Neutral Citation Number: [2003] EWCA Civ 510 B2/02/2666
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
CENTRAL LONDON COUNTY COURT
(HIS HONOUR JUDGE FYSH QC)

Royal Courts of Justice
Strand
London, WC2

Friday, 28 February 2003

B E F O R E:

LORD JUSTICE PILL

LORD JUSTICE LAWS

LADY JUSTICE ARDEN

- - - - - - -

JACEY PROPERTY COMPANY LIMITED

Claimants/Respondents

-v-

1. MIGUEL DE SOUSA
2. PAULA ROSA PEREIRA DE SOUSA

Defendants/Appellants

(Computer-Aided Transcript of the Palantype Notes of
Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR DANIEL GATTY (instructed by Messrs Pittalis & Co, London, N12 8NP) appeared on behalf of the Appellants
MR DUNCAN KYNOCH (instructed by Messrs W R Burrows & Son, Middlesex, HA3 0QB) appeared on behalf of the Respondents

J U D G M E N T
(As approved by the Court)

1. LORD JUSTICE PILL: I will ask Lady Justice Arden to give the first judgment.

2. LADY JUSTICE ARDEN: This is an appeal by the defendants in this action against paragraphs 2 to 5 the order of His Honour Judge Fysh QC, sitting in the Central London County Court, dated 29 November 2002. By paragraphs 2 to 5 of his order, the judge ordered the appellant to pay the respondent the sum of £25,399.80 by way of mesne profits up to and including 29 December 2002 and continuing thereafter at a daily rate of £41.10. He gave judgment for the claimant in the sum of £5,928.63 being the aggregate of the sums which he held were due in respect of legal costs and repairs, together with interest at the rate specified in the lease. By his order the judge also ordered that the appellants give possession of the property, the subject of the lease, namely the ground floor lock up at 302 Wellworth Road, London SE17 ("the property"). The judge also dismissed the appellants' counterclaim.

3. The action was brought by the respondent as landlord of the property. The respondent sought possession on the basis that the appellants' user of the property was unauthorised, that they had failed to pay a sum due in respect of repairs to drains of the property and were liable for legal fees and interest, and that they were also liable for the arrears of rent of £15,000.

4. The lease of the property was executed on 16 May 1997. User is restricted to use as a shop for the appellants' business as a patisserie or such other use within class A1 of the Town and Country Planning (Use Classes) Order 1987, for which the landlord shall give consent not to be unreasonably withheld or delayed. The appellants accept that their particular user of the patisserie was in breach of this clause from about mid-1998, from which date they used the property for the sale of hot and cold food to be eaten both on and off the premises. This was food which had been prepared on the premises as opposed to food which had been brought in for re-heating on the premises.

5. The appellants' case was that the respondent was estopped from complaining about the authorised user, alternatively that there was a collateral agreement that the property would be used as a restaurant of this kind. The judge found against the appellants on both those issues. The issue on appeal arising out of the user of the property was whether the judge was wrong to reject the appellants' case that the respondent had waived the user clause in so far as it precluded the appellant from serving and preparing hot and cold food. It is necessary that I should set out the judge's findings in relation to that matter and in relation to other matters with which he dealt.

6. The judge heard evidence from six witnesses: Mr Jack Cornbloom, who represented the respondent landlord; Mr Alfred Pearce; Mr Eric Dunning; the second appellant, Mrs De Sousa; her neighbour, Mrs Barbara Cradduck and Mr Chris Faulkner. The judge found that Mr Jack Cornbloom was a satisfactory witness "but only just so". He found that the second appellant, Mrs De Sousa, was not a reliable witness. He held that the other witnesses were satisfactory and, in relation to Mr Pearce, he expressed the view that he was a very fair witness whose word could be relied upon. In relation to his assessment of Mrs Cradduck's evidence, the judge also commented that her evidence as to what was on sale at the property has now become rather unimportant.

7. The judge found the following facts. By mid-1998 the appellants were offering hot and cold food to be eaten both on and off the premises. That food was prepared on the premises. By the summer of 1998 and unknown to Mr Cornbloom, the second appellant had installed an impressive commercial cooking range in the kitchen at the rear of the premises for the preparation of food on the premises both for re-heating and hot from the oven. Such food included not only lasagne, pastas and risottos etc, which had been previously brought in, but

also cooked breakfasts. There was a drain from the kitchen sink which ran out in the external drain opening in the outdoor back area of the property. The respondent's case was that the cooking gave rise to grease which caused blockages in the drains.

8. The judge held that the in-house cooking facilities would have been invisible, or at best only partially visible, to customers in the public part of the premises and even to those making use of the lavatory facilities at the rear of the premises. The respondent made frequent visits to the property. The appellants' evidence was, therefore, that he was fully aware of the numerous breaches of the user conditions in the lease and he did nothing, even though he knew of the unapproved and unenhanced catering facilities that had been undertaken by them at the relevant time. It is said that he stood by watching the appellants build up their business.

9. The judge held that the respondent's evidence, particularly that of Mr Cornbloom, regarding ignorance or innocence of what was going on in the public parts of the patisserie was "implausible". He held that it was there to be seen and, in addition, there were signboards offering hot foods of various kinds. He held that it was just possible that Mr Dunning, the respondent's agent, did not notice. However, the judge accepted that, although Mr Cornbloom visited the lavatory during his visit, he did not notice the in-house cooking facilities to the rear. The judge therefore accepted Mr Cornbloom's evidence on this point. He further accepted that Mr Cornbloom only fully appreciated what the appellants were doing at the cafe in January 2000. He held that on the evidence there was no question of Mr Cornbloom having sanctioned the on-site cooking facilities, whatever else he may have turned a blind eye to. In the judge's judgment that was the end of the estoppel issue.

10. There were also issues before the judge concerning the malfunction of the common drains. The judge held that from December 1999 the drains under the patisserie had given repeated and serious trouble because of blockages. The respondent attempted to deal with them. Its case was that, under the terms of the lease, the appellant should pay a proportion of what the respondent spent on trying to rectify the drains.

11. The lease provided that the tenant agreed:

> "To pay a proper and fair proportion as determined by the Landlords surveyor of the expense of repairing renewing and rebuilding....
>
> (iii) ...sewers and drains...
>
> And the amount of any such proportion when ascertained as aforesaid shall become payable by the Tenant to the Landlord ... within 14 days."

The lease further provided that:

> "The Landlord will maintain and repair the remainder of the Building and the nearby premises so as to provide support and shelter for the demised premises."

12. The lease also conferred on the tenant the right to use in common with the landlord and all other persons having the like right:

> "...the common drains and sewers ... situate under the rear service area."

13. By clause 3 the landlord had the right to enter on the property in order to:

> "...construct ... cleanse ... inspect ... replace ... sewers drains ... causing as little inconvenience or disturbance as possible and making good all damage caused to

the demised premises."

14. The landlord claimed a proportion of the works done to the drains pursuant to clause 3(iii) of the lease. There is no dispute as to the manner of apportionment, nor is it said that the building costs were unreasonable. The only point taken by the appellants was that the determination was performed by the respondent's solicitor acting in a surveying role and not by the landlord's surveyor as stipulated in the lease. The judge held that that was factually correct. However, he rejected the appellants' case that that relieved them of responsibility for paying for any sum under this part of the claim since precisely such determination was a condition precedent to liability.

15. The judge gave the lease what he held to be a purposive construction. He said that in his judgment the phrase should be construed as meaning:

> "an appropriately skilled person appointed by the landlord to act as a surveyor for this purpose".

16. No qualification was specified for the surveyor and he accepted the submission that a departure from the literal wording of the clause could be condoned if circumstances warranted it. He relied on the passage from judgment of Mr David Blunt QC in Scottish Mutual v Jardine (unreported 12 March 1999). As regards legal fees and interest, it was common ground that the legal fees were not unreasonable. The judge held they were payable with interest at the rate provided for in the lease in the light of his findings.

17. The judge then turned to the appellants' counterclaim. There were allegations of six breaches of the repair obligations and a list of eight items of remedial work which the appellants contended had to be undertaken and in respect of which they sought a mandatory injunction.

18. The first question relates to the true construction of clause 4(3) of the lease, which I have already read. This provides for the landlord to maintain and repair the property, other than the demised premises, so as to provide "support and shelter" for the demised premises. On the question of the construction of this clause the judge held that the covenant was limited in scope. The remainder of the building, including the drains, and the landlord's obligations were not positive in the sense of their general obligation of repair and maintenance, but limited simply to ensure that the remainder of the building remained to provide support and shelter for the lock-up shop. However drains and sewers could not provide support for the building unless the building was jeopardised by the collapse of the drains. Accordingly, a blocked drain could not jeopardise the support, still less the shelter of the premises on the ordinary meaning of those words.

19. The appellants argued before the judge that, if the repair covenant did not cover the drains, there was logically a gap in the repair obligation. Accordingly, the appellants contended that a purposive construction had to be given to the repair covenant to avoid a construction which was uncommercial, undesirable and unlikely because it would mean that nobody had a responsibility for repairing the common drains. Moreover, the appellants had an obligation to keep their own drains in good order. Accordingly, unless the common drains were likewise kept in good order, it would be impossible for the appellants to fulfil their repairing obligations.

20. The judge preferred the respondent's case. The covenant to repair was only activated if the state of repair of the drains in some way undermined the structure of the building. The clause could not provide any protection against a claim for damages for interruption or use. The judge accepted that if, on a fair and purposive construction there was a possibility of closing

the gap so that there was a complete code so far as repair was concerned, the court would lean in that direction. He referred to Holding & Barnes v Hill House Hammond [2000] L&TR 428 at 434. However, that was not the situation in the present case. The presence of a repair gap could not justify rewriting the term of the lease.

21. The judge accepted that there was no implied covenant on the part of the landlord that the demised premises are fit for occupation or that they are suitable for the purposes for the purposes for which they are let or that the landlord will do any repairs. He referred to Southwark LBC v Tanner [1999] 3 WLR 939 at 951. The judge went on to consider whether the defects pleaded by the appellants amounted to disrepair in law. In the light of my overall conclusion in this case it is not necessary for me to set out the judge's reasoning in detail on that point.

22. The appellants appeal on seven points:

(1) The judge was wrong to reject their case that the respondent had waived the user clause insofar as it precluded them from serving and preparing hot and cold food.

(2) The judge was wrong to hold that the claimant was entitled to forfeit the lease and for non payment of a contribution to the repair of the drains.

(3) The judge was wrong to award the respondent legal costs claimed as a debt under the lease and interest. That contention is dependent on the first two succeeding.

(4) The judge was wrong in law to find that the landlord's repairing clause did not encompass the common drains to the building.

(5) The judge was wrong to find that the works to the drains identified as necessary by the joint experts were not repairs in law because they address inherent defects or would be improvements. That issue only arises if the appellants succeed on the fourth issue.

(6) The judge was wrong to find that the concreting over a manhole in the floor of the premises was outside the repairing covenant.

(7) The judge was wrong to hold that lost income claimed during a closure of the business while the respondent opened up the manhole could not be recovered as damages for disrepair.

Those last two issues are also dependent on the appellant succeeding on the fourth issue that the judge was wrong in law to find that the landlord's repairing clause did not encompass the common drains to the building.

23. On the first point, the appellants contend that the respondent waived its rights under the user clause, or was estopped from relying on the breaches, because Mr Cornbloom was aware of the full extent of their user at all material times, and acquiesced by (a) accepting and demanding rent until May 2000; (b) offering to extend the kitchen of the premises for an increased rent in order to facilitate their user; and (c) offering encouragement to the appellants in their successful appeal against the initial refusal of planning permission for the preparation of hot food on the premises. Although at the start of the trial the landlord's case was that even certain foods which were being sold were outside the user clause, the landlord's case was refined in final submissions at trial and on this appeal so what is in issue is the cooking and preparation of hot food by conventional means. It is said by the landlord that that is outside the clause.

24. Mr Daniel Gatty appears for the appellants. He has relied in his skeleton argument on a number of authorities such as Attorney General for Hong Kong v Fairfax [1997] 1 WLR 149 and Hepworth v Pickles [1900] 1 Ch 108. The appellants contend that the judge ought to have found that Mr Cornbloom knew that hot food was being prepared on the premises. In this regard he relies on the following:

(a) the second appellant's evidence that Mr Cornbloom encouraged their planning application for permission to prepare hot food on the premises;

(b) Mr Cornbloom denied all knowledge of the planning application prior to the proceedings, but he admitted in cross-examination that he had been told of the application by the second appellant though he denied that she had told him that the appellants were appealing against the refusal;

(c) the appellants' evidence that Mr Cornbloom offered to extend the premises to house a larger kitchen;

(d) the evidence of Mrs Cradduck (Mrs De Sousa's neighbour) that Mrs De Sousa had told her at the time about Mr Cornbloom's offer to extend the kitchen of the premises; (e) Mr Cornbloom's admission in oral evidence that he did offer to build the appellants an extension to the premises, which he said was an extension to provide storage and office space.

(f) the respondent's failure to complain about the use made of the premises until May 2000, following a dispute over the drains, notwithstanding that on Mr Cornbloom's evidence he was aware of such use from at the latest January 2000;

(g) the respondent's complaints about user in a letter dated 25 May 2000, in the section 146 notice and in the particulars of claim. None of these refer to the preparation of food but to the sale of hot and cold food. The judge found that the respondent's denial of knowledge that hot food was being sold was implausible.

25. Mr Gatty submits that the judge should have made findings about all these crucial issues. Having rejected Mr Cornbloom's evidence on the question of the sale of hot food, the judge should also have rejected his evidence about not knowing about the preparation of hot food. Mr Gatty relies on Lloyds TSB plc v Hayward [2002] EWCA Civ 1813, in which a failure to make a finding as to the date when a document was created so undermined the lower court's findings as to what was orally agreed at a meeting that a new trial was ordered.

26. For the respondent Mr Duncan Kynoch submits that this court should not interfere with the findings of the judge who saw the witnesses. He relies on a passage in Biogen Inc v Medeva plc [1997] 1 RPC at 45 per Lord Hoffmann. Mr Kynoch further submits that, as a matter of law to support an estoppel, the appellants must show a clear promise by the respondent that it would not insist on its strict rights under clause 3(14), the user clause (see Woodhouse AC Israel Cocoa SA v Nigerian Produce Manufacturing Co [1972] AC 741). He submits that that was not the case in the present case. The appellants' case relies on the second appellant's evidence and the judge found the second appellant to be an unreliable witness. Moreover, the acceptance of rent may affect remedies under the doctrine of waiver by election, but does not amount to representation for the purposes of waiver by estoppel. In addition, the appellants failed to show detrimental reliance which is necessary for waiver by estoppel. Further, a substantive waiver of covenant would, on Mr Kynoch's submission, require consideration or a deed. The period of the alleged acquiescence was too short to support the inference that there had been any waiver by instrument under seal.

27. As far as waiver by election is concerned, Mr Kynoch submits that this doctrine does not apply to breaches of covenant which continue. A user clause is a covenant whose breach continues. On this point the essence of the appellants' case is that the judge failed to deal with the evidence about Mr Cornbloom encouraging the planning appeal and offering to extend the kitchen. It is said that his failure to do so undermines his findings on waiver. It is said that in consequence this court should make a finding in the appellants' favour; alternatively, this court should order a retrial.

28. There are three main items of evidence relied upon by the appellants. The first is the evidence about the planning appeal. The first element of this evidence is the evidence of Mrs De Sousa in her witness statement paragraph 11:

> "While it is true that we omitted to seek Mr Cornbloom's written consent to apply for planning permission, we told him that we were applying for planning permission and that we initially failed to obtain permission. He encouraged us to make an appeal against this as he thought the refusal was wrong. He even advised us about possible alternations to the premises like extending the kitchen and the store room."

29. I have only read an extract from that paragraph, but those are the only particulars given in relation to the encouragement which it is said Mr Cornbloom gave to the appeal against the initial planning refusal. That matter was put to Mr Cornbloom. He denied that he knew that there was going to be an appeal, although he accepted that he knew that an application had been made. His attitude was that the appellants would have to come to him as landlord for him to approve either the application or the change of user. I quote from one of his answers at page 12 of the transcript of day 1:

> "Q. You were aware from conversation with Mrs De Sousa that she was applying for planning permission for class A3 use [cafe or restaurant].
>
> A. Let's put it this way. We didn't have a conversation about it, we didn't discuss it in detail. She told me that she had been -- in fact what she actually said to me was that it had been turned down. She put in for A3 planning use and it had been turned down. That was the beginning and end of the subject.
>
> ...
>
> Q. Is it your evidence that that was part of your discussion with Mrs De Sousa?
>
> A. No, I didn't -- I had that in mind when she mentioned that she was going for A3 planning, I had in mind, okay, before she gets it, she's got to apply to me.
>
> Q. Why did you not in your statement, mention the conversation with Mrs De Sousa regarding planning applications?
>
> A. I can't answer that. I mean, there's probably lots of things I didn't mention in it. I didn't---"

30. That is a summary of the evidence on that point. The second point was that, as I have read from Mrs De Sousa's evidence, Mr Cornbloom had offered to extend the kitchen and had said that, if that happened, there would be extra rent. It was said that, as a result, he must have known that food preparation was going to take place or was taking place in the kitchen.

31. There was also evidence from Mrs Cradduck who said:

> "I recall soon after Mr and Mrs De Sousa started to sell hot food, Mrs De Sousa told me that Mr Cornbloom had a discussion with them that he would pay for an extension to be built at the back in order to extend the kitchen. In return he would want an extra £5,000 in rent. Paula De Sousa asked me what I thought, and I advised that she should speak to her accountant as to whether it was a viable proposition. I also recall that she told me that when asking him about selling hot food, he had no objection."

32. The judge found that Mrs Cradduck's evidence as to the sale of hot food was rather unimportant. Mr Gatty relies on this as showing that the judge overlooked the conversation between Mrs Cradduck and Mrs De Sousa and its importance in contradicting what Mr Cornbloom was saying about his knowledge.

33. Finally, the further evidence on which Mr Gatty relied is a letter of 25 May, the section 146 notice and the particulars of claim. These are not freestanding points, but Mr Gatty draws attention to the point that it was not the preparation and cooking of food on the premises to which Mr Cornbloom objected, but the sale of hot food. As will be clear from what I have said, the sale of hot food heated in the microwave was a matter which was within the user clause.

34. I come to my conclusions on this point. The crucial paragraphs in the judgment are the paragraphs contained in the judge's assessment of the witnesses (paragraphs 12 and 13 which I have summarised) and paragraph 18 of his judgment; which reads as follows:

> "I need not consider this user in any further detail for this reason: the de Sousas have admitted breaches of the user conditions, but, as noted, rely on estoppel in answer to the claimed consequences. My findings touching this estoppel are as follows: I regard as implausible the evidence led by Jacey (principally that of Mr Cornbloom) regarding ignorance (or innocence) of what was going on before his very eyes in the public parts of the patisserie. Not only was it there to see but there were signboards offering hot food of various kinds. It is, I suppose, just possible that Mr Dunning did not notice; he had no interest in the matter and was a less frequent visitor I do however accept that though he visited the lavatory during his visits, Mr Cornbloom did not notice the in-house cooking facilities to the rear. That was what he said and I believe it. Mrs de Sousa suggested that he must have noticed the commercial cooking range -- but why should he? It was not directly before him on his way to the toilet but off to one side. It may even have been obscured by a door or screen -- but my note of evidence is unclear on this. The toilets were marked and the search for a toilet is usually undertaken with a single purpose in mind. I also accept that Mr Cornbloom only fully appreciated what the de Sousas were doing at the café in January 2002. On the evidence, there is no question of Mr Cornbloom having seen still less sanctioned (see the next paragraph) the on-site cooking facilities -- whatever else he may have turned a blind eye to. And that in my judgment, is the end of the post-lease estoppel issue."

35. Mr Gatty has informed us that in his written closing submissions he referred to the elements of the appellants' case, which he has contended that the judge failed to deal with so that they were before the judge in writing when he came to write his judgment. Yet, in this paragraph, which is the kernel of his judgment and contains his findings and his decision, there is no reference, for instance, to Mrs De Sousa's case that the Mr Cornbloom encouraged her to appeal against the refusal of planning permission or asked her to extend the kitchen. Those,

together with the letters, make up, on Mr Gatty's submissions, a case which undermines the judge's findings.

36. This court should not readily interfere with findings of fact by a trial judge. The reasons for this have been explained on many occasions, but I would cite in particular the paragraph from the speech of Lord Hoffmann in Biogen Inc v Medeva Plc, referred to by Mr Kynoch in the respondent's skeleton argument:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

37. The reasons for not interfering with the judge are very much more than that the judge heard the witnesses and was able to form a view as to their credibility, but that there would have been more complex reasoning than the judge is able to express in a judgment. The judge's findings on one point are absolutely clear; that is that he preferred Mr Cornbloom's evidence to that of Mrs De Sousa. He rejected Mr Cornbloom's evidence about his lack of knowledge of the sale of hot food, but that rejection is not, in my judgment, inconsistent with his rejection of Mrs De Sousa's evidence on the points with which he did not deal. There is therefore no necessary knock-on effect from his holding against Mr Cornbloom on the knowledge of sale point on to the further point that he actually knew about the preparation of food on the premises.

38. As to the evidence about the extension to the kitchen, when the written statement of Mrs Cradduck is examined it can be seen that she was giving evidence of a conversation between her and Mrs De Sousa. She was not, therefore, present at the discussion between Mrs De Sousa and Mr Cornbloom. In those circumstances, the judge was entitled to say that that did not carry matters much further.

39. Secondly, Mrs Cradduck was in any event not specific as to the purpose of the extension of the kitchen. It will be recalled that the respondent's case was that he did offer an extension of the kitchen but that it was for an office or storage purpose, not for kitchen use. On that point also Mrs Cradduck's evidence does not take the position substantially further.

40. On Mrs De Sousa's evidence about the extension to the kitchen, the judge found her to be an unreliable witness. Therefore it would have been inconsistent for the judge to have accepted her evidence on that point.

41. As to the letters, the section 146 notice and the particulars of claim, the issue taken was that the user had become that of a café and was no longer that of a patisserie. That particular point was unanalytical because it failed to identify what made the business a café rather than a patisserie, given that the understanding between the parties all along was that the food could be microwaved at a patisserie. Again, in my judgment, the letters, the section 146 notice and the particulars of claim do not take the matter much further.

42. I find some assistance can be obtained from the judgment of the Court of Appeal in English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2419 where the Court of Appeal considered the

adequacy of reasons. I need only read four paragraphs from the leading judgment of Lord Phillips, MR:

> "17. As to the adequacy of reasons, as has been said many times, this depends on the nature of the case: see for example Flannery at page 382 In the Eagil Trust case, Griffiths LJ stated that there was no duty on a Judge, in giving his reasons, to deal with every argument presented by Counsel in support of his case:
>
> > 'When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted, and the reasons which led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge in giving his reasons to deal with every argument presented by Counsel in support of his case. It is sufficient if what he says shows the parties, and if need be the Court of Appeal the basis on which he acted… (see Sachs LJ in Knight v Clifton [1971] 2 AER 378 at 392–393, [1971] Ch. 700 at 721).' (p.122).
>
> 18. In our judgment, these observations of Griffiths LJ apply to judgments of all descriptions. But when considering the extent to which reasons should be given it is necessary to have regard to the practical requirements of our appellate system. A Judge cannot be said to have done his duty if it is only after permission to appeal has been given and the appeal has run its course that the court is able to conclude that the reasons for the decision are sufficiently apparent to enable the appeal court to uphold the judgment. An appeal is an expensive step in the judicial process and one that makes an exacting claim on judicial resources. For these reasons permission to appeal is now a nearly universal prerequisite to bringing an appeal. Permission to appeal will not normally be given unless the applicant can make out an arguable case that the Judge was wrong. If the judgment does not make it clear why the Judge has reached his decision, it may well be impossible within the summary procedure of an application for permission to appeal to form any view as to whether the Judge was right or wrong. In that event permission to appeal may be given simply because justice requires that the decision be subjected to the full scrutiny of an appeal.
>
> 19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.
>
> 20. The first two appeals with which we are concerned involved conflicts of expert evidence. In Flannery Henry LJ quoted from the judgment of Bingham

> LJ in Eckersley v Binnie (1988) 18 Con L.R. 1 at 77-8 in which he said that 'a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal'. This does not mean that the judgment should contain a passage which suggests that the Judge has applied the same, or even a superior, degree of expertise to that displayed by the witness. He should simply provide an explanation as to why he has accepted the evidence of one expert and rejected that of another. It may be that the evidence of one or the other accorded more satisfactorily with facts found by the Judge. It may be that the explanation of one was more inherently credible than that of the other. It may simply be that one was better qualified, or manifestly more objective, than the other. Whatever the explanation may be, it should be apparent from the judgment.
>
> 21. When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the Judge's decision."

In that passage that the court explains that it is not necessary for a judge to set out every reason or to deal with every question of fact, provided that the Appeal Court and the parties can understand his essential reasoning.

43. In this case I do not consider that the appellants have shown a sound basis for interfering with the judge's findings. As I see it, the judge's omission to deal with the specific matters on which the appellants rely on this appeal was not inconsistent with his other findings and with his assessment of the witnesses. Accordingly, those omissions do not logically undermine his findings.

44. It was not suggested that the judge did not have sufficient opportunity to make his assessment. Indeed, he set out his assessment in some details at paragraphs 12 and 13 of his judgment. On this point, in my judgment, the appeal fails. In argument I asked counsel whether, when judgment was handed down, the judge's attention was drawn to the omissions. It is not necessary for me to pursue that point, but I would refer to what this court said in Fawcett v Felix Inns, in Re T as well as in English v Emery Reimbold & Strick at paragraphs 22 to 25.

45. I now turn to the second issue, as it appears in the Notice of Appeal, which was argued before us. On the second issue Mr Gatty submits that the sum was not ascertained by the landlord's surveyor. A solicitor is neither qualified nor practices as a surveyor and therefore is not appropriately skilled, even under the judge's definition, to act as a surveyor for the purposes of determining a fair and proper contribution. It was not open to the judge to rewrite the clause. Scottish Mutual v Jardine, relied on before the judge, is not, on Mr Gatty's submission, authority for the proposition that the court can ignore a requirement that a service charge amount should be determined by a surveyor, but rather that the court can substitute its judgment for the surveyor's determination if the latter is wrong.

46. Mr Gatty accepted that on the third issue the judge was wrong to award the claimant legal costs claimed as a debt under the lease and interest if he was able to succeed on both the first and second issue.

47. For his part Mr Kynoch seeks to uphold the judge's judgment. He submits in particular that the decision in Scottish Mutual v Jardine is authority for the proposition that the

determination of a fair proportion by the landlord's surveyor under a similar clause is not a precondition to recovery. This is a short point and I can set out my conclusions upon it.

48. I see no escape from the proposition that the parties have submitted to the arbitrament of one person, that is the landlord's surveyor, and that is one person only. It is not open to the landlord to substitute another person, however well qualified in other respects, and even though he is appointed to act in a surveying role. As I see it, that is outside the fair construction of the clause.

49. In Scottish Mutual v Jardine there was a clause requiring the tenant to pay a fair proportion of certain expenditure as determined by the landlord's surveyor. There was a provision for a certificate of the landlord to be conclusive evidence as to that due proportion. In that case the judge held that the terms of the lease could not prevent the court from reviewing the amount of expenditure for which the tenant was liable. In addition the judge held that the absence of the determination by the landlord in that event did not prevent the landlord from recovering the proportion of the expenditure which the court determined the tenant should pay.

50. That case was very different. In this case the court makes no determination of the due amount payable by the tenant, whereas in Scottish Mutual the court made that determination. Moreover, it was not in issue in that case that some person other than the landlord's surveyor or the court could make the determination. That is the issue in the present case. As I see it, the machinery in the clause must be followed. It is not a situation where it is impossible to use the machine for which the parties have clearly provided.

51. I now turn to the fourth ground of appeal which concerns the true construction of clause 4(3) of the lease. On this Mr Gatty submits that the judge was wrong in his construction because it leaves a gap in the repairing obligations of the parties. It leaves the appellant no right to carry out the necessary repairs to the common drains, but no means either to require the landlord to do so. He submits that this is a construction which the court should seek to avoid where possible. The judge was also wrong on his submission to attribute to the words a limiting effect which they were not intended to have. The judge's construction attributes too narrow a meaning to the word "support."

52. Mr Gatty submitted that the lease should be construed against the landlord who submitted the draft lease. Moreover, as the drains within the property depended on the common drains those drains could be said to provide support for the premises. Support is used in the sense of "support services", that is providing assistance from which something else is to function. In this connection Mr Gatty relies on the Oxford English Dictionary definition of "support", which includes "the provision or availability of services that enable something to fulfil its function or keep it operational". Mr Gatty also relies on the fact that if this clause is construed, as he submits, there is no gap in the repairing clause and the uncommercial result, to which I have already referred, is avoided.

53. Mr Kynoch submits that the true intent of clause 4(3) is that it is to apply not to every defect in the drains, but only to defects having certain limited consequences. The repairing covenant does not ensure "support and shelter for the demised premises and the use and occupation thereof". On the appellants' case practically any blockage of the common drains would adversely affect the ability of the premises to function. On Mr Kynoch's submission the support in question is physical support. He relies on the fact that the lease also grants an easement of support. He submits that clause 4(3) simply provides a positive obligation to maintain support to complement the negative obligation not to withdraw support in the easement of support. On that basis, the concept of support is consistent throughout the lease. He accepts that as a result there is gap in the repairing obligations but submits that the court

should not strain to find ambiguities in the language in order to fill a gap (see Credit Suisse v Beegas [1994] 1 EGLR at 85H). The court should not rewrite the covenants. The parties have not wholly failed to deal with the drains altogether but imposed a limited obligation. It is common ground between the parties that the position in law is that stated by Lindsay J in the case of Credit Suisse v Beegas in this passage:

> "Barrett [v Lounova (1982) Ltd [1990] 1 QB 348] might assist a court in coming to a business-like conclusion and in filling a gap where the language of a lease can fairly be construed either to leave a gap or to fill it, but it cannot be authority for a proposition that whenever one encounters what seems to be an unbusiness-like gap then the court is able or obliged to fill it."

54. The principal matter on which Mr Gatty relies in his argument is the wider meaning of "support" to be found in the Oxford English Dictionary. For the purposes of clause 4(3) of the lease we must find the true meaning of "support" by reference to the lease. The meaning of any word is bound to be contextual. In the particular provision in question, in my judgment the more obvious meaning is that it refers to physical support. It has received some support itself from page 31 of the lease, Part III paragraph 1 of the Exceptions and Reservations to the Landlord, which provides for a right to subjacent and lateral support for the nearby premises in the building from the demised premises, which clearly refers, as I see it, to physical support.

55. In my judgment it would be straining the language too far to say that it is sufficient that a further matter can be included within the repairing covenant which indirectly lends support of a non-physical nature to the demised premises. I appreciate that that appears to leave a gap in the repairing clause, but the court cannot supplant and rewrite the terms of the parties' agreement. I appreciate also that the tenant may find that he is unable to clear his own drains because of a blockage in the common drain. In those circumstances he is likely to have other remedies against the landlord; likewise if the premises become uninhabitable as a result of the blockage to the drains. All we are concerned with is the question of clause 4(3) of the repairing covenant. We were invited to look at certain evidence of Mr Cornbloom's subjective intention, but those matters were not admissible, and I understood Mr Gatty, on reflection, to accept that.

56. In my judgment the appellants fail on that issue. Therefore, the further issues that arise on the counterclaim do not arise. In the circumstances I would dismiss the appeal with the exception of the claim for the contribution to expenses on which, for the reasons I have given, in my judgment the judge was in error and that matter should not form part of the order against the appellants.

57. LORD JUSTICE LAWS: I concur in the result upon each of the points in this appeal proposed by my Lady for the reasons given by her. I add only that in granting permission to appeal last December, I considered it arguable that the judge's failure to address those specific points that are enumerated in paragraph 4.6 of Mr Gatty's skeleton, and elaborated by him before us, undermined the judge's conclusions upon what has been called the estoppel point.

58. Having, in common with my Lord and my Lady, seen Mr Kynoch's skeleton argument and been referred to various passages in the transcript of evidence, I am quite satisfied that the judge was entitled to conclude as he did upon that point and that a reasoned basis for his decision sufficiently appears on the face of the judgment.

59. LORD JUSTICE PILL: I also agree.

Order: Appeal dismissed with the exception of the claim for the contribution for expenses in the sum of £1,113.58 together with the part of the interest related to that in paragraph 3 of the judgment below.

Stay on order for possession to be removed. Possession in 14 days (14 March).

Costs summarily assessed in the sum of £6,000. The respondent will have 80 per cent of his costs (80% of £6,000) in this court.

Costs order below revised to the extent that the respondent (claimant as he then was) will have 80 per cent of his costs below.