Neutral Citation Number: [2023] EWCA Civ 849

Case No: CA-2022-002253

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTCE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
PROPERTY, TRUSTS AND PROBATE LIST
Mr Justice Fancourt, Vice-Chancellor of the County Palatine of Lancaster
[2022] EWHC 2671 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 July 2023

Before :

LORD JUSTICE ARNOLD
LORD JUSTICE NUGEE
and
LADY JUSTICE FALK

- -

Between :

ALMA PROPERTY MANAGEMENT LTD	**Claimant / Appellant**
- and -	
(1) RICHARD GEORGE CROMPTON **(2) JONATHAN EDWARD COOKSON**	**Defendants/ Respondents**

- -
- -

Timothy Dutton KC (instructed by **Walker Morris LLP**) for the **Appellant**
Adam Rosenthal KC and Mark Galtrey (instructed by **Wedlake Bell LLP**) for the **Respondents**

Hearing dates: 28 and 29 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This appeal from the High Court in Manchester concerns a prominent high-rise building in Salford, partly used as a hotel and partly as residential flats let on long leases.

2. The structure of leasehold interests in the building is an unusual one, under which the responsibility for carrying out repairs to the building is that of the lessee of a lease of the common parts. The current holders of that lease are the Respondents (the Defendants below), two insolvency professionals who were appointed receivers of the freehold of the building pursuant to a charge (**"the Receivers"**), and who acquired the common parts lease in the course of their receivership for reasons explained below. The charge over the freehold has long since been redeemed, and the receivership has come to an end. One might have expected (and at one stage it was indeed envisaged) that the Receivers would then give up the lease of the common parts to someone else. But this never happened and the Receivers have been left holding it.

3. The Appellant (and Claimant below), Alma Property Management Ltd, (**"Alma"**) is the current freeholder, and brought an action for specific performance of the repairing obligations in the common parts lease. The Receivers counter-claimed for a declaration that Alma had unreasonably refused its consent to an assignment of that lease. The action was heard in Manchester by the Vice-Chancellor of the County Palatine of Lancaster, Fancourt J, in September 2022. In a conspicuously clear, thorough and well-reasoned judgment at [2022] EWHC 2671 (Ch), handed down on 28 October 2022, he resolved a large number of contentious issues, dismissed the claim for specific performance, and gave judgment for the Receivers on their counterclaim.

4. Among other things, the Vice-Chancellor held that the Receivers had acquired the common parts lease in exercise of their powers as receivers, and hence as agents for Alma. As such they were entitled to be indemnified by Alma. In view of this he concluded that it was inappropriate to order specific performance of the repairing obligations against them.

5. Alma appealed to this Court with permission partly granted by the Vice-Chancellor himself, and partly by Newey LJ. The Receivers, as well as supporting the judgment, sought to uphold it on alternative grounds.

6. The arguments on both sides of the appeal were wide-ranging and erudite, and were skilfully advanced by Mr Timothy Dutton KC, who appeared for Alma, and by Mr Adam Rosenthal KC, who appeared with Mr Mark Galtrey for the Receivers, respectively. But I have concluded that the Vice-Chancellor's judgment should be upheld both on the issue whether the Receivers were acting within their powers in taking the lease of the common parts, and on the counterclaim, and that in those circumstances the appeal should be dismissed in its entirety.

Facts

7. The facts were largely agreed, although the Vice-Chancellor heard oral evidence and made some further findings.

8. The building in question is now known as North Tower, Victoria Bridge Street, Salford. It was constructed in the 1960s. The Vice-Chancellor described it as consisting of 22 storeys (above the ground floor), but it appears from plans we were provided with that there is in fact a 23rd floor. The lower floors (up to the 9th) are used as a hotel. The upper floors (11th to 22nd) are used as residential flats. As to the 10th floor, see below. We were not told anything about the 23rd floor.

9. By 1999 the freehold of the building had been acquired by Bruntwood Estates Ltd (**"Bruntwood"**). It granted a series of leases on the same day, 6 August 1999, as follows:

    (1) The hotel premises (floors 1 to 9 and parts of the ground floor, basement and sub-basement) were demised by Bruntwood to an associated company, Bruntwood First Properties Ltd (**"BFPL"**). We have not seen this lease (**"the Hotel Headlease"**) but it is recited in the subsequent underlease of the hotel (see below) to have been for a term of 130 years less 3 days.

    (2) The residential parts (floors 11 to 22 and part of the ground floor) were demised by Bruntwood to Crosby Homes (North West) Ltd (**"Crosby"**) for a term of 130 years less 10 days from 6 August 1999 in consideration of a substantial premium (in excess of £2.9m) and at a peppercorn rent (**"the Residential Headlease"**).

    (3) The common parts were demised by Bruntwood to North Tower Management Company Ltd (**"NTMC"**), again for a term of 130 years less 10 days from 6 August 1999 and at a peppercorn rent (**"the Common Parts Lease"**). We were provided with the plans attached to this lease which show that the areas demised consist of significant areas in the sub-basement and basement, very small parts of the ground, 1st to 9th and 11th to 22nd floors (mainly the staircases), the entirety of the 10th floor, parts of the 23rd floor, and the flat roof. We were not told anything about the 10th floor, but the Residential Headlease contained a covenant by the Landlord in cl 9.5 that the 10th floor would only be used for purposes associated with the administration of the estate and the provision of services and purposes reasonably ancillary thereto, and the user covenant by NTMC in cl 4.16 of the Common Parts Lease (which applied to all the demised premises) was to the same effect.

    It may be noted that in both the Residential Headlease and the Common Parts Lease the demised premises were defined in such a way as to include the interior plaster of the external walls but to exclude any other part of them. The same was no doubt true of the Hotel Headlease. This means that the exterior walls were not demised at all but retained by Bruntwood.

10. Both the hotel premises and the residential parts were subsequently further demised by their respective headlessees, as follows:

    (1) The hotel premises were demised by BFPL to Scottish & Newcastle plc by an underlease dated 14 November 2001 for a term of 35 years less 3 days from 31 August 2000 (**"the Hotel Underlease"**). This lease reserved a substantial rent, initially of £240,000 pa, rising to £432,989 after 5 years, and subject to upwards only rent review by reference to an open market rent every 5 years thereafter.

Mr Dutton told us that Premier Inns is now the registered proprietor of the Hotel Underlease, that the Hotel Underlease is noted against the title to the freehold, and that the title to the Hotel Headlease was closed in 2005. It can safely be inferred from that that Premier Inns now holds the Hotel Underlease directly from Alma as freeholder, the Headlease presumably having been surrendered.

(2) So far as the residential premises are concerned, Crosby granted long leases at substantial premiums of most of the individual flats in 2000 and 2001. We have seen a sample flat lease, that of Flat 2303, which demises the flat for a term of 130 years less 15 days from 6 August 1999 at a premium of £106,000 and reserving a rent of £120 pa (**"the Flat Lease"**).

As appears below, Crosby's interest was later acquired by a company owned by the lessees of the flats.

11. With this structure of leases and underleases in mind, it is now possible to explain the provisions for the maintenance of the building. In the case of the hotel premises these are straightforward. The lessee under the Hotel Underlease covenanted by cl 6 to pay BFPL a service charge amounting to 47.55% of the total cost of the Building Services as defined, and BFPL covenanted to provide or procure that the Building Services were provided. It is not necessary to refer to the definition of Building Services, which included the sort of items one would expect, including maintaining and repairing the structure and exterior. Bruntwood was also party to the underlease and gave a guarantee of BFPL's obligations.

12. One might have expected the Residential Headlease to contain corresponding provisions. But it does not. There is no covenant by Crosby as the tenant to pay a service charge, although there is a covenant by Bruntwood as the landlord in cl 9.4 that the exterior of the Remaining Premises (defined to mean the parts of the Building other than those demised by the Residential Headlease and the Common Parts Lease, and so including the structure) should be repaired and kept in good and substantial repair.

13. Instead, the liability of Crosby as headlessee under the Residential Lease to contribute to the cost of repairs was provided for by a combination of the Common Parts Lease and a separate Deed of Maintenance, as follows:

(1) Schedule 6 to the Common Parts Lease contained an obligation by NTMC as tenant to perform the Services throughout the term, Services being widely defined to include maintaining and repairing the Structure, itself defined to include the roofs, exterior walls and other structural parts of the building. It also contained an obligation by Bruntwood as landlord to pay to NTMC a Service Charge, calculated at 49.42% of NTMC's Annual Expenditure, being in effect its net expenditure on providing the Services.

(2) NTMC and Crosby entered into a Deed of Maintenance, also dated 6 August 1999 (**"the Deed of Maintenance"**). It contained a covenant in cl 2 by NTMC in favour of Crosby to perform and observe all the covenants on its part contained in the Common Parts Lease; and a covenant by Crosby to pay to NTMC a Service Charge, calculated at 50.58% of its Annual Expenditure (defined to have the same meaning in the Common Parts Lease).

14. Crosby in turn passed on its service charge obligations to the residential underlessees of the flats (**"the Flat lessees"**). The sample Flat Lease thus contains a covenant by the lessee to pay a Service Charge calculated as 1.18% of the Building Charge Expenditure, defined to include the expenditure in the performance of the covenants on the part of the tenant party to the Common Parts Lease and payable by Crosby pursuant to the Deed of Maintenance.

15. This elaborate network of obligations in relation to the maintenance and repair of the building is an unusual one and it is not easy to grasp at first sight how it was intended to work, so it may be helpful to give an example. Suppose that repairs were required to the exterior of the building. BFPL owed an obligation, guaranteed by Bruntwood, to the lessee under the Hotel Underlease to procure such repairs, and Bruntwood owed a similar obligation to Crosby under the Residential Headlease. Bruntwood could recover 47.55% of the cost from the hotel lessee. But it could not recover the balance directly from Crosby. Instead the responsibility to repair was passed to NTMC, NTMC owing Bruntwood an obligation to repair under the Common Parts Lease, and owing Crosby a similar obligation under the Deed of Maintenance. Assuming NTMC carried out the repairs at say a cost of £100,000, it could recover (i) £49,420 from Bruntwood under the Common Parts Lease and (ii) £50,580 from Crosby under the Deed of Maintenance, thereby covering the entire cost. The Bruntwood group in the shape of BFPL could in turn recover £47,550 of the £49,420 from the lessee under the Hotel Underlease, and Crosby could (presumably) recover its expenditure from the Flat lessees. We were not told what the reason was for the gap between the 49.42% payable by Bruntwood to NTMC and the 47.55% recoverable by BFPL from the hotel lessee.

16. NTMC was a new company incorporated for the purpose of assuming its position in this structure. It had no other significant assets apart from the Common Parts Lease, and no income from the building save for its rights to the service charge payments from Bruntwood and Crosby which did no more than enable it to provide in advance for, and recover, its expenditure. Its 100 shares were allotted 50/50 to Bruntwood and Crosby.

17. In 2005 the building was acquired by Alma, which was registered as proprietor of the freehold on 29 March 2005. The evidence was that Alma acquired it because of the income from the hotel, so the Vice-Chancellor inferred that Alma also acquired the interest of BFPL under the Hotel Headlease; as appears above, what actually appears to have happened is that the Headlease was surrendered in 2005, although we were not told whether this was before or after the purchase.

18. Subsequently Alma took a substantial loan from West Bromwich Commercial Ltd (**"West Bromwich"**), secured by a charge dated 21 December 2005 (**"the Charge"**). I will have to look at the terms of the Charge in more detail below, but for present purposes it is sufficient to note that it included in the usual way express power for West Bromwich to appoint a receiver or receivers (in addition to the statutory power under the Law of Property Act 1925).

19. In 2009 a company called North Tower Residential Management Ltd (**"NTRML"**) acquired Crosby's interest in the Residential Headlease and was registered as proprietor on 1 September 2009. NTRML is a company owned by the Flat lessees.

20. In 2010 Alma fell into arrears on payments due under the Charge. On 7 January 2011 West Bromwich appointed the Receivers (Mr Crompton and Mr Cookson) to be joint

receivers of Alma's interest in the building.

21. Shortly thereafter NTMC was struck off the register for failure to file its annual accounts. It is worth at this point citing from the Vice-Chancellor's judgment at [20]:

> "The dissolution caused a potentially serious problem for the Defendants as receivers, which they quickly recognised. Only NTMC had the right to recover service charge from [Alma] (under the terms of the [Common Parts] Lease) and from NTRML (under the terms of the Deed of [Maintenance]). [Alma] (in receivership) had a liability to NTRML and Premier Inn (which had by then become tenant under the Hotel Lease) to keep the Building in good repair but had no right to recover a contribution from NTRML. Without the benefit of the [Common Parts] Lease, the value of the freehold of the Building was likely to be seriously impaired."

22. In the light of some of the arguments we received, it is worth setting out what happened next in some detail, taken from the Vice-Chancellor's judgment. First the Receivers took legal advice, which considered and rejected the viability of an application to restore NTMC to the register. Then the Treasury Solicitor was asked to assign the Common Parts Lease to a new company controlled by the Receivers, but that prompted the Crown to disclaim it. The Receivers' lawyers then considered other options and it was decided that there should be an application for a vesting order, vesting the Common Parts Lease either in a new company with the Receivers as directors, or in the Receivers themselves. An application was first made for an order vesting the lease in a new company, and West Bromwich were approached for an indemnity against any liability incurred by the Receivers resulting from their taking control of the lease through the new company, but this was firmly rejected.

23. For some reason this application was not proceeded with. A second application was made for an order vesting the lease in the Receivers themselves. Mr Crompton, who gave oral evidence before the Vice-Chancellor, said that he and Mr Cookson realised that taking the Common Parts Lease in their names exposed them to potential risk. The Vice-Chancellor continues in his judgment (at [23]):

> "However, he said, the risk was not great because the receivership strategy was to sell the receivership assets, and any purchaser would need to have control of the [Common Parts Lease] to run the service charge for the Building. The receivers would not sell except on terms that the [Common Parts] Lease was assigned to the purchaser."

It may be noted here that the Vice-Chancellor found both Mr Crompton and Mr Cookson to be entirely honest and straightforward witnesses, who appeared to have a good recollection of events and the reasons for them; and said that he was able to accept their evidence in full save where demonstrated to be in error by the documentary evidence (judgment at [46]).

24. A vesting order was duly made by DJ Matharu on 30 April 2013. It vested in the Receivers the land and property disclaimed by the Crown constituted by the Common Parts Lease and the Deed of Maintenance (and another lease and deed of maintenance relating to a car park with which we are not concerned).

25. The remaining history can be shortly stated. In 2014 the Receivers agreed a sale but the sale fell through. While it was still progressing however the purchaser's solicitors raised a query whether Crosby's obligation to pay under the covenant in the Deed of Maintenance had passed to NTRML, and as a result the Receivers entered into a further deed dated 26 January 2015 with NTRML novating the obligations in the Deed of Maintenance to it. In 2016 Alma started a redemption action, and in due course Alma and West Bromwich agreed the amount due under the Charge, and terms of settlement. The Receivers were asked to hand over keys to the building and instruct tenants to make future payments of rent to Alma's managing agents, Landswood de Coy. Handover meetings took place between the latter and the Receivers' own agents, as a result of which the Receivers had nothing further to do with the building from 7 October 2016, and Landswood de Coy took over the management of the building. The Receivers were asked to, and did, sign formal letters acknowledging the termination of the receivership.

26. In August 2017 Alma contacted the Receivers to tidy up some loose ends, namely the Common Parts Lease and the Deed of Maintenance, and solicitors were instructed with a view to assigning them to another Alma company, but, as the Vice-Chancellor put it, the matter appears to have been lost sight of when the Receivers' solicitor left his firm, and no assignment ever took place. By late 2019 or early 2020 Alma had decided that its interests were best served by leaving the Common Parts Lease vested in the Receivers, and requiring them to carry out repairs. In March 2020 Alma duly demanded that the Receivers carry out works, and in August 2020 issued the proceedings, seeking specific performance of their repairing obligations.

27. NTRML was willing to take an assignment of the Common Parts Lease. On 27 October 2020 the Receivers formally asked Alma for consent to assign. On 25 November 2020 Alma gave consent to the assignment subject to each of the Receivers entering into an authorised guarantee agreement.

The judgment

28. The Vice-Chancellor dealt first with an estoppel argument raised by the Receivers. He rejected this, holding that although there was a common understanding between 2016 and 2020 which resulted in the Receivers not managing the building or carrying out any works in that period, there was no sufficient detrimental reliance to prevent Alma, after a reasonable period of notice, alleging that they were obliged to repair the building (at [83]). There has been no appeal against this.

29. He then considered the exercise of the Court's discretion to grant or refuse specific performance. There were a number of issues under this head, but among others was a contention by the Receivers that they had acquired the Common Parts Lease in the course of their duties as receivers and acting within their powers, and were therefore deemed to be acting as agents for Alma, with the result that they were entitled to be indemnified by Alma (at [90]). On this the Vice-Chancellor concluded that they were indeed acting within their powers as receivers, and specifically within the power in paragraph 17 of schedule 1 to the Insolvency Act 1986, incorporated into the Charge where the chargor was a body corporate, to "take a lease or tenancy of any property required or convenient for the business of the company". That meant that they were acting as agents for Alma, and the Common Parts Lease fell within the scope of their obligation to account to Alma at the end of the receivership (at [114]). He also concluded that they would as a result be entitled to be indemnified by Alma if they were

now compelled to incur expenditure to carry out works (at [123]).

30. In the light of his conclusions on agency, indemnity and the fact that Alma could carry out the works itself, he held that it was inappropriate to order specific performance (at [124]).

31. He then considered the counterclaim, and the question whether the condition imposed by Alma on the giving of consent (namely that the Receivers enter into authorised guarantee agreements) was a reasonable one. Leaving aside the question of the indemnity, he concluded that the condition would have been a reasonable one, in the sense that it could not be said that no reasonable landlord would require a guarantee for a company such as NTRML, given the importance of the Common Parts Lease (at [193]). But taking into account the indemnity, he concluded that the condition was unreasonable. This was because the Receivers *were* entitled to be indemnified as lessees of the Common Parts Lease against liability on the tenant's covenants, but would *not* be entitled to be indemnified if they assigned the lease and entered into guarantees. Alma was therefore seeking to improve its position at the expense of the Receivers, and that was unreasonable (at [200]-[202]). The Receivers were therefore entitled to assign the Common Parts Lease to NTRML without Alma's consent (at [203]).

32. By his Order dated 28 October 2022 he therefore dismissed Alma's claim, and by a further Order dated 2 November 2022 he declared that the Receivers were entitled to assign the Common Parts Lease to NTRML without Alma's consent.

Issues on appeal

33. Alma's Grounds of Appeal are as follows:

    (1) Ground 1 is that the Vice-Chancellor was wrong to find that the Receivers were acting within their powers (and hence wrong to dismiss the claim and give the Receivers judgment on their counterclaim). Permission to appeal on this ground was given by the Vice-Chancellor.

    (2) Ground 2 is that if the Vice-Chancellor was right to find that the Receivers were acting within the powers, the counterclaim should have been dismissed. Permission to appeal on this ground was given by Newey LJ.

34. The Receivers by Respondent's notice sought to uphold the judgment on alternative grounds as follows:

    (1) Taking the Common Parts Lease was within the powers of the Receivers not only on the basis of paragraph 17 of schedule 1 to the Insolvency Act 1986, but also within paragraph 23 of the schedule, and clause 15(4)(iv)(a) of the relevant terms of the Charge.

    (2) If the Vice-Chancellor was wrong that taking the lease was within their powers, his conclusion that specific performance should be refused should be upheld on the basis that Alma had other remedies.

    (3) If the Vice-Chancellor was wrong that taking the lease was within their powers, his judgment on the counterclaim should be upheld on the basis that it was

nevertheless unreasonable to require the Receivers to enter into authorised guarantee agreements.

35. Mr Dutton very helpfully identified the issues that arose out of the parties' respective contentions as follows:

(1) Were the Receivers acting within their powers when they acquired the Common Parts Lease (Alma's Ground 1 and Receivers' Ground 1)?

(2) If the answer to (1) was No, then should specific performance be refused (Alma's Ground 1 and Receivers' Ground 2)?

(3) If the answer to (1) was Yes, should the counterclaim be dismissed (Alma's Ground 2)?

(4) If the answer to (1) was No, then was the requirement for the guarantees unreasonable (Receivers' Ground 3)?

36. We heard extensive argument on all four issues. But as I have already indicated, I have concluded that the Receivers were indeed acting within their powers when they took the Common Parts Lease, that is that the answer to issue (1) is Yes. That means that issues (2) and (4) do not arise, and I propose only to consider issues (1) and (3).

Were the Receivers acting within their powers in taking the Common Parts Lease?

37. The Charge was subject to West Bromwich's Commercial Mortgage Conditions (**"the Conditions"**). Clause 15 of the Conditions concerned Receivers and Administrators. Clause 15(4) provided as follows:

> "(4) **Every Receiver shall** (subject to any restrictions in the instrument appointing him but notwithstanding any winding-up, dissolution, death or mental incapacity of a Security Provider) **have and be entitled to exercise**, in relation to any asset which is secured in favour of the Lender in respect of which he was appointed, and as varied and extended by the provisions of any Security Document (in the name of or on behalf of a Security Provider or in his own name and, in each case, at the cost of a Security Provider):
>
> (i) all the powers conferred by the Law of Property Act 1925 on mortgagors and on mortgagees in possession and on receivers appointed under that Act;
>
> (ii) **where a Security Provider is a body corporate, all the powers of an administrative receiver set out in Schedule 1 to the Insolvency Act 1986 (whether not the Receiver is an administrative receiver)**;
>
> (iii) all the powers and rights of an absolute owner and power to do or omit to do anything which a Security Provider itself could do or omit to do; and
>
> (iv) **the power to do all things** (including bringing or defending

> proceedings in the name or on behalf of a Security Provider) **which seem to the Receiver to be incidental or conducive to:**
>
> **(a) any of the functions, powers, authorities or discretions conferred on or vested in him;**
>
> (b) the exercise of any rights, powers and remedies of the Lender provided by or pursuant to any Security Document or by law (including realisation of all or any part of any asset which is secured in favour of the Lender); or
>
> (c) bringing to his hands any assets of a Security Provider forming part of, or which when got in would be, the assets secured in favour of the Lender."

(emphasis added).

38. The powers of an administrative receiver set out in schedule 1 to the Insolvency Act 1986 include the following:

> "2 Power to sell or otherwise dispose of the property of the company by public auction or private contract …
>
> …
>
> 17 Power to grant or accept a surrender of a lease or tenancy of any of the property of the company, and to take a lease or tenancy of any property required or convenient for the business of the company.
>
> …
>
> 23 Power to do all other things incidental to the exercise of the foregoing powers."

39. The Vice-Chancellor held that the Receivers had power to take the Common Parts Lease under paragraph 17 of schedule 1. He rejected three arguments put forward by Mr Nicholas Trompeter KC, then appearing for Alma, namely (i) that taking the lease was not the exercise of a power "in relation to" the freehold; (ii) that obtaining a vesting order was not "tak[ing] a lease or tenancy"; and (iii) that the lease was not "required or convenient for the business of the company". On the last point he held (at [112]) that the business of Alma was to hold valuable property assets and that:

> "Taking a vesting of the CP Lease to preserve the value of the freehold of the Building was, in my judgment, taking a lease that was required or convenient for the business of [Alma]."

40. On the appeal Mr Dutton took a different point on paragraph 17. This was that what needed to be "required or convenient for the business of the company" was not the *lease* but the *property*. "Property" in paragraph 17 did not mean an estate in land, but physical premises, and the position of "any" meant that the natural reading was "a lease of (any premises required or convenient for the business of the company)" rather than "a lease (of any premises) that was required or convenient for the business of the company".

41. If that was right, he further submitted that Alma did not require possession of the common parts for its business. Its business no doubt included complying with its covenant to repair under the Residential Headlease, but it did not need physical possession of the Common Parts to do that, and in any event with the Common Parts Lease disclaimed, it was in possession of them.

42. In reply, Mr Dutton developed a new argument as follows. Under clause 2 of the Deed of Maintenance NTMC covenanted with Crosby to perform the covenants in the Common Parts Lease, and under clause 3 Crosby covenanted to pay its Service Charge (calculated as 50.58% of NTMC's expenditure on services). Neither obligation, Mr Dutton submitted, actually required the Common Parts Lease to continue. All that the Receivers needed was the Deed of Maintenance and that was sufficient. Hence the taking of the lease was not required for Alma's business.

43. On Mr Dutton's first argument on the construction of paragraph 17, I agree with Mr Rosenthal that the powers in schedule 1 to the Insolvency Act 1986 should be construed broadly, and on this basis I agree with him that it is sufficient, as the Vice-Chancellor thought, that the *lease* is required or convenient for the business in question.

44. On Mr Dutton's second argument I can see the force of the point that it was not strictly necessary for the Receivers to acquire the Common Parts Lease and that it might have been sufficient to acquire the benefit of the Deed of Maintenance. But I do not think it necessary to reach any concluded view on this question. This is because I accept Mr Rosenthal's submission that, whether or not Mr Dutton is right, the acquisition of the lease was within the powers conferred on the Receivers by clause 15(4)(iv)(a) of the Conditions. As set out above, this conferred power on the Receivers to "do all things … which seem to the Receiver to be … conducive to … any of the … powers … vested in him."

45. One of the powers vested in the Receivers was the power to sell the freehold (by virtue of clause 15(4)(i) of the Conditions, and/or paragraph 2 of schedule 1 to the Insolvency Act 1986). It was therefore sufficient if it seemed to the Receivers that acquiring the Common Parts Lease was conducive to the sale of the building. That is a question of fact, not of law, and is to my mind answered by the judgment of the Vice-Chancellor. He recites Mr Crompton's evidence (as set out at paragraph 23 above) that the receivership strategy was to sell the receivership assets, and that the Receivers took the Common Parts Lease because any purchaser would need to have control of it to run the service charge for the building. He does not reject or qualify this evidence, and in circumstances where he found both Mr Crompton and Mr Cookson to be entirely straightforward witnesses with a good recollection "of events *and the reasons for them*", and where he accepted their evidence "in full" save where demonstrated to be in error, I think he clearly accepted this evidence. That seems to me sufficient to show both that the Receivers did in fact take the Common Parts Lease in contemplation of the exercise of the power of sale, and that it seemed to them conducive to a sale to do so.

46. Mr Dutton said that this power would not be available unless the Receivers were not only of that opinion but had a reasonable basis for it. I am not sure that is right on the wording of the clause, but in any event it seems to me plain and beyond doubt that the Receivers did have a reasonable basis for it. The structure of property and contractual interests put in place by Bruntwood in 1999 was a very unusual one that would have

been unfamiliar even to experienced property professionals. The Common Parts Lease played a central role in this network of obligations. The scheme was to have a separate services provider from the freeholder (namely NTMC), and the Common Parts Lease imposed both an obligation on NTMC, owed to the freeholder, to do the work, and an obligation on Bruntwood to pay 49.42% of the cost. That then tied in to the Deed of Maintenance where Crosby agreed to pay for the other 50.58%. If one takes the Common Parts Lease out of this structure there is a hole at the heart of it. Put simply only NTMC had the right under the Deed of Maintenance to payment of the 50.58% from Crosby or its successor NTRML. So if the freeholder (Alma) simply did the work (as it was obliged to do under both the Hotel Underlease and the Residential Headlease), it had no contractual route to recovery of that 50.58% from NTRML.

47. Now Mr Dutton may be right that there might have been other methods to get round this problem such as Alma doing the works and negotiating a replacement for the Deed of Maintenance from NTRML, or by the Receivers simply replacing NTMC in the Deed of Maintenance without also reviving the Common Parts Lease. But at least one obvious solution to the hole in the middle of the structure is to fill it with the reproduction of the missing piece. That is what the Receivers did, on advice, and it seems clear from the judgment that it was never suggested to the Vice-Chancellor (or presumably to the Receivers when giving evidence) that that was all quite unnecessary. On the contrary, the Vice-Chancellor referred to the dissolution of NTMC as causing a "potentially serious problem" for the Receivers, and to the value of the freehold as "likely to be seriously impaired" without the Common Parts Lease (see paragraph 21 above); and he referred to the Receivers taking the lease "to preserve the value of the freehold" (see paragraph 39 above). There is no suggestion there that he thought, or that it had even been suggested, that that was an unreasonable view to take, and he evidently took the same view as the Receivers did.

48. In any event we know that the Receivers acted on advice, and I am not surprised that this was the advice they received. One can well imagine that a purchaser of the building might take some persuading that the structure of mutual obligations would continue to work satisfactorily without the Common Parts Lease which on the face of it was a significant component at the heart of the structure. I can understand why in those circumstances the advice would be to recreate the original structure to prepare the building for sale rather than try and devise a new one.

49. In my judgement therefore the Receivers were acting within their powers when they sought and obtained a vesting order in respect of the Common Parts Lease, as it fell squarely within clause 15(4)(iv)(a) of the Conditions as a thing which seemed to them conducive to the sale of the building. It is not necessary in those circumstances to say anything more about paragraph 17 or paragraph 23 of schedule 1 to the Insolvency Act 1986.

Should the counterclaim have been considered?

50. In the light of my conclusion on issue (1), the only other issue that I need consider is issue (3) (see paragraph 36 above).

51. It was common ground that if the Receivers' acquisition of the Common Parts Lease was within their powers as receivers (as I have held it was) then they do not hold the Lease beneficially but for Alma. The Vice-Chancellor described this as an agency

relationship, but Mr Dutton said that the proper analysis was in fact that on redemption of the Charge and discharge of the receivership, they became bare trustees for Alma, and Mr Rosenthal did not dissent from that. I will therefore proceed on the basis that they are trustees of the Common Parts Lease for Alma.

52. Mr Dutton's argument was that the duty of such a trustee is to deal with the property as his beneficiary directs. He referred to the Trusts of Land and Appointment of Trustees Act 1996 (**"TLATA"**), s. 11(1) of which provides as follows:

> "**11 Consultation with beneficiaries**
>
> (1) The trustees of land shall in the exercise of any function relating to land subject to the trust—
>
> (a) so far as practicable, consult the beneficiaries of full age and beneficially entitled to an interest in possession in the land, and
>
> (b) so far as consistent with the general interest of the trust, give effect to the wishes of those beneficiaries, or (in case of dispute) of the majority (according to the value of their combined interests)."

53. In his submission therefore the Receivers had no business disposing of the Common Parts Lease to NTRML, or seeking consent to assign, and the counterclaim should just have been dismissed. Their duty as trustees was to give effect to Alma's wishes, and unless Alma wished them to assign the lease, they should simply have held it. That was subject to s. 6(2) TLATA under which a trustee of land can convey land to beneficiaries of full age and capacity even though they have not required the trustees to do so; and to s. 14 under which a trustee of land may apply to the Court for an order relating to the exercise of their powers. But the Receivers had not sought to assign the Lease to Alma under s. 6(2), nor had they applied to the Court under s. 14.

54. The answer to this submission in my judgement is that given by Mr Rosenthal. Once the Charge had been redeemed, Alma occupied two positions in relation to the Common Parts Lease. On the one hand it was the landlord. On the other it was the beneficiary under a trust of the lease. It is necessary to keep these two capacities distinct. Suppose for example a case where the landlord (A) has let to a lessee (B) who holds on trust for a beneficiary (C). As between landlord and tenant B has as legal owner of the lease a power to dispose of it subject to complying with the covenant in the lease. That requires it to seek A's consent, and if A gives consent subject to compliance with a condition, B is entitled to ask the Court to determine if that condition was reasonable or not. None of that has anything to do with C. If C does not wish the assignment to take place, C's remedy is to assert that it would be a breach of trust and either seek to prevent it by injunction or claim compensation for breach of trust afterwards.

55. Now in the present case Alma occupies the position of both A and C. It could have asserted its rights as beneficiary (no doubt contingently on the Court finding that the Receivers took the Common Parts Lease in exercise of their powers) and sought to prevent the Receivers assigning on the basis that it would be a breach of trust. But it did not do so. The only argument was whether Alma as landlord was reasonably entitled to require that the Receivers enter into authorised guarantee agreements. Since

that was the issue, the Court was simply not concerned with the rights and wrongs of the matter as between trustee and beneficiary; it was only concerned with the rights and wrongs of the matter as between landlord and tenant.

56. Mr Rosenthal accepted that Alma might have had an arguable defence to the counterclaim along these lines. The relief sought in the counterclaim was a declaration. A declaration is an equitable remedy. If any assignment would be a breach of trust, it is arguable that the Court should refuse to grant a declaration in its discretion. He said that if that had been pleaded or argued at trial, the Receivers might have had an answer to it on the basis that the Receivers did not want the lease, which was onerous, that Alma had declined to take it themselves, that the Receivers had found someone who was willing to take it, and hence that they should be at liberty to assign it, if necessary by asking the Court to exercise its powers under s. 14 TLATA. But none of that had been pleaded or argued. The action as constituted was a perfectly valid action as between landlord and tenant, and, contrary to Mr Dutton's submission, was not non-justiciable.

57. As I have already indicated, I accept Mr Rosenthal's submissions on this point. The case was run below as a dispute between landlord and tenant, not a dispute between trustee and beneficiary. The Vice-Chancellor dealt with it on that basis. The question which was argued was whether Alma's requirement that the Receivers enter into guarantees was reasonable or not. His decision was that it was unreasonable. The question on appeal is whether that decision was wrong. It is no answer to that decision to say that if the case had been run differently he might have persuaded not to grant a declaration at all because the Receivers had no business assigning the lease given their position as trustees. And I do not think this case can be articulated for the first time on appeal.

58. In those circumstances I would dismiss Ground 2 of Alma's appeal.

Conclusion

59. On issue (1) I would uphold the decision by the Vice-Chancellor to dismiss the claim, albeit for slightly different reasons. On issue (3) I would also uphold his decision on the counterclaim. I would therefore dismiss the appeal.

Lady Justice Falk:

60. I agree.

Lord Justice Arnold:

61. I also agree.