Neutral Citation Number: [2024] EWHC 1440 (Ch)

Case No: PT-2023-000266

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

7 Rolls Building,
Fetter Lane,
London, EC4A 1NL

Date:12 June 2024

Before:
Mr Charles Morrison
(sitting as a Deputy Judge of the High Court)

Between:

TRIPLARK LIMITED — **Claimant**

AND

(1) PHILIP JOHN WHALE AND KATHERINE ANNE CALVERT

(2) SHARON ISABEL SUZANNE BREEN

(3) FAITH DEWHURST AND SARAH JANE BRODIE (in their capacity as personal representatives of the Estate of Eve Elsie Ethel Dewhurst)

(4) AYLIN ORBASLI

(5) THE ESTATE OF MS SALLY VERNON

(6) SIMON JOHN HAGGIS

(7) ANGELIKA MARTHA WIENRICH

(8) EILEEN BISSELL AND MICHELE ANNE FREEDMAN

(9) NEIL HARE-BROWN

(10) DAVID MAX MAZOWER

(11) MARAÉAD AOIN WEISZQUINN AND SHULAMITH SORCHA WEISZ QUINN (in their capacity as personal representatives of the Estate of ErnaWeiss) — **Defendants**

(12) ANNA SABINE ROSE

Brie Stevens-Hoare KC and **Cameron Stocks** (instructed by **Hamlin LLP** Solicitors) for the **Claimant**
Christopher Heather KC (instructed by **Payne Hicks Beach** Solicitors) for the **Defendants**

Hearing dates: **13 - 14 May 2024**

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Approved Judgment

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10.30 am on 12 June 202

Mr Charles Morrison (sitting as a Deputy Judge of the High Court):

Introduction

1. Northwood Hall (**NH**), Hornsey Lane, London N6 5PG, is a purpose-built block of 194 flats, constructed in or around 1935. The flats at NH are held by their occupiers under long leases with varying unexpired terms (the **Leases**); a number of the Leases are held by the Defendants (**Ds**). The dispute that came before me for trial centred around the communal heating and hot water system serving all the flats at NH, which is operated by the landlord. The landlord is the Claimant (**C**) in these proceedings. The C wants to change the way in which the system operates. The Ds do not want to see any change because they say it will alter the terms of their leases.

2. The C has come to court seeking declarations. It says it needs to know where it stands. By 2019, a predecessor to the C in the guise of a Tribunal appointed manager, had already installed a new communal system and more than 180 flats are receiving their heat and hot water from it. The C asks me to declare that it is entitled to renew the system by replacement apparatus which might not be identical to what has been there since 1935, but performs the same service.

3. The kernel of the dispute can be quite readily stated. The new system is different to the old inasmuch as it relies upon additional apparatus, principally heat exchangers, in order to deliver the hot water to the flats. The existing system had no need for such equipment, sending hot water directly into the pipes in the flats and directly to the radiators. The Ds say that they do not want to be bothered with heat exchanger units which will add to their repairing covenant obligations. It is for this reason that the C, in the alternative, invites the court to express an opinion by way of a declaration, as to whether it will be in breach of its covenant to supply, if it merely brings hot water to the exterior of the Ds' flats and offers it up for connection. The terms of the declaration sought, go on to express the court's approbation in respect of the C's desire to switch-off the existing system which the C explained it has had to run in parallel with the new only because of the Ds' intransigence. As I have already touched on, far from demonstrating inflexibility, the Ds say that their position is simply that it would be wrong for the C to be permitted to foist upon them a new system that would add greatly to their long-term repairing obligation.

4. I ought to say a bit more about the system. I am here grateful to Ms Stevens-Hoare KC who appeared for the C, for her helpful explanation which was not I think controversial and upon which I will rely. As originally constructed, heat was generated from gas-fired boilers in the sub-basement. Hot water for heating radiators was, as I have explained, delivered already heated to each flat. It was delivered from the sub-basement of NH via a network of pipes in trenches underneath the four wings. From there it went up into the building through vertical risers passing up a stack to each flat, and then along underfloor pipes which ran to and from the stacks, ultimately connecting

to individual radiators and apparatus situated within each flat. Cold water was delivered from the mains to a water tank on the roof. Cold water from that tank travelled down a service network of pipes in the vertical risers and along pipework going into each flat. Hot water was stored in large cylinders in the plant-room in the sub-basement.

5. The new system changed the distribution system. Hot water from, and cool water to, the boilers in the basement, is now pumped through large pipes via the service area on each floor, up to the roof level. The hot and cold water descends through the building and then tees-off to the corridors at each floor level, with the hot and cold water being distributed by ceiling-mounted pipework in the corridors. Heat exchanger units (**HIU**s) are installed in each flat. These HIUs "exchange" the heat from the hot water circulating in the building, which is then used to heat the cold water supplied into each flat. In this way each flat receives hot water and also heated water to the radiators.

6. As matters stand, the hot water supply for the kitchens and bathrooms in the Ds' flats is supplied by the old system, which remains operational solely for that purpose. The cold-water supply to the Ds' 11 flats, is supplied from the old large cold water storage tanks in the roof of the building. A temporary HIU, which is located in the corridors outside the flats, provides the hot water for the heating.

7. Both the old plant in the basement, which I am told includes large asbestos covered cylinders, and the large cold water storage tanks in the roof, would no longer be needed if the 11 flats in question were to be supplied completely by the new system.

8. When describing the background to the matter that came before me, I ought to mention the proceedings before Mrs Recorder McGrath which resulted in a judgment dated 22 May 2019. The Ds, save for the 11th Defendant, were claimants in those proceedings, which sought the restoration of the heating supply that had been permanently disconnected, and to prevent disconnection of the existing hot water supply. There was also a challenge to the claim to recover costs in respect of the newly installed system, through the service charge. Put simply, the judgment of the Recorder found that the then Manager of NH had acted in breach of his obligation under the Lease to provide central heating to the, in this case, claimants. A final injunction was ordered to compel the Manager to continue to supply hot water. I mention the proceedings before the Recorder as they concerned the same heating and hot water systems as are at the centre of the controversy before me; however, the fact of the proceedings and the judgment delivered are not relevant to the decision at which I must arrive. Whilst there was an argument raised by Mr Heather KC who appeared for the Ds, in his skeleton argument, as to the effect of an issue estoppel arising out of the proceedings before the Recorder, that point was not pursued following a concession made by the C during the trial that it would no longer seek to install HIUs inside individual flats and was not pursuing a

determination of its averral at para 5 of the Amended Claim Form that it was not bound by the judgment of Mrs. Recorder McGrath.

9. The case made to me by Mr Heather KC was that the declarations being sought by the Claimant were inconsistent with the terms of the leases and would not entitle the Claimant to carry out any identified or identifiable works. That case can be more fully understood from paragraph 24 (3) of its "Response to Details of Claim":

> "The replacement systems do not comply with the Claimant's obligations in the Lease for the reasons in that:
>
> (i) They additionally require the installation of a Heat Interface Unit ("HIU") within each flat (which is not currently there). A HIU is a substantial object for which an appropriate location within the flat must be found;
>
> (ii) New pipework is required in each flat between the HIU and the existing radiators and between the HIU and the points of hot water consumption (kitchen sink, shower, basin etc);
>
> (iii) The HIU would require a new electrical power supply to be installed;
>
> (iv) The Defendants would potentially be responsible for the repair and maintenance of each HIU and new pipework pursuant to clause 3(3)(a) of the Lease, which would amount to an increase in the burden on the Defendants;
>
> (v) The new systems and/or the HIU do not comply with the landlord's obligations in clause 5(7) of the Lease in that:
>
> > (a) In order to produce hot water, a HIU requires a supply of cold water which is heated across the interface by the communal heating supply. This is not the supply of hot water to the flat. It is the supply of cold water to the flat, which is then required to be heated by new apparatus within the flat.
> >
> > (b) The new system does not provide heat to the radiators in the flat. It provides heat to the HIU.
>
> (vi) Accordingly the agreement of each Defendant and appropriate variations of each Defendant's Lease would be required for the new systems."

10. It was also submitted that the declarations sought were merely "declarations in the air", and that they would serve no useful purpose; the Ds claimed that the declarations would do nothing to resolve the underlying dispute between the parties, which would be left unresolved and for resolution on another occasion; on this basis it was submitted that the court ought to decline to make each of the declarations asked for.

The Lease

11. The leases of the NH flats are in a common form. An agreed specimen lease was provided to me, and I shall refer to that as the **Lease**. Clause 1 of the Lease contains the parcels clause and defines the flat occupied by the tenants:

> "ALL THAT the flat particulars where are set out in Part 3 of the said Second Schedule and including one half part in depth of the structure between the floors of the said flat and the ceilings of the flat or structure below it and of the structure between the ceilings of the said flat and the floor of the flat or structure above it (hereinafter called "the flat")."

12. The demised premises included one half of the structure of the building between the flat and the respective flats above and below. Clause 10.(1) made similar provision for division between a flat and adjoining property:

> "…every wall separating the flat from any other part of the Building shall be a party wall severed medially and shall be included in the demised premises as far only as the medial plane thereof."

13. The Lease provides that the tenant's demise includes the central heating and hot water apparatus in each Flat solely applicable to the flat. It was said to be unusual that the tenant's repairing covenant also included, and the tenant is responsible for, the central heating and hot water apparatus solely applicable to the tenant's Flat whether that was within the flat, so part of the demise, or outside the flat and so outside the tenant's demise. The tenant's repairing covenant is at clause 3(3) of the Lease, which (so far as is material) includes covenants to:

> "(a) Repair maintain and renew uphold and keep the flat (other than the parts thereof comprised and referred to in paragraphs (2) (3) and (4) and clause 5 hereof) and (subject to Clause 10(1) hereof) including all … water gas electrical and central heating apparatus … drains pipes wires … solely applicable to the flat and all fixtures and additions thereto in good and substantial repair and condition…
>
> (b) For the purpose of carrying out the obligations in sub-paragraph (a) of this paragraph relating to sanitary and water pipes apparatus and installations and all plumbing works the Lessee will only employ competent persons whose knowledge of the workings of the Building or similar buildings would enable them to carry out any work in such a manner as would not damage adjoining or neighbouring flats"

14. By clause 5 the lessor covenanted to:

> (2) … maintain and keep in good and substantial repair:-
>
> > (i) the main structure of the Building including … its main water tanks main drains gutters and rain water pipes (other than those included in this demise or in the demise of any other flat in the Building)
> >
> > (ii) all such gas and water mains and pipes … in under and upon the Building as are enjoyed or used by the Lessee in common with the owners or lessees of the other flats
>
> (7) Maintain at all reasonable hours a reasonable and adequate supply of hot water to the flat and during the period from the First day of October to the First day of May in every year provide sufficient and adequate heat to the radiators for the time being fixed in the flat (if any) unless the Lessors shall be unable to perform this covenant by reason of the act neglect or default of the Lessee or any mechanical breakdown or interruption of the supply of fuel or current or other cause whatsoever over which the Lessors have no control …
>
> (8) Maintain and renew when required the central heating and hot water apparatus and all ancillary equipment thereto other than that contained in the flat
>
> (17) Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors may be necessary or advisable for the proper maintenance safety and administration of the Building.

The Declarations

15. It is perhaps necessary at this juncture to look at the declarations the C has asked the court to make. The C asks for declarations that it is entitled to:

> "renew, by replacement, the hot water and/or central heating systems in Northwood Hall in circumstances where the replacement is not identical but provides the same service it has covenanted to provide (the **First Declaration**); and/or
>
> disconnect the hot water and/or heating apparatus in any flat from an existing communal hot water and/or heating system and reconnect that apparatus to the replacement communal system (s) provided in its absolute discretion that work is necessary or advisable for the proper maintenance safety and administration of Northwood Hall." (the **Second Declaration**)

16. In the alternative, C seeks a declaration whether it would be,

> "in breach of its obligation to supply hot water and heat under clause 5(7) if it installed a system capable of providing the required hot water and/or heat up to the exterior of the flat in a manner that the flat owner could connect[ion] to if they wish and then decommissioned the pre-existing system so that it no longer supplied hot water or heat." (the **Alternative Declaration**)

17. As the C makes clear, the questions for the Court are not those that were before the Recorder; I am not to decide whether the C is entitled to disconnect the Ds' water supply or whether C is entitled to carry-out a specific set of works. Instead, the question raised goes to what are the precise extent of the C's powers and obligations relating to the renewal of the heating and hot water system under the Lease, in particular in regard to clause 5(7), 5(8) and 5(17).

18. I am specifically invited to interpret the meaning of Clause 5(7), in order that its effect can be understood in light of what are said to be the C's obligations under Clause 5(8) and 5(17). As the C submits, and I agree, the issue now before the Court is substantively different from the case argued before the Recorder. The declarations now sought are focused on the proper interpretation and meaning of various Lease clauses, including clause 5(7), and their meaning and effect in the widest sense.

19. The C develops its case in this way. It says that the Lease in clause 5(7), contains an obligation on the C to supply heating and hot water. At 5(8), there is an obligation on the C to maintain and repair, as well as renew the communal system. The C points to what it says is a qualified right to access the demised premises and do works it is obliged to do or to make any alterations it thinks fit or desirable (see the Lease at Schedule 4 paragraphs (2) and (4)). The C also relies upon a generic obligation on the lessor to do all that is necessary or advisable for the proper maintenance, safety and administration of the building (clause 5(17)); the C also highlights the general obligation on the lessee to repair the demised premises and certain identified elements pertaining to their flat including the heating and hot water apparatus solely applicable to the flat (clause 3(3)).

20. What is not contained in the Lease, submits the C, is any express provision restricting the lessor such that by any renewal of the heating and water system which the Ds accept the C has the right to install, the repairing obligation upon the lessees must entail the same cost or less. It could easily have done so.

21. At all events, the C's case as I understood it, was that it had the plain right to renew the heating and hot water system. That right was not challenged by the Ds; nor was it in issue before me whether the decision taken to install the new system was reasonable or not. The C's position is that it is entitled to the first declaration simply because it has the right to replace the heating and hot water system in a manner that does not have to

be identical, and it matters not if the Ds are put to greater trouble in repairing the apparatus that is solely applicable to the tenant's flat that comes with the new system. The terms of the Lease provide that the lessees must keep in repair the heating and hot water apparatus as well as any "additions". Additions in this context, it was submitted, plainly encompasses additions to the heating and hot water apparatus.

Declarations – The law

22. There is a helpful reminder of the principles relating to the grant of declaratory judgments set out in the notes to *CPR 40.20*. The notes explain that:

> "The jurisdiction to grant remedies in the form of declarations is not derived from r.40.20, as that rule is concerned only with the short point that a declaration can be granted whether or not any other remedy is claimed. The High Court's jurisdiction is based on statute and is now derived from the Senior Courts Act 1981 s.19…
>
> The power to make declarations is a discretionary power. As between the parties to a claim, the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law (*Financial Services Authority v Rourke* [2002] C.P. Rep. 14 (Neuberger J)). When considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose, and whether there are any other special reasons why or why not the court should grant the declaration (ibid.)….
>
> In the several judgments delivered by the Court of Appeal in the case of *Rolls-Royce Plc v Unite the Union* [2009] EWCA Civ 387; [2010] 1 W.L.R. 318, CA, there are extended discussions of the power of courts to grant declaratory relief as a final remedy in the context of a claim proceeding under the CPR Pt 8 alternative procedure and raising issues under the Employment Equality (Age) Regulations 2006 likely to affect persons other than the parties before the court. In succinctly stating and explaining the principles to be applied, Aiken LJ noted that the circumstances in which the court will be prepared to grant declaratory relief have been widened considerably in modern times (ibid. at paras 118 to 120). There is nothing in the general statements found in the modern authorities as to the general principles applicable that requires that a declaration may not be granted unless there is an actual or imminent threat to a legal right (*Pavledes v Hadjisavva* [2013] EWHC 124 (Ch) (David Richards J)).
>
> Those authorities demonstrate a willingness by the courts in appropriate cases to make declarations as regards rights which may arise in the future or which are academic as between the parties, but the court may refuse a declaration on grounds of prematurity, or because it would serve no useful purpose (no practical utility) (*Pavledes v Hadjisavva* op cit)…

> The matters to be taken into account by the court in considering the exercise of the discretion were summarised in *Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch) (Marcus Smith J) at para.21. In that case the claimant's (C) claim for a declaration against foreign defendants (D), who had taken no steps in the proceedings, to the effect that amounts were payable by D under a trust deed (that being the only remedy sought by C), was refused at a trial held in the absence of D…
>
> In considering whether or not to grant a declaration as to the proper construction of a contract, the court should, at the very least, proceed with caution and in accordance with the principles referred to in the notes and authorities referred to above (*Thomas Brown Estates Ltd v Hunters Partners Ltd* [2012] EWHC 21 (QB) (Eder J), where held it was not an appropriate use of the court's discretion to make a declaration as to the proper construction of a franchise agreement where the substantive issues had been agreed between the parties)."

23. A number of the principles that I have recited from the notes to CPR 40.20 were argued before me. In particular much was made of the question whether it was in the circumstances right for the court to make an order as there was simply no need for it or to put it another way, it would serve no useful purpose; reliance was here placed by Mr Heather KC on the decision of David Richards J in *Pavledes*, for the very reason that it is cited, as can be gleaned from the above, by the editors of the Civil Practice.

24. Caution was also urged upon me in circumstances where it was said that there was no real dispute between the parties as to the essence of the declarations sought. This last point lost its significance in argument as it became clear that there was a manifest difference between the parties as to the construction of the Lease as it related to the C's ability to install a replacement heating system with the concomitant imposition of an enhanced repairing obligation upon the Ds.

25. I have found it helpful to consider the approach taken by Marcus Smith J, when he was asked to make declarations, also in a Part 8 claim, in *The Bank of New York Mellon, London Branch v Essar Steel India Limited* [2018] EWHC 3177 Ch. At [**20**] he said this:

> "The court's jurisdiction to grant declaratory relief derives from section 9 of the Senior Courts Act 1981. By CPR 40.20 the court may grant declaratory relief, whether or not any other remedy is claimed. However, the 2018 edition of *Civil Procedure* ("Civil *Procedure 2018"*) notes at §40.20.2 that claims for declarations alone are unusual, and that generally declarations are sought and granted together with other forms of relief.
>
> [**21**] The power to grant declaratory relief is discretionary. When considering the exercise of the discretion, in broad terms, the court should take into account justice

to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are other special reasons why or why not the court should grant the declaration. More specifically:

1. There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. A present dispute over a right or obligation that may only arise if a future contingency occurs may well be suitable for declaratory relief and amount to a real and present dispute.

2. Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.

3. The fact that the claimant is not a party to the relevant contract in respect of which such a declaration is sought is not fatal to an application for a declaration, provided that the claimant is directly affected by the issue. In such cases, however, the court ought to proceed very cautiously when considering whether to make the declaration sought.

4. The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question", if all parties so wish, even on "private law" issues. This may be particularly so if the case is a test case or the case may affect a significant number of other cases, and it is in the public interest to decide the point in issue.

5. The court must be satisfied that all sides of the argument will be fully and properly put. It must, therefore, ensure that all those affected are either before it or will have their arguments put before the court. For this reason, the court ought not to make declarations without trial. In *Wallersteiner v. Moir,* Buckley LJ said this:

> "It has always been my experience and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in *Williams v. Powell* [1894] WN 141, where Kekewich J, whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by

> evidence. If declarations ought not to be made on admissions or by consent, *a fortiori* they should not be made in default of defence, and *a fortissimo* , if I may be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently…"

6. In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question, the court must consider the other options of resolving the issue.

26. Though I have not recited them in the passage that I have just set out, it is clear from his judgment that in distilling the principles in regard to the grant of declarations, Marcus Smith J relied upon a number of earlier decisions of this court as well as, principally, the decision of the Court of Appeal in *Rolls Royce plc v Unite the Union* [2009] EWCA Civ 387. I have no hesitation in adopting the views of Marcus Smith J, which as will be seen, will have specific application in reaching a conclusion to the matters that are now before me.

Discussion

27. As has been seen, the Ds' case was built around a simple premise; they have no difficulty with the First Declaration which seeks to confirm the C's ability to replace the heating and hot water system in circumstances where the replacement system is not identical to the old system and where it provides the covenanted service. But, it is submitted, such a seemingly innocuous declaration takes the matter no further; why in the first place is it even necessary? Moreover, it is a wolf in sheep's clothing; the circumstances surrounding the First Declaration must be taken into account. The C accepted, when asked by me, that the system it intends to operate is one that relies upon HIUs. If that is the case says Mr Heather KC, then it is inevitable that the Ds will accrue a more onerous repairing obligation than they bargained for when they each took the Lease. It follows he says, that the Second Declaration is equally offensive. The C should not be permitted to disconnect the existing supply and reconnect to what is admitted will be a new HIU-based system, if and to the extent that it serves to increase the repairing obligation of the Ds under their leases.

28. What then of the Alternative Declaration? The problem here for the Ds turns on the manner by which the hot water is to be supplied to the exterior of the flat. As was conceded, the hot water would only be available by way of an HIU. Each flat would require its own HIU. At this point account must be taken of the effect of clause 3.3(a) of the Lease. It was common ground that an HIU supplying hot water to a flat, albeit being situate outside that flat, would fall to be treated as part of the flat-owner's repairing obligation pursuant to clause 3(3) of the Lease. This is because the repairing

obligation contained in the clause extends to central heating apparatus solely applicable to each flat.

29. Whilst much was made in the skeleton arguments regarding the effect of the Recorder's judgment and the extent to which aspects of it were binding on me by operation of an estoppel or whether continuing with these proceedings in light of that judgment was in terms an abuse, none of these points were, for the reasons explained at paragraph 8 above, argued out at the trial. Mr Heather KC sought to persuade me on the strength of the decision in *Pavledes* that I ought not to concern myself with declarations which serve no useful purpose or were merely hypothetical. Any declaration made by the court must, he insisted, be properly determinative of an issue between the parties. Although I have set out the views of Marcus Smith J on the principles applying to the grant of declarations, for reasons which will become clear in this judgment, I do not have to decide whether any of the three declarations the C asks for, fall within the first two of the principles he set out and which, as I have observed, I regard as a proper statement of the law and the tests I must apply.

30. The decisive question that I must decide in this case is whether a lessor is entitled to change by renewal a communal central heating and hot water system in a way that it considers reasonable and then connect that new system to individual flats where the result would be an enhanced and different repairing obligation on the lessees. I was informed by counsel that there is no direct authority on the point.

31. It is argued by the C that the language used in the repairing obligation makes it clear that it extends to new and different apparatus for the delivery of heating and hot water. Reliance is placed on the word "additions". The clause refers to "*…and central heating apparatus walls ceilings drains pipes wires and cables solely applicable to the flat and all fixtures and additions thereto…*". The HIUs are merely additions to the existing heating apparatus and so the Ds should repair and maintain them.

32. I must approach the construction of this covenant by enquiring what was contemplated by the parties upon entering into the Lease. I must perform this task keeping in mind what was said by the Supreme Court in *Arnold v Britton* [2015] UK SC 36. In a case concerning leases, at [15] Lord Neuberger said this:

> "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 this case clause 3(2) of each of the 25 leases, 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.″

33. I have to say that it does seem to me to be an exorbitant construction to place on this repairing covenant to hold that it permits the lessor to make additions howsoever it considers appropriate and then expect the lessee to carry out repairs as if it were a fixture comprising part of the demise. The lessor may respond by saying, "but I would only make reasonable additions", but that would require reading words into the Lease that are not there.

34. It also seems to me that the word "additions" in this context, is properly to be construed as a reference to something added to the demise by the lessee. This is because the reasonable reader of the repairing obligation would see it as being intended to extend to fixtures added to the demise by the lessee and in my view the same applies to the use of the word "additions". The phrase ought to be read conjunctively in the sense that the fixtures and additions are of the same essence. They are fixtures and additions which the lessee has introduced, and the purpose and effect of the covenant is that the lessee must keep those in repair too. Had it been the case that the additions could have been added to the demise by the Lessor, then that would have been clear by virtue of a separate limb to the covenant.

35. It follows that I do not think that the submissions made by the C as to the right on the part of lessor to enter the demised premises takes the matter any further. Whatever is the basis of the right, whether the so-called *Jervis v Harris* clause at clause 3(5) of the Lease or paragraph 2 of the Fourth Schedule to the Lease which reserves from the demise the right to enter for the purposes of carrying out the lessor's obligations under clause 5, it does not seem to me that such a right is probative of the lessor's right to make additions to the demise or at any rate not the additions to the heating and water system as is proposed in this instance.

36. The Ds submit that the effect of the introduction of the HIUs to the new system means that there is a change in the way that the Lease operates; it is not as the C says that there is no change to the repairing covenant itself, it is that the introduction of the new system would entail two heating devices whereas upon the grant of the Lease there was only one. Whilst previously the hot water arrived at the taps and radiators, now a HIU is required: the Ds would have to repair that HIU. This is an additional burden not contemplated by the parties upon entering into the Lease. On this proposition I find myself in complete agreement with the Ds.

37. As I have already recounted, it was submitted by Ms Stevens-Hoare KC that the Ds had not pointed to anything in the Lease which restricted the C's right to renew the heating and hot water system in a manner that had the effect of imposing a more

onerous repairing obligation: it so easily could have, had the parties intended the Lease to operate in that way. I am not persuaded that the absence of such language in the Lease permits the C to carry out the works proposed such that a more onerous repairing obligation would be the result. It was not contested before me that the result of the installation of HIUs would lead to a repairing obligation of a different character from that imposed by the Lease with the original system in operation. It seems to me that the converse might well be the case, that is to say, if the lessor had intended to create a right to impose a repairing obligation of a different magnitude or extent it could have done so. In this instance it did not.

38. In seeking to persuade me to favour her construction of the Lease, Ms Stevens-Hoare KC invited me to adopt reasoning similar to that of Mr Martin Rodger QC, sitting in the Upper Tribunal in *London Borough of Southwark v Michelle Baharier* [2019] UKUT 0073 (LC). That was a case which also concerned the replacement of a communal hot water and heating system. It had been decided below on the issue of whether the replacement had been by way of a repair or an improvement. This was thought to be important to the lessee's challenge to the increased service charge obligation that resulted from the installation of a new system by the landlord. Mr Rodger QC however took the view that the matter in fact turned on the landlord's obligation to provide a service. The landlord's covenant at cl.4 of the lease, was in those terms. At [**35**] he concluded that there was unlikely to be any gap in a lease between the obligation of the landlord to provide a service and its ability to recover the cost from the tenant. One can, it seems to me, easily follow this approach where the lease required the tenant "to pay all costs and expenses of or incidental to providing the services." (see at [**28**]). That is however a very different situation to one where the court is concerned not with the cost of services provided, but rather with the interpretation of the ambit of a tenant's repairing obligation. It is for this reason that I am unable to see anything in this decision as would persuade me to a different outcome to the one I have arrived at.

Conclusions

39. For the reasons that I have given, I decline to make any of the declarations sought by the C.

40. I will await a draft order for approval from counsel. If there is the need for further directions from me, whether on costs or otherwise, I shall see to it that a consequentials hearing is listed so soon as is convenient for the parties.