Corporation of London v Various Leaseholders of Great Arthur House [2021] EWCA Civ 431

Court of Appeal (Civil Division), 25 March 2021

Lewison, Bean and Arnold LJJ

In a dispute about costs of about £8m to re-clad a tower block and a potential service charge liability of over £72,000 for each lease granted under the right to buy, the Court of Appeal has held that wording in the lessees' covenant to pay a service charge in respect of "repairs … not amounting to the making good of structural defects" was to be interpreted to exclude from charge works of repair to the structure and exterior which had the effect of making good a structural defect. It made no difference that the works also remedied deterioration that had occurred over the time that the defect existed.

Timothy Straker QC and Jonathan Manning of 4-5 Gray's Inn Square acted for the Corporation of London.

Christopher Baker of 4-5 Gray's Inn Square acted for the leaseholders.

Background

Great Arthur House is a Grade 2 listed building, consisting of 120 flats, on the Golden Lane Estate in London EC1. It was constructed in 1957. The leaseholders' flats were held under leases granted by the Corporation of London pursuant to the statutory right to buy, formerly pursuant to the Housing Act 1980 and later (and currently) pursuant to the Housing Act 1985.

The leases were granted between 1983 and 2015, all for a term of 125 years from 10 May 1982 and in a standard form. The leases all contained a covenant requiring the lessee to pay to the Corporation a reasonable part of the costs of carrying out "specified repairs" and of insuring against risks involving specified repairs.

The expression "specified repairs" was defined by the leases as

> "… repairs carried out in order:
>
> (i) to keep in repair the structure and exterior of the premises and of the Building in which they are situated (including drains gutters and external pipes) not amounting to the making good of structural defects;
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> (ii) to make good any structural defect of whose existence the Corporation has notified the tenant in the notice served pursuant to [statutory requirements] which therein stated the Corporation's estimate of the amount (at then current prices) which would be payable by the tenant towards the costs of making it good (such defects being listed in the Fourth Schedule hereto) or of which the Corporation does not become aware earlier than ten years after the grant hereof and

(iii) to keep in repair any other property over or in respect of which the tenant has any deemed rights."

As originally constructed, the building consisted of a concrete frame with the main east and west elevations largely clad in curtain wall glazing, contained by a framework of aluminium sections fixed to a timber sub-frame. That, in turn, was fixed to the edge of the floor slabs and ends of the cross walls of the main structure. The building suffered from water penetration for many years. The Corporation commissioned a number of expert reports, in particular a report by structural engineers in August 2002 which concluded:

i) The standard of construction of the framework, and in particular the formation of joints was poor at a significant number of locations.

ii) In fabricating the aluminium framework no allowance had been made for thermal movement. The differential coefficients of expansion between the aluminium framework and the concrete frame has caused the aluminium framework to deform. Where the deformation exceeded the tolerance of the mastic, failure had occurred causing the cladding to leak.

iii) Vertical members of the aluminium frame were not supported.

iv) The opaque glazing was not supported equally along all four sides.

v) Wind deflection of the vertical members of the aluminium frame could result in leakage.

vi) Many of the brush seals in the opening lights of the windows were in poor condition. But even where they were in good condition, they were incapable of providing a wholly effective barrier against wind driven rain.

The Corporation undertook a scheme of works, beginning in February 2016 and concluding in the summer of 2018, to address the problems. The works cost approximately £8 million; and consisted of:

i) Complete removal of the existing curtain walling.

ii) Installation of a new curtain wall of a completely different design.

iii) Investigation, strengthening and making good of the structural frame.

iv) New balcony doors and cladding.

v) New sliding windows to the north and south elevations.

vi) Works to the roof.

If the Corporation were entitled to pass on the full cost of those works to the lessees, it would result in a potential bill of over £72,000 per flat.

The leaseholders applied to the First-tier Tribunal (FTT) for a determination of their liability. The FTT directed that the interpretation of "specified repairs" should be determined as a preliminary issue.

The Corporation contended that:

- works did not cease to be works of repair merely because they simultaneously eradicated a defect in the building that had been there from the time it was constructed, where that defect had caused damage to or deterioration in the subject matter of the covenant;
- on the other hand, if works eradicated a defect which had resulted in neither damage to nor deterioration in the subject matter of the covenant, then those works were not works of repair;
- if works were repair, properly so called, then they fell within paragraph (i) of the definition, and were properly chargeable to the lessees.

The leaseholders contended that, by reason of the words "repairs … not amounting to the making good of structural defects", paragraph (i) of the definition involved merely a factual question of the effect of the works.

- Accordingly, works of repair of the structure and exterior of the building did not fall within paragraph (i) of the definition if the effect of the works was to make good a structural defect.
- Whether that was the effect of the whole or part of a scheme of works was a question of fact, to be determined on the evidence (including expert evidence where necessary). Some parts of a scheme of work might amount to the making good of a structural defect, while other parts might not.

The issue of interpretation was decided in the leaseholders' favour in the FTT. The Corporation appealed and the Upper Tribunal (Fancourt J, President) rejected the Corporation's argument while granting it permission to appeal ([2019] UKUT 0341 (LC); LRX/42/2019).

Court of Appeal decision

The Corporation's appeal was dismissed.

1. The Corporation contended that it was all a question of classification or description and that accordingly works of repair fall within paragraph (i) of the definition whether or not they made good a structural defect so long as that making good was incidental to or part and parcel of the work of repair. But that gave no content to the carve out from paragraph (i) of the definition, which must have been intended to except or exclude something from the ordinary meaning of repair, as explained in *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12. This formulation replaced the contractual words "not amounting to" with the phrase "whether or not it amounts to". That was not interpretation, but rewriting.

2. The scope of the exclusion could not be dependent on whether or not the defect had caused damage.
    - The overarching requirement that rechargeable works be works of repair necessarily meant that there had been deterioration or damage.
    - If there were a distinction between rectifying structural defects which caused damage (paragraph (i)) and rectifying those which had not (paragraph (ii)) there would be what the FTT described at [90] as a "perverse incentive to

landlords to wait until structural defects had caused disrepair before carrying out works".

3. The test proposed by the leaseholders was not uncertain.
   - Whether a scheme of works fell within the scope of a service charge often gave rise to uncertainty at the edges. The FTT was a specialist tribunal well used to resolving such difficulties; and the powers conferred on that tribunal extended to deciding whether works would fall within the scope of a service charge, whether wholly or partly, even before the works are carried out. So any uncertainty could be cured before the landlord was irrevocably committed to any particular scheme of works.
   - The test was no more uncertain than a test which depended on ascertaining the "purpose" of the works (which had to mean more than the landlord's subjective purpose).

4. The statutory provisions introduced by the Local Government and Housing Act 1989, which required a local housing authority to maintain a housing revenue account and keep it in balance, did not shed any light on the question for the Court.
   - By the time that these provisions came into force, the service charge regime applicable to leases granted under the right to buy had radically changed. In the light of those changes, the Corporation could have changed the form of the leases but chose not to do so.
   - Earlier legislation was not usually interpreted by reference to later legislation.
   - Whether a housing authority may have to raise rents across the whole of its estate in order to keep the housing revenue account in balance could not affect the question whether it was contractually entitled to pass on a bill of many tens of thousands of pounds to an individual lessee.

5. The purpose of the legislation was to encourage home ownership by council tenants, often persons of modest means. It had long been the common law that (except in the case of the sale or lease by a builder of a dwelling in the course of construction) a seller (or lessor) gave no implied warranty that the dwelling had been properly constructed; or, indeed, that it was fit for habitation. But it was by no means surprising that Parliament gave a measure of consumer protection to persons to whom the right to buy was given by partially insulating them from liability to contribute towards the cost of rectifying structural defects in the property in question. The case was all the stronger in the case of a building like Great Arthur House because it could not be supposed that the purchaser of a single flat in a large block would commission a structural survey of the whole building before committing himself to acquiring a long lease.