A STITCH IN TIME MAY NOT ALWAYS SAVE NINE

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In a promotional video celebrating a recent project, award-winning architect Sophie Hicks said: *"I think it's very important for a new house to sit very comfortably and fittingly in its landscape".*[1] However, protracted litigation with neighbours over Ms Hicks' development plans for her home in Holland Park, London, demonstrates how subjective and divisive opinions and perspectives on this can be.

"The architect's controversial plans involved a subterranean mansion, with a striking surface glass cube."

The architect's controversial plans involved a subterranean mansion, with a striking surface glass cube. You can see some images in this Architects Journal piece.[2] The cube was designed to be even more arresting at night, when it would have been illuminated.

The freehold and leasehold owners of the neighbouring property, 89 Holland Park, strongly resisted the plans. This opposition was based on a deed of covenant over Ms Hicks' plot that required the freeholder's prior approval of her plans before she could apply for planning permission. The litigation eventually entailed three separate High Court claims, one of which also went to the Court of Appeal.

Aesthetic considerations and leaseholders' interests

The key principles coming out of the past litigation were that:

- aesthetics can be relevant considerations for consent to a covenantor's proposals. Deliberations do not need to be limited to whether the plans will have an adverse impact on the capital or rental value of the covenantee's tenement; and
- leaseholders' interests are also relevant when determining whether a freeholder should grant consent when the covenant is expressly stated to be for the freeholder's benefit. This is because section 78 of the Law of Property Act 1925, which regulates the benefit of covenants impacting land, provides that a covenant made with a covenantee is deemed to have also been made with those deriving title from it.

Accordingly, the UK's Court of Appeal decided that the freeholder was entitled to refuse consent to the development on aesthetic grounds and because the planned works would extend beyond a building line. Ms Hicks' plans needed to be scaled back as a consequence.

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The price of peace

This success came at a heavy cost to the freeholder – £2.7m in legal and other professional fees. Only some of those costs were recoverable from Ms Hicks as the loser in the proceedings. Overall, the cost to the freeholder was approximately £2m – a salutary reminder that a successful party in litigation may still be left out-of-pocket.

The freeholder attempted to recover the balance of its costs from its leaseholders as a service charge item, which the Judge described as *"eye-watering"*. Two dissenting leaseholders challenged the reasonableness of these service charges (*Dell v 89 Holland Park (Management) Ltd* [2022] UKUT 169 (LC)). They had initially been supportive of the litigation against Ms Hicks. However, as their specific premises did not overlook the controversial development site, they had grown increasingly apprehensive of the litigation costs and sought to distance themselves from the claims.

Upper Tribunal appeal

The case went to the Upper Tribunal and a full copy of its judgment, which is thought to represent one of the largest service charge appeals in the UK to date, can be viewed here.

The question for the Upper Tribunal was: Did the leases entitle the freeholder to demand the charges as service charge items? The costs were for legal representation and expert advice in the litigation and objecting to one of Ms Hicks' planning applications.

The freeholder relied on the following service charge items in the leases to justify recoverability:

"To employ all such surveyors builders architects engineers tradesmen solicitors accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building.

… to do or cause to be done all such works installations acts matters and things as in the reasonable discretion of the Lessor may be considered necessary or advisable for the proper maintenance safety amenity and administration of the Building…"

("the Sweeper Clauses").

When construing these Sweeper Clauses, the Upper Tribunal was required 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 mean (using the language in the documents). This involves focussing on the meaning of the relevant words in their documentary, factual and commercial context, including:

(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 (*Arnold v Britton* [2015] UKSC 36 applied).

Upper Tribunal decision

"The purpose behind the Sweeper Clauses was to fund the freeholder's obligations as a landlord, instead of supporting its wider interests as the freehold owner"

The Upper Tribunal decided in favour of the leaseholders of 89 Holland Park. The freeholder could not recover the balance of its litigation costs from them. Central to its decision were the following important points, which landlords, leaseholders and other interested parties (such as lenders) ought to be alive to:

- **To ascertain the scope of the Sweeper Clauses, it was necessary to also consider the other relevant provisions in the leases.** The Upper Tribunal noted that the leases were highly prescriptive about various landlord obligations (such as maintaining fire extinguishers and the entry system), the costs of which would be recoverable from the service charge. The leases also specifically allowed the freeholder to recover litigation costs for enforcement of the leaseholders' covenants. Therefore, the absence of provision for litigation involving neighbouring landowners was held to be stark and deliberate. In this context, the Upper Tribunal considered that the Sweeper Clauses were instead intended to focus on the practical management and upkeep of the building.
- **The purpose behind the Sweeper Clauses was to fund the freeholder's obligations as a landlord, instead of supporting its wider interests as the freehold owner of 89 Holland Park.** Deciding otherwise would have been *"too great a stretch"*. The freeholder was not obliged to take action to prevent Ms Hicks' planned development under the leases (despite consulting and taking action per its leaseholders' requests to do so).
- **Clear wording should have been included in the leases if the parties were aware of potential action regarding the plot's development and intended it to be included as a potential service charge cost.** Counsel for the freeholder argued that there had been historic litigation concerning the plot that the parties to the leases were aware of at the time they entered into them (see *Radford v de Froberville* [1977] 1 WLR 1262 for example). They would have also been aware that future disputes regarding the plot's development were possible in the light of the past disputes and this would therefore have reasonably been in their contemplation when entering into the leases. However, the Upper Tribunal determined that, if this was indeed something within the parties' minds when the leases were granted, they ought to have expressly spelt it out instead of relying on broad provisions such as the Sweeper Clauses and banking on the courts inferring such an obligation.
- **It would not make commercial common sense to include litigation between the freeholder and the owner of the plot as a service charge item.** The legal costs that had been incurred in litigation against Ms Hicks were extraordinary. The Upper Tribunal held that an obligation in the leases for the freeholder to incur and for the leaseholders to fund costs of such a level (in reliance on the Sweeper Clauses alone) was *"implausible"*. To determine otherwise could have potentially ruinous consequences for the leaseholders and might render their leases unmarketable.

Our thoughts

"Drafting highly prescriptive service charge items is a double-edged sword."

Dell v 89 Holland Park (Management) Ltd has some interesting takeaways:

- As is common, the freeholder was a company incorporated to acquire the freehold of 89 Holland Park. The leaseholders were shareholders of the company and some acted as its directors (rotating from time-to-time). Accordingly, not only were the leaseholders aware of the litigation, costs and decisions being made – they essentially controlled and steered the freeholder throughout the process. However, the freeholder and those representing it should not have been complacent about the extent to which the leaseholders were thus bound to the costs of well-intentioned legal action. The Upper Tribunal made it clear that the leaseholders' largely supportive attitude to the litigation did not displace the contractual and statutory protections afforded to them against onerous service charges. We suggest that parties with potentially ambiguous service charge provisions should consider putting in place deeds of variation and/or litigation participation and funding agreements before taking action to oppose neighbouring development schemes.
- As noted above, the leaseholders are the freeholder's shareholders and so ultimately would end up paying the shortfall in the freeholder's accounts. However, there may be a sizeable difference between a leaseholder's liability to pay as a service charge and its liability to pay in its capacity as a shareholder. Even if a leaseholder is a shareholder, uneven apportionment of service charges may make it commercially shrewd for that leaseholder to challenge the treatment of an expense as a service charge item. Doing so will also protect the leaseholder from immediate action being taken against its asset (such as forfeiture for non-payment).
- Drafting highly prescriptive service charge items is a double-edged sword. It has the benefit of being clear that listed items are recoverable. However, parties need to properly apply their minds to ensure that the list is comprehensive enough (particularly as services required are likely to change from time-to-time during the currency of a lease's term). A court might infer that a failure to expressly address something in the drafting was deliberate, rather than accidental and may be unprepared to construe *"catch-all"* sweeper provisions broadly enough to remedy the omission. This applies equally to commercial and residential premises.

There is a big difference between landlords' actions to tackle physical threats from neighbouring premises and purely legal and valuation-related ones. The Upper Tribunal contrasted *Assethold Limited v Watts* ([2014] UKUT 537 (LC)), concerning an immediate risk to a party-wall, with the present case. The structure of the freeholder's building had not been affected or endangered by Ms Hicks' actions or plans. There might be instances where similar preventative action would be legally warranted (allowing costs to be recovered via the service charge). However, prescriptive examples were not provided by the Upper Tribunal. Accordingly, freeholders should bear in mind that a stitch in time may not always save nine.

[1] https://sophiehicks.com/ ("House between two lakes").
[2] https://www.architectsjournal.co.uk/news/legal-blow-for-sophie-hicks-self-designed-underground-home-in-holland-park

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