

B2/2003/1102

Neutral Citation Number: [2004] EWCA Civ 289
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BRIGHTON COUNTY COURT
(HIS HONOUR JUDGE KENNEDY QC)

Royal Courts of Justice
Strand
London, WC2

Friday, 13 February 2004

B E F O R E:

LORD JUSTICE BUXTON

LORD JUSTICE MAURICE KAY

SIR MARTIN NOURSE

BLUESTORM LTD

Claimants/Respondents

-v-

PORTVALE HOLDINGS LTD

Defendant/Appellant

(Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG
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Official Shorthand Writers to the Court)

ROMI TAGER QC (instructed by Osler Donegan Taylor, Brighton BN1 1UF) appeared on behalf of the Appellant

MR JONATHAN SMALL (instructed by Pickworths, Herts AL1 3JB) appeared on behalf of the Respondent

J U D G M E N T

Friday, 13 February 2004

LORD JUSTICE BUXTON:

BACKGROUND

1. Embassy Court was one of the most significant buildings of the 1930s. It is a 12-story block of flats in a very prominent position on the seafront at Brighton. It was built in 1930s by Wells Coats, one of the leading figures in the English modern movement, only a year after he had completed his famous Lawn Road flats in Hampstead. Unfortunately, however, the building's glory is now in the past. For the past 15 years it has been subject to neglect, lack of repair and under-investment, and for the last five or six years it has been the locus in quo for the series of disputes that culminated in a 10-day hearing before His Honour Judge Kennedy QC, and a two-day appeal in this court.
2. I deal, first, with the factual background to those proceedings. Although the learned judge's judgment gives a lucid, indeed vivid, account of events, it will be necessary for understanding of this judgment to set out a significant part of the background, drawing as I do, though, upon the clear findings made by the learned judge.
3. In March 1994 a company called Portvale Holdings Ltd ("PHL"), the defendant in this action, was incorporated. It used a subsidiary, Portvale Ltd ("PVL"), to purchase the freehold of Embassy Court in June 1994. It is right to say that by that stage the building was already in some difficulty. PHL also acquired the leasehold interest in some 11 of the individual flats that were in the building. It is right to say now that it has been recognised throughout these proceedings that the leading figure in the Portvale Group is a Mr Marcel. It has also been recognised that the interests of Mr Marcel and his activities have been expressed through the Portvale companies, which are to all intents and purposes to be regarded, at least for the purposes of the present action, as an emanation of himself. Progressively further flats were acquired by PHL or, as the judge found, by one of its associated companies. Figures were given to the judge and I shall have to return to them later.
4. There was also involved in the affairs of Embassy Court, and in the action, though not in the appeal before us, a Mr Camillin. He also acquired a significant number of apartments - by the time of the trial apparently numbering some 15. Mr Camillin was the solicitor to the Portvale Group, and I think also, if not a director of it, then closely associated with it. The judge made certain findings about his relationship with the Group, to which I shall have to come later. We will have to look in more detail at some parts of the leases in due course, but it was accepted, again at least for the purposes of this action, that the leases were in common form or, if not in common form, very similar to each other. They contained obligations on the part of the landlord to provide and maintain water, central heating, lifts and common parts, matched by an obligation on the leaseholders to contribute to the costs of running the building and to future estimated costs for its wider upkeep. In due

course PVL, then in its capacity as the freeholder, issued claims against two of the leaseholders, claiming forfeiture for non-payment of maintenance charges in the years 1992-1993 and 1993-1994. One defendant was a lady, Miss Smart, who appears later in the action. The other was a lady who was still occupying the flats. Miss Smart counterclaimed for damages, including damages for diminution in value, because of want of repair and for items very similar to those alleged in the present action. She also sought an order for specific performance of the obligation to put into repair.

5. That action was eventually tried by Her Honour Judge Viner QC. She gave her judgment in July 1997. She included in her order a full account of the maintenance provisions for years 1991-1997, specific performance by PVL of the work, and specific performance of the works recommended by the expert employed by the lessees. She awarded damages to both defendants totalling some £6,000. That was, of course, a striking order against PVL. As His Honour Judge Kennedy found (see paragraph 19) the reaction to it, or to their expectation of it, on the part of Mr Marcel and others who were then running the Portvale Group, was not to attend the hearing at which Her Honour gave judgment, and to dissolve PVL. PVL therefore went into liquidation, and for the moment Embassy Court effectively had no landlord.
6. A leaseholders' association had been formed and they of course took a concerned interest in this turn of events. Matters were not resolved, but at least a move was made towards resolving them by the court vesting the freehold in Miss Smart, to whom I have already referred. She was a leading figure in the leaseholders' association, and in turn she and others arranged for the formation of the company, Bluestorm Ltd, the claimants in these proceedings, and for the transfer of the freehold to Bluestorm from Miss Smart.
7. On that happening, what can only be described as a singular event took place. On that very same day the solicitors to PHL, the party to these proceedings, wrote to Bluestorm in their capacity, as they now were, of tenants of Bluestorm, giving formal notice of breach of the landlord's covenants. Those breaches had of course been inherited by Bluestorm from the previous landlord, which was a subsidiary of the people who were now complaining of the breach of covenants. The judge commented on that in these terms in paragraphs 21 and 22 of his judgment:

"Mr Marcel was to admit to me in evidence - not that the letter could have borne any other construction - that he was more than put out at what was a defeat for his plans and that his attitude thereafter, in refusing to pay the monies claimed by the Claimants until he had to, was wrong...

22. The short historical fact is that from then on, as Mr Marcel also admitted, he hoped the Claimants would founder... Bluestorm and Portvale have been in conflict ever since."

8. At December 2002 it appears that some 35 flats were occupied by persons who leased flats from either PHL or Mr Camillin, and 26 flats, so the judge found, were occupied by shareholders'; officers or otherwise associates of the claimant's, Bluestorm.
9. Having received that letter and being faced with the problems of a freeholder, Bluestorm in January 1999 applied to the Leasehold Valuation Tribunal in Brighton for a decision about the service charges incurred during 1998 and those proposed for 1999. The judge found that that application, perhaps at first sight surprising, was necessary because of the expressed and rooted opposition of Mr Marcel on behalf of Portvale to paying any charges at all. As Mr Small, who represents Bluestorm in this appeal, told us, that was seen as the necessary first step to seeking to achieve a different attitude on the part of Portvale.
10. At the hearing before the Leasehold Valuation Tribunal, Mr Marcel, who represented PHL, argued that the accounts for 1999 had been too low - not too high - because they were not based on a proper assessment of the cost of urgent but major refurbishment, which he estimated in the sum of some £2.6 million. The judge's view of those proceedings was set out in paragraph 33 of his judgment, where he said this:

"Putting it shortly, I am quite unable to see that whole application as anything other than a waste of money, designed to delay matters and prevent Bluestorm from obtaining funds needed, even to deal with current maintenance needs."

The judge also recorded that in evidence before him Mr Marcel had apparently said that his attitude had been inappropriate and incorrect. The judge accepted that concession, whilst pointing out that it was somewhat belated.

11. New managing agents were appointed in November 2000. The judge said this about that stage of the proceedings at paragraph 35:

"It is now apparent to the Court that, from the start of Bluestorm's ownership, the major obstacle in funding even current Maintenance Services, let alone planning for the major works, has been lack of resources, in large part brought about by the opposition of Portvale and their Associates. That undoubtedly had an effect on the ability to employ suitable professional advisers."

There was no doubt that the situation was severe, if not desperate.

The proceedings

12. The claim in this case was brought as long ago as March 2001. Bluestorm issued a claim against PHL for their share of the actual ground rents in respect of their various flats for 1998, 1999 and 2000, actual maintenance contributions for the first of those years and an advance claim for those contributions for the year 2000. The

claim was some £86,000, together with interest. Portvale challenged the claim and its amount on various grounds, either not persisted with before the judge or rejected by him and not pursued in this court, but more importantly for our present purposes Portvale made a substantial counterclaim based upon the diminution in the value of their leaseholding by reason of the dilapidated condition of the buildings. It was expressed thus in paragraph 11 of the counterclaim:

"As a result of the delapidated condition of the Building and lack of services during the period from November 1998 to the date hereof the demised premises were of substantially less value to the Defendant than they would have been if the Building were properly maintained and serviced. As a result the Defendant suffered loss and damage."

13. The reply denied the amount in question but also went on to plead as follows:

"17. The defendant has at all times while the claimant has been freeholder, wilfully refused to pay any service charge contribution whatsoever even though in the case of the charges for 1998 and 1999 the [Leasehold Valuation Tribunal] has ruled that the charges claimed herein are reasonable.

18. In the premises the claimant has never had any obligation to the defendant under clause 8 of the Seventh Schedule to the lease and is therefore not in breach thereof and the defendant has no claim for damages arising there from."

Clause 8 of the Seventh Schedule features at a later stage of this judgment. It will be convenient to refer to it now. That provides for the lessor to carry out the duties upon him that are set out in the Sixth Schedule to the lease headed "Purposes for which the maintenance fund is to be applied": the maintenance fund being the fund into which maintenance contributions are to be paid. The part of the clause 8 with which we are concerned reads as follows:

"That the Lessor will (subject to the receipt by the Lessor of the Maintenance Contribution from the Tenant) throughout the term hereby granted provide and carry out or procure the provision and carrying out of the purposes particulars of which are set out in the Sixth Schedule..."

There is then a general proviso which I do not need refer to.

14. So far as Mr Camillin was concerned he also issued a claim for breach of the landlord's covenants to repair. He was a claimant because he had indeed paid his ground rent and current maintenance charges. The judge referred to the issue of proceedings and then said this at paragraph 37 of the judgment:

"Mr Camillin was not far behind. He had purchased two flats in early April 2001. In May 2001 he issued his own claim for breach of

landlords' covenants of repair. I am quite unable to see that as anything other than a deliberate and public alliance of his interests with those of PVL. By the time of his Amended Particulars of Claim in September 2002, he owned some 15 flats; 12 had been acquired from Portvale. He has now gone to live permanently in Australia, but in evidence he made no secret that, apart from acting as Portvale's Solicitor he had become an enthusiastic acquirer of an interest in Embassy Court."

The situation on the ground as the judge found, was that not merely the Portvale interests but a significant number of other tenants were not paying their charges. He said this in paragraph 46:

"With most other tenants holding off as well, I have concluded, as I believe I must, that Embassy Court is held in stalemate until Portvale and Mr Camillin radically change their attitude and their behaviour. Otherwise, their stance only bears the construction that they are still waiting for Bluestorm - or any Freehold owner other than themselves or their creatures - to fall down and let them back in."

And the judge gave a graphic account of the way in which the parties had asked him to address this stalemate, indicating that he was not able to do so within the curtilage of his role as a judge in those proceedings. He said, however, of the suggestion that he should act as some sort of arbitrator, that that was:

"... a tempting prospect not least because it is a disgrace to see a building that should be a reasonable source of income to its owners as well as a provider of reasonable, peaceful and secure homes to its occupiers, become first neglected by the former; then, when the latter obtain judgment to have matters put right, to have that judgment thwarted by behaviour frankly more suited to a Nursery School playground than to the conduct of responsible landlords; then, lastly, to find those landlord in the guise of tenants, aided by their professional advisers and associates, deliberately obstructing the putting right of their own previous neglect (albeit inherited) as landlords, and using the very defects - now worsened by time, it is true - of which they avoided the remedy by sinking into tactical insolvency, as an excuse for not playing their part as tenants in putting things right."

The judge then said that he mentioned all of this because it was relevant to various submissions made to him; and it is relevant to various of the issues before this court.

15. The outcome of the proceedings was that, subject to questions of set-off, judgment was given on the claim for the arrears in sums calculated by the judge at paragraphs 57 and 58 of the judgment, and there is no appeal against that order, which we are

told by counsel has in fact been discharged. The dispute before us is about the counterclaim. The judge rejected Bluestorm's reply. That, as we have seen, referred principally, though I am prepared to accept not exclusively, to the terms of the lease and to clause 8 of the Seventh Schedule. I shall return to that point at the end of the judgment.

16. Before us Bluestorm's resistance took a somewhat different approach, which it is fair to say had not been pleaded, and certainly not pleaded in detail, at the trial. What the judge said about the counterclaim was this. He made it quite clear that he regarded the counterclaim with the greatest possible disapproval. He said this in paragraph 59:

"Following Mr Marcel's acknowledgment of the impropriety (my word) of Portvale's attitude to the new Landlords, the Court is disinclined to assist them unless it must... to claim in respect of alleged loss suffered as a result of disrepair to which - as I find here - Portvale have substantially contributed by their intransigent conduct, is inelegant to the point of being offensive."

He then said in paragraph 62:

"When, however, the Leaseholders deliberately use such tactics, including what this Court regards as almost futile arguments in the [Leasehold Valuation Tribunal] deliberately to bring down the freeholders, they may find a Court unlikely to assist with Orders for specific performance, let alone considering the granting of any Set Off against service charges (whether current or future) originating from complaints about dilapidations brought about by the conduct of the Leaseholders themselves."

Then at paragraph 67, having previously set out again the view that she took for the conduct of Portvale, he said this:

"Dress it up how you will, this Court is not prepared to entertain a claim for damages in respect of breaches which the Claimants have themselves substantially helped to ensure could not be remedied."

He found in respect of the amount of the counterclaim that the claim in respect of loss of rental income had in his view not been made out. In respect of damage to the reversion he indicated that he was not concerned with questions of quantum and he came to no conclusions about it. He did something more radical. He dismissed the counterclaim in its entirety on what he described as a matter of principle. At paragraph 70 he said:

"I am persuaded to dismiss Portvale's claim on principle for the reasons I have stated."

That view and the consequent costs order that sprang from it is the subject of this

appeal. What the appellants seek is effectively on order that they are entitled to damages yet to be quantified for breach of the repairing and maintaining covenants. So far as other orders were concerned the judge indicated that on grounds of equity he would not allow any set-off nor specific performance as Portvale had claimed. The proceedings in respect of Mr Camillin were adjourned and I need say no more about them. I turn, then, to the issues that arise on the appeal.

The counterclaim: the judge's ruling

17. As we have seen, the judge dismissed the counterclaim on principle (paragraph 70). That principle was first, that the court would not assist the party that had behaved with impropriety (paragraph 59); nor would entertain a claim for damages in respect of breaches which the claimants had themselves substantially helped to ensure could not be remedied (paragraph 67). To the extent that the judge held that an otherwise valid claim for damages could be dismissed simply because of the inequitable behaviour of the claimants, he was wrong. Such considerations obtain when the remedy sought is equitable or discretionary, but the remedy in damages is neither of those. Mr Small, for Bluestorm, did not seek to uphold the judge's decision on that ground.

Bluestorm's attack on the counterclaim

18. Bluestorm did, however, argue that in the event the judge had been right to dismiss the counterclaim, even though it was admitted, or at least was clear, that PHL had suffered some, though as yet unquantified, damages by reason of Bluestorm's breaches of its repairing covenants. The argument was somewhat complex, and it had not been put, at least in all of its elements, before the judge. The steps in it, as I understand it, are as follows. (i) PHL cannot set-off its claim under the repairing covenants against its liability, found by the judge and not challenged, to pay service charges. (ii) Accordingly, PHL remain liable to Bluestorm to pay the amount owed under the repairing covenants, and are in breach of contract in not paying that amount. (iii) PHL's liabilities in respect of that breach include not merely its debt for the sum unpaid, but also damages for any foreseeable further loss caused to Bluestorm. (iv) The judge had found that PHL's non-payment, in the context in which it took place, was the cause, alternatively a cause, of Bluestorm's inability to fulfil its obligations under the repairing covenants. (v) PHL is therefore liable to Bluestorm for any loss caused to Bluestorm by that inability. (vi) That loss includes Bluestorm's liability to PHL, so Bluestorm can set-off damages for that loss against any damages that it otherwise owes in respect of its own liability to PHL, thereby reducing the latter to nil. I deal with these points in turn.

Set-off by PHL against Bluestorm

19. The set-off on which PHL would have to rely, and did rely, is not the set-off of mutual claims after action brought that is discussed, for instance, by Morris LJ in Hanak v Green [1958] 2 QB 9. Rather, it would seem to be the form of "self-help" set-off, in terms of deduction from a debt otherwise payable, that was described by

Lord Denning MR in Federal Commerce [1978] 1 QB at 974. That form of set-off is of uncertain reach and content, but it is undoubtedly equitable in its origins and nature, as Lord Denning said in that same case at page 974E. The judge was clear that PHL was not entitled to, and he would not recognise, any equitable relief.

20. It was plainly open to the judge to take that view. I have set out his findings as to the motive and aims of PHL and, as must realistically be recognised, of Mr Marcel as the moving spirit of all the Portvale companies. Those findings were not seriously challenged before us. They gave ample justification for refusing PHL the assistance of equity in any form. PHL were and are liable to Bluestorm for the sums found by the judge, and were in breach of contract in not paying those sums.

The causal effect of PHL's nonpayment, and its legal consequences

21. PHL argued, first, that since it was only responsible for 31 per cent of the non-payment, and other tenants also had not paid, its default could not be said to have been the cause of Bluestorm's default; and second, that in any event Bluestorm, by not securing proper funding to take on the task that it had inherited with the freehold, had disabled itself from properly performing its duty. Whatever PHL did or did not do, therefore, did not cause Bluestorm's non-performance.
22. The judge was not asked to pass on either of those claims, because the precise argument that they seek to meet was not raised before him. Mr Tager QC complained that accordingly the causal argument could not be raised here. However, the judge was asked to consider the causal effect of PHL's default in the context of the arguments about set-off that were before him. His observations on the subject in the judgment (which I have already in large part quoted) were therefore not simply gratuitous, but made for a purpose. I am satisfied that his findings are sufficient to enable both of PHL's arguments to be rejected. As to the causal effect of PHL's default, allied to its very public assertions that it would not pay, the judge found (at paragraph 41, already cited) that other tenants saw no point in paying while PHL held out. I have already read paragraph 46 of the judgment where the judge found that the other tenants held off because of the stalemate between PHL and Bluestorm caused by PHL.
23. The judge also held (see paragraph 35) that PHL's attitude was, as he put it, a major obstacle in the way of Bluestorm in funding even current maintenance and planning for the future. Those findings, and in particular the first two, are, in my view, sufficient findings that the lack of contribution by other tenants was caused by, and was the fault of, PHL. Although, as I have said, the issue was not addressed before the judge in these precise terms, it would be futile to order that another court should revisit it, when the outcome of such inquiry is bound to be the same as was found by His Honour Judge Kennedy.
24. The judge also made a specific finding that PHL had "substantially helped" to ensure that Bluestorm's breaches could not be remedied (see paragraph 67). That in itself is sufficient to ascribe relevant causal responsibility for Bluestorm's breaches

to PHL. The causal link does not have to be one of a sole cause, but only of a substantial cause: if authority is needed for that proposition, the line of cases commencing with Wardlaw v Bonnington Castings [1956] AC at 613 provides it.

25. As to the complaint that the fault was in any event that of Bluestorm for taking on the freehold without sufficient funding, it first has to be said that that criticism of Bluestorm is highly unattractive. When Miss Smart, in desperation, and to protect her and others' homes, took on the freehold and then formed Bluestorm, she was forced to do so because of the parlous state of the building, which had been in Portvale's hands for the previous three years, and by the disappearance of the landlord through Mr Marcel's liquidation of his subsidiary company. She was also faced with a very substantial tenant whose controlling shareholder had made it plain at a meeting nine months previously, on 8 January 1998, that it was not prepared to make any contribution even towards the heating of the building. Mr Tager revealingly said that one reason why the freehold had been vested by the court in Miss Smart for only a nominal consideration was the presence of a recalcitrant tenant, in the shape of his new clients. The judge in these circumstances understandably (see paragraph 52) described Miss Smart and then Bluestorm as unwilling freeholders.
26. Where causal responsibility is concerned, the various alleged contributors are only required to act reasonably. The reality of the position at Embassy Court, well known to PHL as much as to Bluestorm, was that the landlord company was a creature of the tenants, dependent on their cooperation for its justification and being. That is why, as Mr Small demonstrated, the landlord had no power under the lease to raise external funds. That is why it would have been simply imprudent and unreasonable of Bluestorm to go ahead with any major scheme when it knew that 31 per cent of any funding for that scheme was not going to be available. To the extent that Bluestorm failed in this respect, it failed because of the attitude of PHL. Its acts were entirely reasonable, and do not break any causal chain between PHL and Bluestorm's liabilities. Nor is it enough for PHL to say that Bluestorm was in any event under-funded and could not have performed its functions whether or not PHL contributed. PHL's actions, before and after Bluestorm became the freeholder, first forced Bluestorm to take the freehold in disadvantageous circumstances, to which PHL or its associates had already strongly contributed; and second had, and were intended to have, a chilling effect on Bluestorm's performance of its duties as landlord. In any question as to the causal responsibility of PHL, these considerations well out-weigh the nice financial calculations that Mr Tager sought to put before us. PHL undoubtedly contributed sufficiently to Bluestorm's difficulties for it to be found to have caused those difficulties for the purpose of the present argument.
27. Mr Small demonstrated from Wadsworth v Lydall [1981] 1 WLR at 598 that special damage could be caused by a failure to pay money. He argued that Bluestorm's ability to fulfil the repairing covenant was not merely foreseeable by Mr Marcel but foreseen and indeed intended by him. Once it is accepted that PHL's

failure to pay caused Bluestorm's inability to meet the repairing covenant, then loss accruing to Bluestorm by that inability can be recovered by it from PHL.

28. Mr Tager raised two objections to that part of the argument, over and above his contentions as to causation. First, the claim as to foreseeability had not been pleaded and therefore not been investigated at the trial as it needed to have been. While it is true that we do not have the judge's view on this point I would not turn it aside on those grounds. Foreseeability, at least when one is concerned with the reaction of contracting parties to known facts, rather than with whether those facts had arisen or would arise at all, is not a matter of fact or evidence, but for the judgement of the court. We are as well able, assisted by Mr Tager's submissions, to determine that question as would have been the judge. Secondly, Mr Tager argued that foreseeability had to be judged according to the contemplation of the parties at the time of entering into each individual lease: in the case of the example used in the trial in 1975, and between a different landlord and a different tenant. It was simply impossible to say that a single tenant, entering into his lease with a different landlord in very different circumstances from Embassy Court as it is now, would have contemplated the matters complained of by Bluestorm. I agree that the application of the principle of this case is unusual, but I would not disqualify it on those grounds.
29. Mr Tager took us to the judgment in Wadsworth v Lydall of Ormrod LJ at 605, which cited observations both by Denning MR and by Scarman LJ in Parsons (Livestock) v Uttley Ingham [1978] QB 791. I will read simply what was said by Scarman LJ, as quoted at page 605C of Wadsworth v Lydall:

"The court's task, therefore, is to decide what loss to the plaintiffs it is reasonable to suppose would have been in the contemplation of the parties as a serious possibility had they had in mind the breach when they made their contract."

By "the breach" I am quite satisfied that Scarman LJ did not simply mean the bare fact of the breach, but also the circumstances in which it occurred. Especially in a long running contract like a lease, it is legitimate to ask: (a) could the parties have contemplated the circumstances of the breach? (b) was the loss caused by that breach in their contemplation? I understood that Mr Tager conceded that the circumstances of the breach were indeed within the parties' contemplation. Even if he did not so concede, that, in my judgment, was the case. I have already referred to Mr Marcel's intention in bringing about the circumstances that arose. True it is that he was not the original contracting party. But he succeeded to the position of the original contracting party, and if that party had been asked whether if one of his successors acted in the way that Mr Marcel acted that would bring about the difficulties that occurred, there is no doubt what the answer would have been. In those circumstances the second question, was the loss complained of and caused by that breach within the parties' contemplation, follows, as a matter of course or inevitability on the facts of this case. I repeat that in many cases the courts may not

find contemplation of events in the future easy to establish; but this is not such a case. I am therefore satisfied that that part of Bluestorm's argument is made out.

Set-off of Bluestorm's claims against its liability to PHL

30. The two claims are effectively "back-to-back" and cancel each other out. This may appear to be a legal artifice, but it is one that in this case properly meets the merits. The case was not argued in this way in the court below, but the issues are purely ones of law and we can properly consider them. The set-off at this stage of the case is the equitable set-off between claims within the same litigation that was expounded by Morris LJ in his classic judgment in Hanak v Green. The court will be guided by the essential requirements of justice in the context of the relationship between the two claims: National Westminster Bank v Skelton [1993] 1 WLR 76F, per Slade LJ. On that basis, a set-off in this case is inevitable.
31. I would therefore uphold the judge's decision to reject the counterclaim on the basis set out above, rather than on at least the first of the bases the judge himself adopted. PHL remains liable for its service charges, since they are not to be set-off against any loss that PHL may have suffered through the failure to repair.

Yorkbrook Investments v Batten

32. That conclusion makes it unnecessary for the determination of the appeal to consider Mr Small's alternative case, rejected by the judge, that Bluestorm was not liable in any event to PHL to perform its responsibilities under the lease, because of PHL's failure to pay the service charges. That claim was based upon the terms of paragraph 8 of the Seventh Schedule to the lease, which I have already set out.
33. That wording would seem plainly to mean that the lessor is under no liability if the tenant does not pay. The judge held otherwise, on the basis of the decision of this court in Yorkbrook Investments v Batten [1985] 2 EGLR 100. Mr Tager accepted that that conclusion gave the words in brackets in paragraph 8 of the Seventh Schedule no meaning at all, but he said that that position had been hallowed by many years of understanding and acceptance, both in relation to repairing covenants and in relation to covenants for quiet enjoyment. In Yorkbrook, similar to our case, a landlord of a large complex of flats claimed for possession and payment of arrears and service charges. The tenant counterclaimed for damages of breach of repairing covenants by the landlord. He had been, with other occupiers, dissatisfied with the cost and standard of service provided by the landlord, and had withheld both his rent and his maintenance contributions. The clause in question was not in directly the same form as our clause, but again I accept that its substance was very close to ours. It said this:

"The lessor covenants with the lessee that subject to the lessee paying the maintenance contribution pursuant to the obligations under clause 4 hereof the lessor will..."

- and then a series of obligation were set out. Unlike in our case, those obligations

did not directly mirror the statement of the landlord's obligations that we saw set out in the Sixth Schedule to our lease.

34. The submission accepted by the judge below in Yorkbrook had been that the prompt payment by the appellant of his maintenance contribution was a condition precedent to the landlord's liability to provide hot water and central heating. This court rejected that argument. It referred to cases on covenants for quiet enjoyment, where phrases such as "the lessee paying his rent and performing the covenants" were held not to create conditions precedent, but said that the general principle was to be found in a passage from Foa's General Law of Landlord and Tenant:

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

The question, therefore, was whether this condition as to payment of rent was a condition precedent. The court said that one should look at the statutory provisions existing at the time the lease was drawn and any indications should have been from the deed itself, and examine the possible consequences of the interpretations put forward.

35. The court decided that the term was not a condition precedent. It was principally led to that conclusion, I think it is fair to say, by looking at the position of the particular lessee in that case. It was pointed out that if it were really the case that a simple failure to pay absolved the landlord entirely, then he could refuse to provide services in circumstances where the tenant's lack of payment was not culpable. The court also pointed out that as a condition precedent the requirement for prepayment would largely stultify any attempt by the tenant, as was the case in Yorkbrook v Batten, to express dissatisfaction, either with the landlord's performance or with the level of service charges. The court pointed in that connection to legislation then fairly recently introduced requiring such charges to be reasonable. It is clear that the court was concerned about the situation where a genuine dispute had actually to be taken to court, with the landlord not performing in the interim, rather than be partially determined by the tenant not paying. Accordingly, although the contractual structure in Yorkbrook was not dissimilar from our contractual structure, the context of the case and its surroundings were very different from our case.
36. If the point had to be decided by this court - and I have indicated it does not - I would not think that we were constrained to come to the same conclusion in respect of this lease and this dispute as did the court in Yorkbrook. First, it must be said that the instrument, although similar, is in fact different; so in any event what the Court of Appeal said about a different instrument does not bind us, though of course its view must be taken with the greatest respect. Second, the Court of Appeal in Yorkbrook stressed, with respect rightly, that the words must be

interpreted in the context of the particular lease and of the assumed intention of the parties in entering into it. The lease in Yorkbrook, although similar to our lease did, not as clearly as does the present lease create a close linkage between the tenants and their payments on the one hand and the landlord and his responsibilities on the other, as I have set out above. In the context of a lease such as ours, and the scheme in which it forms part, it would be entirely understandable that the words in brackets were intended at least to carry some meaning. The landlord depends entirely for his ability to run the building on contributions from the tenants, and that is what the lease provides for.

37. Mr Tager suggested that a construction such as was rejected by the court in Yorkbrook would lead to wholly unreasonable results that no parties could have intended: for instance, if a tenant was one day late with his payment by accident, or alternatively was temporarily unable to pay, his lights or heat might be arbitrarily cut off by the landlord. I see the force of that contention, but the difficulty may have arisen, as my Lord Sir Martin Nourse suggested in the course of argument, from the court in Yorkbrook being asked to construe the proviso as a condition precedent. One can understand the court's reluctance to accept that view of these words. If they were so construed, then they would have the all or nothing (if I may use the expression, he did not, "blockbuster") effect that Mr Tager suggested. But I doubt whether it is an acceptable alternative to that extreme case to say at the other extreme that the clause must necessarily therefore have, and be given, no meaning at all. I think that it may well be an acceptable approach to a provision such as that under consideration to say that it deprives the non-payer of the right to complain of the landlord's breach when there is a direct connection between the non-payment and the breach. Thus some, but not all, and probably not very many, defaults in payment would disqualify action by the tenant. Applying that view of it, the single tenant with a genuine grievance in Yorkbrook would not be disqualified. On the other hand a tenant such as Portvale, refusing to pay for the reasons that it did, would be. That, indeed, may be to state in more general terms a conclusion somewhat like that which I have already reached without reference to this disputed clause.
38. These are difficult issues. They were not fully debated before us, and I apologise for the fact that the solution that I have tentatively suggested was not exposed to criticism by counsel. I will therefore say no more on this point, but leave it to be considered, or repudiated, when it does become essential to a decision.
39. I would simply dismiss this appeal for the reasons that I gave earlier in this judgment.
40. LORD JUSTICE MAURICE KAY: I agree that the order made in the county court should stand for the reasons given by Buxton LJ in relation to the issues of causation and set-off. That is sufficient to dispose of this appeal.
41. For my part, I prefer not to address the alternative argument relating to Yorkbrook. Whatever may be the conceptual imperfections of that authority, it has stood

without judicial criticism for almost 20 years. It stated an approach, and to some extent a principle, and it appears in leading textbooks as authority for the same. It is binding on this court. We are invited to distinguish it. Whilst the facts of this case can be described as extraordinary, there is nothing extraordinary about the terms of the lease. It contains similarities to the lease in Yorkbrook. I am concerned that if we strive to distinguish Yorkbrook we may unwittingly disturb the assumptions upon which other leases have been negotiated and upset the balance that Yorkbrook appears to achieve. I do not think that this is an appropriate case in which to go down that road.

42. Accordingly, I refrain from any decision about it.
43. SIR MARTIN NOURSE: I also agree with the judgment of Buxton LJ. I add some observations of my own on the Yorkbrook point.
44. Paragraph 8 of the sixth schedule to the lease contains a covenant by the lessor that:

"... the Lessor will (subject to the receipt by the Lessor of the Maintenance Contribution from the Tenant) throughout the term hereby granted provide and carry out or procure the provision and carrying out of the purposes particulars of which are set out in the Sixth schedule..."

There is then a proviso (inapplicable here) relieving the lessor from liability under the covenant in the event of strikes etc, or other causes not within his control.

45. The question is what is the effect of the words "subject to the receipt by the Lessor of the Maintenance Contribution from the Tenant"? On their face they must have been intended to mean something, and I agree with Mr Small that they were intended to limit the lessor's liability under the covenant in some way. Clearly, they were not intended to bring the liability altogether to an end in the event of the tenant's failure or neglect to pay a single instalment of the maintenance contribution. At the other extreme, it would offend all conventional principles of construction to give them no effect at all, which is what Mr Tager QC has frankly accepted would be the result of the argument he has put before us.
46. The lessor is under a continuing obligation to provide and carry out, or to procure the provision and carrying out, of the purposes specified. The tenant is under a continuing obligation to pay the maintenance charge which is the product thereof. The purpose of the words "subject to the receipt by the lessor of the maintenance contribution from the tenant" is to forge a particular link between the one obligation and the other and to provide that the tenant is not to be able to claim the benefit of the lessor's obligation if and so long as he does not discharge the burden of his own.
47. It may be - I express no view - that the lessor would not be able to disclaim liability under his obligation where a tenant was substantially in arrears with his maintenance contribution but nevertheless recognised his obligation to pay it. That is not this case. Here, at a meeting on 8 January 1998 of which we have seen a

note, well before Miss Smart or Bluestorm became the freeholder, Mr Marcel evinced the clear intention that neither he nor his companies would pay a penny more towards the costs of the building, either as leaseholders or as freeholders. He was as good as his word and it was only the judge's order that produced any payment at all.

48. In the circumstances, this is a case where, until judgment, the tenant had evinced a fixed intention not to be bound by his obligation and had thereby disentitled himself from claiming the benefit of the lessor's obligation. On that ground alone the counterclaim fell to be dismissed.
49. On these facts, if it is not otherwise distinguishable, I would distinguish Yorkbrook. I would only add that, while I accept that that decision may well have been justified on its own facts, I do not myself regard the authorities referred to by this court, in particular Edge v Boileau (1885] 16 QBD 117 (covenants for quiet enjoyment) and Bastin v Bidwell (1881) 18 Ch D 238 (options for renewal), as being helpful in this context. More apposite, I would think, is Tito v Waddell No.2 [1977] Ch 106, where Megary V-C, at pp 289 et seq, building on Halsall v Brizell [1957] Ch 169, distilled from previous authorities what he called "the pure principle of benefit and burden". However, neither of those cases has been examined in argument and it is unnecessary to rely on them. Here the express words of the lease import its own principle of benefit and burden and no court of equity could, on the facts, allow the tenant to recover.
50. I too would dismiss this appeal.

(Appeal dismissed; Appellant to pay Respondent's costs in the full amount; stay lifted).