Neutral Citation Number: [2023] EWCA Civ 1460

Case No: CA-2022-001932

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
JUDGE ELIZABETH COOKE
[2022] UKUT 169 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/12/2023

Before:

LORD JUSTICE ARNOLD
LORD JUSTICE PHILLIPS
and
LADY JUSTICE FALK

- -

Between:

89 HOLLAND PARK (MANAGEMENT) LIMITED	**Appellant**
- and –	
(1) ANDREW LAWSON DELL **(2) JENNIFER SIMONE DELL**	**Respondents**

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James Fieldsend and Edward Blakeney (instructed by **KDL Law**) for the **Appellant**
Mark Loveday and Mattie Green (instructed by **Howard Kennedy LLP**) for the **Respondents**

Hearing date: 21 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 8 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction and background

1. 89 Holland Park ("89 HP") is a substantial detached Victorian villa in West London which is divided into flats. There are currently five flats held on long leases. The freeholder is the appellant, 89 Holland Park (Management) Ltd, a management company owned by the leaseholders ("Manco"). The respondents, Andrew and Jennifer Dell, are the owners of one of the flats.

2. This appeal concerns whether the service charge provisions in the lease of the Dells' flat permit the recovery of substantial costs incurred by Manco in a dispute with the owner of a neighbouring property. The issue is therefore one of construction of the lease. The background to the dispute can be summarised as follows.

3. In 1965 the then freeholder of 89 HP sold land alongside it with planning permission for a house (the "Site"). The sale of the Site was subject to certain positive and negative covenants which were supplemented by a further deed entered into on 10 July 1968. One of the covenants, under which the purchaser undertook to build a boundary wall, led to proceedings culminating in the decision in *Radford v de Froberville* [1977] 1 WLR 1262, which concerned the measure of damages for breach of the covenant.

4. The material covenants for present purposes are contained in the 1968 deed. In summary, clause 2(b) requires the owner of the Site to obtain the prior approval of the freeholder of 89 HP to any "plans drawings and specifications" before applying for planning or other necessary permissions in respect of them, and clause 3 prevents work being commenced before the freeholder has approved "definitive plans drawings and specifications" (together, the "Covenants").

5. The Site remained unbuilt and was eventually acquired by the architect Sophie Hicks in 2012. Ms Hicks' plans for the Site, which included a "glass cube" and two floors below street level, did not meet with the approval of 89 HP's residents and have resulted in a significant amount of litigation, as follows:

    (1) Ms Hicks initially contended that the Covenants did not bind the land or were not enforceable. This led to a claim by Manco and the leaseholders of four flats, including the Dells, which was determined by Robert Miles QC, sitting as a Deputy High Court Judge, in 2013 (*89 Holland Park (Management) v Hicks* [2013] EWHC 391 (Ch), the "First Claim"). Mr Miles QC determined that both Manco and the leaseholders could enforce the Covenants, but the consents required were those of Manco as the freeholder. He also determined that consent could not be unreasonably withheld.

    (2) The following year Ms Hicks issued a claim against Manco seeking a declaration that it had unreasonably refused approval of her plans (the "Second Claim"). The Second Claim was ultimately discontinued.

    (3) Ms Hicks sought approval for revised plans in late 2016. Manco took advice and refused approval in January 2017. Its reasons related to the design and aesthetics of the proposals, their adverse effect on trees, loss of amenity during the works and certain specified structural and/or construction issues.

(4) In August 2017 Ms Hicks issued a further claim alleging that Manco's refusal to approve the revised plans was unreasonable (the "Third Claim"). She was initially partially successful before Judge Pelling QC, sitting as a Deputy High Court Judge, on the basis that the Covenants were concerned only with the protection of Manco's limited property rights rather than the interests of leaseholders, and as a result only structural rather than aesthetic issues could justify a refusal of approval (*Hicks v 89 Holland Park (Management)* [2019] EWHC 1301 (Ch)).

(5) Manco appealed successfully to the Court of Appeal ([2020] EWCA Civ 758), which determined that Manco was entitled to consider the interests of leaseholders, including aesthetic issues and the impact on amenity. Following a remittal Judge Pelling QC dismissed Ms Hicks' claim ([2021] EWHC 930 (Comm)), concluding that Manco was entitled to refuse approval.

6. Manco incurred substantial costs in connection with the dispute, only a portion of which have been recovered from Ms Hicks. In addition to the legal and professional costs (including expert witness fees) in relation to the three claims, Manco incurred legal and professional fees in connection with Ms Hicks' requests for approval under the Covenants and in relation to planning objections. It sought to recover the costs from the lessees by way of ad hoc demands for service charges.

7. To give an illustration of the numbers involved, by 18 January 2021 Manco had invoiced the lessees a total of £2,763,521 in connection with the costs of the dispute, of which £1,292,157 was incurred in 2019 (we were informed that the aggregate figure has since been reduced somewhat through recoveries from Ms Hicks). In contrast, routine costs of insurance and maintenance for 2019 amounted to £30,645.

8. The Dells were initially prepared to pay the demands, but by an email dated 9 July 2014 informed Manco that they were unwilling to spend more on legal proceedings. The disputed amounts all postdate that email, and relate to the costs of the Second Claim, the Third Claim and planning objections (together, the "Disputed Costs"). The Disputed Costs amount to £430,411.

9. On 27 March 2020 the Dells applied to the First-tier Tribunal ("FTT") pursuant to s.27A of the Landlord and Tenant Act 1985 to determine whether and to what extent the Disputed Costs were recoverable as service charges under the terms of the Dells' lease. The FTT concluded that they were. The Dells appealed to the Upper Tribunal ("UT"). In a decision by Judge Elizabeth Cooke, the appeal was allowed. Manco appeals to this court with the permission of the UT.

The terms of the Lease

10. A long lease of the Dells' flat was first granted on 23 July 1989 for a term of 90 years from 25 March 1981. The freeholder who granted the lease was at that time an individual. Manco acquired the freehold in 1990. There have been two lease extensions, by deeds entered into in 2006 (when the Dells acquired the flat) and in 2007. It is common ground that both extensions took effect as surrenders and re-grants, although the second deed was described as a variation. The effect of the second extension was to create a lease with a term of 999 years commencing on 1 June 2007 and to reduce the ground rent to a peppercorn.

11. While the term of the lease and the ground rent have both been altered, neither lease extension made any change to the other terms on which the flat was demised. The effect of the 2006 and 2007 deeds is that (subject to those important changes) all of the provisions of the original lease are incorporated by reference into the existing lease. These include all the provisions relevant to service charges.

12. We are therefore concerned with the interpretation of provisions contained in the 1989 lease. These should be read in the light of the fact that the terms were effectively re-agreed in 2006 and 2007, although neither party sought to argue that that made any material difference on the facts. For convenience, references below to the "Lease", "Lessor" and "Lessee" are to the document entered into in 1989 and to its grantor and grantee respectively.

13. As Judge Cooke aptly put it, the Lease employs a "traditional torrential drafting style and aversion to punctuation". In terms of broad structure, there are a set of definitions at the start, numbered (1) to (9), then the substantive clauses of which clause 1 contains the demise, clauses 2 and 3 contain Lessee covenants, clause 4 contains Lessor covenants and clauses 5 to 11 contain additional provisions. Of these, clause 5 is worth noting because it contemplates the formation of a lessee-owned management company to take over the Lessor's interest. Schedules 1 to 4 contain details of the demised premises, rights included and excepted from the demise and a number of regulations about use of the flat. Schedule 5 sets out more detailed provisions about the timing and certification of service charges.

14. Clause 3(4) contains the main obligation to pay the "Interim Charge and the Service Charge". We are concerned with the meaning of Service Charge, which is defined in paragraph (8) of the definitions section as "24.67% of Common Parts Expenditure and 19.83% of General Expenditure". Common Parts Expenditure is not relevant for our purposes. The opening paragraph of the definition of General Expenditure at paragraph (6) reads:

> "'General Expenditure' means the total expenditure … incurred by the Lessor in any Accounting Period in carrying out her obligations under Clause 4(4) of this Lease and any other costs and expenses reasonably and properly incurred in connection with the Building including without prejudice to the generality of the foregoing…"

15. The list of items that follows covers the cost of employing agents, the cost of professionals to determine General Expenditure and service charges, accommodation for caretakers or other staff, rubbish disposal and a 12.5% margin on overall costs.

16. In the FTT and UT, Manco relied solely on arguments related to two paragraphs of clause 4(4), paragraphs (g)(ii) and (l), both of which have been described as "sweeper" provisions. Before us Manco also seeks to rely in the alternative on the words "and any other costs and expenses reasonably and properly incurred in connection with the Building" in the first paragraph of the definition of General Expenditure.

17. Clause 4 contains lessor covenants in numbered sub-clauses prefaced with the words: "The Lessor … HEREBY COVENANTS with the Lessee as follows". Sub-clauses (1) to (3) deal with quiet enjoyment, a requirement for leases of other flats to be subject to similar covenants and regulations (their owners being defined as "Flat Owners"), and for

those provisions in the other leases to be enforced at the Lessee's cost. Sub-clause (4) materially reads as follows, with text shown in square brackets being a high-level summary of the detailed text and underlined text being the provisions relied on by Manco:

> "Subject to and conditional upon the Lessee performing and observing the said regulations in the said Fourth Schedule and payment being made by the Lessee of the Interim Charge and the Service Charge at the times and in the manner hereinbefore provided and out of and entirely at the expense of payments of the Interim Charge and the Service Charge by the Lessee and Flat Owners:
>
> (a) To maintain and keep in good and substantial repair and condition [the main structure, common tanks, pipes and cables and the common parts and boundaries].
> (b) [To paint the exterior and non-demised parts at least once every five years.]
> (c) [To insure the Building.]
> (d) [To clean the windows in the common parts.]
> (e) [To pay rates and other charges.]
> (f) For the purpose of performing the covenants on the part of the Lessor herein contained at her reasonable discretion to employ … one or more caretakers porters maintenance staff gardeners cleaners…"
> (g) (i) At the Lessor's discretion to employ an Agent to manage the Building…
> (ii) To employ all such surveyors builders architects engineers tradesmen solicitors accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building.
> (h) [To maintain communal television aerials.]
> (j) [To maintain and install fire extinguishers.]
> (k) [To maintain an electric porter system.]
> (l) Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the reasonable discretion of the Lessor may be considered necessary or advisable for the proper maintenance safety amenity and administration of the Building.
> (m) [To keep a reserve fund.]
> (n) [To pay the costs of the formation of a lessee-owned company.]"

Legal principles

18. There was no dispute about the principles to apply. The leading authority on the construction of leases is *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619. As Lord Neuberger explained at [15]:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101 , para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and

> commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions…"

19. Lord Neuberger went on to emphasise seven factors, of which four are particularly relevant. Lord Neuberger's third and fourth points, at [19] and [20], were about commercial common sense. That concept may not be invoked retrospectively. The natural language should not be departed from simply because a contract has worked out badly, or even disastrously, for one of the parties. Further, while commercial common sense is a very important factor, the court should be "very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight". The aim is to identify what the parties agreed, not what the court thinks that they should have agreed.

20. Lord Neuberger's sixth point refers to subsequent events which were "plainly not intended or contemplated by the parties, judging from the language of their contract". In such a case "if it is clear what the parties would have intended, the court will give effect to that intention". However, the conclusion must be based on the parties' intentions as at the date the contract (paragraph [22]).

21. The seventh point is specific to service charges (although Lord Neuberger added that it did not help resolve the issue raised in that case):

> "23. Seventhly, reference was made in argument to service charge clauses being construed 'restrictively'. I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in *McHale v Earl Cadogan* [2010] HLR 412, para 17. What he was saying, quite correctly, was that the court should not 'bring within the general words of a service charge clause anything which does not clearly belong there'…"

22. There appears to be an element of tension between the principle that service charge clauses are not subject to any special rule of interpretation and Lord Neuberger's approval of Rix LJ's statement in *McHale v Earl Cadogan*. However, I consider that this is more apparent than real. It must be borne in mind that leases are typically long-term obligations with the potential for significant future liabilities. It is inherently unlikely that parties entering into such a transaction would intend to commit themselves to obligations that are neither expressly spelled out nor of a nature that clearly fall within general words, read in their context.

The FTT and UT decisions

23. There were four issues before the FTT, being: 1) whether the Dells had already agreed to pay some of the charges such that the FTT had no jurisdiction in respect of them; 2)

whether the charges were recoverable as service charges under the Lease; 3) whether the Dells were estopped from challenging the validity of the ad hoc demands; and 4) the reasonableness of the charges pursuant to s.19 of the Landlord and Tenant Act 1985 (which provides that service charges are not payable unless they are reasonably incurred).

24. The FTT decided issue 1) in the Dells' favour and issues 2), 3) and 4) in favour of Manco. On issue 2) the FTT reasoned as follows:

> "57. In the tribunal's view, on the true construction of the terms of the Lease the legal and professional costs do, in principle, fall within clauses 4(4)(g)(ii) and 4(4)(l). The costs can be said to relate to the maintenance and/or safety of the Building, particularly insofar as one of the key concerns was the extent to which the structural integrity of the Building could be compromised by the proposals - as identified in the professional advice obtained by the Respondent as referred to in Dr McKie's evidence. We also note that clause 4(4)(l) also makes specific reference to 'amenity … of the Building', which, in our finding, can also cover challenges to Ms Hicks's proposals on aesthetic grounds. Accordingly, the tribunal does not accept the argument that 'other professionals' should be construed solely by reference to assisting with regard to management functions. In our determination, the wording of the clauses is not so restrictive and, properly construed, extends to the type of costs in issue here, notwithstanding that there is no express reference to rights relating to building on 'adjoining or contiguous land' in clause 4 or reference to spending to oppose planning applications."

25. There was no appeal against the FTT's decisions on issues 1) and 3), but the FTT gave permission to appeal on issue 2) and the UT gave permission on issue 4). By agreement, the appeal on issue 4) has not been heard because the UT allowed the appeal on issue 2). The effect was that Judge Cooke's decision is, like the appeal to us, concerned solely with the correct construction of the Lease, and specifically whether the Disputed Costs are recoverable as service charges under the terms of the Lease.

26. Judge Cooke first set out the background. This included the FTT's finding of fact that Manco "acted at all times on the basis of legal advice and with advice from technical experts, and its concerns about the threat to the structure of the building (which the appellants shared) were valid" (paragraph 26).

27. Judge Cooke then summarised the principles to apply in interpreting the Lease, with specific reference to *Arnold v Britton* at [15] and [23] (set out above). The judge correctly pointed out that care is needed in considering dicta in earlier cases given the guidance that we now have from the Supreme Court.

28. The judge referred to earlier cases where the recoverability of various types of legal costs as service charges have been discussed and then considered clauses 4(4)(g)(ii) and (l) of the Lease in detail by reference to each of points (i) to (v) listed by Lord Neuberger in *Arnold v Britton* at [15]. The judge reiterated that Manco was motivated by concern for the structural integrity and safety of 89 HP as well as by concerns over amenity, but said that that did not assist in determining whether the costs fell within the general words relied on (para. 50).

29. Looking at the context, "the focus of clause 4(4) is on managing and maintaining the building", and that was similar to the clause considered in *Kensquare v Boakye* [2021] EWCA Civ 1725, [2022] L & TR 18 ("*Kensquare*"): "the clause is about management and there is no hint of litigation" (para. 51). The judge noted that litigation was specifically mentioned elsewhere in the Lease, concluding that the FTT had given insufficient regard to the context of the provisions relied on and reiterating that the focus of clause 4(4) was on the "practical management and upkeep of the building" (para. 54).

30. As to the purpose of clause 4(4), the judge commented that it was to fund the landlord's obligations as landlord to maintain the building, rather than to support its wider interests as freeholder. It was "too great a stretch" to read it as covering the costs in question (para. 55). In relation to factual background, the judge referred to the Site as a "much-litigated piece of land". The parties to the Lease and the 2007 surrender and re-grant had to be taken to have been aware of *Radford v de Froberville*. They would also reasonably have had the possibility of development of the Site in contemplation "and therefore also the possibility of dispute". From this the judge concluded that, had the original parties wanted to include an obligation to pay service charges such as those in dispute, express provision would have been made (para. 56).

31. Finally, as regards commercial common sense, the judge agreed with Mr Loveday, for the Dells, that an obligation to fund the "extraordinary" level of costs incurred was implausible. If those costs were included then the costs of any litigation brought against or by the owner of the Site in future would be covered, and the landlord and lessees would "have an extraordinary commitment to potentially ruinous costs", which would make their property interests unmarketable. Obligations to pay such costs did not "clearly belong" in the clause (para. 57). The judge distinguished *Assethold Ltd v Watts* [2014] UKUT 537 (LC), [2015] L & TR 15 ("*Assethold*", discussed further below) on the basis that the circumstances were very different, there being in that case an immediate physical threat to a party wall such that actual damage was being caused (para. 59).

Grounds of appeal

32. The single ground of appeal is that the judge erred in her construction of the Lease. However, this is subdivided into the following alleged errors:

    (1) determining that the fact that Manco acted on advice, and the reasons for its decisions to act, were irrelevant;

    (2) giving an unduly restrictive interpretation to clauses 4(4)(g)(ii) and (l) of the Lease (and to "sweeper" clauses generally);

    (3) taking account of or placing too great a weight on the quantum of the Disputed Costs;

    (4) wrongly distinguishing the decision in *Assethold* by reference to the immediacy of physical threat; and

    (5) failing to determine that the Disputed Costs did not fall within the second half of the opening paragraph of the definition of General Expenditure (see [14] above).

Discussion: clause 4(4)(g)(ii) and (l)

33. I consider that the judge was correct to conclude that the Disputed Costs are not recoverable under clause 4(4)(g)(ii) or (l) of the Lease. I will address specific criticisms made by Mr Fieldsend, for Manco, but subject to my comments on those I do not think that the judge erred in her approach.

34. As the judge observed, the wording of paragraphs (g)(ii) and (l) is general in nature, rather than ambiguous. The task of the tribunal or court is to determine whether the expenditure in question falls within or outside it. Given the general nature of the words, factors enumerated by Lord Neuberger other than the natural meaning of the words, in particular the context in which the words appear, the purpose of the clause and the lease and any relevant factual matrix, will be of particular importance in determining what the parties must be taken to have intended the words to cover. Commercial common sense will, at the least, provide a useful cross-check.

35. The judge was correct to hold that the overall focus of clause 4(4) is on the maintenance and management of the building. Although relatively major items may be covered (such as substantial repairs), much of what is specified is of a day-to-day nature and/or is highly detailed, such as cleaning windows and maintaining fire extinguishers. It is also notable that paragraph (g)(ii) is grouped together with paragraph (g)(i), which contains an entirely routine power to employ a managing agent. Within paragraph (g)(ii), although there is a reference to solicitors and other professionals, that follows a list of "surveyors builders architects engineers tradesmen", a list which naturally refers to persons employed to do work on or in relation to the physical structure of the building.

36. Paragraph (l) follows three detailed provisions in relation to television aerials, fire extinguishers and a porter system. It is expressed to be without prejudice to the preceding paragraphs, but all that does is make it clear that paragraph (l) should not affect the construction of those other provisions; the converse is not true. The specified items provide important context. Further, the general reference in paragraph (l) to "acts matters and things" follows specific references to "works [and] installations", which (like the three immediately preceding paragraphs) are clearly focused on the physical structure of the building.

37. The key operative words of paragraphs (g)(ii) and (l) are "for the proper maintenance safety and administration of the Building" and "for the proper maintenance safety amenity and administration of the Building" respectively. In the context of a clause that clearly focuses on management and maintenance of the building itself, these words naturally refer to expenditure of that kind. In my view it would strain those words to read them as extending beyond costs incurred in maintaining and running the building, and keeping it safe. Although amenity is expressly referred to in paragraph (l) that most naturally refers, in context, to the amenity of the building itself rather than to (for example) the attractiveness of views from it.

38. While Manco did act on the advice of experts and had valid concerns about the potential threat to the structure of the building as well as about aesthetics, the references in paragraphs (g)(ii) and (l) to "safety" must be read both in the context in which they appear and with the particular expenditure in mind. Concerns over structural integrity could involve safety issues, but the building was under no immediate threat of being rendered unsafe. More importantly, it seems to me that the object of the expenditure was to prevent

Ms Hicks from being permitted to implement her proposals for the Site. The motivations behind that included structural concerns but were neither limited to those concerns nor it appears dominated by them. Paragraphs (g)(ii) and (l) require the purpose or object of the expenditure to be considered (that is, what was the expenditure "for"). In reality, the purpose of the expenditure was to stop Ms Hicks' proposed development rather than to maintain 89 HP or keep it safe.

39. It is also worth bearing in mind that clause 4 sets out the covenants to which the Lessor is subject. These are not mere discretionary powers. Thus, a conclusion that service charges may be levied in respect of a particular item of expenditure involves, at least in principle, a finding that the Lessor is under an obligation to incur it. This is also consistent with the first part of the definition of General Expenditure, which refers to expenditure in carrying out the Lessor's obligations under clause 4(4): see [14] above. It seems to me that, just as service charge clauses should not have brought within them anything which "does not clearly belong there", a similar point could be made about clauses imposing what may be substantial as well as long-term obligations on lessors.

40. In this case the feature that clause 4 imposes obligations on the Lessor is qualified by two points. The first is that the introductory wording to sub-clause (4) makes the Lessor's obligations subject (among other things) to being put in funds by the Lessee. I do not consider that that has any effect on the scope of what follows, and it was not suggested otherwise. I note that, although there is also a reference in that wording to other Flat Owners, the Lessor's obligations are not explicitly contingent on the provision of funding by them as well. We heard no argument on that point, but there must at least be a risk that the effect of sub-clause (4) may be to commit a Lessor to expenditure without full funding being in place.

41. Secondly, paragraphs (g)(ii) and (l) use the phrases "as may be necessary or desirable" and "as in the reasonable discretion of the Lessor may be considered necessary or advisable". At least in the case of paragraph (l) this indicates that there is some scope for the Lessor to determine for itself whether a particular item of expenditure is appropriate. However, it remains the case that if expenditure on professional fees "for the proper maintenance safety and administration of the Building" is in fact necessary or desirable, or expenditure "for the proper maintenance safety amenity and administration of the Building" is in fact reasonably determined to be necessary or advisable, then the Lessor would in principle be obliged to undertake it, and could be challenged if they did not do so.

42. It is convenient to address the first sub-ground of appeal at this point. Manco maintains that the UT disregarded the FTT's findings as to the reasons why it incurred the relevant charges, which were based on expert advice about the structural and amenity issues raised by the proposed development. However, the judge correctly focused on the question whether the Disputed Costs fell within the words "for the proper maintenance safety and administration of the Building" or "for the proper maintenance safety amenity and administration of the Building". If they did not, as the judge found, then it is irrelevant how necessary, desirable or advisable those costs might be regarded as being. The work in question must be for one of the purposes specified.

43. Returning to the context of clause 4(4) (g)(ii) and (l), other provisions of the Lease specifically contemplate litigation. Clause 2(6) permits re-entry for repair and provides for recovery of the costs of doing so, including "solicitors' counsels' and surveyors' costs

and fees reasonably incurred", as if it were rent in arrear (a so-called *Jervis v Harris* clause, [1996] Ch 195). This clearly contemplates fees of solicitors and counsel being incurred in taking proceedings against the Lessee. There is a similar reference in clause 2(9) in relation to costs and fees incurred in or in contemplation of forfeiture proceedings under ss. 146 and 147 of the Law of Property Act 1925. Within clause 4, sub-clause (3) also explicitly provides for the Lessor to enforce covenants entered into with other Flat Owners at the Lessee's request and expense. The existence of these provisions provides some indicator that professional costs incurred in disputes are the sort of exceptional expenditure which might generally be expected to be explicitly provided for where it is intended to be covered.

44. This does not mean that no litigation costs could ever fall within the general words of clause 4(4) (g)(ii) and (l). It might well be that certain costs would do so in appropriate circumstances, particularly if they relate to something for which the Lessor has a clear responsibility under the Lease. One example might be a dispute relating to poor workmanship on a repair. Another example, discussed in oral argument, might be a claim against the building's insurers after a refusal to pay out on a claim. But, as discussed below in relation to *Assethold*, the answer will depend on the particular expenditure in question.

45. Turning to the factual matrix, Manco takes issue with the judge's reference to the Site being "much-litigated", because up to 2007 the only litigation was that resulting in *Radford v de Froberville*, which was much earlier in time and concerned a different covenant. For myself, I would focus more on the existence and nature of the Site and the covenants in respect of it. It must be taken to have been within the contemplation of the parties that a site next door to 89 HP, which was as yet undeveloped but clearly had development potential and had been sold for that purpose, would not be left alone indefinitely. The existence of the covenants and their nature, and the fact that they had already led to litigation, must also have been within the contemplation of the parties. There was clearly both the potential for development and the potential for dispute. Further, although the fact that the covenants would be enforceable by the Lessee had not yet been established, it would have been apparent that it was the Lessor that would be required to provide or refuse consent to any development.

46. Against that background, the absence of any specific provision in the Lease governing the process of giving or refusing consent, and any resultant dispute, is telling. The only provisions with any specific relevance are clause 8(i) and paragraph 4 of Schedule 3 (the schedule dealing with excepted rights). Clause 8(i) spells out that the Lessor and owners of adjoining premises have the power, without consent from or compensation to the Lessee, to "deal as they may think fit with any of the land or premises adjoining or contiguous to the Demised Premises", including erecting buildings. Paragraph 4 of Schedule 3 reserves to the Lessor full rights to deal both with the rest of 89 HP and land or premises adjacent or near to it, including erecting buildings, subject only to due regard being paid to modern building standards and methods. These provisions provide a strong indication that any such matters are for the Lessor alone.

47. Mr Fieldsend submitted that it would be wrong to infer from the list of specified items in clause 4(4) that anything that had been contemplated when the Lease was granted would be spelled out, such that (as Mr Loveday submitted) the general words were intended only to cover matters not contemplated when the Lease was first granted, such as internet

connectivity. For example, while fire extinguishers are referred to other obvious forms of safety feature, such as fire alarms, are not.

48. I agree with Mr Fieldsend up to a point, namely that the general words are not necessarily limited to matters that the parties could not have contemplated at the date of grant. But it does not follow that the general words should be read as extending clause 4(4) in a way that takes no account of the overall focus of clause 4(4) on maintenance and management of 89 HP, the other provisions that contemplate litigation and the terms of clause 8(i) and paragraph 4 of Schedule 3. Rather, the specific provisions in clause 4(4), read in the context of the other provisions of the Lease, provide the best indication of what might be encompassed by the general words in clause 4(4). So, for example, the inclusion of fire extinguishers provides a flavour of the types of safety feature that may and may not be covered by the general words.

49. Mr Fieldsend also submitted that it was relevant that the Lease contemplated the formation of a tenant-owned management company. That entity would be entirely dependent on the service charge to fund its activities. The parties would therefore have contemplated that litigation undertaken on the advice of experts and with the backing of most tenants would be recoverable. Otherwise the Lessor could face insolvency.

50. I disagree. I do not consider the fact that the Lessor might at some stage become owned by the flat owners to be a material factor. As the present case illustrates, the risk remains that the Lessee may be obliged to incur expenditure with which they disagree. The approach to construction cannot differ. Further, I think there is nothing in the point that a tenant-owned company has no other resources. First, any landlord will seek to cover their costs by rent and service charges. Secondly, the owners of a tenant-owned company have a choice. If the majority wish to incur expenditure on something not covered by the service charge then they can choose to fund the company for that purpose.

51. As to the criticism that the judge placed too much weight on the quantum of the Disputed Costs (the third sub-ground of appeal), the judge considered that point in the context of commercial common sense. I agree with Mr Loveday that the judge was referring not to the actual amounts incurred, but to the potential for "ruinous costs". In my view the judge was entitled to treat the risk of open-ended litigation costs in what is essentially a planning dispute with a neighbour as a factor in concluding that the Disputed Costs are not covered by general words in clause 4(4), and rather would require explicit provision.

52. Mr Fieldsend pointed out that litigation costs of any kind are of their nature open-ended and potentially unlimited, and further that it is clear from *Arnold v Britton* that the mere fact that a contract has worked out badly, or even disastrously, does not justify a departure from the language used. Since litigation costs might in principle be covered by general words (see [44] above), it cannot be correct to treat the Disputed Costs as excluded by reference either to their actual or potential scale. I agree with that in principle but reiterate that what is critical here is the nature of the dispute in question. A dispute over a building repair or insurance claim might prove very expensive, but it would be of a different nature to a dispute of the kind in issue here, principally because the remainder of clause 4(4) provides the strongest indication of the sorts of expenditure that was intended to be covered. It is possible (although I do not need to decide the point) that the former may be covered by the general words in appropriate circumstances, but it does not follow that the latter is also covered.

53. The fourth sub-ground of appeal criticises the judge for distinguishing the UT decision in *Assethold*. The judge referred to that case as the sole example that counsel had identified of a decision that litigation costs against a third party could be recovered through a service charge. It was therefore unsurprising that Manco sought to rely on it. In that case the claimant was the landlord of a block of flats. The neighbouring landowner served notice under the Party Wall Act 1996 of its intention to carry out work on a boundary on which the flank wall of the block was constructed. Work was started before agreement was reached with the landlord. The landlord issued proceedings and immediately obtained an interim injunction requiring work to be stopped, an injunction which was continued until a party wall award was published. The landlord sought to recover its costs of proceedings, relying on a clause in materially identical terms to clause 4(4)(l) in the Lease. As in this case, there were also other provisions of the lease that explicitly contemplated litigation. The Deputy President of the UT concluded that the costs of ensuring that the protection afforded by a party wall award was not lost were recoverable (para. 62 of *Assethold*).

54. Mr Fieldsend submitted that the judge wrongly distinguished *Assethold* on the basis that in that case there was an immediate threat and actual damage was being caused. There was no indication of actual damage. Rather the landlord was taking steps to preserve and protect property rights, in circumstances where the tribunal had found that the party wall notice had the potential to affect safety and amenity. The position was the same in this case, and if anything the risk of physical harm appeared to be greater. As in *Assethold* the Lessor had a responsibility not only to repair actual damage but to "keep" the structure in good repair.

55. *Assethold* is obviously not binding on us, but I am content to assume that it is correctly decided. While it is not apparent that actual damage had been caused to the block of flats, it was the case that work was being done on a boundary on which the block of flats was constructed. Further, the nature of the steps taken by the landlord was inherently limited since protection was only sought to enable the party wall process to be completed (albeit that further costs were in fact incurred thereafter in connection with the neighbour's claim that the injunction should not have been granted and in relation to discontinuance of the proceedings). More importantly, however, each case must be decided on its own facts. The question is always whether the particular item in dispute falls within or outside a service charge provision. The court does not need to attempt the difficult task of determining where the precise dividing line should be drawn, but only what the correct treatment of the particular item is. That is a decision that must be reached having regard among other things to the context of the wording and the relevant factual matrix. Even if the costs of disputes with neighbours can in some circumstances be brought within a "sweeper" clause like clause 4(4)(l), it does not follow that planning-related disputes with the owner of the Site are covered in this case given all the contextual and factual background features to which I have referred.

56. Mr Fieldsend further submitted that Judge Cooke erroneously equated clause 4(4) (g)(ii) and (l) of the Lease with the wording considered in *Kensquare*. The clause considered in that case covered the costs of "employing such professional advisers and agents as shall be reasonably required in connection with the management of the Building", which was substantially narrower than the wording of the Lease.

57. *Kensquare* concerned a tenant-owned company which sought to recover by way of service charges costs of taking proceedings against the relevant tenant to recover earlier

service charges. Judge Cooke was the UT judge and decided that those costs were recoverable, but her decision was reversed by the Court of Appeal. Newey LJ concluded at [54] that the litigation costs did not fall within the wording set out above on a natural reading. Lawyers were not mentioned specifically and nothing was said about legal proceedings, the focus being on "management services rather than litigation". A decision in favour of the landlord would involve bringing within the general words of a service charge clause something "which does not clearly belong there" (referring to Lord Neuberger's comment to that effect in *Arnold v Britton* at [23]). The use of "in connection with" language made no difference. The position was similar to that in *No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2021] EWCA Civ 1119 [2022] L & TR 10, where a landlord also failed in an attempt to recover costs incurred in litigation with the tenant under a clause focused on management services.

58. Mr Fieldsend is correct to say that the clause considered in *Kensquare* specifically concerned "management", and clause 4(4) is not so limited. But Judge Cooke was obviously aware of that. The reference in paragraph 51 to the clause being "about management" should be read in the context of the reference a few lines earlier to the focus of clause 4(4) being on managing and maintaining the building, and also in the context of what the judge said in paragraph 54 about its focus being "practical management and upkeep". The real point being made was to draw a distinction between that sort of activity on the one hand and litigation with neighbours on the other.

The definition of General Expenditure

Whether the new point should be allowed

59. As already indicated, Manco sought to rely on an alternative argument that the words "and any other costs and expenses reasonably and properly incurred in connection with the Building" in the definition of General Expenditure in paragraph (6) extended to the Disputed Costs. The point was raised for the first time in Manco's application to the UT for permission to appeal to this Court. The UT granted permission on terms that extended to this argument, but it was common ground that Manco was still required to satisfy us that it was appropriate to permit the introduction of a new point on appeal (for a recent example of a case that confirms that, see *Azhar v All Money Matters t/a TFC Home Loans* [2023] EWCA Civ 1341 at [24]). Mr Fieldsend also accepted that permission would in addition be required to amend Manco's statement of case.

60. The principles to apply in deciding whether to allow a new point on appeal were conveniently summarised by Lewison LJ in *Hudson v Hathway* [2022] EWCA Civ 1648, [2023] KB 345, as follows:

> "34. There is no doubt that the court has the power to entertain a new point on appeal. In *Singh v Dass* [2019] EWCA Civ 360 Haddon-Cave LJ set out the principles which this court generally applies in deciding whether a new point may be advanced on appeal:
>
> '16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the

> trial being conducted differently with regards to the evidence at the trial …
>
> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs.'
>
> 35. In *Notting Hill Finance Ltd v Sheikh* [2019] 4 WLR 146 Snowden LJ (then sitting in this court as Snowden J) amplified these criteria. He first said that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. He pointed out that there was a spectrum of cases, at one end of which is a case in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken."

61. Mr Loveday did not seek to argue that any new evidence was required, and there has also clearly been sufficient time to address the point. Apart from the fact that it was obviously not raised on a timely basis, Mr Loveday's main point related to the way the case had been run. The issue of the reasonableness of the charges pursuant to s.19 Landlord and Tenant Act 1985 had not yet been heard by the UT (see [23] and [25] above). The new wording now relied on also includes a test of reasonableness. If the Dells lost on that question in this court then the only avenue apparently available to the Dells would be to attempt to appeal to the Supreme Court, outside the costs protection afforded to tribunal proceedings and leaving something of a procedural mess.

62. While this is a legitimate concern there would be ways of addressing it, most obviously by remitting the question whether the Disputed Costs were actually "reasonably and properly incurred" to the UT. The point is a short one of construction which Mr Loveday has had time to address. I also bear in mind the potential for future dispute between the parties in relation to further costs that have been or may be incurred in the future in connection with the Covenants. In those circumstances I consider that it is appropriate to deal with the point.

The merits of the new point

63. There are three initial points to note. First, the wording now relied on in the definition of General Expenditure differs from the wording relied on in clause 4(4) because it does not relate to matters in respect of which the Lessor is under any form of obligation. Secondly, however, there is no form of discretion: costs must be "reasonably and properly

incurred". Thirdly, while the words "in connection with the Building" might in principle be read fairly broadly, a) the expenditure must still relate to the building itself rather than anything else and b) while the list of items that follows is stated to be without prejudice to the generality of the preceding text, the relatively limited nature of that list, covering items such as employing agents and removing rubbish (see [15] above), provides relevant context for determining the intended scope of the general words.

64. I do not consider there to be any real merit in the new argument. Many of the points made about clause 4(4) (g)(ii) and (l) apply at least equally. The expenditure must relate to the building itself rather than anything else such as adjacent land. The relevant context includes not only the list of items that follows the words relied on but clause 4(4) itself (to which reference is made in the first part of the definition) and the other provisions of the Lease to which I have referred. The factual matrix also remains the same. Further, the wording is contained within a definition rather than forming part of what might be considered to be the substantive provisions of the Lease. It is inherently unlikely that the parties would have intended to include an obligation to fund uncertain but potentially significant costs of a planning-related dispute with a neighbour within general wording in a definition in circumstances where extensive and specific provision is made for the types of costs that may be included in the service charge both by the preceding words that cross-refer to clause 4(4) and by the list of items that follows.

Conclusion

65. In conclusion I would dismiss the appeal.

Lord Justice Phillips:

66. I agree.

Lord Justice Arnold:

67. I also agree.