contractual words 'not amounting to' with the phrase 'whether or not it amounts to'. That is not interpretation, but rewriting [¶44].*

Moreover, as regards the 'purpose' argument, the court accepted the landlord's general proposition that repairs do not cease to be repairs merely because a scheme incidentally involves the making good of a structural defect. However, this restatement of *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* was not particularly relevant in the context of the specific clause at hand. Again, the court re-iterated that the governing phrase was *"not amounting to the making good of a structural defect"* which introduced a carve out from paragraph (i) of the definition clause to separate repairs from works to make good a structural defect.

Comments

All landlord and tenant practitioners will be familiar with the general principles of interpretation of leases. The starting point being Lord Hoffmann's speech in *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896*, with the proper approach to such questions recently summarised by Carr LJ *in Apache North Sea Limited v Euroil Exploration Limited [2020] EWCA Civ 1397 at [33]-[34]*. Indeed, there are excellent summaries of these principles within two authoritative texts: Dilapidations: The Modern Law and Practice 6th Ed (Ch. 4) and Service Charges and Management 4th Ed (Ch 1). Nevertheless, it is sometimes difficult for practitioners to get an intuitive sense of how these guiding principles apply in the real word. Whilst the landlord was unsuccessful, the approach to construing the lease against the legislative framework and the common law ought to be noted.

As this case shows, it is worth remembering that the starting point for any construction exercise is the words used by the parties (see *Tael One Partners v Morgan Stanley & Co International [2015] UKSC 12* per Lord Reed at [41] and *L Batley Pet Products v North Lanarkshire Council [2014] UKSC 27* per Lord Hodge at [18]. This guide should act to ensure that the parties, in their attempts to construe the relevant clause favourably, do not stray too far from the words themselves and inadvertently 'rewrite' rather than 'construe' the relevant clause.