UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2017] UKUT 0497 (LC)
UTLC Case Number: LRX/178/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – Service Charges – Insurance – leaseholder obliged to insure flat in own and landlord's joint names – whether noting landlord's interest sufficient – in event of default landlord entitled to insure and recoup cost – whether landlord required to insure in joint names – appeal allowed

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

BETWEEN:

(1) FRANCIS MARK ATHERTON
(2) SARAH KALLENDER
(3) NOEL ALLISON

Appellants

and

M B FREEHOLDS LIMITED

Respondent

Re: Flats 1, 21 and 24 Albion Court,
Albion Road,
Sutton,
Surrey SM2 5TB

Deputy Chamber President, Martin Rodger QC

Royal Courts of Justice, Strand, London WC2A 2LL
1 November 2017

Mr Atherton, in person for the appellants
Mr Jonathan Wragg, instructed by PDC Law, for the respondent

© CROWN COPYRIGHT 2017

The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36

Havens v Middleton (1853) 10 Hare 641

Introduction

1. Albion Court is a small residential estate at Albion Road, Sutton, comprising 27 flats in three blocks set in communal grounds. The flats are all let on long leases granted in the early 1960s which contain unusual provisions relating to insurance. In the circumstances which I will describe, since at least 2015 (and possibly for a year before that) the flats have been doubly insured. The individual leaseholders have complied with obligations in their leases to insure their own flats against fire and other usual risks, while the freeholder, M B Freeholds Limited ("MBF"), has arranged insurance against the same risks for the whole estate, including both the structure and common parts of the blocks themselves and of the individual flats. The issue in this appeal is whether the freeholder is entitled to recover from the leaseholders the whole of the cost it has incurred in insuring the estate.

2. By a decision made on 7 November 2016 the First-tier Tribunal (Property Chamber) ("the FTT") dismissed an application under section 27A, Landlord and Tenant Act 1985 brought by the leaseholders of nine of the flats at Albion Court in which they sought a determination that they were not obliged to contribute to the landlord's costs of insuring their individual flats. The leaseholders of three of the flats, numbers 1, 21 and 24, were refused permission to appeal by the FTT but were granted permission by the Tribunal.

3. The appellants were represented at the hearing of the appeal by Mr Atherton, the leaseholder of Flat 21. The freeholder was represented by Mr Jonathan Wragg of counsel. I am grateful to them both for their helpful submissions and the constructive way in which they each presented their case.

4. At the invitation of the leaseholders, and with the concurrence of MBF, the FTT determined the application without a hearing on the basis of the written material provided by the parties. As the Tribunal pointed out in granting permission to appeal, that is a procedure which can place the FTT in a difficult position when, as in this case, the parties do not agree on the relevant facts. The basis of the appellants' application for permission to appeal was that the FTT had misunderstood those facts and in particular had taken certain matters to be agreed when, as far as the leaseholders were concerned, they were very much in contention.

5. The Tribunal directed that the appeal would be conducted as a review of the decision of the FTT with a view to a rehearing. In the event, I was satisfied after hearing both parties' submissions on the appeal that consideration of the disputed facts would not affect the outcome of the substantive application. I therefore heard no additional evidence although both parties provided a more complete account of the facts (as they saw them) than had been available to the FTT.

6. In the course of the hearing the argument developed to the point where the parties asked for the opportunity to make further submissions in writing on the true meaning of the insurance obligations. I received additional submissions from Mr Wragg on 17 November, to which Mr Atherton responded on 29 November.

The Lease

7. The FTT was shown the lease of No. 27 Albion Court, a first and second floor maisonette in Block B. It was agreed that the leases of the other flats and maisonettes with which the FTT was concerned were in substantially the same form.

8. The lease was granted on 16 April 1963 for a term of 199 years at a rent of £26 per annum. M.J. Gleeson (Contractors) Ltd, the original landlord, is referred to throughout the document as "the Lessor" and the leaseholder is referred to as "the Lessee". The recitals define the expression "the Buildings" as meaning Blocks A, B and C together with their entrance buildings. The maisonette itself is referred to as "the demised premises" and is defined in the First Schedule of the lease as specifically including (to half its depth) the concrete floor slab between the first floor of the flat and the ceiling of the flat below, all internal and external walls of the flat, and that part of the roof of the Block which constitutes the roof of the maisonette itself.

9. By clause 3 of the lease the Lessee covenanted with the Lessor, and with the lessees of the other flats in the Buildings. The covenants included two separate obligations concerning insurance. The first was part of the general service charge obligation and provided, by clause 3(vi), that within 1 month of receiving notice of the sum due, the Lessee would pay to the Lessor:

> "A sum equal to one twenty-seventh part of (a) the amount of the premium or premiums payable in respect of any insurance or insurances effected by the Lessor on or in respect of ALBION COURT or any part thereof other than on or in respect of the said twenty-seven flats and maisonettes and (b) [the estimated cost of repairs, maintenance and other obligations undertaken by the Lessor]."

10. By clause 3(vii) the Lessee also undertook the following specific insurance obligation of their own (omitting irrelevant parts):

> "To insure and keep insured the demised premises at all times throughout the term hereby created in the joint names of the Lessor and the Lessee from loss or damage by fire and such other risks as are included in a Tariff Company's Comprehensive Policy in the full insurable value thereof with the Road Transport and General Insurance Company Limited in the Agency of the Lessor or such other Office and Agency as the Lessor shall from time to time approve and to make all payments necessary for the above purposes within 7 days after the same shall respectively become due and to produce to the Lessor or its agents on demand the Policy or Policies of insurance and the receipt for each such payment and to cause all moneys received by virtue of such insurance to be forthwith laid out in rebuilding and other wise reinstating the demised premises … under the direction of the Surveyor of the Lessor … PROVIDED ALWAYS that if the Lessee shall at any time fail to keep the demised premises insured as aforesaid the Lessor may do all things necessary to effect or maintain such insurance and any monies expended by the Lessor for that purpose shall be repayable by the Lessee on demand and be recoverable forthwith by action."

11. None of the covenants on the part of the Lessor imposed any obligation on it to insure the Buildings or their common parts including the garage blocks or the grounds of Albion Court in which they stood.

12. The arrangements concerning insurance therefore positively oblige each Lessee to insure their own flat or maisonette; because of the definition of "the demised premises" this includes substantial parts of the main structure of the Buildings (clause 3(vii)). The extent of cover (a "Tariff Company's Comprehensive Policy") and the identity of the insurer were prescribed. In a helpful note Mr Wragg explained that a Tariff Company had been one of a group of major insurance companies which, since 1790, had co-operated in setting insurance tariffs. The Fire Insurance Tariff Association was wound up in 1985 and its activities transferred to the Association of British Insurers.

13. The Lessor has no obligation to insure, and no right to recover any part of the cost of insuring the flats and maisonettes themselves, but it can recover from each of the Lessees a proportionate part of the cost of insuring the common part of the Buildings or any other part of Albion Court except the flats and maisonettes (clause 3(vi)). By virtue of the proviso to clause 3(vii) the Lessor also has an entitlement to insure the flat or maisonette of any Lessee who fails to comply with their own obligation, and may recover the cost of so doing from that defaulting Lessee.

The facts

14. Until 2014 the original Lessor, M G Gleeson (Contractors) Limited, retained its interest and employed agents to manage Albion Court on its behalf. It was common ground before the FTT that those agents had arranged insurance for certain parts of Albion Court. The details of that insurance were not in evidence before the FTT, but it was the leaseholders' case that the cover it provided was limited to the communal areas of Albion Court, leaving the individual leaseholders to insure their own flats. A division of responsibility along those lines would be consistent with the terms of the standard lease.

15. The Road Transport and General Insurance Company Ltd, the insurance company named in 3(vii) of the lease, was a subsidiary of the General Accident Fire & Life Assurance Corporation; it went into liquidation in 2006 when its parent changed its name to Aviva Insurance.

16. Clause 3(vii) allows insurance to be placed with the named insurer or in "such other Office and Agency as the Lessor shall from time to time approve". The Lessor's entitlement was therefore to approve an alternative insurer of the leaseholder's choice, rather than to nominate one of its own. It has not been suggested that either MBF or its predecessor has ever nominated an alternative insurer, but nor did any of the appellants seek approval before making their own arrangements.

17. MBF acquired its interest in Albion Court in February 2014. It first obtained insurance for the estate with effect from 27 March 2014. The insurance was with AXA and was in MBF's sole name for 12 months at a premium of £1,263.40. The property insured was described simply as Albion Court, Albion Road, Sutton and the declared value was stated in the insurance certificate to be £559,943.

18. The 2014 declared value used by MBF is said by the appellants to have been the same as had previously been declared by Gleeson and the premium was comparable to the sum Gleeson had recouped from the individual leaseholders under clause 3(vi) of the Lease in previous years.

19. The leaseholders did not object to paying the 2014 charge and did not ask the FTT to decide any issue about it. Nevertheless, there is an unresolved disagreement over the extent of the insurance procured by MBF in 2014. Mr Atherton, on behalf of the appellants, explained that it was the leaseholders' understanding (based on the sum insured and the premium) that MBF had initially continued Gleeson's former practice of insuring only the communal parts of Albion Court and its grounds and not insuring the individual flats. Mr Wragg, on instructions, informed me that the appellants' understanding was not correct, and that from the outset MBF had insured Albion Court in its entirety. It is not necessary to resolve that disagreement although I would note that there is nothing on the face of the certificate of insurance issued by AXA, or the invoice issued by the broker, to suggest that cover was limited to the communal parts of the buildings and grounds. Had there been such a significant restriction on the subject of the insurance one might have expected it to be made clear on the face of one of these documents.

20. No insurance certificate for the year commencing 27 March 2015 has been disclosed by the respondent but two broker's invoices show that cover for that year was obtained in two tranches. The first invoice, dated 26 February 2015, shows that cover was initially obtained at a premium of £1,329 on the basis of a building sum insured of £591,860, which I assume was simply the previous year's declared value adjusted by reference to some index of building costs.

21. In June 2015 MBF took advice on cost of the reinstating Albion Court in the event of its destruction. As a result of that advice additional cover was obtained for the period from 6 July 2015 to 27 March 2016 for a further premium of £4,877. A second invoice dated 8 July 2015 shows the declared value of the estate now to be £3,725,848.

22. The leaseholders do not appear to have become aware of the 2015 increase in insurance costs until a copy of the annual service charge accounts was provided to them on 18 July 2016. This indicated that there was a deficit in the service charge account because of an increase in insurance costs and that a balancing charge was therefore required. The budgeted figure for insurance in the year ending 24 March 2016 had been £1,721, whereas the total cost incurred was £6,162.

23. In October 2014 MBF's agents, RMG, had written to each leaseholder asking that they provide a copy of their current insurance policy and schedule to demonstrate that they were complying with the requirements of their leases. Before the FTT there was initially some confusion concerning the date on which these letters were sent, and it is Mr Atherton's case that he and a number of other leaseholders never received them. It is clear, however, that some at least of the leaseholders received the request because a number of them complied with it by producing copies of their insurance documents. In Mr Atherton's case there is evidence that RMG did not always communicate with him at his correct address, or using the correct postcode; while it is not necessary for me to decide the issue, I have no reason to doubt Mr Atherton when he says he did not receive a copy of RMG's request for a copy of his insurance policy.

24. At the hearing before the FTT, RMG produced a copy of another letter said to have been sent in January 2015 which advised leaseholders that "most residents" appeared not to be insuring their flats in their own name and that of the freeholder and informed them that "to protect the freeholder's interest the block buildings policy will remain in place". The appellants maintain that none of them received this letter. Nevertheless, the appellants acknowledge that none of their insurance arrangements provide for insurance in joint names. Instead, they have procured that MBF's interest is noted on the policy document. In a number of cases the reference to MBF was included as a result of an amendment made some time after the October 2014 request for evidence that clause 3(vii) was being complied with.

25. The cost of insurance in the year from March 2015 was £6,162, more than a four-fold increase on the previous year, while for the following year the cost was £8,367. These substantial increases triggered an application to the FTT by nine leaseholders on 14 August 2016 for a determination of the extent of their liability.

26. The issues which the FTT was asked to determine for the years 2015/16 and 2016/17 included the following:

(1) Whether MBF was permitted to charge only for insurance of communal areas, leaving the demised premises to be insured by the individual leaseholders.

(2) Whether MBF was entitled to recoup the additional cost of insuring individual flats from leaseholders who had complied with their obligations as well as from those who had not.

(3) Whether the contributions demanded by MBF (£228 per leaseholder in 2015 and £309 in 2016) were excessive.

The FTT's decision

27. The FTT analysed the parties' respective rights and obligations arising out of clauses 3(vi) and (vii) of the leases in four stages.

28. First, they noted that the leaseholder has an express obligation under clause 3(vii) to insure the demised premises against loss or damage by fire and other usual risks.

29. Secondly, clause 3(vii) also requires that the leaseholder's insurance policy be in the joint names of the leaseholder and the lessor, with the named insurance company or such other company as the lessor might approve.

30. Thirdly, if the lessor chose to arrange insurance it was entitled to do so and could then recoup an equal share of the premium from each of the 27 leaseholders under clause 3(vi). The FTT then said that the leaseholder "only has to pay the premium incurred by the Lessor for insuring the structure of the buildings and the common parts, but not the fabric of the demised premises themselves." Having regard to the description of the demised premises in the first schedule to the lease the distinction made by the FTT is not accurate. The demised premises include the external walls, roof and structural floor slabs of the building, to the extent that they enclose the flats or maisonettes themselves. The sample lease I have been shown is of a unit on the first and second floors, and does not indicate how the leases of ground floor flats treat the floors and foundations beneath them, but it is clear that, in principle, the Lessor's entitlement to recoup the cost of insurance under clause 3(vi) is limited to parts of the building which are not comprised in any of the demised premises, including structural parts.

31. Finally, the FTT said that if a leaseholder fails to comply with the obligation to insure the demised premises "the lessor can do so and can charge the lessee accordingly." That is a reference to the proviso to clause 3(vii), and the precise extent of the Lessor's entitlement will have to be considered in greater detail.

32. It was MBF's case at the FTT that it was entitled to insure the whole of Albion Court under the proviso to clause 3(vii) because, as the FTT recorded in paragraph 12(c) of the decision, "most of the leaseholders failed to comply adequately with the request" made in October 2014 to provide evidence that individual flats had been insured in accordance with clause 3(vii). It was also MBF's position before the FTT that it was not possible to insure only "the structure and common parts" and that three insurers whom it had approached had refused to quote for cover on that basis.

33. The FTT found little evidence that the leaseholders had complied fully with their obligations during the years in question. In particular none of them appeared to have insured in joint names with MBF, as required by clause 3(vii). On the other hand, all but one of the policies which the FTT was shown named MBF as an interested party. Additionally the FTT found that there had been no evidence that any of the insurers had been approved by the freeholder.

34. The FTT explained that the proviso to clause 3(vii) entitled MBF to recover the cost it had incurred in making good a breach of clause 3(vii) from those leaseholders

who had failed to comply with their own obligation, but not from those (if any) who had complied.

35. The FTT said that, had it been necessary to do so, it would have been unable to identify the amount by which compliant leaseholders had been overcharged. There was no evidence of the cost of insuring "only the structure and common parts" although some evidence was provided by MBF that three insurers had been unwilling to quote for cover on that basis. In suggesting that there was no evidence of the cost of insuring only the estate excluding the demised premises the FTT appears to have overlooked that it was the leaseholders' case both that Gleesons had insured only the communal parts before 2014 and that the insurance premiums had increased by a factor of almost five between 2014 and 2015 when MBF had (they believed) switched to insuring the entirety of the estate.

36. In paragraph 23 of its decision the FTT made the following important comments about the limits of the evidence it had received, on which its subsequent conclusion was based:

> "We are left then only to draw inferences from the little evidence we do have. Ultimately, the burden is on the applicants to prove their case. The only conclusion we can derive from the evidence we have is that there is only one way for the freeholder to insure the structure and common parts and that is by way of insuring the whole of Albion Court, as they have done. Since we have no evidence of a market price for insuring only the structure and common parts, we can infer that effectively the market price for insuring only those elements is the same as the premium for insuring the whole and therefore there is no difference. We make that inference because the only option for building insurance to cover situations such as in this case seems to be all or nothing, on the evidence available to us. It follows that there is no deduction to be made to the insurance premium payable by the applicant leaseholders, even if they can prove that they have complied with their obligation to insure in the leases."

37. The FTT went on to conclude that because the appellants had not proved that they had been overcharged, their applications must be dismissed. The outcome was therefore that the leaseholders would be required to pay twice for the insurance of their flats. The FTT encouraged the parties to seek to agree some more satisfactory insurance arrangements and pointed out that the deficiencies in the leases which this case highlighted did not entitle any of the parties unilaterally to adopt a different procedure.

The appeal

38. The issues in the appeal divide into two parts. The first concerns the FTT's handling of the evidence and the reasons it gave for finding that the appellants were liable to pay the full sum claimed for insurance despite having already insured their own flats. The second concerns the rights conferred on MBF by clause 3(vii) of the

lease and whether, on the undisputed facts, it was entitled to recover the cost of the insurance it placed for the whole building and not just for the common parts.

The FTT's treatment of the evidence

39. In summarising the background to the dispute the FTT made what the appellants argue were two errors. The first is said to be in paragraph 11(a) of its decision when the FTT suggested that it was not known whether the insurance arranged by Gleeson and by MBF in its first year excluded cover for the 27 flats and maisonettes themselves. The second was in paragraph 11(c) of its decision, when the FTT recorded that "neither party alleges that the insurance cover before March 2015 only related to the structure and common parts."

40. The appellants dispute both of those statements contending that it was known that the insurance placed by Gleeson excluded the individual flats themselves, and that MBF had continued that practice in 2014. The appellant also say that they had clearly stated in their application and statement of case to the FTT that a change in the insurance arrangements had been made in March 2015.

41. On behalf of the respondent Mr Wragg submitted that the appellants had had a number of opportunities to put their case to the FTT "in a digestible way" and that they had only done so when applying for permission to appeal. In any event the FTT had not had sufficient evidence to reach a conclusion on the basis of insurance cover in the time of MBF's predecessor. It had been entitled to conclude that it was for the leaseholders to show that the insurance charges were too high and that they had failed to do so.

42. In my judgment the FTT's decision did not deal sufficiently or at all with the applicants' case that there had been a change in the basis of insurance and that historically only the communal areas had been insured. The leaseholders' position had been clearly stated, and I do not accept Mr Wragg's submissions that it emerged only as part of their application for permission to appeal. Four documents supplied by the leaseholder with their application, or in response to MBF's case, demonstrate that that is not the case. First, the list of issues identified in the application itself included the question whether the lease entitled MBF "to move from the long-standing position of taking out insurance for the buildings' structure but not the individual flats." Secondly, in their letter accompanying the application and stating their case the leaseholders explained that MBF "have amended the block insurance policy which historically only provided insurance coverage for the communal areas to include all demised properties" and that this had caused the substantial increase in insurance charges. Thirdly, the same letter asserted that the insurance arrangements in the lease, by which each leaseholder insured their own flat, had been changed "despite it being workable for the past 50+ years". Finally, the insurance charges for each year from 2010 to 2017 were listed in an email from the appellants to MBF's agents which was identified as an appendix to their statement of case and as the source of detailed information on previous charges; it showed that before MBF acquired its interest those charges had never exceeded £1,134 in any year.

43. The FTT's statement in paragraph 11(a) of its decision that it was not known whether the insurance previously obtained by Gleeson excluded the 27 flats, was part of its recital of the history of insurance at Albion Court and was not a determination made following any assessment of the case presented by the leaseholders. Its statement in paragraph 11(c) that "neither party alleges that the insurance cover before March 2015 only related to the structure and common parts" was incorrect. That was precisely what the leaseholders alleged, based on their own understanding of arrangements and on the substantial change in premiums when MBF assumed responsibility and insured the whole building.

44. The FTT's conclusion that the reasonable cost of insuring the common parts and not the individual flats was the same as the cost of insuring the whole structure was counter-intuitive and predicated entirely on its acceptance of the case of MBF that it was impossible to procure such insurance. The basis of that case was evidence in the form of three short e-mails from insurers declining to quote; each email had been received within the space of a few hours on 15 February 2016, and in each case the terms of the request for cover were not disclosed. The appellants were dismissive of this evidence, but the FTT did not evaluate it or, more importantly, make any finding of fact or assessment of the evidence concerning the previous basis of insurance. That evidence was limited, but it needed to be addressed.

45. The decision is therefore open to the criticism that the FTT has reached a conclusion on an issue of fact without considering all of the evidence, or alternatively that it has failed to give sufficient reasons for its conclusion or for dismissing the contrary case which was supported by credible evidence. By one or other route I am satisfied that, without an evaluation of the leaseholders' case and findings of fact the FTT's conclusion in paragraph 23 of its decision that the only conclusion that could be drawn from the evidence was that the common parts could not be insured separately from the flats, was not one which was properly open to it.

46. Mr Wragg may be right in his submission that the balance of the evidence suggested that the increase was attributable to a revaluation, rather than to a change in the extent of the building included within the insurance. I am not in a position to say that the opposite conclusion is not equally open on the evidence, since the increase could be the result of a combination of factors; Mr Atherton's submission was that the revaluation coincided with and disguised the change in the basis of cover, and without knowledge of the basis of cover obtained by Gleesons it is not possible to rule that out. Those were matters for the FTT to grapple with and to decide. If it found itself unable to reach a conclusion on a disputed issue of fact of critical importance to the way it would eventually dispose of the application the FTT ought to have given the parties the opportunity to provide more substantial evidence at an oral hearing. The alternative would be to resort to the burden of proof (as effectively the FTT did in this case), but that is a most unsatisfactory approach where the parties are unrepresented and the application is being considered on paper.

47. The FTT's decision that the leaseholders were liable to pay the full amount claimed was based on its determination that that amount represented the reasonable

cost of insuring only the common parts, which MBF was entitled to do under clause 3(vi). For the reasons I have given that decision must be set aside.

The effect of clause 3(vii)

48. The remaining issues in the appeal concern the effect of clause 3(vii) in view of the undisputed evidence that none of the appellants insured their own flats "in the joint names of the Lessor and the Lessee."

49. As a preliminary matter Mr Atherton emphasised that he had not received the request from MBF's agent in October 2014 requiring all leaseholders to provide a copy of their current insurance policy and schedule to demonstrate that they were complying with the requirements of clause 3(vii). I have already said that I see no reason to doubt that he is right about that, but I agree with the FTT and with Mr Wragg that it does not matter whether he received the letter or not.

50. The proviso to clause 3(vii) (by which I mean the part of the clause which comes after the words "PROVIDED ALWAYS") gives MBF the right to place its own insurance and recoup the costs from the leaseholder "if the Lessee shall at any time fail to keep the demised premises insured as aforesaid." The only precondition to the Lessor's right was therefore that the leaseholder should have failed to insure in the manner required by clause 3(vii). There was no requirement that MBF should first ask the appellants for details of their insurance arrangements or give notice that it intended to exercise its right. The non-receipt of correspondence of that type could not deprive MBF of any rights it may have had as a result of non-compliance by any leaseholder.

51. The appellants all accept that the insurance they have procured for their own flats and maisonettes is not in the joint names of themselves and MBF. Nor was insurance ever placed by these appellants in joint names with Gleesons.

52. The appellants argued that by procuring that MBF's interest was noted on their insurance documents they had done enough, or at least all they could, to satisfy the requirements of clause 3(vii).

53. The material before the FTT included an email sent to Mr Atherton by Aviva, the insurance group which is the corporate descendent of the Road Transport and General Insurance Company named in the lease. The email was not formally in evidence, having been produced only in support of an application for permission to appeal, but its contents are not controversial in this appeal. Mr Atherton had asked about the practice of insurance in joint names and his contact at Aviva provided the following explanation which had been agreed with its underwriting team:

> "It is quite unusual for a freeholder to request to be named as a joint policy holder on a home buildings insurance policy in the name of a leaseholder. … Where a freeholder has made the leaseholder responsible in their agreement, we

can add the freeholder as an "interested party" on policy documentation, in the same way as a mortgage provider might be added.

If an individual or organisation is named as a joint policyholder, this gives them entitlement to make amendments or make a claim against the policy, something that would not be possible as an interested party."

54. It appears from this information that it is unusual, though it is not said to be impossible, for insurance to be placed by parties with different legal interests in their joint names. That would be consistent with the letter from the respondent's agent sent in January 2015 which advised leaseholders that "most residents" appeared not to be insuring their flats in joint names, the implication being that some residents were doing so.

55. The Aviva material also identifies an important practical difference between insurance in joint names and the arrangements made by the appellants, which merely note the interest of MBF on their policies. In particular, as a person whose interest is noted on a policy MBF would not be in a position to make a claim of its own, but would be dependent on the leaseholder to make the claim on its behalf.

56. Assuming it is possible, though unusual, to insure in joint names it is clear that the appellants have not complied with their obligation under clause 3(vii). Even if it were not possible to insure in joint names, the appellant's would still have failed to comply with their obligation. In either event the proviso to clause 3(vii) would be satisfied and MBF would be entitled to insure because the appellants had not kept the demised premises "insured as aforesaid" i.e. insured in the manner described in the early part of the clause, including in joint names.

57. It was not submitted by Mr Wragg that a failure to insure with the Road Transport and General Insurance Company would be enough to satisfy the proviso and entitled MBF to obtain its own insurance. Neither MBF nor Gleesons had suggested any alternative insurer, and in any event clause 3(vii) entitled the leaseholder to insure in any other office or agency which the Lessor might from time to time approve. MBF has been aware of the identity of the appellants' various insurers since 2014 and has raised no objection to their suitability. The right to grant or withhold approval must in principle be exercised honestly and rationally, and for the purpose for which it was conferred. MBF could not refuse to approve an insurer selected by the leaseholder on capricious grounds or with a view simply to engineering a situation in which the leaseholder could be said to be in breach of clause 3(vii).

58. I therefore conclude that, despite the appellants having obtained cover for the own flats, including the structural parts of the Buildings which enclose them, MBF was entitled to obtain insurance for the same structure at the appellants' expense, but solely because the appellants' insurance was not in joint names.

59. The respondent's case is that, having placed insurance under the proviso it was entitled to recoup the cost from the appellants and other leaseholders. Although clause 3(vii) gave it a right to recover the cost of insuring the demised premises under each individual lease, and to recover the cost from the defaulting leaseholder, in practice it had insured the whole of Albion Court under a single policy. It had divided the cost equally between all leaseholders (or at least has charged no leaseholder more than one twenty-seventh of the total cost, there being uncertainty whether all leaseholders were in default or have been charged).

60. The question which then arises, and on which the parties made additional written submissions, is whether MBF is entitled to recover the cost of the insurance it has placed under the proviso, as well as the insurance under clause 3(vi).

61. Mr Wragg explained, on instructions, that the insurance obtained by MBF was not for each flat, but was for the whole estate. The insurance was in MBF's sole name and was not in joint names with all of the leaseholders, or any of them. With those facts in mind it is necessary to consider the terms of the proviso to clause 3(vii) which, for convenience, I repeat:

> "… PROVIDED ALWAYS that if the Lessee shall at any time fail to keep the demised premises insured as aforesaid the Lessor may do all things necessary to effect or maintain such insurance and any monies expended by the Lessor for that purpose shall be repayable by the Lessee on demand and be recoverable forthwith by action."

62. The Lessor's entitlement is therefore to effect "such insurance" and to recover any money expended "for that purpose" i.e. for the purpose of effecting "such insurance." Does "such insurance" mean insurance satisfying all the requirements of the leaseholders' own obligation, including that it be in joint names, or was MBF free to insure in its own sole name when the leaseholders were in default?

63. On behalf of the respondent Mr Wragg submitted that the phrase "such insurance" could refer to a number of different elements of the description of the insurance in clause 3(vii). It could refer to the "type" of insurance mentioned in the clause (by which he meant the risks to be covered and the amount of cover); it could refer to the "manner in which the insurance was to be obtained" (i.e. in joint names); or to the identity of the insurer; or to a combination of these elements.

64. Mr Wragg reminded the Tribunal of the principles of construction summarised by Lord Neuberger PSC in *Arnold v Britton* [2015] UKSC 36 at paragraph [15]. The Tribunal's task is 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. It must do so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease,

(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

65. The most natural meaning of the words "such insurance", Mr Wragg submitted, was that they were a reference to the "type" of insurance set out in the first part of the clause i.e. to the requirement that insurance should be in the full insurable value of the demised premises against loss or damage by fire and other risks included in a comprehensive policy of insurance. This was said to be consistent with a standard dictionary definition of insurance as "an arrangement by which a company or the state undertakes to provide a guarantee of compensation for specified loss, damage, illness, or death in return for payment of a specified premium." To read into the words "such insurance" a requirement that the insurance was to be in joint names would necessitate an extension of that natural meaning of the word. If the parties had wanted to specify the manner in which the insurance was to be obtained, Mr Wragg suggested that the clause would have included some appropriate reference such as "the Lessor may do all things necessary to effect or maintain such insurance and in such manner."

66. I do not accept Mr Wragg's submission on the natural meaning of "such insurance" in clause 3(vii). The question is not what "insurance" means (and Mr Wragg's definition is unobjectionable) but what "such" insurance means in this clause. To my mind it is clearly a reference to insurance satisfying the description or specification given earlier in the clause, by which I mean satisfying the whole of that description, unless there is something to limit the reference to only part of the subject previously described. That is apparent from the structure of the proviso: if the lessee fails to insure "as aforesaid" the Lessor may effect "such insurance" i.e. such insurance as the lessee was obliged to obtain as previously described ("aforesaid"). Mr Wragg's division of the clause into different components and selection of "type" as the only one which is required to be replicated is artificial and unconvincing and, in my judgment, the natural meaning of the words is obvious and contrary to his submission.

67. The expression "such insurance" is also used earlier in the clause (referring to "all moneys received by virtue of such insurance") but its use in that context does not seem to me to cast any helpful light on the parties' intention.

68. Consideration of the overall purpose of the clause also lends support to what I take to be the natural, or more obvious, meaning of the expression. The object of the primary obligation is comprehensive insurance of each flat in joint names at the expense of the individual lessee. The proviso is a safety net, which enables the Lessor to step in where the lessee fails to comply with that obligation. It is reasonable to expect that the Lessor's default power would be intended to secure the same object, rather than to change the basis of insurance or the benefit which each of the parties was to enjoy. It is true that the lessee has the primary obligation, and might expect to sustain some disadvantage as a result of default; but, by defaulting, the lessee loses the opportunity to choose while remaining liable for the cost of the insurance obtained

by the Lessor. It is not apparent that any additional loss of the substantive benefits of the insurance was intended, and the language is consistent with the object remaining the same whichever party obtains the insurance.

69. It might also be said that if, as Mr Wragg argues and I am prepared to accept, a failure to insure in joint names is a sufficient breach of clause 3(vii) to trigger the Lessor's right to insure at the Lessee's expense, the parties must have regarded insurance in joint names, and not in either of their sole names, as being a principle of some importance. Had they intended a change in that principle they would have been expected to make that change clear.

70. Mr Wragg also suggested that problems would arise if "such insurance" was taken to describe the identity of the insurer since this would, as he put it, strain the meaning of "insurance" and render the alternative, "or such other Office and Agency as the Lessor shall from time to time approve" unnecessary and meaningless.

71. I cannot see what the suggested problems would be. If the Lessor selected an insurance company other than the named insurer the selected insurer would obviously be one it had approved. The Lessor's power of approval is required when the insurer is one selected by the Lessee, but the existence of a default option for the Lessor to insure does not make that power meaningless.

72. There were also, Mr Wragg submitted, solid business reasons for a Lessor, faced with a Lessee (or Lessees) in breach of their covenant, to insure in the Lessor's sole name. He suggested a number of such reasons.

73. First, as the email from Aviva to Mr Atherton showed, insurance in joint names would give both parties various rights including the right for Lessees (as joint policy holders) to amend the insurance or even, Mr Wragg submitted, to cancel it altogether. That power would undo precisely what the clause sought to achieve.

74. Secondly, if, as here, the insurance policy covered a number of flats it is difficult to envisage that it was intended that all the Leaseholders would be joint policy holders with each other as well as with the Lessor.

75. Thirdly, the power of the Lessor to effect insurance was a reserve power to be exercised when the Lessees had failed in their obligations. The purpose of the power was to benefit the Lessor and not to benefit the Lessees.

76. I find none of these suggested business reasons persuasive. The scheme of the clause envisaged that each individual Lessee would insure their own flat, including the structural parts surrounding it, and that in the event of a total loss of the building each Lessee would make their own claim and lay out the proceeds of that claim in rebuilding their own demised premises under the direction of the Lessor's surveyor.

The practicality of that scheme may be questioned, but it is what clause 3(vii) provides for.

77. Any difficulties which the normal operation of the scheme gives rise to cannot justify giving a contrived meaning to the default provision simply to avoid the same difficulties. Thus, if it is a feature of insurance in joint names that the policy may be cancelled unilaterally by one of the joint insured (which was Mr Wragg's submission, although there is nothing in the Aviva email to support it) then that was a risk the Lessor had been prepared to take by requiring the Lessee to insure in joint names. Similarly the right of one joint assured to amend the policy will be subject to the detailed terms of the policy, but if the default power is being exercised those detailed terms will be for the Lessor to negotiate and it can be in no worse position than in the normal case where the Lessee insures.

78. The default power arises only if one or more Lessees fails to insure as required. In that eventuality the Lessor may insure the individual demised premises, and step into the shoes of the defaulting lessee in making any claim, and laying out the proceeds. It is true that in this case MBF has obtained cover for the whole of Albion Court under a single policy, but that is not what clause 3(vii) envisages. The impracticality of having numerous joint policy holders is of MBF's making. Any impracticality of having insurance of a single flat in joint names (none is suggested) is a necessary consequence of the principal obligation under clause 3(vii).

79. I agree that the purpose of the power was substantially to benefit the Lessor (and, I would add, other lessees), by allowing it to guarantee that there would be insurance and to enable it to recoup the cost in the event of default. But I do not see that that is any reason to regard a joint-names condition as being any less commercial or more improbable in the default situation than when the scheme operated as intended.

80. For those reasons I do not accept Mr Wragg's submission that "such insurance" as the Lessor may effect under the proviso to clause 3(vii) is different in any respect from the insurance which the Lessee is obliged to obtain. MBF was therefore entitled to recover the cost of insuring each individual flat in the joint names of itself and the leaseholder.

81. The next question is whether, having procured insurance which does not correspond to the description in clause 3(vii) MBF is nevertheless entitled to recoup the cost from the appellants. The effect of the proviso is that the Lessor's entitlement to recoup the cost of insurance is subject to the condition that the insurance be in accordance with the agreed specification. It is a question of construction of the clause whether any departure from that specification was intended to be fatal to the right of recoupment. If, as Mr Wragg argues, the specification was sufficiently important so that any departure from it by the Lessee, such as by failing to insure in joint names, would be sufficient to trigger the proviso, it must follow in my judgment that full

compliance with the specification is an indispensable condition of the Lessor's right of recoupment.

82. Mr Wragg referred to an old case, *Havens v Middleton* (1853) 10 Hare 641, which is authority for the proposition that a leaseholder's obligation to insure in joint names is not breached so as to give rise to a risk of forfeiture if the leaseholder insures in the name of the landlord alone. Mr Wragg suggested that the effect of the proviso was to transfer the obligation to insure to the Lessor, who was entitled to satisfy it by insuring in its own sole name.

83. That argument is flawed in two respects. First, the proviso does not impose an obligation on the Lessor at all; it gives it a right to recover the cost of insurance which it may choose to obtain or not. On normal principles where one party has a right which is conditional on the occurrence of an event (such as the making of a payment), the condition must be fully satisfied before the entitlement accrues.

84. Secondly, the case on which Mr Wragg relies is an example of the principle that a party may waive the benefit of a contractual entitlement which is intended exclusively for its own benefit. The tenant was taken to have waived the right to have the premises insured in its name, jointly with the landlord. That principle does not apply where the entitlement confers a benefit on both parties. In this case the Lessor's entitlement to insure at the Lessee's expense confers a benefit on both parties, in that the premises in which they both have an interest become insured in their joint names, which is an advantage to them both.

85. Finally, Mr Wragg submitted that the right of the Lessor to insure was discretionary and not mandatory. I agree. If the Lessor chose not to take out insurance in accordance with the clause, it could nevertheless rely on its contractual remedies in the event of a breach by the lessee of its obligation. Again I agree. The appellants had been in breach of covenant and, Mr Wragg submitted, MBF had mitigated its loss by taking out insurance on its own behalf, and was entitled to recover the cost of the premiums.

86. Mr Wragg may or may not be correct that MBF has a claim for damages equal to the cost it incurred in obtaining insurance. In considering the remedy available it must not be forgotten that in this case the building was already fully insured. Whether MBF could recover, as damages, the cost of duplicating that insurance would depend on whether it was reasonable for it to have insured again in order to mitigate the possible loss it might suffer as a result of insurance not being in joint names.

87. In any event, the only claim which was before the FTT was the contractual claim to recoup the cost of insurance under the proviso in clause 3(vii). There was no claim for damages, nor would such a claim have been within the jurisdiction of the FTT. There would therefor be no point in remitting the matter to the FTT to enable it to determine that issue, as Mr Wragg invited me to do.

Disposal

88. For these reasons I am satisfied that the appeal must be allowed. MBF was not entitled to recover the full amount of the sum claimed for insuring the whole building in its sole name. Its only entitlement was under clause 3(vi) to recover, through the service charge, the cost incurred in insuring the common parts.

89. The FTT thought it was for the appellants to prove that there was a difference between the cost of insuring the whole complex and the cost of insuring only the common parts, but I do not see why that should be the case. It was for MBF to show what cost it had incurred. The evidence it adduced (in the form of the three emails responding to its undisclosed request) was not sufficient to establish that insurance of the common parts alone was impossible to arrange, as on the evidence of the appellants there was a presumption that Gleesons had been doing so for the previous fifty years. In those circumstances the most that can be said to have been established as the reasonable cost of insuring the common parts is the budgeted sum for 2014 to 2015, which was based on the previous year's cost and was £1,230. Each appellant is obliged to contribute one twenty seventh part of that total, being £45.55.

90. I therefore allow the appeal and set aside the FTT's decision. The sum which each of the appellants is obliged to contribute towards the respondent's costs of insurance is £45.55 for 2015. For 2016 I assess the appropriate sum as £47.82, and for 2017, £50.21.

91. Finally, Mr Atherton asked the Tribunal to make an order under section 20C, Landlord and Tenant Act 1985, restricting the respondent's entitlement to add the costs of the proceedings to the service charges payable by the appellants. Mr Wragg submitted that such an order should not be made, since the point on which the appellants had succeeded was not one which arose out of their own submissions but out of an issue raised by the Tribunal. I take that into account, but I do not consider it to be a sufficient reason to justify refusing the appellants protection against liability for the respondent's costs of proceedings in which they have succeeded. The appropriate order is that no part of the costs of the proceedings before the FTT or in this Tribunal which might otherwise be payable by the appellants shall be included in any service charge payable by them. As no other leaseholder sought permission to appeal the FTT's refusal of an order under section 20C, and none has sought an order in respect of the appeal to the Tribunal, the order I make applies only to the appellants.

Martin Rodger QC
Deputy Chamber President

20 December 2017