UPPER TRIBUNAL (LANDS CHAMBER)

r: LC-2022-84

Royal Courts of Justice, Strand,
London WC2A 2LL

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – extent of landlord's liability to repair – extent of the demised premises – procedure – interrupted connection to a video hearing – fair procedure in the circumstances

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

BETWEEN:

PHILOMINA LOUISA REYNARD TANN

Appellant

-and-

SUNI AND HARISH BHUNDIA (1)
ROHANA SAMANTHA WIJETUNGE (2)

Respondents

Re: 187 and 187A Dudden Hill Road,
London,
NW10 1AR

Judge Elizabeth Cooke

Heard on: 6 October 2022

Decision Date: 20 October 2022

Mrs Tann represented herself in the appeal
Mr Faisel Sadiq for the first respondents, instructed by Seddons Law

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The following cases are referred to in this decision:

Arnold v Britton [2015 UKSC 36
Frogour Limited v Farsi and Lenjawi (2021)
Greystone Property Investments Limited v Margulies (1984) 47 P & CR 472
Hallissey v Petmoor Developments Limited [2000] EGCS 124
Ibrahim v Dovecorn Reversions Limited (2001) 82 P & CR 28
Sturge v Hackett [1962] 1 WLR 1257
Twyman v Charrington [1994] 1 EGLR 243

Introduction

1. This is an appeal by Mrs Tann, the leaseholder of one of a pair of maisonettes, from a decision of the First-tier Tribunal ("the FTT") about the extent of the freeholder's repairing obligations under the leases of the maisonettes and the lessees' corresponding liability for service charges.

2. Mrs Tann is a solicitor, but is semi-retired and in any event landlord and tenant law is not within her expertise; for practical purposes she is a litigant in person. The first respondents are the freeholders of the building, and were represented before the FTT and at the hearing of the appeal by Mr Faisel Sadiq. I am grateful to Mrs Tann and Mr Sadiq. The second respondent Mr Wijetunge is the leaseholder of the other maisonette, and has not taken part in the appeal. I am told that he is content with the FTT's findings, and is willing to pay his share of the cost of the repair in question whether it is the freeholders' or the lessees' responsibility.

3. In the course of the hearing of the appeal Mrs Tann said that she had not seen Mr Sadiq's skeleton argument. I am satisfied that it was sent to her by email on Friday 30 September 2022. The hearing adjourned for twenty minutes to allow Mrs Tann time to read the skeleton, and she indicated that she was content with that.

The dispute between the parties

4. 187 Dudden Hill Road is a house comprising two maisonettes; number 187 is the ground floor maisonette, held by the appellant on a long lease, and 187A is the first-floor maisonette above it, held by Mr Wijetunge. The lower ground floor has been extended beyond the first floor, so that the appellant has an additional room beyond the kitchen; the roof of the extension is the balcony of 187A. The roof consists of a concrete slab, with a ceiling below and an asphalt surface above; the concrete slab is cracked and needs repair.

5. The freeholders wanted to know whether they were obliged, under the terms of the leases of the maisonettes, to repair the concrete slab and, if so, whether they could recover the cost from the lessees by way of service charge. To that end they made an application to the FTT. No service charges had been demanded when the application was made, and so there was no issue about the reasonableness of charges; instead, the FTT was asked to exercise its jurisdiction under section 27A(3) of the Landlord and Tenant Act1985 which provides:

> "(3) An application may [be made to the FTT] for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—
>
> (a) the person by whom it would be payable,
>
> (b) the person to whom it would be payable,
>
> (c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable."

6. The freeholders argued that the terms of the lease required them to repair only those parts of the freehold that were not demised to either lessee; that the entire thickness of the extension roof/balcony floor was demised and that therefore that either or both of Mrs Tann and Mr Wijetunge must repair the concrete slab.

7. Mrs Tann's case before the FTT was that the freeholders were obliged by clause 3(2) of her lease to repair the "roofs" of her maisonette, which she took to mean the main roof of the building and also the extension roof. She was and remains willing to pay a contribution towards that work, although there is a separate argument about a set-off, which was not before the FTT, and there is a dispute about the cause of the damage which is not within the jurisdiction of the FTT or of this Tribunal.

8. The FTT therefore had to consider:

   a. whether the entire extension roof/balcony floor was demised to either or both the lessees;

   b. whether the freeholders were liable to repair it and could charge the cost by way of service charge; and

   c. if so, in what proportions the service charge was payable by the two lessees.

9. The FTT was also asked to consider a number of other issues, some of them raised by Mrs Tann, most of which it rejected as irrelevant; there has been other litigation between the parties and a long history of acrimony, none of which is relevant to what the Tribunal has to decide. In particular the Tribunal has no jurisdiction to make any judgment about how or why the concrete slab was damaged.

10. The FTT set out the relevant terms of the two leases in a helpful tabular form so that it is possible to see side-by-side the descriptions of the demised premises and the parties' various obligations, and I gratefully reproduce the FTT's layout:

Lease of 187	**Lease of 187A**
The Demise	
Clause 1: "…the Lessor HEREBY DEMISES unto the lessees ALL THOSE pieces of land situated and being on the northern side of the road known as Dudden Hill Lane, Willesden in the	Clause 1: "…the Lessor HEREBY DEMISES unto the Lessee ALL THOSE PIECES of land situate and being on the northern side of the road known as Dudden Hill Lane Willesden in the

London Borough of Brent and which as to its position and boundaries are particularly shown on the plan annexed hereto and thereon coloured green and red TOGETHER with the lower maisonette erected thereon and known as 187, Dudden Hill Lane, Willesden in the London Borough of Brent…”	London Borough of Brent and which as to its position and boundaries are particularly shown on the plan annexed to the Underlease and thereon coloured green and mauve hatched red together with the maisonette known as 187a Dudden Hill Lane Willesden aforesaid being the entrance hall on the ground floor and the first floor and the staircase as leading thereto of the building now standing upon the pieces of land coloured red and hatched red respectively …”
Rights over the Front Path / Side and Rear Path	
Clause 1(i): “The right in common with the Lessor or the lessees of the upper maisonette and all other persons having the like right to the use of those parts of the pathways giving access to the demised premises which are delineated on the plan annexed hereto and thereon coloured yellow…”	Clause 1(i): “The right in common with the Lessor and the other persons having the like right to the use of those parts of the pathways giving access to the demised premises which are delineated on the plan annexed hereto and thereon coloured yellow…”
Lessees’ Repairing Covenants	
Clause 2(8): “From time to time and at all times during the said term well and substantially to repair uphold support cleanse maintain drain amend and where necessary rebuild the demised premises and in particular the foundations of the demised premises and all new buildings which may at any time during the said term be erected thereon by the Lessees and all additions made to the demised premises and	Clause 2(8): “From time to time and at all times during the said term well and substantially to repair uphold support cleanse maintain drain amend and where necessary rebuild and keep the Demised Premises and in particular the roof of the Maisonette and all new buildings which may at any time during the said term be erected on and all additions made to the Demised Premises and the fixtures therein

the fixtures therein and all party and other walls and fences sewers drains pathways passageways easements and appurtenances thereof with all necessary reparation cleansing and amendments whatsoever”	and all party and other walls and fences sewers drains pathways passages easements and appurtenances thereof with all necessary reparation cleansings and amendments whatsoever”
Lessees' obligation to pay service charges	
Clause 2(9): “At all times during the said term to pay and contribute a rateable or due proportion of the expenses of making repairing maintaining supporting rebuilding and cleansing all ways passageways pathways sewers drains pipes watercourses water pipes cisterns gutters foundations party walls party structures fences easements and appurtenances belonging to or used or capable of being used by the Lessees in common with the Lessor and lessee of the upper maisonette or the tenants or occupiers of the premises near to or adjoining the demised premises or of which the demised premises form part such proportion in the case of difference to be settled by the Surveyor the time being of the Lessor whose decision shall be binding…”	Clause 2(9): “At all times during the said term to pay and contribute a rateable or due proportion of the expense of making repairing maintaining supporting or rebuilding and cleansing all ways passageways pathways sewers drains pipes watercourses water pipes cisterns gutters party walls party structures fences easements and appurtenances belonging to or used or capable of being used by the Lessee in common with the Lessor or the tenants of occupiers of the premises near to or adjoining the Demised Premises or of which the Demised Premises form such proportion in the case of difference to be settled by the Surveyor for the time being of the Lessor whose decision shall be binding.”
Landlord's repairing covenant	
Clause 3(2): “The Lessor HEREBY covenants with the Lessees as follows: At all times during the said term to repair maintain support rebuild and cleanse and to	Clause 3(iv): “The Lessor HEREBY covenants with the Lessees as follows: At all times during the said term to pay and contribute a rateable proportion of the

pay and contribute a rateable proportion of the expense of making repairing maintaining supporting rebuilding and cleansing all ways passageways pathways sewers drains watercourses water pipes cisterns gutters roofs party walls party structures fences easements and appurtenances belonging to or used or capable of being used by the Lessor with the Lessees and the tenants or occupiers of the premises near to the demised premises or of which the demised premises form part such proportion in the case of difference to be settled by the Surveyor for the time being of the Lessor whose decision shall be binding.”	expense of making repairing maintaining supporting rebuilding and cleansing all ways passageways pathways sewers drains pipes watercourses water pipes cisterns gutters roofs party walls party structures fences easements and appurtenances belonging to or used or capable of being used by the Lessor with the Lessees and the tenants or occupiers of the premises near to the demised premises or of which the demised premises form part such proportion in the case of difference to be settled by the Surveyor for the time being of the Lessor whose decision shall be binding.”

11. The FTT decided that:

    a. The freeholders were obliged by the leases to repair only those parts of the building that are “used or capable of being used by the lessor and the lessee” (clause 3(2) of the 187 lease and 3(iv) of the 187A lease); and

    b. The lessees are required to pay service charges only in respect of the lessor’s costs of carrying out that obligation.

    c. “While the obligation includes party walls and party structures the Applicants neither use nor are capable of using the concrete slab between 187 and 187A and are not liable for its repair under either of the leases.”

    d. “Clause 1 of each lease effectively demises the concrete slab to both 187 and 187A because:

        i. R1, the lessee of 187 is liable to repair the foundations of the demised premises and party structures (clause 2(8))

        ii. R2, the lessee of 187A is liable to repair the roof of the demised premises and party structures (clause 2(8));

        iii. The leases do not reserve any part of 187 and 187A to the Applicants.”

e. The leases were silent as to the proportions payable by the lessees in respect of party structures, and a fair proportion would be 50% each.

12. Mrs Tann has permission from this Tribunal to appeal the finding at c above, on the basis that it was insufficiently explained and seems to leave no content to the freeholders' repairing obligations. That means that points a to d above have to be re-examined since the findings are interconnected.

13. Mrs Tann also has permission to appeal on the ground that she was not afforded a fair hearing by the FTT because she lost her video connection during the hearing and missed part of it. I will deal with that ground first.

Procedural fairness

14. Mrs Tann in her grounds of appeal states that she lost connection shortly after the start of the hearing. She says that she tried to reconnect, and then repeatedly tried to phone the FTT from her mobile and her land line and emailed the case officer at the FTT. She was reconnected; she acknowledges that the FTT in its refusal of permission to appeal stated that she was re-connected at 11:02 but says that the disconnection felt much longer than half an hour. She says counsel then summarised his opening in about five minutes and that it made "no meaningful sense" to her. She was particularly upset by this because she had received counsel for the respondents' skeleton argument shortly before the hearing and had had no time to read it. (Mrs Tann asked for permission to appeal the admission of the skeleton argument, and was refused both by the FTT and by this Tribunal, and so I make no further comment on that).

15. The FTT refused permission to appeal on this point. It said that Mrs Tann made no attempt to contact the FTT to alert it to the fact that she was disconnected, and that when the judge noted she had been disconnected the hearing was stopped and the tribunal waited until she was reconnected at 11:02.

16. What I believe has happened here is that neither the FTT nor Mrs Tann knew what the other was doing. Mrs Tann did not know that the hearing had been stopped and that the FTT was waiting for her; it was not the case that the hearing went on for half an hour in her absence. Equally, the judge and member did not know that Mrs Tann had made eight phone calls and sent an email while she was disconnected, as I accept that she did.

17. Mrs Tann acknowledges that she did not tell the FTT that she did not understand Mr Sadiq's recapitulation of his opening. I asked her what more the FTT should have done, and she was not able to help me. I asked her whether she thought that, if I were to agree that the proceedings were unfair, the respondents' application should be sent back to the FTT to start again or whether the appeal should proceed so that the Upper Tribunal can decide the substantive issue. She sensibly conceded that the appeal should go ahead.

18. Mr Sadiq confirmed that the FTT at the hearing made every effort to help Mrs Tann, to explain what was happening, and to have cross-examination questions repeated and simplified for her where necessary, and I have no doubt that that is the case.

19. Losing connection during a video hearing is very stressful, and I understand completely that to be shut out of the hearing for so long was upsetting for Mrs Tann. The FTT's comments about Mrs Tann's attempts to contact the tribunal while she was disconnected were unhelpful, and ignored the obvious fact that where a party is trying frantically but unsuccessfully to make contact the tribunal would necessarily be unaware of the efforts being made. But so far as the hearing itself was concerned the FTT followed the proper course in halting the hearing, waiting for her to re-connect, re-starting the hearing and asking counsel for the freeholders to repeat his opening. I find that there was no unfairness in the FTT's procedure. The appeal fails on this ground.

The substantive appeal about the service charges; the parties' arguments

Background to this issue

20. The FTT offered no explanation for its finding about the lessor's liability to repair, quoted at paragraph 11 c above, apart from its findings at a, b and d. The FTT's conclusion cannot be understood without careful perusal of the provisions of the leases, which are poorly drafted and do not fit together in the way one would expect.

21. The demise at clause 1 of each lease refers (as can be seen at paragraph 10 above) to a plan. The plan for 187, Mrs Tann's property, shows the entire footprint of the building shaded red. The plan for 187A likewise shows that the demise corresponds with the full extent of the area of the building, with the original extent shaded red and the balcony hatched red; it is not in dispute that the upper surface of the balcony is part of the demise of the upstairs flat. The lease of 187A was granted before the downstairs lease; the ground floor doorway and staircase are clearly part of the upstairs demise. Half of the garden is demised to each lessee but the garden paths are not demised.

Mrs Tann's arguments

22. Mrs Tann went through clause 1 of her lease and the description of the demised premises. She noted that there is no mention of a roof, nor any suggestion that the structure above her property is horizontally divided. Her case is that what was demised to her is the internal walls of the maisonette, the ceilings and the floors. The structural parts are retained by the lessor. She pointed to the words of clause 3(2) which defines the lessor's repairing obligation and requires it to repair the "roofs", in the plural. That must mean, she argued, both the main roof of the building and the balcony roof. Clause 3(2) also requires the lessor to repair "party structures"; she argued that the building is the lessor's investment and it cannot have intended to leave responsibility for its structure with the lessees. She referred to clause 2(13) which requires the lessee to permit the lessor to enter and repair.

23. Mrs Tann referred to the Supreme Court's decision in *Arnold v Britton* [2015] UKSC 36 and to the well-known principles at paragraph 15. The lease is to be interpreted in light of the ordinary and natural meaning of the words in question, any other relevant provisions of the lease, the purpose of the clause and the lease, the facts known to the parties when the document was executed, and commercial common sense, but disregarding evidence of the parties' subjective intentions. Mrs Tann said that the lessor may have made a bad bargain

but the lease was, she said, drafted by the lessor and the respondent freeholders must abide by it whether or not it makes commercial sense for them.

24. Mrs Tann relied on a number of other cases. She referred to *Hallissey v Petmoor Developments Limited* [2000] EGCS 124, where it was held that a landlord's repairing covenants included an obligation to repair the weatherproof surfaces of a roof terrace as part of the exterior fabric of the underlying structural parts of the building. The case looks like an attractive comparison because the roof concerned did consist of a concrete slab with surrounding material. But it does not help me because in that case the lease expressly reserved the structure to the landlord, so that there was no dispute about the concrete slab itself; the dispute was about the upper surface materials, which is not the problem before the Tribunal here. The same can be said of *Ibrahim v Dovecorn Reversions Limited* (2001) 82 P & CR 28, where again the dispute was about liability to repair a roof terrace, but again the lease expressly reserved the "main walls and structure" of the building to the lessor and it was agreed that the lessor was responsible for joists and the dispute was about the layers of material above them. Nor can I derive anything useful from the First-tier Tribunal's decision in *Frogour Limited v Farsi and Lenjawi* (2021) because the dispute there was about the surface of the roof.

25. Mrs Tann accepted that clause 2(8) of the lease would require her to contribute to the cost of repairing the concrete slab, because of its reference to "party structures".

The arguments for the respondents

26. Mr Sadiq also started with the demise in each lease. It is the freeholders' case that both leases demise the external walls as well as the internal surfaces of the walls, and that there is no reservation of the structure of the building to the freeholders, with the exception of the main roof (which the lessor has treated as not demised). Accordingly, even though there is no mention of the concrete slab, or of the division between the two storeys, both must be demised to one or both leaseholders. The freeholders are not concerned with where the horizontal boundary lies. Furthermore the leaseholders are each responsible (under clause 2(8) in each lease) for the repair of their demised premises and therefore one or both of them and not the lessor is responsible for the concrete slab.

27. Mr Sadiq explored the rather different terms of the two leases. The upper floor lease was granted first and in fact imposes no repairing obligations at all on the lessor (except to carry out the obligations of the downstairs lessee whilst the downstairs maisonette remains unlet). Instead, clause 3 (iv) obliges the lessor to pay "a rateable proportion" of certain repairs including the repair of the roof, for which the lessee is responsible (clause 2(8) of the 187A lease). The downstairs lease was granted later, and does impose a repairing obligation on the lessor. There is a list of items in clause 3(2) which the lessor must repair only if either

    a. the item "belongs" to the lessor – which Mr Sadiq says means that the item is not demised), or

    b. if it is used by the lessor, or

c. if it is capable of being used by the lessor.

28. Mr Sadiq argues that the lessor must repair the garden paths, the fences at the boundaries, and the main roof of the building but not (despite the plural "roofs") the roof of the extension because that is demised, and is neither used nor capable of being used by the freeholders.

Discussion

What the FTT had to decide

29. It is worth going back to the basis of the FTT's jurisdiction in this case. Section 17A(3) of the 1985 Act enables it to decide "whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs", and, if so, by whom and in what proportions.

30. So the application to the FTT was about service charges. Service charge provisions can generally not be understood without first knowing the extent of the demised premises and the obligations of the parties to the lease, so I start with the demised premises, look at the repairing obligations, and then analyse the central question about service charges. In doing so I bear in mind that the upstairs lease, 187A, was granted first, on 6 June 1980, and the downstairs lease, 187, was granted shortly after on 23 September 1980. The leases are to be construed in the light of the ordinary meaning of the words used, and in light of "the facts known to the parties when the document was executed" (*Arnold v Britton*, above), and so it is important to note that the leases refer to each other. The parties to the lease of 187A were therefore aware that the downstairs maisonette was going to be let, and the parties to the lease of 187 will have been aware of the upstairs lease which was already in place.

The demised premises

31. The demise in each lease is set out at paragraph 10 above. Neither lease says anything about the concrete slab or the rest of the horizontal structure between the maisonettes, nor indeed anything at all about the structure of the building. Mrs Tann says that her lease includes only the internal surfaces of the walls, floor and ceiling, and that the structure remains with the lessor. But the lease does not say so.

32. It is well-established that in the absence of an express reservation a lease must include the external walls. As Diplock LJ put it in *Sturge v Hackett* [1962] 1 WLR 1257:

> "It is … well settled law that , in the absence of provisions to the contrary in a lease, a demise of part of a building divided horizontally or vertically includes the external walls enclosing the part so demised."

33. Neither lease contains any express reservation of the structure of the building to the lessor. I find that both leases include the external walls. For the same reason I find that the horizontal structure between the maisonettes, including the concrete slab, was not reserved to the lessor.

34. That is consistent with the very limited nature of the lessor's right to enter, reflected in the lessee's covenant at clause 2(13) of each lease which says:

> "To permit the Lessor and the lessee tenants or occupiers of the adjoining premises and in particular of the upper maisonette and their respective agents or workmen at any time or times during the said term [on notice] … to enter upon the demised premises for the purpose of cleaning and for executing repairs or alterations of or upon such adjoining premises"

35. There is no mention here of the lessor entering in order to repair its own property. Similarly clause 2(14) requires the lessee to permit the lessor to enter in order to repair etc service conduits "in connection with or for the accommodation of the upper maisonette", not for the purpose of repairing any parts retained by the lessor. There is a reservation to the lessor in clause 1 of the two leases to enter the demised premises (exception (iv)) for the "purposes mentioned" which appears to refer only to the alteration and rebuilding of the demised premises (exception (iii)) and not to repair or maintenance.

36. Therefore the concrete slab and the rest of the horizontal structure between the properties were demised to one or both the lessees. There is nothing in the description of the demise in the two leases to say whether it was included in the upper maisonette, or the lower one, or divided horizontally between the two as the FTT found.

37. There are obvious problems with a horizontal division of the structure between two flats or maisonettes so that two lessees have to repair half of it each and no one person can be required to repair the whole structure. At paragraph 7-17 of *Dowding and Reynolds on Dilapidations* the learned authors comment that "This seems an unlikely intention to attribute to the parties in the ordinary case". It is unlikely that the parties to the lease of 187A intended the demise to include half of the horizontal structure below the maisonette and half the concrete slab, in the absence of express words to that effect, and I find that that is not what the lease did.

38. Moreover, the most usual arrangement for flats is that the demise extends from the underneath of the flat's own floor (excluding the horizontal structure below) to the underneath of the floor of the flat above (including the horizontal structure above).In *Dowding and Reynolds on Dilapidations* at paragraph 7.16-17 there is reference to *Greystone Property Investments Limited v Margulies* (1984) 47 P & CR 472, where Griffiths LJ observed that the general expectation of anyone taking a lease of a flat is that he acquires "the space between the floor of his flat and the underneath of the floor of the flat above". The parties to the original lease of 187A, granted in June 1980, might well have intended that the demise would include the horizontal structure above his ceiling (whether or not it also included the roof) and will have had in mind that the forthcoming lease of 187 downstairs would include the space and structure between the two storeys.

And in that case the parties to the lease of 187, knowing the terms of the demise of the upstairs maisonette, will have intended that the demise would include the space and the horizontal structure above the ceiling – both the joists inside the main building and the concrete slab above the extension – as far as the underside of the floor of 187A above.

39. I find that that was the intention of the parties to both leases. Further support for that conclusion can be gathered from the repairing and service charge provisions, as will be seen.

The repairing obligations

40. Each of the two leases imposes repairing covenants on the lessees at clause 2(8). The lease of 187A, upstairs, does not contain a repairing covenant on the part of the lessor, but the lease of 187, downstairs, does. There are therefore three repairing covenants as follows:

    a. The lessee of 187A has to repair the demised premises "and in particular the roof of the Maisonette", and "all party and other walls and fences sewers drains pathways passages easements and appurtenances thereof".

    b. The lessee of 187, downstairs, has to repair the demised premises "and in particular the foundations", and then the same list as above: "all party and other walls and fences sewers drains pathways passageways easements and appurtenances thereof".

    c. In the lease of 187 the lessor covenants at clause 3(2) both to repair and to contribute "a rateable proportion" of the expense of repairing: "all ways passageways pathways sewers drains watercourses water pipes cisterns gutters roofs party walls party structures fences easements and appurtenances belonging to or used or capable of being used by the Lessor with the Lessees and the tenants or occupiers of the premises near to the demised premises or of which the demised premises form part".

41. Each lease contains provision for the lessee to require the lessor to enforce the other lessee's covenants, subject to an indemnity (clause 3(v) of the lease of 187A, clause 3(3) of the lease of 187).

42. Each lease gives the lessee the right to enter the other maisonette in order to repair and maintain their own demise (clause 1(iv) in each lease).

43. Is the lessor obliged as Mrs Tann says, if only to the lessee of 187, to repair the concrete slab and the rest of the horizontal structure between the maisonettes?

44. I agree with Mr Sadiq that the lessor has to repair the items in the list set out above only if either they "belong to" the lessor or if they are used or able to be used by the lessor with the lessees. I agree that items "belonging to" the lessor are the parts of the property that are not demised; that comprises very little, as we have seen, but the plans indicate that the

garden paths and fences are not demised to either lessee (each has half the garden). The concrete slab and horizontal structure are not reserved to the lessor, and cannot be used by it. So the lessor is not under an obligation to repair them. Mrs Tann relies upon the word "roofs", in the plural, among the items the lessor has to maintain, but I do not think that assists her because the list of items is qualified by the requirement that each be capable of shared use. The lessor has no way to make any use of the horizontal structure between the properties. "Roofs" can refer only, if it refers to anything, to the main roof.

45. The Tribunal in giving permission to appeal expressed concern that the FTT's construction of the lease appeared to leave very little content to the lessor's repairing obligations in Mrs Tann's lease. Having now had the opportunity to read both leases, and in light of the absence of any repairing obligation at all on the part of the lessor in the upstairs lease, I conclude that that appears to be exactly what the parties intended.

46. If the horizontal structure between the maisonettes and the concrete slab were split medially between the lessees as the FTT said, then each lessee would be required to repair their own half; obviously neither can repair half the concrete slab or half a joist without co-operation from the other and that arrangement would be very problematic; I have found that that was not the parties' intention.

47. If the slab had been demised as a whole to the lessee of 187A then that lessee would have had to repair both the horizontal structure between the floors and the roof, which would have placed a disproportionately heavy practical burden on that lessee, which lends support to my conclusion that the parties to the original leases are likely to have expected the concrete slab and the horizontal structure between the floors to belong with the downstairs flat, 187. I have already found that they do, and it follows that Mrs Tann is responsible for getting the repair done to the concrete slab. I appreciate that that may be unwelcome to her, but it does give her control over the process.

48. Most importantly for Mrs Tann, can the lessee of 187A be required to contribute to the cost of the repair by way of service charge?

The service charge provisions

49. Clause 2(9) of the lease of 187A requires the lessee to pay a proportion of the cost of repairing and maintaining:

> "all ways passageways pathways sewers drains pipes watercourses water pipes cisterns gutters party walls party structures fences easements and appurtenances belonging to or used or capable of being used by the Lessee in common with the Lessor or the tenants of [sic] occupiers of the premises near to or adjoining the Demised Premises or of which the Demised Premises form part."

50. The "of" in the penultimate line must be a typo for "or" and I read it as such.

51. Mrs Tann's obligation to pay a service charge is in clause 2(9) of her lease; she is to pay a "rateable and due proportion" of the cost of repairing etc:

> "all ways passageways pathways sewers drains pipes watercourses water pipes cisterns gutters foundations party walls party structures fences easements and appurtenances belonging to or used or capable of being used by the Lessees in common with the Lessor and lessee of the upper maisonette or the tenants or occupiers of the premises near to or adjoining the demised premises or of which the demised premises form part." (I comment on the underlined words below)

52. So the usual arrangement whereby a service charge is payable by reference to the cost of the lessor fulfilling its obligations is absent. Instead there is a list of the work for which each lessee has to pay a contribution. It seems to be envisaged for example that the lessor might (but does not have to) repair the foundations and the downstairs lessee can be required contribute. The lessor too has to pay a contribution to the repair of certain shared items – in clause 3(2) of the lease of 187 downstairs, and in clause 3(iv) of the lease of 187A upstairs – but only if those items are used or able to be used by the lessor, which again excludes the concrete slab.

53. Reverting to the lessees' obligations, I have underlined the additional words in the lease of 187 downstairs, which reflect the fact that this was the second lease to be granted. One would have expected mirrored wording in the first lease; the omission may be accidental, but since it is clear that the lease of 187A was drafted with the knowledge that the downstairs maisonette was to be let it seems more likely that the words "capable of being used by the tenants or occupiers of the premises or of which the demised premises from part" may have been felt to be sufficient, in the upstairs lease, to require that lessee to contribute to the cost of repairs to items shared with the downstairs lessee – in particular party structures.

54. The structural material between the two floors belongs, as I have found, with the downstairs lease. But I regard it as a party structure for the purpose of the service charge clause. In *Twyman v Charrington* [1994] 1 EGLR 243 the lessee of the ground floor and basement of a three-storey building was required to contribute to the cost of repairs to "mutual or party structures" and the Court of Appeal found that that included the roof of the building. Woolf LJ said:

> "Structure which are immediately adjoining the demised premises shall be regarded as party structure, and those parts which are used for their common benefit which are not immediately contiguous should be regarded as mutual, and I would so regard the roof."

55. This horizontal structure immediately adjoins the demised premises at 187A and is used for its benefit (for support) and so its repair falls within the service charge clause at clause 2(9) of the lease.

56. Accordingly the cost of repairs to the concrete slab can be shared through the service charge, since this is pre-eminently a structure that both parties use (one to shelter a ceiling,

the other to support a floor). Note that the requirement is that the item be used in common with the lessor *or* the tenants of the premises adjoining the demised premises (that is, of the downstairs maisonette) so there is no requirement for the lessor to be using the concrete slab too.

57. As we have noted above, each lessee is able to require the lessor to enforce the other lessee's covenants. I take the view that clause 2(9) in the lease of 187A upstairs enables the lessor to require the upstairs lessee to contribute to the cost of repairing the slab, and enables Mrs Tann to require the lessor to enforce that covenant. The contribution would obviously have to be passed on to her as she would have incurred the cost of the repair. As to the amount of the contribution I see reason to depart from the FTT's conclusion that each lessee must pay half the cost of the repair, and no-one has suggested that I should.

Conclusion

58. The question posed by section 27A(3) is "whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs", and, if so, by whom and in what proportions.

59. The answer is:

   a. The lessors are not obliged to repair the concrete slab. They could do so if the two lessees agreed and gave them access, but they would not be able to demand payment from the lessees by way of service charge.

   b. The concrete slab and the horizontal structure between the two maisonettes are demised with the lower maisonette, number 187, and the lessee of 187 therefore has to repair it.

   c. The lessee of 187A upstairs has to share the cost of that repair, and the lessee of 187 can require the lessor to enforce that covenant. It is a covenant made with the lessor but obviously the payment must be passed on to the lessee of 187.

60. Accordingly I have reached a different conclusion from the FTT, and its decision is set aside and the Tribunal's decision substituted. The decision leaves Mrs Tann in control of the repair to the concrete slab, and Mr Wijetunge is obliged to let her have access to carry out the work, but his obligation to contribute to the cost must be enforced by the lessor.

Upper Tribunal Judge Elizabeth Cooke

20 October 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for

permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.