UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – LEASEHOLD ENFRANCHISEMENT – value of freehold – development value – letting scheme – role of management company

BETWEEN:

VECTIS PROPERTY COMPANY LIMITED

Appellant

-and-

CAMBRAI COURT MANAGEMENT COMPANY LIMITED

Respondent

Re: Cambrai Court,

130 Aldermans Hill,

London,

N13 4QH

Upper Tribunal Judge Elizabeth Cooke and Mrs Diane Martin MRICS FAAV

11 January 2022

Royal Courts of Justice

Mr Sam Madge-Wyld for the appellant, instructed by TWM Solicitors LLP

Mr Michael Jefferis for the respondent, instructed by OGR Stock Denton LLP

The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36

British Glass Manufacturers v University of Sheffield [2003] EWHC 3108

Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101

Dartmouth Court Blackheath Limited v Berisworth Limited [2008] EWHC 350 (Ch)

Devonshire Reid Properties Limited v Trenaman [1997] 1 EGLR 45

Elliston v Reacher [1980] 2 Ch 374

H Waites Limited v Hambledon Court Limited [2014] EWHC 651 (Ch)

Hannon v 169 Queen’s Gate Limited [2000] 1 EGLR 40

Katchukian v Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon [2013] EWCA Civ 90

LM Homes Limited v Queen Court Freehold Company Limited [2020] EWCA Civ 371

Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Limited [2015] UKSC 72

Introduction

1.
This is an appeal from a decision of the First-tier Tribunal ("the FTT") about the price payable on the enfranchisement of a block of flats. The appellant is the landlord, Vectis Property Company Limited, and it argues that the price determined by the FTT was too low in view of its right to develop the property. The respondent, Cambrai Court Management Company Limited, is the nominee purchaser for the lessees and is also the management company under the leases of the flats, and it argues that the price determined by the FTT was too high; it has therefore applied for permission to cross-appeal on two alternative grounds, one relevant if the landlord's appeal fails and one if it succeeds; the Tribunal directed that the application for permission to cross-appeal, and the arguments on the cross-appeal, would be heard and determined together with the landlord's appeal.

2.
We heard the appeal and the arguments about the potential cross-appeals at the Royal Courts of Justice on 11 January 2022. The appellant was represented by Mr Sam Madge-Wyld and the respondent by Mr Michael Jefferis both of counsel, and we are grateful to them for their helpful arguments. Following that hearing we asked counsel to comment on a number of points that seemed to us to emerge from the authorities to which they had referred to us but which had not been discussed at the hearing, and we have been assisted by the written submissions received in response to that request (which are relevant to our paragraphs 67 to 74 below).

3.
In the paragraphs that follow we set out the factual background, go through the relevant terms of the leases in the building (on which the appeal turns), and discuss the decision in the FTT before discussing the grounds of appeal, the arguments on the appeal and our conclusions. Since the appeal succeeds, we have to consider the respondents' applications for permission to cross-appeal, which we refuse for the reasons set out in the final section of our decision.

The factual background

4.
Cambrai Court is a block of nine flats with a garden and parking spaces. It has a flat roof. All nine flats are let on long leases granted in 1969. Six of the flats have two bedrooms and three have one bedroom, but the leases are in identical terms so far as material; the parties to each lease are the freeholder, the lessee of the flat concerned and the respondent. The demise extends to the internal surface of the walls, the floor and the ceiling; the external walls, the floors between the flats and, significantly, the roof remain in the possession of the landlord. The respondent covenants to repair and maintain the building, including the roof; the landlord has power to repair and maintain if the respondent fails to do so.

5.
The respondent was no doubt initially owned by the freeholder but today its shareholders are the nine lessees, and the leases anticipate this by providing that on assignment of the lease the lessee must ensure that the assignee becomes a member of the respondent company (clause 3(g)).

6.

In 2018 a developer obtained planning permission to build two new flats on the roof of the building. It offered to purchase the freehold, and on 10 April 2019 the appellant served on the lessees a notice under section 5A of the Landlord and Tenant Act 1987, which gives them the right of first refusal in these circumstances. On 19 June 2019 the respondent served on the appellant a notice under section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 claiming the right to enfranchise the building. The appellant admitted the right, and only the price payable had to be determined by the FTT.

7.
Indeed, only one element of that price was in dispute. The parties agreed that the price payable by the respondent for the freehold would be £24,500, together with whatever sum was payable for the development hope value in relation to the roof space; the appellant claimed that that hope value was worth a further £203,300 while the respondent said that it had no value.

8.
The FTT found that the terms of the leases meant that the landlord did not have the right to build two new flats on the roof. It held that nevertheless a purchaser might pay a further £25,000 for hope value, making a total of £49,500, because it was possible that development could be achieved through negotiation. It also found that if it was wrong about the appellant landlord's right to develop, and the leases did not preclude the freeholder from building two new flats on the roof, then the development value to be added to the purchase price was £166,725 making a total of £191,225.

9.
The landlord appeals, with permission from the Tribunal, against the decision that the price payable is £49,500, arguing that it is not prevented by the terms of the nine existing leases from adding two more flats, and that therefore the price payable is £191,225.

The terms of the nine existing leases

10.
The terms of the leases are therefore crucial to the determination of the appeal. As we noted above, they are identical in all material respects; we have a sample lease in the appeal bundle. The leases are tripartite; after setting out the three parties' details the lease begins with two recitals which identify the land in question and define the terms "Estate", "Building" and "Block":

"(1)
The Lessors are registered at HM Land Registry as Proprietors with Absolute Title of an Estate situate at Alderman's Hill …

(2)
There is erected or in the course of being erected on part of the said estate a block of flats known … as Cambrai Court … and for the purpose of identification only the Block in respect of which the flat hereby demised is contained is coloured grey on the plan attached hereto (being hereinafter referred to as 'the Building') and the other part of the said estate is being laid out as garages and gardens with pathways and driveways for the use of the lessees of the said Block."

11.
The plan depicts the shape of the building coloured grey, and the surrounding garden and parking areas. To one side of the plan, not coloured grey, is a diagram showing the layout of nine flats over three floors.

12.
The third recital reads as follows:

“(3)
The Lessors have recently offered to demise each of the flats comprised in the said Block in accordance with a general scheme and intend that every such Lease should impose on the Company and upon the Lessee of each flat in accordance with the general scheme obligations and restrictions as set out in Parts IV, V and VI of the Schedule hereto and to the intent that the Lessors and the Company and the Lessee for the time being of any flat may be able to enforce in equity the performance and observance thereof by the Company and the Lessee for the time being of each and every other flat.”

13.
It is common ground between the parties that this recital creates a letting scheme. The implications of that were not fully explored either in the FTT or at the hearing of the appeal, and we say more about it later, but it is common ground that the effect of a letting scheme is, first, that once a lease has been granted the lessor is obliged to grant all future leases in the same form as the first lease and, second, that the covenants given and received by the lessees will be mutually enforceable between all the lessees, present and future, on the estate.

14.
The next recital explains the role of the respondent:

(4)
The Company has been incorporated with the object inter alia of providing certain services to and for the Lessees of the said flats and garages and otherwise managing the same as hereinafter appears.

15.
Clause 1 of the lease then demises the flat to the Lessee, together with the easements etc in Part II of the Schedule, excepting and reserving to the Lessor the easements etc in Part II of the Schedule.

16.
In clause 2 the Lessee gives a number of covenants to the Lessor and the Company “and with each of them” including covenants to pay the rent, and to pay rates and taxes etc including a proportion of those payable in respect of the Building “provided always that such proportion shall not exceed one ninth part of the whole”.

17.
In clause 3 “in accordance with the said general scheme” the Lessee gives covenants to the Lessor and to the Company and to the Lessees of the other flats and garages, including a covenant to perform the obligations set out in parts IV and V of the Schedule, and by clause 3(e) to “pay on demand a ninth part” of the Company’s costs in carrying out its obligations in part VI of the Schedule, and of the Lessor’s costs if it performs those obligations instead.

18.
In clause 4 the Lessor gives its covenant for quiet enjoyment, and covenants to require “all persons to whom they shall hereafter grant a lease of any flat comprised in the Building” to give the same covenants as does the present Lessee, and to enforce those covenants at the Lessee’s expense. Clause 4(c) provides:

“That the Lessors will allow the Company and persons authorised by the Company to have such access to the Building and other parts of the said Estate as may be necessary and proper for enabling the Company to carry out its obligations hereunder”.

19.
Clause 5 contains standard provisions for re-entry; clause 6 obliges the Lessor to perform the Company’s covenants if it fails to perform them; by clause 7 the Company give to the Lessee the covenants set out in part VI of the Schedule and by clause 8 the Company covenants with the Lessor to perform the covenants set out in part VI of the Schedule.

20.
The parties’ covenants in the Schedule (parts V and VI given by the Lessee, part VI by the Company) divide the Lessee’s and Company’s responsibilities, so that the Lessee is responsible for repairing, maintaining and decorating their own flat while the Company covenants to repair and maintain the external walls, structure, foundations, roof, gutters etc of the Building.

21.
The easements given to the Lessee in part II of the Schedule include at paragraph 3 “The right to subjacent and lateral support and shelter and protection from the elements for the said Flat from the other parts of the Building and from the foundations and roof thereof” , and at paragraph 4 to the passage of water, gas, electricity etc along the pipes and wires in standard form. Paragraph 5 gives “The right for the Lessee … to enter into and upon other parts of the Building for the purpose of repairing cleansing maintaining or renewing any such sewers drains and watercourses cisterns gutters cables pipes and wires …”. Paragraph 6 provides “The right for the Lessee … to enter into and upon other parts of the Building for the purpose of repairing maintaining renewing altering or rebuilding the said Flat or any part of the Building giving subjacent or lateral support shelter or protection to the said Flat…”.

22.
Part III of the Schedule then gives the Lessor:

“Easements rights and privileges over and along and through said Flat and garage similar in all respects mutatis mutandis to those set forth in paragraphs 3, 4, 5 and 6 of Part II of the Schedule hereto”

as well as the right to enter the flat and garage for the purpose of performance of the Company’s covenants by the Company or the Lessor, and Part IIIa gives it:

“(ii)
The right at any time hereafter to erect any building upon any land adjoining or near to the said Flat and/or garage or alter rebuild and make additions to any of the adjoining or neighbouring buildings erected or to be erected on the said land in such manner as the Lessors shall think fit notwithstanding that the access of light or air to the said Flat may be obstructed or diminished.”

The decision in the FTT

23.
The FTT identified the issue for determination as “whether the [landlord] has the right to construct new flats on the roof of Cambrai Court.”

24.

It was common ground that the landlord retains the roof and the airspace above it. The landlord called evidence to show that two flats could be built without disturbing the tank room on the roof or the access to it. The existing roof would be covered by a steel grillage stretching from the front parapet wall to the rear parapet wall, so that the weight of the new flats and surrounding terraces would rest on the walls of the building; there would be a void, a few inches deep, between the upper surface of the present roof and the lower surface of the new construction.

25.
The FTT was unimpressed by argument that the landlord did not have the right to build on its retained land in the absence of an express reservation of such a right; it agreed with the respondent that "As long as the [Lessor] does not substantially interfere with the rights and obligations of the [Company] and/or the lessees, any land which is not demised can be used a the [Lessor] wishes." But it accepted Mr Jefferis' argument that the respondent would have the right to prevent the construction of new flats on the roof by injunction, because the presence of the new flats would interfere with its obligation to repair and maintain the roof and with its easement to do so. Mr Jefferis relied upon the definition of "the Building" in the lease; he argued that the lease must be construed by reference to the physical circumstances at the time of its creation, and that the roof which the management company must repair and to which it is given access is that which existed and was contemplated by the parties when the leases were granted. The FTT accepted that the lease did mention the possibility of alteration to the Building, but took the view that only alterations that required access to one or more of the flats were contemplated (part II of the Schedule, paragraph 6, and the mirror version for the Lessor in part III). The FTT concluded:

"46.
We accept Mr Jefferis' submission that if a roof is repaired, or even entirely renewed in a recognisable manner, then it is the roof, from time to time, that is within the ambit of the provisions but that a roof in a different form and on a different level would not have been within the contemplation of the parties when the flat leases were entered into. …

49.
We find that the "roof" which was in the contemplation of the parties at the time of the grant was the roof of the block of flats erected or in the course of being erected at the date of the 1969 Lease, as subsequently maintained, repaired, redecorated and/or renewed. It was not a roof in a different form on a different level over additional flats. The presence of the proposed new flats would substantially interfere with the rights and obligations of the lessees and the Applicant in respect of the "roof". The roof would be largely covered by the new flats on a permanent basis which would substantially interfere with the ability to access it. The lessees and the Applicant would therefore be entitled to an injunction preventing the proposed development from taking place.

50.
For these reasons, we find that the Respondent does not have the legal right to construct new flats on the roof of Cambrai Court."

The arguments on the appeal

26.
The appellant has permission to appeal on the basis that the FTT was wrong to decide that the respondent was bound to repair and maintain the roof that existed in 1969 rather than the roof that existed from time to time, and that the construction of the new flats would not interfere with the company's right of access to repair the roof and its obligation to do so.

27.
The respondent's grounds of opposition respond to the grounds of appeal, reiterate its argument that the landlord cannot build on the roof in the absence of an express reservation to do so. They also contain argument on further points it had raised in the FTT but which the FTT, having found in its favour on the basis set out above, did not deal with – in particular, the argument that the letting scheme itself prevented the construction of more than nine flats, and that the construction of the new flats would involve a derogation from the landlord's grant because it would make the top floor flats unsafe to reside in. So the scope of the arguments in the appeal was wider than those raised in the grounds of appeal. We examine them in turn.

(i)
Is the landlord entitled to build on the roof in the absence of an express reservation of the right to do so?

28.
We address this point first because if the respondent's argument succeeds then that is the end of the matter, whether or not building on the roof would interfere with the rights and obligations of the other parties to the lease. The respondent says that the landlord has no right to build on the roof because it has not reserved what Mr Jefferis called "overriding rights" to enable it to do so.

29.
We agree with the FTT and with the appellant on this point; the landlord did not need to reserve any rights over the roof and the airspace above it because it had not demised them. The landlord can do what it wishes with its land and buildings insofar as they are not demised, subject to the question whether it would be interfering with the rights of others which is a separate point.

30.
The express reservation at paragraph (ii) of Part IIIa of the Schedule (set out above at paragraph 22) enables the landlord to build on the ground, outside the building itself, even if to do so interferes with the access of light and air to the flats; but that does not mean that the landlord cannot also do what it pleases on the roof, again subject to its not interfering with any other rights. It is not possible to construe that reservation as preventing the landlord from developing the roof. Similarly, the parties clearly contemplated the alteration of the building because the lessor has reserved the right to enter the flats in order to do so; but that reservation does not mean that the landlord cannot alter the building in ways that do not involve entering any of the flats. The landlord retains possession of the roof, and it does not need a reserved right to alter the roof or to build on it. Nor did it need to reserve a right of access to the roof, because it has not parted with possession of the common parts including the internal stairs which give access to the roof nor of the exterior of the building nor of the land that surrounds it. Obviously there would be practical problems in carrying out the development without disturbing the residents; but it is not the case that the landlord cannot do so because it has not reserved a right to do so.

31.
The next issue is about those practical problems. The landlord has, because it has never parted with, the right to develop land that it has not demised, including the roof of the building. It does not have the right to interfere with easements granted to others, and it may (but will not necessarily) be prevented by injunction from interfering with easements or with the performance of covenants by other parties to the lease; whether this development would involve such interference is the next question.

(ii)
Would the construction of the new flats prevent the respondent from having access to, and repairing, the roof?

32.
The development that the appellant says it would be entitled to carry out would place two new flats on top of most, although not all, of the existing roof. The current roof would be covered entirely by the grillage and the new structures, and therefore would become inaccessible from above.

33.
Central to the respondent's case, and the basis of the FTT's decision in its favour, is the argument that the development would prevent it from exercising its right of access to the roof and from carrying out its obligations to the lessees and to the landlord to maintain and repair it. For that reason, it says, it would be entitled to an injunction to prevent the development; and therefore the landlord has no right to carry out the development.

34.
The respondent says that the rights of the lessees, too, would be interfered with; they have easements to enter all parts of the building (Part II of the Schedule) in order to repair their flats and to repair parts of the building that give shelter and support to their flats. We note that the respondent does not have such a direct entitlement; the lease does not grant it any easements, obviously, since it has no estate in land to which an easement could attach, but the landlord covenants with the lessees at clause 4(c) to allow the company access to the building and to all parts of the estate so that it can perform its obligations. The respondent's argument is that the landlord could no longer give it that access.

35.
The appellant argues that the respondent's obligation is to maintain whatever roof is on the building from time to time and that therefore its obligation (and right of access) will be to repair the roof of the new flats, and that insofar as the respondent remained under any obligation to repair what used to be the roof (and would then be hidden beneath the grillage, supporting the terraces and the flats) it would either have no need to do so (since the roof would not be exposed) or could access the former roof from the flats below.

36.
Even if the respondent is right, it is not the case that the respondent is guaranteed the grant of an injunction to prevent development. But the respondent is right only if it can show that the leases oblige and enable the respondent to repair exactly what was built in 1969 rather than, for example, a different roof, and that the leases grant the lessees easements to access the building as originally built and not, for example, over a new different roof.

37.
In support of his argument to that effect Mr Jefferis relies on the second recital to the lease, set out at our paragraph 10 above. He says that the use of the capital "B" for "Building" , together with the recital that it was built or being built, indicates that the lease refers throughout to the building exactly as it was when the leases were granted in 1969. Any addition or extension to that structure, whether horizontal or vertical, would not fall within the definition of "the Building". The original roof could be replaced in the same form, and indeed was so renewed in 2012, by the respondent at the cost of the lessees. But a roof in a different form – even, Mr Jefferis argued at the hearing, a pitched roof instead of a flat one – would not be part of the "Building" which defines the respondent's obligations.

Accordingly the respondent would have no obligation to repair the roof above the new flats and would remain obliged to repair the old roof submerged beneath them.

38.
We find this argument extremely far-fetched. The use of capitalised words to define terms in a lease or any other legal document, and indeed in judgments, is common and helpful, but it does not have any substantive implications. It does not mean that the ordinary rules of construction are disapplied.

39.
Mr Madge-Wyld argues that the lease obliges the respondent to repair and maintain the roof of the building in whatever state it is from time to time. He relies upon the principles of construction summarised by the Supreme Court in Arnold v Britton [2015] UKSC 36, where Lord Neuberger said at paragraph 15:

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does 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."

40.
The natural and ordinary meaning of the respondent's repairing covenant, Mr Madge-Wyld argues, is that it is obliged to repair and maintain whatever roof is in place from time to time, given that the flats are let on long leases and that no-one expects a flat roof to last for ever. If it is replaced, for example, with a pitched roof then that is the roof the respondent has to repair; likewise if it is replaced with one on a higher level. The purpose of the covenant is simply that the roof should be sound and provide shelter for the building; its purpose is not to prevent the landlord from developing its property. None of the facts and circumstances indicates otherwise.

41.
Mr Madge-Wyld refers to the judgment of Lewison J in British Glass Manufacturers v University of Sheffield [2003] EWHC 3108, where the tenant, under a long lease which obliged the tenant to repair and maintain the buildings on the land, proposed to demolish and re-build. The judge concluded that the tenant was obliged to repair and maintain the buildings on the site, whatever they happened to be, rather than to repair the very same building throughout the 1,000-year term of the lease. We observe that the leases of Cambrai Court are of far shorter duration; but we agree with the appellant that one would not expect the same roof to remain in place even for the initial term of 99 years. Indeed, the lease at paragraph 1 of Part III of the Schedule contemplates the landlord "renewing altering or rebuilding the said Flat or any part of the Building giving subjacent or lateral support shelter or protection to the said Flat." If there is a new roof, whatever its design and – in the absence of anything to prevent the landlord from raising the height of the building – whatever its height, the respondent must maintain it and must be given access to maintain it. Similarly, if an exterior wall were replaced, whether or not the footprint of the building remained the same, the respondent would still be obliged to maintain it.

42.
It is right, of course, that “the lease is construed with reference to the circumstances existing at the time of execution” (Hill & Redman’s Law of Landlord and Tenant at [941]). But that does not mean that the shape of a building is set in aspic. We take the view that the respondent is obliged to repair and maintain the structure and exterior of the building, or the “Building” as the lease calls it, in whatever form they take at the time in question. The replacement of a flat roof with a pitched roof, which is the most obvious possibility that comes to mind, would not absolve the respondent of its covenant; that would be a perverse construction of the lease and would make it unworkable. Similarly if the landlord is entitled to add further floors – and we ask at paragraph 60 and following whether the landlord is so entitled – then the respondent remains obliged to maintain and repair the structure and exterior of the building, including the old foundations and the new roof, as they stand at the time in question.

43.
As to the old roof itself, once mostly submerged beneath the new flats, it would need maintenance and would be the respondent’s responsibility just like the other horizontal elements of the structure above the ground and first floors (between the ceiling of a ground floor flat and the floor of the flat above, since only the inner surfaces of the flat are demised). The landlord would be obliged to provide access to the old roof for maintenance just as it does to the rest of the horizontal parts of the structure; whether access would actually be needed once the old roof is covered by the grillage is a practical question and it would be for the landlord to ensure either that maintenance would not be needed or that access would be possible and maintenance practicable.

44.
That might be challenging; Mr Jefferis points out that it is difficult to imagine how the waterproof membrane in the existing roof could be repaired or replaced without access to the whole of it from above. He relies upon the decision of the Court of Appeal in LM Homes Limited v Queen Court Freehold Company Limited [2020] EWCA Civ 371.

45.
LM Homes was another case about leasehold enfranchisement, but about a different issue: what the lessees were entitled to acquire. The building in question extended over seven floors, and the landlord had granted a lease of the airspace above the roof. The lessee of the airspace was not a participant in the collective enfranchisement; its lease conferred full rights to develop the airspace in accordance with any planning permission that might be obtained, while reserving to the lessor rights of access for the performance of the lessor’s obligations to the owners of the flats below. The Court of Appeal had no difficulty in finding that the lessees’ nominee purchaser was entitled to the freehold reversion to the airspace lease. It then had to consider whether the nominee was also entitled to purchase the airspace lease. It found that it was, on two bases. Crucial to its decision was the provision in section 2(3) of the Leasehold Reform, Housing and Urban Development Act 1993 (“the 1993 Act”) that the lessees are entitled to acquire:

“… the interest of the tenant under any lease … under which the demised premises consist of or include-

(a)
any common parts of the relevant premises …

where the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts … on behalf of the tenants by whom the right to collective enfranchisement is exercised."

46.
Section 101(1) provides that:

"'common parts', in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it".

47.
Lewison LJ, with whom Lindblom and Leggatt LJJ agreed, held at paragraph 49 that the premises demised by airspace lease consisted of common parts, being either part of the building (since the freehold of a building includes the airspace above it) or part of the exterior of the building. But was the acquisition of the lease "reasonably necessary for the proper management or maintenance of those common parts"? It was. The Court of Appeal agreed with the Upper Tribunal that the proper management of the airspace included the right of access to the roof, as well perhaps as its use for facilities serving the building such as aerials or air conditioning plant. Convenient access to monitor the structure of the roof would become impossible once the airspace lessee had built on it. So the nominee was entitled to acquire the airspace lease to prevent that consequence.

48.
The Court of Appeal added at paragraph 69:

"… if and when new flats are built on the roof of the building, whatever new roof covering is constructed would become part of the Building as defined in the lease. It would therefore be the responsibility of the freeholder to keep in repair a roof structure over which it had no design control. That is, in my judgment, plainly a question of maintenance of common parts, which gives rise to a legitimate concern on the part of the freeholder."

49.
We note in passing that the Court of Appeal came to the same conclusion as we have reached about the new roof over the new flats: it would become part of "the Building" as defined in the leases and the responsibility in the leases to repair the roof would attach to the new roof. But Mr Jefferis seeks to rely on the decision to show that the landlord is not entitled to carry out development on the roof of Cambrai Court so as to make the existing roof inaccessible and difficult to maintain.

50.
That is not what the Court of Appeal decided. It decided that the lessees were entitled to purchase the airspace lease because it was "reasonably necessary for the proper management or maintenance" of the airspace and the roof. It did not decide that it was legally impossible for the airspace lessee to build on the roof. The issue before us is whether the landlord of Cambrai Court has the right to build on the roof. It has, although its doing so will present practical challenges. In LM Homes the statute provided that those practical challenges meant that the lessees were able to acquire the airspace. In the present case, the practical challenges would have to be addressed by the developer and might prove to be quite a puzzle, but there is no legal impediment to the development.

51.
Mr Jefferis also relied upon Dartmouth Court Blackheath Limited v Berisworth Limited [2008] EWHC 350 (Ch); but again, that was a decision about very different statutory provisions – in that case, the

extent of the lessees' right of first refusal, under the Landlord and Tenant Act 1987, on a proposed sale of the freehold. Whether the roof and airspace were included in the scope of the right depended upon whether they were part of the building concerned or appurtenant to the building. The reasoning in the case is of no assistance in connection with the very different question before us.

52.
We find that the FTT made an error of law in concluding that the rights and obligations of the respondent and the lessees in relation to the roof relate only to the roof as it existed in 1969 or a roof in similar form, that the new flats proposed to be built would substantially interfere with those rights and obligations, and that the lessees and the respondent would therefore be entitled to an injunction to prevent the development from taking place.

53.
We find that the construction of the new flats on the roof would not interfere with the respondent's covenant to maintain the roof, nor with the lessees' and the respondent's right of access to the roof ; the roof in question would be the new roof over the additional flats. As to the original roof, it would be covered by the steel grillage and would be hidden beneath the new flats and the terraces. The landlord would have to provide access to the respondent to maintain that layer insofar as it required maintenance. That would be a practical puzzle for the landlord; the difficulty of the puzzle will depend on the way the new flats are built – Mr Madge-Wyld observes that the respondent is assuming that it would not be possible to prevent water getting on to the old roof beneath the flats, and says that that assumption is unreal. Certainly the problem would have to be addressed and the cost of doing so would be factored in to the price that a developer purchaser was willing to pay for the freehold. But the landlord is entitled to take on that challenge; it has the legal right to construct the new flats.

(iii)
The implications of the letting scheme

54.
Two issues arise here, which were not addressed by the FTT. One is whether the letting scheme restricts the number of flats to nine, and the second is whether the respondent would be obliged to join in the leases of the new flats so that they could be granted in the same form as the leases of the existing flats, as the letting scheme would require if it permitted the addition of new flats.

55.
Before we examine those questions we should pause to say something about the nature of a letting scheme, which is the leasehold version of the more familiar freehold building scheme found in Elliston v Reacher [1980] 2 Ch 374, although its origins are older. It is described in Megarry and Wade, the Law of Real Property, 9th edition, at paragraphs 31-076 and following. A freehold building scheme will arise where a number of plots derive from a common vendor of a defined estate intended to be sold in lots, where the parties intended to create mutually enforceable restrictive covenants on the estate. Where such a scheme is in place the restrictive covenants binding the freehold properties on the estate will be mutually enforceable regardless of the order in which they were created; no unsold plot may be disposed of unless the vendor requires the purchaser to enter into the covenants of the scheme, and the vendor is bound by the scheme once the first lot is sold.

56.
A letting scheme is the leasehold equivalent. The parties agree that the effect of a letting scheme is to ensure that the lessees are guaranteed that the covenants they give and receive will be mutually

enforceable between all the lessees, present and future, on the estate. In Arnold v Britton [2015] UKSC 36 at paragraph 49 Lord Neuberger said:

“A letting scheme involves properties within a given area being let on identical or similar terms, normally by the same lessor, with the intention that the terms are to be enforceable not only by the lessor against any lessee, but as between the various lessees - even by an earlier lessee of one property against a later lessee of another property.”

57.
The parties also agree that the letting scheme takes effect once the first lease is granted (if the conditions for the existence of a scheme are met), and that from that point on, whenever a new lease is granted the landlord is obliged to grant all further leases in the same form as the first. And they agree that the leases of the flats in Cambrai Court create a letting scheme.

58.
There is some doubt (Arnold v Britton, paragraph 51) as to whether a letting scheme makes positive covenants mutually enforceable, or only restrictive ones as does a freehold building scheme. We take the view that a letting scheme extends to both positive and negative covenants; the purpose of creating leasehold flats is to ensure that positive covenants (whose performance is essential where a building and facilities are shared) are enforceable, and it would make no sense for a letting scheme to make the negative covenants enforceable between all the lessees but not the positive ones. In any event the matter is placed beyond doubt by recital 3 of the Cambrai Court leases which we set out at paragraph 17 above and which makes it clear that the “obligations and restrictions as set out in Parts IV, V and VI of the Schedule hereto” (which are of course both positive and negative) are to be imposed upon “the Company and the Lessee” and are to be enforceable by the Company and the Lessee.

59.
We now turn to the issues raised by the existence of a letting scheme in this case.

60.
So far as the first issue is concerned, Mr Jefferis stated that the letting scheme itself prevents the landlord from building more than the nine flats initially contemplated in the leases. He did not point to any authority for that statement, and it is not the case that letting schemes in general establish a defined number of units or lots that cannot be exceeded. But Mr Jefferis argued that the definition of “the Building” in the second recital included a stipulation that there are to be no more than nine flats, by reference to the diagram of nine flats on the plan. He pointed to the lessees’ obligation to pay no more than one-ninth of the rates and taxes on the building, and to their obligation to pay one ninth of the service charge there is therefore, he argued, an implied term that there will be no more than nine flats because the scheme cannot work otherwise. In particular, recital 3 which obliges the lessor to impose the same obligations and restrictions on every lessee in the block must refer to the block as it then existed, comprising nine flats.

61.
Mr Madge-Wyld reminded us that the diagram of the nine flats is not part of the shaded area defined as the “Building” or “the block” on the plan to the lease. He referred us to the conditions for the implication of terms in a contract, set out by Lord Neuberger in Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Limited [2015] UKSC 72. Among them are the requirements that the term must be necessary to give business efficacy to a contract and that it must be so obvious that it “goes with saying”. A term restricting the number of flats to nine is neither obvious nor necessary,

said Mr Madge-Wyld. He referred to two decision of the High Court where no term had been implied to limit the number of flats in a letting scheme to those initially constructed: Hannon v 169 Queen's Gate Limited [2000] 1 EGLR 40 and H Waites Limited v Hambledon Court Limited [2014] EWHC 651 (Ch). Neither related to leasehold enfranchisement; in both cases one or more of the lessees objected to a proposed development of new flats by the freeholder.

62.
H Waites was a decision of Morgan J in which he had to decide whether the freeholder of a block of flats was entitled to build additional flats on top of the garages demised with the existing flats. It was held that the landlord had demised the airspace above the garages so that the landlord had not retained the right to build there. But the judge went on to decide, obiter, that there was a letting scheme but that that did not restrict the number of flats on the estate to the original number. There was no implied term restricting the number of flats to the existing twelve. The lessees had covenanted to pay one twelfth of the service charge each, but the court would imply a term that the lessees pay instead a reasonable proportion if additional flats were built, because "it would be obvious that what should replace the reference to 1/12 should be a reference to 'a fair proportion'".

63.
The respondent relies upon the decision of this Tribunal (HHJ Rich QC) in Devonshire Reid Properties Limited v Trenaman [1997] 1 EGLR 45 where, as in the present case, the issue before the Tribunal was the price to be paid on enfranchisement. The property in question was a block of four flats; the freeholder claimed that its interest should be valued on the basis that it had the right to construct an additional flat in the roof space, for which it had planning permission. There was a letting scheme, and the lease expressed the parties' intention that the lessees of the flats should be subject to the same covenants and should all be able to enforce them against each other. HHJ Rich QC found that the parties had not contemplated, when the lease was granted, that more than four flats would be built. Therefore he took the view that the covenant about mutual enforceability should be understood to refer only to those four flats, and any additional flat would be outside the letting scheme. Accordingly it was necessary to give business efficacy to the letting scheme to imply a covenant on the part of the lessor not to add any further flats.

64.
We find that decision difficult to understand. It may well be that the parties to the letting scheme only expected there to be four flats built. But that does not mean that any further flats would be outside the scheme. The scheme must be defined from the outset in terms of the estate to which it refers (above paragraph 55) but there is no need for the number of units to be defined at the start. The fact that the parties contemplated a particular number makes no difference. The court in Hannon was aware of the decision in Devonshire Reid but distinguished it on the basis that the leases in Hannon, unlike those in Devonshire Reid did not make any reference to the original number of flats. In H Waites the leases did make such a reference, requiring the lessees to pay one-twelfth of the cost of insurance and service. In making his decision Morgan J referred to Devonshire Reid but reached a different conclusion. He did so even though he found that the parties to the scheme in H Waite had not initially contemplated there being more than 12 flats.

65.
We are aware that the decision on this point in H Waite is obiter; but we are persuaded by Morgan J's reasoning and prefer to adopt it than to follow the reasoning in Devonshire Reid, where there was no real explanation of why the fact that the parties originally only contemplated four flats meant that only four flats could ever be built. In the present case it may or may not have occurred to anyone that

there would ever be more than nine flats. Probably it did not, in light of the references in the lease to the lessee paying a one-ninth share of the service charges, and no more than one ninth of rates on the building. But that does not mean that the scheme cannot extend to any further flats that the landlord has the right to build, and we take the view that a term would be implied to adjust the service charge proportions accordingly in order to give business efficacy to the new scheme.

66.
So we reject the respondent's argument that the existence of a letting scheme precludes the building of further flats.

67.
The second issue is this. The letting scheme in this case involves three parties. One of the points made by the respondent at the hearing was that while the landlord is obliged to ensure that future leases are in the same form as those already granted, it could not carry out that obligation in the case of the proposed new flats because that would require the respondent company to join in, to make the leases tripartite as are the original nine. Mr Madge-Wyld at the hearing took the view that the respondent was not obliged to join in future leases but, he said, "Why would it not?"

68.
It is very clear that the respondent, being owned by the present nine lessees and anxious for the rooftop development not to take place, would have every reason to be unwilling to join in the new leases and to make its opposition known before the development commenced, so that the lessor would not be able to offer leases conforming to the scheme. We agree with the respondent that if the respondent is not obliged by the present leases to join in future leases it cannot be forced to do so and would have reason to refuse to do so.

69.
Certainly there is no express covenant in the present leases obliging the respondent to join in future leases. As the respondent points out, in 1969 there was no need for such a covenant because the respondent at that point would have been owned by the developer, and only later transferred to the ownership of the lessees, and so it was under the developer's control. After the hearing, and having reflected upon the authorities relevant to building schemes, we asked counsel for both parties to comment on the proposition that the letting scheme itself would oblige the respondent to join in future leases in the same form, just as it obliges the landlord to grant future leases in the same form.

70.
None of the authorities to which we have been referred by either party involves a letting scheme with tripartite leases. Thus there is no authority to the effect that the management company, once it joins in the first lease, is bound by the nature of the letting scheme to join in future leases. Mr Jefferis argues that the management company in a scheme such as this is a third party and is not bound by the scheme; he regards letting schemes as essentially bipartite and binding only upon the landlord and lessees. He observes that in Arnold v Britton at paragraph 51 Lord Neuberger expressed some doubt as to whether a letting scheme encompassed positive covenants as well as negative ones; the respondent in the Cambrai Court leases gave only positive covenants (clause 7, to perform the covenants set out in Part VI of the Schedule). Accordingly, Mr Jefferis argues, if a letting scheme is relevant only to the mutual enforceability of negative covenants then the respondent cannot be placed under any obligations by it.

71.

As we observed above, the matter of the positive covenants is placed beyond doubt by recital 3 in the Cambrai Court leases; the intention is that both positive and negative covenants will be enforceable by the respondent as well as by the lessees. We take the view that the letting scheme itself obliges the respondent to join in future leases of flats in the block. If it does not do so, the letting scheme is rendered largely useless because all the practical obligations in the scheme are undertaken by the respondent and the lessees and not by the landlord

72.
We can see this if we put ourselves in the shoes of the lessees of the first flat to be let. At that stage the respondent was no doubt owned by the developer. But the intention (made clear in the lease as we have said) was that the respondent should pass to the ownership of the lessees. We do not know how many lessees there were before that move was made. An anxious original lessee might ask: what about the future leases of the other eight flats? Suppose we get to a point where six are let and the management company belongs to the six of us, but my five fellow lessees refuse to have the company join in the last three leases?

73.
The answer to such a question is obvious: of course the respondent was obliged, whatever its ownership, to join in the leases of flats 2 to 9. We take the view that it was so obliged by the letting scheme itself. If we are wrong about that, then there is an implied term in the leases in the form of a covenant with the lessees and the landlord that it will do so. And if the letting scheme does not restrict the number of flats – and we have found that it does not – then the same obligation, whether arising from the letting scheme itself or an implied covenant – applies to the proposed flats 10 and 11.

74.
So the involvement of the respondent in the leases of the nine flats does not constitute a legal impediment to the landlord's constructing two new flats. The leases would have to be granted in the same form as the present, and the respondent would be obliged (and, we expect, could be compelled by injunction) to join in.

(iv)
would the construction of the new flats derogate from the landlord's grant?

75.
This is a further issue that the FTT did not address. We can deal with it very shortly because it is not about the landlord's right to develop the roof. It relates to the practical possibility that the landlord in doing so will derogate from its grant to the lessees, or be in breach of its covenant for quiet enjoyment. Mr Jefferis argues that the construction process will make the existing top floor flats unsafe to reside in, particularly while steel beams and grilling will have to be hoisted on to the roof; there is also a risk of damage to the existing roof and to the ceilings of the upper flats. Expert evidence before the FTT confirmed that there would be risks. The structural engineers for both parties in the joint statement said that the contractor would need to produce a method statement to show how he would protect the health and safety of the lessees. And from a common sense point of view, noise and mess would be inevitable.

76.
The short answer to this is that of course it is possible that a dangerous or noisy building operation could put the landlord in breach of covenant. But that is a practical problem. It would be for the landlord to work out how to carry out the development safely and without disturbing the residents, and/or to meet any liability for breach of covenant insofar as it was not successful. The need to protect

the existing flat owners and to abide by its covenants is part of the cost for which a freeholder intent upon development would budget. That might make the development very expensive, but it would not amount to a legal bar to development.

Conclusion on the appeal

77.
Accordingly the landlord's appeal succeeds. There is no legal impediment to its constructing two new flats on the flat roof of the existing building. Of course, the respondent does not face the prospect of having to put up with that development because it is going to buy the freehold and will be able to refuse whatever temptations a developer purchaser can offer. But the landlord is entitled to be paid a price that reflects the development value it is losing when it parts with the freehold.

The respondent's applications for permission to cross-appeal

78.
The respondent seeks permission to cross-appeal on two grounds. If the landlord's appeal succeeds, it argues that the development value of £166,725 determined by the FTT is too high; if the landlord's appeal fails, it argues that the £25,000 hope value is, likewise, too high and that the hope value is nil. We heard argument about these two grounds at the hearing, sufficient to enable us to decide both the permission applications and the cross-appeals if permission were granted.

79.
We can deal shortly with the application for permission to appeal the FTT's finding about hope value (which is in any event academic since the landlord's appeal has succeeded.). We refuse permission to cross-appeal on this point, because there is no realistic prospect of success for the argument that the FTT was in error when it determined that, even if the landlord had no right to develop on the roof, a purchaser would pay for the possibility of negotiating an agreement with the respondent and the lessees so as to enable the development to go ahead. Mr Jefferis says that the FTT in making that decision treated the legal position as uncertain, in contradiction of its own decision that the landlord had no right to build, and contrary to authority (Katchukian v Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon [2013] EWCA Civ 90). That is clearly not what the FTT was doing. It proceeded on the basis that the landlord has no legal right to build. However, it took into consideration the fact that of course a legal obstacle can be overcome by negotiation, and that a purchaser would make its bid in the hope that that could be achieved. It may be that the respondent and its member lessees as a matter of fact would not reach an agreement with a developer for any price under the sun; but a purchaser, even with the knowledge of the respondent's and lessees' view on the matter, would reckon that there was still some hope value in the possibility of negotiation. There is no legal error in the reasoning process and, given the possible gains involved, there is nothing irrational about the FTT's figure of £25,000.

80.
The other application for permission to cross-appeal is not academic and is very important to the respondent, because its members now have to pay to the landlord the development value of the freehold on the basis that the freeholder does have the right to build two new flats on the roof. The FTT put that value at £166,725, taking as a starting point the figure of £200,000 offered by the developer and deducting £24,500 for the agreed value of the freehold without development hope value to arrive at £175,500. The FTT then reduced this figure by 5% to account for structural risk. Mr Jefferis says that the FTT erred in ignoring evidence of gross development value and costs of

development which, when reworked with the FTT's own assessment of gross development value, produced a residual value of only £22,000.

81.
However, the FTT explained that its decision was not based on a residual valuation, because it was satisfied that reliable market evidence was available. As a simple cross-check to its figure the FTT assessed gross development value and applied a figure of 33% (drawn from market evidence provided by the appellant's expert) to reflect the value of an assumed airspace lease for Cambrai Court. The resulting figure indicated that the FTT's assessment of development value, derived from the developer's offer, was within the range of prices that a developer might pay. We cannot fault the FTT's decision in the presence of the offer which it found was made by a developer with expertise and experience in this kind of development and with no connection to the appellant. We therefore refuse permission to cross-appeal on this point because there is no reasonable prospect of success.

Upper Tribunal Judge Elizabeth Cooke		Mrs Diane Martin MRICS FAAV
	Dated:	22 February 2022

Right of appeal

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