UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charge – liability of sub-lessees to contribute to cost of repair of additions to the original structure of the building said to have been created in breach of covenant – appeal allowed

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

BETWEEN:

CHRISTOPHER MORAN HOLDINGS LIMITED

Appellant

and

LAURA CARRARA-CAGNI

Respondent

Re: Daska House,
234 Kings Road,
London SW3 5US

Martin Rodger QC, Deputy President

The Royal Courts of Justice

16 March 2016

Philip Sissons, instructed by Darwin Law Limited, appeared for the Appellant
Ben Maltz, instructed by direct access, appeared for the Respondents

The following cases are referred to in this decision:

Alghussein Establishment v Eton College [1988] 1 WLR 587

Arnold v Britton [2015] AC 1619

Rose v Spicer [1911] 234

Introduction

1. This appeal concerns the liability of the lessees of flats in Daska House, a residential building in Chelsea, to contribute through a service charge to the cost of repairs carried out by their immediate landlord to parts of the building which had been added after its original construction. Those parts, two conservatories enclosing sections of a roof terrace, were added to the building in the early 1970s, at a time when none of the parties to this appeal had any interest in the building. They were found by the First-tier Tribunal to have been constructed in breach of an absolute prohibition on alterations contained in the head-lease of the building and in breach also of a similar prohibition in the lease of the penthouse flat.

2. In its decision given on 14 August 2015 the First-tier Tribunal (Property Chamber) ("the FTT") decided that, because the conservatories had been constructed in breach of an absolute covenant against alterations, the lessees were not liable to contribute towards the cost of their repair, but instead should contribute only a lesser sum which the FTT considered would have been required to be spent on repairs to the original structure if the conservatories had never been built.

3. The appellant, Christopher Moran Holdings Limited, is the head lessee of Daska House under a lease granted to a predecessor in title on 15 August 1972. The appellant is also the lessee of the penthouse flat, which was granted as a sub-lease out of the head lease and which the appellant acquired by assignment from the original lessee in 1975.

4. The respondent, Ms Laura Carrara-Cagni, is the lessee of one of the flats in the building, flat 12, which she occupies under a lease granted to her on 1 June 2006. The lessees of flats 3, 4, 5, 7, 10, 11, 13, 14, 16, 19 and 20 in the building, whose leases are in the same terms as the respondent's, were parties to proceedings before the FTT but have chosen not to respond to the appeal (possibly on the basis that their interests would be represented by Ms Carrara-Cagni).

5. Permission for the appeal was given by the Tribunal, having previously been refused by the FTT. At the hearing the parties were represented by counsel, Philip Sissons for the appellant and Ben Maltz for the respondent. I am grateful to them both for their submissions.

The facts

6. Daska House is a 9 storey building constructed in the early 1970's on a site in Kings Road, directly opposite Chelsea Town Hall. The ground, first and second floors comprise commercial units and form a podium above which rises a tower block from the third to the ninth floors containing 25 residential flats. The ninth floor of the tower block is occupied by a penthouse flat surrounded by a roof terrace, while the other floors each have three flats. I will refer to the tower block as "the Building".

7. On 15 August 1972 the Building was demised by a lease granted by Nesadean Properties Limited, the freehold owner of the site, to Deltrane Properties Limited for a term of 99 years from 24 June 1972. In interests subsequently granted out of this lease it is referred to as "the

Superior Lease" and I will adopt that terminology. The Building is referred to in the Superior Lease as "the demised premises" and the document includes a recital that the demised premises had recently been erected.

8. The Superior Lease includes a number of covenants by the lessee which are of relevance to this appeal. By clause 3(4) the lessee covenanted that at all times it would keep the demised premises in repair "including all buildings, structures or erections which now are or may at any time hereafter be erected thereon". It covenanted by clause 3(9) that it would "not make any structural alterations or additions to the demised premises", although without prejudice to that prohibition it was contemplated by clause 3(10) that external alterations to the demised premises would be permitted with the previous written consent of the lessor which was not to be unreasonably withheld.

9. Each of the 25 flats in the building is comprised in its own underlease, of which 17 were granted between November 1972 and August 1973, while the remainder, including that of flat 12, were granted more recently under the provisions of the Leasehold Reform, Housing and Urban Development Act 1993. All of the underleases are in substantially the same form.

10. Each of the underleases describes the demised premises (in the second schedule) as including "the interior faces only of such walls as bound the said flat (for which purpose the interior faces shall include the plaster on such walls"; the same description specifically excludes from the demise the "main structural parts of the building … and external parts thereof (but not the glass of the windows which shall be included in the premises." These are instead part of the "Reserved Property", defined in the first schedule, which comprises:

> "All those premises demised by and included in the Superior Lease other than the 25 Flats… and without prejudice to the generality of the foregoing specifically includes … the main walls structure and roof of the property including all walls not included in any flat or dividing any flat from another."

11. The underleases each include a covenant by the lessor to comply with the obligations in the seventh schedule, and a covenant by the lessee to pay as a service charge the agreed proportion of the costs incurred by the lessor in so doing. The most significant of the lessor's obligations is at paragraph 1 of the seventh schedule, by which it agrees "to keep the Reserved Property and all fixtures fittings and furnishings therein and additions thereto in a good and tenantable state of repair."

12. The underlease of flat 12 was granted to the respondent on 1 June 2006. It includes a recital of an earlier underlease granted on 9 May 1973 by which flat 12 had originally been demised for a term of 99 years less 10 days from 24 June 1972. The 2006 underlease, granted to the respondent pursuant to the 1993 Act, is for a term of 189 years less 10 days from the same date. With minor exceptions the other terms of the respondent's underlease mirror those of the original 1973 underleases.

13. The penthouse underlease was granted by Deltrane to Leonard Philips for a term of 99 years less 10 days from 24 June 1972. It includes a covenant by the lessee to contribute to the

service charge at a rate of 2/26th of the lessor's expenditure on relevant services; the other 24 underleases require a contribution of 1/26th of expenditure. By paragraph 21 of the sixth schedule the lessee covenanted to observe all of the covenants and conditions in the Superior Lease. By paragraph 27 he covenanted not to erect any new or additional building on the demised premises or make any external addition.

14. The underlease of the penthouse flat is dated 29 June 1972, but it seems very likely that this is a mistake, and that the grant actually took place on the same date in 1973. There are a number of significant pointers to that conclusion. First, the year 1972 is part of the printed form of the underlease, to which the date and month have been added in manuscript. Secondly, it recites that the Lessor, Deltrane Properties Ltd, was registered as proprietor of the Superior Lease which had been granted to it by Nesadean Properties on 15 August 1972; if that recital is correct, the purported date of grant of the underlease must be wrong. Thirdly, the registered title to the underlease was not opened until 10 July 1973, more than a year after the date of execution on the face of the document; though not impossible, so prolonged a delay would be surprising as, at that time, section 123A of the Land Registration Act 1925 required an application for registration to be made within 2 months of a relevant disposition. Finally, the underlease appears in the schedule of leases included in the registered title to the head lease which itself was only opened on 14 September 1972; the underlease is there recorded as having been granted on 29 June 1973 (not 1972).

15. The FTT was aware of the uncertainty over the date of the grant of the penthouse underlease, referring to it as "dated 29 June 1972 (sic)", but it made no express finding concerning the date on which it had been granted. Were it necessary to decide when the underlease came into existence I would conclude that the inconsistencies in the document itself (between the apparent date of grant and the recital of the registered title out of which it was granted) and the external evidence all pointed strongly towards the grant having been on 29 June 1973, and not a year earlier. As will become apparent, however, I do not consider that anything turns on the resolution of that issue.

16. The appellant acquired both the Superior Lease and the penthouse underlease on 30 June 1975. It also owns the underleases of three other flats in the Building, so is liable in all to contribute 5/26th of the service charge expenditure.

17. The premises demised by the penthouse underlease are described in the second schedule and shown edged in red on an annexed plan which is dated June 1972. The area within the red edging includes the terraces surrounding the penthouse on three sides, showing that they were part of the demised premises. The plan does not show the two conservatories, one of which extended the kitchen and main living room out onto the terrace on the south side of the penthouse, while the other extended a bedroom onto the east terrace. The conservatories were described by the FTT in paragraph 15 of its decision, where it explained that they are not self-contained structures but form part of the living accommodation of the flat; there are no longer any doors or windows between the original flat and the space now enclosed by the conservatories, so "they have become an integral part of the flat."

18. The absence of the conservatories from the underlease plan suggests that they had not been built when the plan was drawn in June 1972. There are a number of other clues which

help to narrow the date of their construction, but they yield no conclusive answer. The penthouse itself seems to have been an after thought, as it was the subject of its own separate planning permission granted on 14 August 1970. An application was subsequently made for permission to erect three conservatories at penthouse level but this was refused on 17 November 1972, but a month later, on 15 December, planning permission was granted for the erection of two conservatories. It is not known who applied for these planning permissions but they suggest that the conservatories were constructed after December 1972. The evidence of Mr Moran, a director of the appellant, which the FTT accepted, was that the conservatories were already present in June 1975 when the appellant acquired the penthouse. The FTT concluded that the conservatories had been constructed in about 1973, which seems a reasonable hypothesis. Whether the actual date of construction was before or after the grant of the underlease of flat 12 on 9 May 1973, or the grant of the penthouse underlease which seems likely to have been on 29 June 1973, is not now known.

19. It is not known who constructed the conservatories. All that can be said is that no document is available showing whether or not the freeholder, Nesadean Properties Limited, or the Superior Lessee, Deltrane, were aware of, involved in, or consented to the addition of the conservatories to the Building.

20. In June 2012 the appellant commenced a programme of major works to the exterior of the Building, at a cost of almost £1.38m. The works included the installation of new windows and patio doors in each of the flats. The penthouse conservatories, which were in a poor state of repair, were demolished and rebuilt at a cost of £91,334. It is the liability of the respondent to contribute towards this sum which is in issue in the appeal.

21. On 5 February 2015 the first respondent applied to the FTT under section 27A, Landlord and Tenant Act 1987, for a determination of her liability to contribute towards the cost of the major works. She also applied (not for the first time) for the appointment of a manager under part 2 of the 1987 Act. Other members of the Daska House Residents Association applied and were joined as co-applicants at the final hearing which took place on 20 July 2015.

The FTT's decision

22. The only part of the decision which is challenged in this appeal concerns the liability of the lessees to contribute to the repair of the conservatories. In particular there is no challenge by the respondent to the conclusion in paragraph 40 of the decision that the two conservatories were in disrepair and that the appropriate repair was for them to be removed and re-built.

23. The case for the appellant was that the conservatories were part of the main structure of the Building and therefore formed part of the Reserved Property which it covenanted to repair at the expense of the service charge; alternatively they were additions to the Reserved Property which similarly fell within the appellant's repairing obligation. The respondent contended that the work to the conservatories should not be borne by the service charge account as they were not part of the Reserved Property.

24. In paragraph 37 of its decision the FTT recorded that it was common ground between the parties that the conservatories had been constructed after the grant of the penthouse underlease. The sole basis for that consensus appears to have been the absence of the conservatories from the June 1972 plan attached to the underlease. But whether that plan reflected the condition of the penthouse when the underlease was actually granted is unknown.

25. The FTT assumed that the conservatories had been constructed in breach of the express covenant in the head lease against the making of any structural alterations or additions to the demised premises and in breach of the prohibition in paragraph 27 of the sixth schedule to the penthouse underlease against making any external addition to the premises. The finding that the conservatories were constructed in breach of the covenants in the underlease does not seem to me to have been justified on the evidence, and was supported only by the apparent concession that the underlease had been granted before the conservatories were constructed. But if, as seems likely, the underlease was granted in June 1973 (and not a year earlier) there is no basis on which it could be inferred that the conservatories were created after the date of grant (indeed the absence of any document indicating that the consent of the lessor had been obtained would support the inference that they pre-dated the grant).

26. It also seems to me that the FTT's finding that the conservatories were constructed in breach of the covenants in the head lease is based on very flimsy material. The most that can be said is that the head lease included an absolute prohibition on external additions or structural alterations or additions to the demised premises (although external alterations to the demised premises are permitted with consent) and that there is no evidence of consent having been granted. It is simply not possible to say with any confidence whether the freeholder gave its consent, formally or informally, to the construction of the conservatories, and therefore whether they were created in breach of the covenants in the head lease.

27. Whether the June 1972 plan reflected the condition of the penthouse when the underlease was actually granted is unknown. Nevertheless the agreed sequence of events, and the inference of breach which flowed from it, were critical to the argument on behalf of the lessees, which the FTT recorded in paragraph 37, as follows:

> "Given that there was an absolute prohibition against any "external additions", the erection of these conservatories would have been unlawful. Mr Maltz argues that when the [respondent] acquired her lease, she would not reasonably expect to be required to contribute to the landlord's costs of repairing and maintaining these unauthorised structures."

In paragraph 42 of its decision the FTT accepted this argument, finding that:

> "…. it would not have been the intention of the original parties to these sub-leases that the sub-lessees of flats 1-24 would be required to contribute, through the service charge, to the cost of repairing and maintaining an unlawful addition erected whether by the sub-lessee or, indeed, the intermediate landlord of the penthouse."

28. In paragraph 44 the FTT summarised its main conclusion, as follows:

> "We are therefore satisfied that the [respondent] should not be liable to pay any additional cost arising from the unlawful erection of the conservatories. Our primary ground is that the cost of these works is not payable pursuant to the terms of the [respondent's] lease."

The tribunal went on to explain that if it was wrong on the meaning of the respondent's underlease, so that the sums in issue were payable contractually, it would not nevertheless exclude their recovery on the grounds that it would not "be reasonable for the [appellant] to pass on these costs to the tenants through the service charge, given the circumstances in which these additions were constructed and were subsequently adopted by the [appellant]." This seems to have been a reference to the effect of section 19, Landlord and Tenant Act 1985, which prevents the recovery of expenditure which has not been reasonably incurred. On behalf of the respondent Mr Maltz conceded that in coming to this alternative conclusion the FTT was wrong; if the underlease obliged the appellant to repair the conservatories and obliged the respondent to contribute through the service charge, it could not be said that the cost of the work had been unreasonably incurred so as to create a statutory bar to its recovery.

29. The FTT proceeded to find that, had the conservatories not been erected, the appellant would have included the replacement of the original windows and patio doors in the major works, at a cost which it estimated at £45,000. It therefore disallowed the expenditure on the conservatories but allowed this £45,000 as part of the service charge.

The appeal

30. In opening the appeal for the appellant Mr Sissons invited the Tribunal first to consider whether, at the time the disputed expenditure was incurred in their reconstruction, the conservatories were part of the premises to which the appellants repairing obligations extended, as a matter of construction of the underleases. If the conclusion was that the appellant was obliged to repair the conservatories the next question would be whether it made any difference that the conservatories may have been erected in breach of the covenants in the head lease or, if it had existed at the time the conservatories were constructed, in breach of the covenants in the penthouse underlease.

31. Mr Sissons submitted that there were four reasons why the obligation at paragraph 1 of the seventh schedule to the underleases, by which the appellant was required to keep the Reserved Property and any additions thereto in a good and tenantable state of repair, extended to the repair of the conservatories, so requiring the lessees to contribute to the cost through the service charge.

32. First, he submitted, the conservatories were part of the "main structure" of the building, which is specifically included in the definition of the Reserved Property in the first schedule.

33. Secondly, even if the conservatories were not part of the "main structure" they were clearly walls which bounded the penthouse flat and which were therefore excluded from the demise (apart from the glass and the interior faces of those walls). The second schedule to the underleases expressly includes only the interior faces the walls bounding the flats and

expressly excludes the main structural parts and external parts of the building. If the conservatories were not walls they were external parts of the building.

34. Thirdly, if they were not part of the original Reserved Property the conservatories were nevertheless "additions" to the Reserved Property and therefore fell within the appellant's repairing obligation in paragraph 1 of the seventh schedule.

35. Finally, the appellant's covenant in the Superior Lease expressly required it to keep in repair any structure erected on the demised premises at any time. By paragraph 7 of the seventh schedule to the underleases the appellant covenanted with the lessees to observe all of the covenants in the Superior Lease so far as they affected the building (except so far as they were to be performed by the lessees themselves).

36. In response, Mr Maltz submitted that it cannot have been the parties' intentions and understanding at the date of grant of the underleases that the lessees would be required to pay service charges covering the costs of repairing and replacing external additions made unlawfully by other lessees or by the head lessee itself. The absolute prohibition against external alterations was a relevant consideration when addressing both the extent of the head lessee's repairing obligation and the duty of the lessees to contribute through the service charge. It required that the lessor's obligation in paragraph 1 of the seventh schedule should be read as if it was "to keep the Reserved Property and *lawful* additions thereto" in repair.

37. Mr Maltz did not accept that the conservatories were part of the "main structure" of the building and therefore included within the Reserved Property, although he was prepared to concede that they were "additions" to the Reserved Property.

38. In his skeleton argument Mr Maltz had submitted that the appellant's repairing obligation in paragraph 1 of the seventh schedule did not require it to repair conservatories constructed in breach of the covenant against alterations in the penthouse underlease. In argument he acknowledged that if they had been constructed before the grant of the penthouse lease, the head lessee would be required to keep the penthouses in repair and rebuild them if necessary.

Discussion and conclusion

39. This appeal turns entirely on the proper construction of the terms of the underleases. None of the original parties to the transactions entered into in the 1970s is now concerned with the flats in the Building, and although the respondent's case is based on a supposed breach of covenant by a predecessor of the appellant it has never been suggested that the appellant itself was culpable for that breach. It follows that the principle of construction (illustrated by cases such as *Alghussein Establishment v Eton College* [1988] 1 WLR 587) that a party is not entitled to take advantage of its own wrong in order to obtain a benefit under a contract, has no application in this case.

40. There was no disagreement concerning the principles of construction which should be applied to the underleases; both counsel cited the recent decision of the Supreme Court in *Arnold v Britton* [2015] AC 1619, and in particular the speech of Lord Neuberger of Abbotsbury PSC at [15]-[23] where he summarised the contemporary approach to the interpretation of contracts, as follows:

> "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."

Lord Neuberger also indicated (at [23]) that service charge clauses are not subject to any special, more restrictive, rule of interpretation.

41. In its decision the FTT referred to a further point made by Lord Neuberger, at [22] of his speech, that:

> "… in some cases, an event subsequently occurs which was 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."

42. There was also general agreement that, in principle, a repairing covenant will apply to subsequent alterations and additions to a building, unless that result is excluded by the language used. That proposition was described as "elementary law" by Fletcher Moulton LJ in *Rose v Spicer* [1911] 234, 248:

> "If a lessee whose lease contains such a [repairing] covenant erects a house on the land leased to him he is just as much bound to maintain it and keep it in repair as if it had been built before the lease was granted."

43. With those principles in mind the answer to the first question posed by Mr Sissons is not seriously in dispute. As Mr Maltz accepted, by the time they came to be reconstructed by the appellant the conservatories were at the very least "additions" to the Reserved Property. That acceptance was on the basis that the conservatories had been added after the grant of the penthouse underlease, and it brings them within the express language of paragraph 1 of the seventh schedule to the underleases. Unless the supposition that they were erected in breach of covenant makes a difference, the appellant is obliged to keep the Reserved Property and all additions thereto, including the conservatories, in a good and tenantable state of repair.

44. On the alternative hypothesis that the conservatories had been constructed before the penthouse underlease was granted, I would also accept Mr Sissons' submission that they were within the Reserved Property by virtue of paragraph 4 of the First Schedule (by which the Reserved Property includes "the main walls structure and roof of the Property including all walls not included in any flat"). They were either part of the main structure, or they were part of the roof and walls not included in the penthouse flat because the flat itself is defined in such a way as to exclude all but the inner faces of exterior walls. For that reason the repair and replacement of the conservatories was included in the appellant's obligation, unless the circumstances in which they were erected makes a difference.

45. Finally, as between the parties to the Superior Lease it is undoubtedly the case that the lessee's repairing covenant at clause 3(4) extend specifically to all structures erected on the demised premises at any time. That obligation is significant because each of the underleases of the flats includes a covenant by the lessor with the lessees to observe all of the covenants in the Superior Lease so far as they affected the Building. That obligation is qualified in the case of each individual lessee so as to exclude covenants "insofar as the same fall to be performed by the Lessee under the covenants contained in this Underlease". The effect of that qualification is that (whatever the position between the Lessor and the Lessee of the penthouse flat) the Lessor was obliged to perform the obligation in clause 3(4) of the Superior Lease and keep the conservatories in repair.

46. Because it is clear that the repair of the conservatories falls squarely within the natural meaning of the language of the appellant's covenants, the outcome of the appeal therefore turns entirely on the effect of their (supposedly) having been constructed in breach of the covenants in either the Superior Lease or the penthouse underlease.

47. The sole basis of the FTT's decision, in paragraph 22, was it would not have been the intention of the original parties to the underleases that the lessees of flats 1 to 24 would be required to contribute, through the service charge, to the cost of repairing and maintaining an unlawful addition erected whether by the lessee of the penthouse flat or by the intermediate landlord.

48. Respectfully, I cannot accept that the FTT's conclusion is capable of being arrived at by any permissible process of contractual interpretation. It is open to a number of objections.

49. First, it is contrary to the natural and ordinary meaning of the words employed by the parties, which make no distinction between lawful and unlawful additions to the Building.

50. Secondly, it is subversive of the overall purpose of the clause and of the general arrangements for allocating responsibility for repair. If the FTT is correct there would exist a part of the main structure of the Building which would fall outside the repairing responsibility owed by the Lessor to the lessees of all of the flats, and its entitlement to recoup the costs of work through the service charge. Liability for the repair of that part would either fall on the Lessor, without entitlement to add the cost to the service charge, or would fall on the lessee of the penthouse; in either case the identity of the party responsible for carrying out the necessary work is not apparent from the contract but depends instead on circumstances which

occurred either before or shortly after the grant of the penthouse underlease and which are by their nature unlikely to be known to those acquiring interests in the Building in the future.

51. Thirdly, it is contrary to common sense. If a breach of covenant was committed by the lessee of the penthouse flat erecting unlawful additions the Lessor had contractual remedies at the time which there is no reason to assume it would have refrained from making use of. The suggestion that, rather than require that compensation be paid or the conservatories be removed and the original condition of the Building reinstated, the parties to subsequent underleases would, without expressly saying so, mutually intend that the Lessor would instead be relieved of its obligation to repair the conservatories is not credible.

52. It was suggested by Mr Maltz that the Lessor might not have been aware of the construction of the conservatories, but there is no evidence of that; it seems improbable that structures for which two planning applications were made and which are obvious from ground level would have escaped the attention of the lessor. But more significantly, speculation of that sort is futile, and underlines the importance of giving the words of the lease their natural and ordinary meaning. An inquiry into the parties' subjective intentions is irrelevant and speculation about what they might or might not have known when forming those intentions is inadmissible; speculation about what the true facts might have been, and whether they would have formed part of the surrounding circumstances known to both parties is equally unhelpful.

53. As Mr Sissons pointed out, there is simply no reason for the historic lawfulness of the addition to the Reserved Property to make any difference to the analysis of the continuing rights and obligations of different parties. Ultimately the power to consent to alterations lies with the freeholder, over whose actions the flat lessees have no control, and who owes them no duty. It cannot be suggested that a lawful addition, erected with the consent of the freeholder and the Lessor of the penthouse underlease, would fall outside the Lessor's repairing obligation or the liability of lessees to contribute, and Mr Maltz did not make any submission to that effect. To interpret the head lessee's repairing obligation as extending only to *lawful* additions would therefore provide only a very weak and ineffectual protection for the flat lessees against an increase in the burden of the service charge.

54. In my judgment even if the FTT was correct to assume that the penthouse underlease was granted before the construction of the conservatories (which was common ground) and correct to assume that the conservatories were erected in breach of covenant, it was wrong to rewrite the clear and practical language of the underleases. The appeal is therefore allowed, and the sum of £46,334.50 disallowed by the FTT may properly be added to the service charge with the result that the respondent is liable to contribute an additional £1,782.09.

Martin Rodger QC
Deputy President
22 March 2016