

A Because of the defendant's behaviour in the past, and in particular that he has deliberately shut his eyes to what he knew or ought to have known was taking place on the premises and made no attempt to keep an eye on them when he was living no more than a mile away or to heed the warnings from the plaintiffs save when they were backed up by the service of section 146 notices, I am of the opinion that it would be quite wrong to grant relief from forfeiture in this case.

In my judgment the learned judge was entitled to have regard to the conduct of the tenant which led to the service of the section 146 notices on the first occasion and the breaches of covenant which were for the purposes of forfeiture only waived thereafter when coming to the overall decision as to whether or not to grant relief. This is an area in which the learned judge exercised his discretion and in my judgment rightly did so. Nothing has been established to show that in exercising his discretion the learned judge either omitted relevant matters which he should have considered or took into account irrelevant matters which he should not have, or was plainly wrong. The grounds of appeal relating, therefore, to the failure of the learned judge to grant relief in my judgment must also fail.

For these reasons I would dismiss this appeal.

OLIVER LJ agreed and did not add anything.

The appeal was dismissed with costs.

condition precedent to the landlords' liability to provide hot water and central heating was invalid — Authorities on conditions precedent and on dependent and independent covenants considered — Tenant's appeal allowed

This was an appeal by R S Batten, a sublessee of a flat in Chiswick Village, from a decision of Judge Birks at Brentford County Court, in an action by the appellant's landlords, headlessees of the Chiswick complex of flats, Yorkbrook Investments Ltd, the present respondents.

Derek Wood QC and E A Bano (instructed by Alan Edwards & Co) appeared on behalf of the appellant; A B Hidden and P W Birts (instructed by Penningtons, of Doncaster) represented the respondents.

Giving the judgment of the court at the invitation of O'Connor LJ, WOOD J said: This is an appeal from the order of His Honour Judge Birks sitting at Brentford County Court made on December 19 1983 as amended on January 13 1984. There is no cross-appeal. In 1971 the respondents to the appeal, the plaintiffs in the court below (whom we shall so term), acquired the headlease of a complex of some 280 flats known as Chiswick Village. Many, if not most, of the tenants were protected tenants. The headlease — a building lease — had been granted initially in March 1936. The appellant (to whom we shall refer as the defendant) acquired a sublease from the plaintiffs dated June 16 1976 by the payment of a premium of £9,995. His accommodation consists of two bedrooms, a sitting-room, a bathroom and kitchen. There is a radiator in the sitting-room and in one bedroom. There were also fireplaces which were bricked up. Under the terms of the underlease the plaintiffs provided services for which the tenants made repayment. The defendant, among other tenants, became dissatisfied with the services provided, as to both their standard and their cost. As a result, from about June 1977 he failed to pay for such services and became seriously in arrears with both his rent and his maintenance contributions.

The flats in Chiswick Village are arranged in four blocks, with a number of staircases in each block, and set around a central garden space. Behind one of the blocks there is a boiler-house which provides hot water and heating to the whole estate.

At some time after acquiring the headlease the plaintiffs started selling underleases of 99 years at a premium. The form of each lease, if not identical with that of the defendant, was probably very nearly identical. Whereas provisions were contained in these leases for payment by the tenants of maintenance contributions, the protected tenants were entitled to similar services for which the landlord was responsible and for which he had to pay out of the rents received. These rents were fixed by the rent officer or a tribunal. At the relevant time there still lived in Chiswick Village a substantial number of protected tenants — we were told it was something like half, although decreasing — and it follows, therefore, that any substantial expenditure, whether of a capital nature or otherwise, on maintenance and provisions of services would have to be met in large part by the plaintiffs out of rents. It was therefore to their advantage to sell as many new leases as possible and in the interim to delay expenditure on capital outlay and expensive maintenance and repair projects for as long as possible, thereby receiving substantial premiums — in 1983 about £30,000 per lease — and transferring the burden for the future.

The particulars of claim are dated February 4 1981 and the plaintiffs sue, first for £1,257.16 arrears of rent and maintenance contribution; second, for possession; and, third, for mesne profits. At the trial the defendant appeared in person. The hearing took some 11 days. By the date of the trial the sum claimed had been reduced to £328.53.

By way of defence the defendant first argued that the calculation of the £328.53 was inaccurate in that there should have been a deduction of a sum of £33.21 awarded to him by His Honour Judge Barr in a judgment dated March 21 1983. Happily this matter has been resolved and the plaintiffs will be paying this to the defendant by cheque, so that no further consideration need be given to this matter. Second, the defendant alleged that the plaintiffs had failed to invest sums of money held as reserves against maintenance expenditure and that therefore the sum claimed should be reduced. In this connection the learned judge found in favour of the defendant and deducted the sum of £10.33. There is no appeal on this issue. Third, the defendant claimed that the charges in respect of maintenance of the gardens were excessive and the standard of work was unreasonable. In this

C Court of Appeal

July 26 1985

(Before Lord Justice O'CONNOR and Mr Justice WOOD)

YORKBROOK INVESTMENTS LTD v BATTEN

Estates Gazette November 2 1985

276 EG 545-552

Landlord and tenant — Appeal from county court judge's decision — Landlord's action for possession, payment of arrears of rent and service charge ("maintenance contribution") and mesne profits — Tenant's counterclaim

for damages for breaches of covenant by landlords — Landlords were headlessees of a complex of 280 flats known as Chiswick Village — Some flats were occupied by protected tenants and others, including the appellant's flat, by sublessees who had purchased subleases for 99 years at a premium — Appellant, among other occupiers, had become dissatisfied with the cost and standard of the services provided and he had fallen into arrear both with his rent and maintenance contribution — County court judge upheld the landlords' claim with a slight modification of the amount and also accepted the tenant's counterclaim in part — The result was judgment for the landlords for a small balance and an order for possession with relief on the payment of the balance in question — The judge placed a limitation on the period covered by the tenant's counterclaims in respect of the landlords' failure to paint window frames and in respect of loss of amenity due to failure to repair and decorate the outside of the whole premises — The judge also rejected entirely the tenant's counterclaim based on failure to supply hot water and provide adequate central heating — Held by the Court of Appeal that the judge's limitation of the claims in respect of windows and amenities was founded on an incorrect

construction of the relevant covenants as indemnities instead of independent obligations and that his reasons for rejection of the counterclaim in respect of hot water and central heating were also unsound — Although the appellant had purchased the lease of his flat together with the pipes and radiators, he had not purchased the heating system as such — The landlords were obliged to renew or replace antiquated or unserviceable equipment to fulfil their covenant to provide "a good sufficient and constant supply of hot water and an adequate supply of heating in the hot-water radiators" — A further submission, accepted by the judge, that the prompt payment by the appellant of his maintenance contribution was a

condition precedent to the landlords' liability to provide hot water and central heating was invalid — Authorities on conditions precedent and on dependent and independent covenants considered — Tenant's appeal allowed

A connection the learned judge held that the amounts involved were *de minimis* and refused to make any deduction. The defendant made a number of other complaints about the standard or cost of services, but the learned judge did not accept them and there is no appeal on these matters.

The defendant also pleaded a set-off and counterclaim under three heads: first, he claimed damages for failure to carry out the repairing covenant to paint the windows externally; second, he claimed damages for loss of amenity through the failure of the plaintiffs to comply with their repairing covenant in Chiswick Village; and, third, he complained that there had been breach of the covenant by the plaintiffs to provide constant hot water and adequate central heating.

B Reducing the claim by £10.33, the learned judge gave judgment for £318.20 with interest. On the set-off and counterclaim he found that the defendant had started to reduce his arrears from March 25 1981 and found in his favour on the issue of painting the windows and the loss of amenity, but limited the period to two and a half years from March 1981. The damages he awarded were £10 a year in respect of the failure to paint the windows, and £100 a year for the loss of amenity through the breach of the plaintiffs' covenant to repair. The learned judge found against the defendant on the issue of the covenant for constant hot water and central heating for reasons which will have to be examined later, and therefore he calculated the damages on the counterclaim at £275. This was set off against the claim, and the ultimate judgment was the sum of £43.20 to be paid into court within 28 days. He made an order for possession but granted relief upon payment of that sum. Thereafter he dealt with costs. The defendant in his appeal criticises the decision of the learned judge in rejecting any reduction in the sum claimed due to the state of the garden and appeals also on each of the heads in the set-off and counterclaim. Before dealing with those issues in detail it is necessary to look at the headlease and underlease.

The terms of the headlease are relevant because the plaintiffs covenanted to observe and perform the lessee's covenants contained in that lease. The headlease was for a term of 999 years from March 25 1935, and I refer specifically to clause 2, subclauses (4) and (6):

D 2. THE LESSEE hereby covenants with the Lessors in manner following namely:-

(4) At all times during the said term well and substantially to repair maintain pave cleanse and amend in every respect and keep repaired maintained paved cleansed and amended in every respect the hereby demised premises with the buildings erected and to be erected thereon and other appurtenances whatsoever and when requisite rebuild all walls party walls buildings erections party fence walls fences and party fences and the said demised premises being in all things repaired maintained paved cleansed amended and kept as aforesaid at the end or other sooner determination of the said term hereby granted quietly to yield up unto the Lessors.

E (6) In the fourth year of the term hereby granted computed from the date of these presents and in every subsequent fourth year of the said term to paint all the outside wood and iron work and other outside parts previously or which ought to be painted (including all external fences) of the said demised premises with two coats of proper oil colours in a workmanlike manner and in the seventh year of the said term so computed and in every subsequent seventh year of the said term to paint in like manner and paper distemper grain and varnish all the inside wood and ironwork and other inside parts of the said demised premises previously painted papered distempered grained and varnished.

Clause 4 contains the covenant by the lessors:

F 4. THE Lessors hereby covenant with the Lessee that the Lessee paying the said yearly rent hereby reserved and observing and performing the Lessee's covenants and agreements hereinbefore contained shall and may peaceably hold and enjoy all and singular the hereby demised premises during the term hereby granted without any interruption by the Lessors or any person or persons lawfully claiming through or under the Lessors.

In order to comply with the covenant in clause 2(6) the plaintiffs would have to paint and decorate the exterior in the years ending March 25 1976 and 1980 and the interior in the years ending March 25 1971, 1978 and 1985.

The defendant's lease is for a term of 99 years from June 16 1976. It is necessary to look at this document in rather greater detail. Clause 1 is a definition clause and I need only refer to the following:

(F) THE expression "the Lessors' Property" shall mean the said property described in Recital (1) hereof and the expression "the Building" shall mean the main and ancillary buildings standing on the Lessors' Property.

(G) THE expression "Retained Property" shall include all such parts of the Lessors' Property not by this or any other Lease or tenancy demised or let.

(H) THE expression "the Demised Premises" shall mean those parts of the Lessors' Property which are described in the First Schedule hereto and are hereby demised.

(J) "THE Surveyor" shall mean the Surveyor or Estate Agent employed pursuant to paragraph (2) of Part II of the Fourth Schedule hereto.

(L) THE expression "Maintenance Year" means every twelve-monthly period ending on the twenty fifth day of March the whole or part of which falls within the period beginning on the Commencement Date and ending on the date of expiry of the term granted by this Lease.

(M) THE expression "Maintenance Contribution" means a sum equal to [such percentage proportion] . . . of the aggregate annual maintenance provision for the whole of the Building (computed in accordance with the provisions of Part I of the Fourth Schedule hereto) [as the rateable value of the Demised Premises bears to the aggregate of the rateable values of all the flats in the Building].

The "Lessors' property" was "Chiswick Village, Chiswick", and the "demised premises" were the defendant's flat.

Clause 2 provides for a progressive rent by reference to Schedule 6, which for the first 25 years is the annual sum of £40. Clause 3 contains the lessee's covenants and starts by a covenant "To pay the rent reserved at the times and in manner aforesaid". It also contains some 25 other covenants. Clause 4 reads as follows:

Covenant to pay Maintenance Contribution

4. THE LESSEE HEREBY FURTHER COVENANTS with the Lessor that the Lessee will in respect of every Maintenance Year pay the Maintenance Contribution to the Lessor by four equal instalments on the quarter day immediately preceding the Maintenance Year and on the three subsequent quarter days in the Maintenance Year Together with the rent hereinbefore reserved and so that in case of default the same shall be recoverable from the Lessee as rent in arrear Provided that in respect of the first Maintenance Year the Maintenance Contribution (subject to any adjustment as provided in paragraph 3 of Part I of the Fourth Schedule) shall be ONE HUNDRED & SEVEN POUNDS and the Lessee shall on the execution hereof pay a due proportion thereof in respect of the period from the Commencement Date to the Quarter Day next following.

Clause 5 contains the covenants by the lessors for quiet enjoyment and, so far as relevant to the issues now before this court, a covenant in clause 5(D) as follows:

5. THE LESSOR HEREBY COVENANTS with the Lessee as follows:-

(D) THAT the Lessor will during the said term pay the rent reserved by the Head Lease and will observe and perform the covenants on the part of the Lessee therein contained save in so far as the same are herein comprised and on the part of the Lessee to be observed and performed.

Clause 6 is very important; so far as relevant, it reads as follows:

6. THE LESSOR HEREBY FURTHER COVENANTS with the Lessee that subject to the Lessee paying the Maintenance Contribution pursuant to the obligations under Clause 4 hereof the Lessor will:-

(i) as often as may in the opinion of the Surveyor be necessary [or as may be properly required under the provisions of the Head Lease] wash and paint in suitable colours and in a workmanlike manner or otherwise treat in an appropriate manner all the outside wood iron cement and stucco work of the Building usually painted or treated as the case may be and to clean and brush down all the outside stonework of the Building (if any) AND ALSO at all times during the said term to keep the walls ceilings and floors of the Retained Property (but excluding those of any flat for the time being not demised by a lease in similar terms to this Lease as envisaged in Clause 5(C) hereof) and the whole of the structure roof balconies foundations and main drains of the Building and the walls rails fences and gates appurtenant thereto in good repair and condition.

Subclause (ii) relates to payment of rates; subclause (iii) to insurance against fire and other risks.

Subclauses (iv) and (v) read as follows:

(iv) unless prevented by mechanical breakdown or failure of fuel supply or other cause beyond the control of the Lessor to provide and maintain a good sufficient and constant supply of hot and cold water to the Building throughout the term hereby granted and also an adequate supply of heating in the hot water radiators (if any) in the cold season between the dates to be determined by the Surveyor and to remedy any mechanical breakdown in the hot water and central heating systems.

(v) to keep the lifts in the Building in good repair and working order unless prevented by mechanical failure of the lifts or their ancillary services or an interruption in the supply of power thereto or any cause or event beyond the control of the Lessor and to remedy any mechanical failure therein.

Clause 7 is the usual provision for re-entry and contains these words:

PROVIDED ALWAYS and these presents are upon this express condition that if the said rent hereby reserved or the Maintenance Contribution or any part thereof respectively shall at any time be in arrear and unpaid for Twenty-one days after the same shall have become due (whether formally demanded or not) . . . it shall be lawful for the Lessor . . . to re-enter . . .

A The Fourth Schedule deals with the computation of the annual maintenance provisions. The relevant parts read as follows:

PART I

Computation of annual maintenance provision

1. The annual maintenance provision in respect of any Maintenance Year (hereinafter called "the Annual Maintenance Provision") other than the Maintenance Year ending the 25th day of March 1977 shall be computed not later than the beginning of June immediately following the commencement of the Maintenance Year and shall be computed in accordance with paragraph 2 hereof.

2. The annual Maintenance Provision shall consist of a sum comprising:-
(i) the expenditure estimated as likely to be incurred in the Maintenance Year by the Lessor for any of the purposes mentioned in Part II of this Schedule together with

B (ii) an appropriate amount as a reserve for or towards those of the matters mentioned in Clause 6 aforesaid as are likely to give rise to expenditure after such Maintenance Year being matters which are likely to arise either only once during the then unexpired term of this Lease or at intervals of more than one year during such unexpired term including (without prejudice to the generality of the foregoing) such matters as the painting of the common parts and the exterior of the Building the repair of the structure thereof the repair of drains and the overhaul renewal and modernisation of any plant or machinery (the said amount to be computed in such manner as to ensure as far as is reasonably foreseeable that the Maintenance Provision shall not unduly fluctuate from year to year).

3. As soon as is practicable after the end of each Maintenance Year the Surveyor shall determine the amount if any by which the estimate under paragraph 2(i) above shall have exceeded or fallen short of the actual expenditure in the Maintenance Year and shall notify the Lessee of the amount of such excess or deficiency and the Lessee shall be allowed or shall pay as the case may be the percentage proportion appropriate to the Demised Premises of the excess or the deficiency.

4. ...

5. ...

6. ...

PART II

Expenses incurred by Lessor to be reimbursed by the Maintenance Contribution

1. The Performance by the Lessor of its obligations in Clause 6 of this Lease.

D The remaining seven paragraphs of Part II deal with the provision of a surveyor or estate agent to manage the lessors' property; the cleaning and general cultivation and maintenance of the gardens, grounds, footpaths and roads; the insurance against liability of the lessors to third parties; the employment of full-time or part-time staff and the repairing, maintaining and decorating of any staff flats, the cleaning of the entrance hall, staircases and other common parts, and, in particular, a very wide discretion in paragraph 5, which reads:

5. Employment of full-time or part-time staff (whether resident or not) and paying all outgoings taxes and other expenses incurred in relation thereto and providing and supplying such other services for the benefit of the Lessee and the other tenants of flats in the Building and carrying out such other repairs and such improvement works and additions and defraying such other costs (including the modernisation or replacement of plant and machinery) as the Lessor shall in its discretion consider necessary to maintain the Building as a block of residential flats or otherwise desirable in the general interests of the tenants.

Having given the background, let us turn to each of the issues. The plaintiffs were seeking to recover a sum which included rent and maintenance contribution. Maintenance contribution is a service charge within the meaning of the relevant legislation. By statute they are entitled to receive only such sums as are reasonable for services of a reasonable standard. Prior to October 3 1980 the statutory provisions are contained in sections 90 and 91 of the Housing Finance Act 1972 and section 91A, as inserted by amendment by section 124 of the Housing Act 1974. The relevant parts of section 91A, subsection (1) read as follows:

F 91A.—(1) A service charge shall only be recoverable from the tenant of a flat —
(a) in respect of the provision of chargeable items to a reasonable standard; and

(b) to the extent that the liability incurred or amount defrayed by the landlord in respect of the provision of such items is reasonable;

...

Since October 1980 the provisions of Schedule 19 to the Housing Act 1980 have, by section 136 of that Act, been substituted for those of the 1972 and 1974 Acts. Although not identical, they are to similar effect. It was not argued that different tests should be applied.

In the court below, the learned judge had the assistance of substantial written submissions from each side. The defendant conducted his case in person and it would therefore be wrong to dissect or criticise the presentation and evidence in oppressive detail.

G The criticism which he was making of the expenditure upon the gardens stretched over the years from June 1976 to the date of the hearing in September 1983 — seven-and-a-quarter years. The evidence of a Mrs Major — a former tenant — related particularly to maintenance years ended March 25 1979 to 1983, but that of Mr Bunning and Mr Hobson could be understood to relate back at least to the summer of 1976. There was no cross-examination of these witnesses on their evidence on this issue. Mr Stephenson, who had lived in Chiswick Village since 1971, also spoke in general terms about the deplorable state of the gardens. Photographs were produced taken during the first half of 1980, and in September 1983 the learned judge himself inspected the property.

H The plaintiffs called the contractor responsible for the gardens, but the learned judge reviewed the evidence and said that he was satisfied that the defendant's criticisms were justified. Although the evidence and his inspection showed that the state of the gardens at the date of the hearing was still unsatisfactory, he limited the deduction to be made from the sums in the claim to a period of two years prior to the date of the defence and counterclaim — March 25 1981. The claim itself was calculated to the date of the hearing and we can find no reason for not taking the same date for items claimed to be deductible in the defence — moreover, the evidence related to all seven-and-a-quarter years.

J The total expenditure over that period is agreed to be £17,124 on this item, and the defendant's contribution was £60. The learned judge found that the services provided did not reach a reasonable standard and decided that the sum claimed should be reduced by one-seventh. It is argued by Mr Derek Wood for the defendant that the whole item should be disallowed. He relies upon the wording of section 91A, subsection (1), which I have set out above. In our judgment, those words do not require quite so Draconian an approach. It is possible to imagine situations where the item was a very large one and where the standard was unreasonable only in some aspect. Thus, although having seen the photographs we might have made a more substantial deduction, we are not prepared to disagree with the view formed by the learned judge.

K Thus, subject to the question of *de minimis*, we would allow a deduction from the claim of £8.57. In cases such as this tenants are looking to the court for decisions on matters which, although small in quantum, may be of considerable moment to the parties concerned. In our judgment, it must only be in very exceptional circumstances that the *de minimis* principle should be applied. We would not apply it here.

L During argument on the issue of garden maintenance, it was indicated that registrars of county courts and those practising in this field were finding difficulty in dealing with the burden of proof when considering applications for declarations under the Housing Acts. Having examined those statutory provisions, we can find no reason for suggesting that there is any presumption for or against a finding of reasonableness of standard or of costs. The court will reach its conclusion on the whole of the evidence. If the normal rules of pleadings are met, there should be no difficulty. The landlord in making his claims for maintenance contributions will no doubt succeed, unless a defence is served saying that the standard or the costs are unreasonable. The tenant in such a pleading will need to specify the item complained of and the general nature — but not the evidence — of his case. No doubt discovery will need to be ordered at an early stage, but there should be no problem in each side knowing the case it has to meet, provided that the court maintains a firm hold over its procedures. If the tenant gives evidence establishing a *prima facie* case, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions. The question of a reasonable charge arises in claims for a quantum meruit, and the courts over the years have not been hampered by problems about the burden of proof.

M The first issue on the counterclaim was that for damages for breach of the plaintiffs' covenant to paint the window frames externally. This claim was made under clause 5(D) of the lease — breach by the plaintiffs of their obligation to comply with the repairing covenants in the headlease: alternatively under clause 6, which contained a separate covenant. The learned judge found that there was a breach of clause 5(D) and that the damage was to be assessed at the rate of £10 per annum; no complaint is made of these findings. However, the learned judge decided that clause 5(D) constituted an indemnity and not a covenant of independent obligation, and therefore that, until the head landlord served a section 146 notice and sued, the defendant

A could not recover from the plaintiffs for this breach. He therefore proceeded to hold that such damages as were recoverable came under clause 6 and limited those damages to a period of two-and-a-half years, on the basis that it was only from March 1981 that the defendant had started to pay off the arrears of rent and maintenance contributions.

It was conceded on the appeal that clause 5(D) was a covenant of independent obligation on the authority of *Ayling v Wade* [1961] 2 QB 228, 233. The learned judge at the trial was not referred to this authority. It follows from this that there was no reason to restrict the defendant's damages to a period of two-and-a-half years, which would be applicable only upon a certain reading of clause 6, and thus the damages due to the defendant on this head of the counterclaim are £72.50.

B Upon the second head of counterclaim the learned judge found that the plaintiffs were in breach of the covenant in the headlease to decorate and repair the entrance hall staircase and outside of the whole premises and awarded the defendant damages calculated at £100 per annum. The evidence indicated that there had been no maintenance under this covenant since about 1972. The approach taken by the learned judge on this claim was similar to that on the preceding claim, and he therefore limited the period of damages to two-and-a-half years. For the same reasons as given above, in our judgment this period must be extended to one of seven-and-a-quarter years. However, the defendant argues that the learned judge was wrong in limiting the loss of amenity only to the block and staircase in which he lived. The repairing obligation of the plaintiffs extended to the whole of Chiswick Village, and in our judgment the appellant's contention is valid, but the sum of £100 per annum is an entirely appropriate figure for assessing damages. Thus the claim under this head must be increased to £725.

C The final head of counterclaim relates to the supply of hot water and the provision of adequate heating. Let us repeat the relevant words of clause 6, as a major part of the hearing was taken up on this issue:

6. THE LESSOR HEREBY FURTHER COVENANTS with the Lessee that subject to the Lessee paying the Maintenance Contribution pursuant to the obligations under Clause 4 hereof the Lessor will:-

D ...
(iv) unless prevented by mechanical breakdown or failure of fuel supply or other cause beyond the control of the Lessor to provide and maintain a good sufficient and constant supply of hot and cold water to the Building throughout the term hereby granted and also an adequate supply of heating in the hot water radiators (if any) in the cold season between the dates to be determined by the Surveyor and to remedy any mechanical breakdown in the hot water and central heating systems.

A number of questions arise as follows:

(a) At what temperature and over what period must hot water be supplied?

"What is meant by "An adequate supply of heating in the hot water radiators?"

E (c) If at any time there was a failure to provide such hot water or adequate heating, was this prevented "by mechanical breakdown or failure of fuel supply or other cause beyond the control of the lessors"?

(d) If this defence is not available, then do the words "subject to the lessee paying the Maintenance Contribution pursuant to the obligations under clause 4 hereof" establish a condition precedent to liability under clause 6, so that if at any time the tenant is in breach of that condition he is for such period as he is in breach debarred from claiming damages in respect of a breach by the plaintiffs of the covenants within that clause?

F These flats were built before the war of 1939-1945, and the heating was provided by three boilers which consumed solid fuel. In about 1955 they were converted to oil. For that purpose some renovations and alterations may have been necessary, but subject to this the system relevant to the period with which this court is concerned was the original system. The same system provides the hot water and the water for the radiators, and until about 1971, when the present managers took over, the provision of this service was considered satisfactory. In his judgment the judge said that: "The defendant took the view that water temperature should be at least 115° at all times. I agree that these are reasonable temperatures for washing up and bathing..." The plaintiffs argued that this was a dubious figure and that the judge really meant to say 105° Fahrenheit. We do not think so. The figure is clear in the manuscript of his written judgment; it is the figure which the defendant included in his written

G submissions; it is the temperature spoken to by the witness Mr Hobson; and the plaintiffs' expert witness, Mr Charlesworth, said: "Hot water. Aim at 120 degrees at tap... better to let tenants reduce temperature."

On the issue of adequate heating in the hot-water radiators the judge, upon the basis of Mr Charlesworth's evidence, held that a room temperature of 55° with an outside temperature of 32° Fahrenheit was the reasonable test.

H In the absence of agreement with the tenant's association (and there was no evidence that this had been sought), the provision of hot water must be constant, that is, 24 hours a day, and indeed Mr Charlesworth faced this point. The provision of heating could also have been the subject of agreement, but likewise there was no evidence of this.

We turn therefore to the third question posed above. Mr Charlesworth had first been involved in the summer of 1982. He made a number of criticisms and recommendations for extensive work, including replacement of equipment. By the date of the hearing the system was providing a reasonable service. In his opinion the original system would have needed replacement after some 20 years; that was the normal life of the boiler for insurance purposes.

J Before considering any question of breakdown the first problem is to decide whether the system, when working properly, was able to provide hot water and heating to a reasonable standard which had been decided. The defendant produced substantial evidence proving that it did not. The plaintiffs failed to call any evidence from witnesses involved with the heating system prior to the summer of 1982. A number of earlier reports and other documents were produced by the plaintiffs but not proved, and there is no indication that they were agreed documents. In the event, therefore, only one conclusion is possible, and it is that the system was not really capable of producing the required hot water or, if it was, that it was not being managed so as to produce it.

K The reason that the learned judge made no finding on this matter may be explained by his approach based upon acceptance of the plaintiffs' submissions — repeated in this court — that the defendant, in buying his flat, had bought the heating system as well and that the obligation of the plaintiffs under this covenant must be construed in relation to the heating system available at the date of the lease and operated in the manner intended by its original designers. This argument was based on the analogy with the repairing covenants as identified in *Pembery v Lamdin* [1940] 2 All ER 434.

L In our judgment the defendant purchased the lease of the flat together with the pipes and radiators in that flat. He did not purchase the system. The plaintiffs' covenant was, and is, to provide "a good sufficient and constant supply of hot water and an adequate supply of heating in the hot-water radiators". How they achieved this was a matter for them. Over the relevant period from June 1976 to September 1983 they failed to fulfil their obligations to a reasonable standard. The learned judge decided that the burden of proving that the standard was unreasonable was upon the defendant. If so, the evidence was overwhelming; it does not require detailed analysis. There was therefore, *prima facie*, a breach of the covenant.

M The learned judge having analysed the reasons for the numerous breakdowns of that heating system, held that the plaintiffs were excused by the phrase in clause 6(iv) which reads: "Unless prevented by mechanical breakdown or failure of fuel supply or other cause beyond the control of the Lessor..." The inclusion of the word "other" indicates to us that the phrase "beyond the control of the Lessor" governs the earlier two phrases. If one analyses the causes of breakdown; they were all, save for the strike of tanker drivers for a few days and the consequent disruption of the fuel supply, the result of antiquated and unserviceable equipment which should have been replaced to enable the plaintiffs to comply with their obligations. The learned judge had been persuaded to apply the principles of *Pembery v Lamdin* (*supra*) to this covenant and to take the view that the defendant could not expect the plaintiffs to renew or replace much of this system. As we have already indicated and with respect to the learned judge, we cannot accept that this argument was well founded. Upon the evidence before him, including undisputed facts, the breakdown in this system could and should have been avoided by the plaintiffs. The solution was within their control; the reason for not expending capital had already been made clear.

Lastly, we turn to the argument based on the opening words of clause 6: "Subject to the Lessee paying the Maintenance Contribution pursuant to the obligations under Clause 4 hereof..."

A The submission for the plaintiffs is that the intention of the parties is perfectly clear upon a reading of the words themselves. This is a condition precedent to any liability of the plaintiffs upon the covenants mentioned in that clause. The judge agreed with that submission and rejected the arguments based upon the analogy with the covenants for quiet enjoyment in such cases as *Edge v Boileau* (1885) 16 QBD 117, 120; *Taylor v Webb* [1937] 2 KB 283, 289. In those cases it was held that the introductory words of the ordinary covenants for quiet enjoyment — “the lessee paying his rent and performing his covenants” — did not create any condition precedent. In *Edge v Boileau* Pollock B said at p 120:

B Then it was contended that the covenant for quiet enjoyment and the covenants to be performed by the plaintiff were not to be read independently, but as dependant covenants, and that the payment of rent and repairing were therefore conditions precedent. I should have thought that point very clear even without authority. But there appears to be a case directly in point, viz *Dawson v Dyer* (1833) 5 B&Ad 584. In that case the same argument was put before the court as in the present case, and the court held the argument untenable.

C Before us Mr Hidden, for the plaintiffs, argued further that the wording was much closer to those cases dealing with renewal of leases or exercise of options such as: *Bastin v Bidwell* (1881) 18 ChD 238, 247 and *Robinson v Thames Mead Park Estate* [1947] ChD 334, 336. In *Bastin v Bidwell* the lessee was given an option to renew “upon paying the rent and performing and observing the covenants” in his lease. When he gave notice to renew he was in breach of his covenant to repair: the observance of the covenant was held a condition precedent to his right to renew. Kay J made an exhaustive review of the authorities and the reason for treating these words as a condition precedent emerges from what James LJ said in *Finch v Underwood* (1876) 2 ChD 310 at p 314: “A renewal of a lease is a privilege to which the tenant is to be entitled in certain circumstances”.

The proper approach for the court is set out in *Foa's General Law of Landlord and Tenant* 8th ed, at p 119:

The question whether liability in respect of one covenant in a lease is contingent or not upon the performance of another is to be decided, not upon technical words, nor upon the relative position of the covenants in the case, but upon the intentions of the parties to be gathered from the whole instrument.

D What was the true intention of the parties? Is this a condition precedent? In seeking the answer, it is in our judgment right to look at the state of the statutory provisions in June 1976; to look for guidance and indications from within the deed itself; and to examine the possible consequences of each interpretation put forward.

We have already referred to section 91A(1) of the Housing Finance Act 1972 earlier in this judgment. Subsection (3) reads as follows:

(3) The High Court or the county court, on the application of the landlord or tenant of a flat, may by order, in relation to any chargeable items specified in the order, declare —

E (a) that they have or have not been provided to a reasonable standard; and
(b) that the amount alleged to be payable in respect of them is or is not reasonable,
and may direct the amount to be paid by the tenant in consequence of the declaration.

It is clear from that section, and in particular those parts which I have cited, that the statute envisages that there will be a number of items for which service charges will be made. Second, it is apparent that the service charges are to be “recoverable” from the tenant, and indeed in the last part of subsection (3) it is envisaged that the tenant will be directed by the county court to make payment to the landlord. Lastly, it is clear that the tenant is liable to pay only a reasonable amount for each item of service charged and that that item must be reasonable as to standard and as to cost. It is against this background that the lease was entered into.

F The lessor's covenants contained in clause 6 are for repair, to pay the rates, to pay insurance against fire — each of these in fact is contained in the headlease — and the last two for provision of hot water and heating and the maintenance of the lifts. By clause 1(M) the maintenance contribution is computed in accordance with Part 1 of the Fourth Schedule, and by that Fourth Schedule the items in respect of which an estimated expenditure schedule can be prepared are set out in Part II. These items contain the lessors' covenants under clause 6 and seven other items. We would refer only to subclause (v), which gives a wide discretion to the lessors, as we have said earlier in this judgment.

The scheme for the computation of the annual maintenance provision is that at a date before June 1 in each maintenance year,

which start on March 25 1977, a maintenance provision is prepared consisting of an estimated expenditure on the items in Part II, and in addition an appropriate sum for reserve to be used towards those items mentioned in clause 6 which are not annual expenditures. This clearly includes repairing and capital expenditure on equipment. As soon as practicable after the end of the maintenance year “the surveyor” prepares an account of the actual expenditure, certifies it, and the excess or shortfall is paid either by the tenant or the landlord, as the case may be, by an accounting process.

Clause 3 of the lease contains the lessee's covenants, the first of which is to pay the rent. Clause 4 contains the lessee's further covenant to pay the maintenance contribution. Clause 5 contains the lessors' covenants, including covenants for quiet enjoyment and to comply with the terms of the headlease. Clause 6 contains further covenants by the lessors. In looking at clause 4 the obligation of the lessee is to pay the maintenance contribution by four equal instalments on the quarter day immediately preceding the maintenance year, that is, March 25, and on the three subsequent quarter days in that year. He covenants to pay it “together with the rent hereinbefore reserved and so that in case of default the same shall be recoverable from the Lessee as rent in arrears”.

The lessee's obligation to pay the maintenance contribution is contained independently in clause 4. In clause 6 the obligations of the lessors are set out, but it is perfectly clear that the maintenance contribution covers a wide variety of matters which are not contained in clause 6, and therefore that the covenant by the landlords forms only part of the consideration for which the tenant is making payment under the maintenance contribution.

Looking at the whole scheme of the deed, Mr Derek Wood for the defendant submits that the true understanding of the agreement is that that part of the maintenance contribution which relates to estimated costs of items is intended to provide the lessors with a cash flow, and that the liability of the lessee is defined only at the end of each maintenance year; moreover, the payment can only be of a reasonable sum. In support of this contention he points to the wording of the statutory provisions to which I have already referred and also the heading to Part II of Schedule 4, which reads: “Expenses incurred by Lessor to be reimbursed by the Maintenance Contribution.”

It is argued for the plaintiffs that the lessee is bound to meet each quarterly payment, which is calculated on the annual figure, and that, unless the contribution is paid, the landlords are absolved from their obligation to the tenant under clause 6 or, to approach the matter in practical terms, where there is a huge estate of flats, the tenant is unable to sue for damages for breach of covenant in respect of that period when he himself is in breach of his covenant to pay. It is said that, if the tenant objects to the sums claimed, he must go to the county court and obtain a declaration which can be obtained quite quickly. (It is perhaps pertinent to point out that in the present case the particulars of claim are dated February 4 1981, the defence and counterclaim May 19 1982, and that the hearing took place in September 1983; in the interim the defendant applied twice to strike out the claim, but was unsuccessful.)

Let us suppose that, because the maintenance is seriously in arrears, a figure for the reserve has been inserted at £100,000, or that the expenditure on the porter's uniforms and decorations for their flats is wholly unreasonable. Based upon the plaintiffs' submissions, the tenant must pay. The reserve may or may be not relevant to the landlords' covenants under clause 6, but the latter item has no connection. Failure to pay absolves the landlords from all their obligations. They need not repair the lifts; they need not provide heating or hot water. The defendant was a postman, and a substantial increase in his maintenance charges would probably be a matter of moment. He might well be unable to service a loan. He cannot go to the county court and pay the money into court, for that would not meet his obligation to pay. What is to happen in the interim?

Let us examine the possible consequences if the defendant's interpretation is right and the lessors' covenants and the lessee's obligations to reimburse are independent obligations. The landlords have their remedies: they can sue for the money; they have rights of forfeiture; they have rights of distress. They are almost certainly in a better position than the tenant to borrow money and they can claim interest in any action they may need to bring. No doubt the tenant can pay his rent and something towards the service charges. It should not be overlooked that the maintenance contribution is the total of a

A number of different items, and the tenant could and should challenge each individually and pay for the others.

The option cases in our judgment are clearly distinguishable, not only on their facts but on the basis that they are dealing with a single happening, and the conditions should be strictly construed against the person who is obtaining a privilege. Here it could be said that the lease should be construed *contra proferentem*.

The facts in *Bastin v Bidwell* (*supra*) are not relevant, but Kay J at p 245 refers to the leading case of *Boone v Eyre* (1779) 1 Hy Bl 273, note, and we find his comments of assistance in the present case. He says this:

The next case to which I refer is *Boone v Eyre* reported in a note to Henry Blackstone. *Boone v Eyre* was with reference to a covenant in a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500 and an annuity of £160 for his life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. He covenanted that the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity. Plea, that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey, to which there was a general demurrer. Lord Mansfield said: "The distinction is very clear. Where mutual covenants go to the whole of the consideration on both sides they are mutual conditions, the one precedent to the other, but where they go only to a part — where a breach may be paid for in damages — there the

defendant has a remedy on his covenant and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." That is a decision of very great authority, being constantly quoted, and undoubtedly is a leading case. Perhaps it is not a very fortunate use of language to say: "Where covenants go to the whole consideration on both sides"; but the meaning is very clear. If a covenant of this kind could be held to be a condition, then the non-possession of any one negro upon this estate would deprive the man of the whole of his annuity, and, looking to the scheme of the deed and the contract between the parties, it is impossible to come to this conclusion. That forms a very good ground of construction of deeds and provisions of this kind, namely, that you are not bound and fettered by the precise words, but are to look fairly and reasonably at the whole scheme of the deed.

Applying the tests which we have formulated above, looking at this matter from each of those aspects and looking at the whole scheme of the deed, as did Kay J, in our judgment it is abundantly clear that the parties to this deed did not intend that the words at the beginning of clause 6 should be a condition precedent.

It follows therefore that, with respect to the learned judge's view in a difficult case, we have reached the conclusion that the defendant is entitled to recover damages in respect of the breach of covenant by the plaintiffs to provide a good, sufficient and constant supply of hot water and an adequate supply of heating in the hot-water radiators. Failing agreement between the parties, the case will have to go back for damages under this head to be assessed.

The appeal is allowed and the sums recoverable by the defendant and available for set-off will be as stated in the judgment.

Judgment was given in favour of appellant for the balance due on his counterclaim after deducting the amount remaining due on the respondents' claim. Appellant to have costs of claim and counterclaim in Court of Appeal and below and the costs of appeal. Legal aid taxation of appellant's costs of the appeal. Leave to appeal to House of Lords refused.

Chancery Division

July 26 1985

(Before Mr Justice HOFFMANN)

POST OFFICE v AQUARIUS PROPERTIES LTD

Estates Gazette November 23 1985

276 EG 923-928

Landlord and tenant — Tenants' liability to repair under full repairing lease — Basement of office building consisting of basement, ground floor and six upper storeys flooded owing to rise of water table combined with defects of construction and possibly of design — Basement ankle deep in water for most of the time between 1979 and 1984 — Owing to lowering of water table since 1984 basement had been dry, but remedial

work was obviously necessary in case water table rose again — Action by plaintiff tenants for a declaration as to liability under the covenants of the lease — Expert structural engineers called by tenants and landlords, although differing in some respects as to the causes of the trouble, agreed that there had been a failure of the "kicker" joint between floor and walls caused by poor workmanship which had resulted in weak areas of concrete of a relatively porous texture — As to the necessary remedial measures, the plaintiff tenants' expert recommended an asphalt tanking of the basement while the landlords' expert recommended either an asphalt tanking scheme, but of a lesser height, or a cheaper waterproof rendering method — Any of these schemes would entail very substantial structural additions to the basement — Held, after considering authorities on repairing covenants and the meaning of "repair", that the work required in the present case did not come within the scope of repair, but entailed structural alterations and improvements to the basement — Hence it did not fall within the tenants' repairing covenant — Declaration accordingly

This was an action by the Post Office as plaintiffs seeking a declaration as to their position as tenants under the repairing covenants of their lease of Abbey House in the City of London, and in the events which had happened. The defendants were the landlords, Aquarius Properties Ltd.

Paul Morgan (instructed by B A Holland, Solicitor's Department, The Post Office) appeared on behalf of the plaintiffs; A D Dinkin (instructed by Masons) represented the defendants.

Giving judgment, HOFFMANN J said: Abbey House is an office building in the City of London constructed in the mid-1960s. Since 1969 it has been let to the Post Office on a full repairing lease by Aquarius Properties Ltd. For most of the time between 1979 and 1984 the basement was ankle deep in water. This appears to have been the result of a rise in the level of the local water table combined with defects in the construction and possibly the design of the building. In 1984 the water table subsided again and since then the basement had been dry.

The tenants' lease expires in 1991, but the building has a life expectancy of many years and it is therefore agreed by landlords and tenants that remedial work is necessary to make the basement waterproof in case the water table should rise again. The issue in this case is whether such work is "repair" within the meaning of the tenants' covenants.

The building consists of front and rear sections. The basement runs under both. It has 12-in thick reinforced concrete walls. Under the front section of the building the basement floor is a reinforced concrete raft 3 ft thick which, together with the walls, supports the ground and six upper storeys. At the rear there are only two upper storeys and the basement slab is of lighter construction. For the most part it is 8 in thick and reinforced with a light mesh on the lower surface only. Around the walls and to a width of 6 ft the thickness is increased to 15 in. There are also three internal columns under which the basement floor becomes a concrete foundation 3 ft thick. The floor has been constructed integrally with the walls by forming a 5-in upstand around the edge of the floor and then using that as the base for the walls. This upstand is called the "kicker".

Concrete has to be cast in sections with each new section of wet concrete being poured alongside or above a section which has already dried. There is also a tendency for concrete to shrink as it dries, partly from chemical reaction and partly on account of evaporation. The result is to produce a construction joint between sections of concrete which, unless suitably bridged, may admit water. In the design of Abbey House, basement pvc water bars were specified for insertion at the construction joints beneath the concrete floor and on the outside of the walls up to a height of 6 ft from a datum line corresponding to the surface of the basement concrete floor. These water bars are, in effect, strips of pvc which are keyed into the concrete and overlay the construction joints by some inches on each side. The floor was also laid upon a thin layer of polythene, which in turn covered a blinding layer laid on the earth to give a level surface. Between the two sections of the building there was an expansion joint which ran across the basement floor and up the walls. A water bar was also specified to bridge this joint.

The contract documents record that in November 1964 trial holes