

(1044)



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00BG/LSC/2014/0134**

Property : **43-45 East Smithfield, London E1W
1AP**

Applicants : **Mrs Z Mack (leaseholder of Flat 9)
and 12 other leaseholders**

Representative : **Mr S Armstrong, Counsel**

Respondent : **Lancsville (East Smithfield) Ltd**

Representative : **Mr D Dovar, Counsel**

Type of Application : **Preliminary issue in relation to a
determination of the liability to pay
a service charge**

Also present : **Mr P Hickson (leaseholder of Flat
7), Mr G & Mrs Z Mack
(leaseholders of Flat 9), Mr S
Serota of Wallace LLP
(Respondent's solicitors) and Mr Y
Sanghri (Respondent's accountant)**

Tribunal Members : **Judge P Korn (chairman)
Mr J Barlow JP FRICS**

**Date and venue of
Hearing** : **30th October 2014 at 10 Alfred
Place, London WC1E 7LR**

Date of Decision : **25th November 2014**

DECISION

Decision of the tribunal

As a matter of construction of the Flat Leases the Tribunal can determine that the Flat Lessees are liable to pay less than 100% (collectively) of the costs of the Building Services.

The issue

1. The Applicants seek a determination pursuant to section 27A of the Landlord and Tenant Act 1985 (“**the 1985 Act**”) as to the reasonableness and payability of certain service charges charged to them.
2. However, a preliminary issue has been identified for determination, namely the following issue:-

“Whether as a matter of construction of the Flat Leases the Tribunal can determine that the Flat Lessees are liable to pay less than 100% (collectively) of the costs of the Building Services in the circumstances where

(1) The Flat Leases provide for the Flat Lessees to pay specified percentages which total 100%

(2) The Flat Leases contain a covenant by the Lessor to pay a fair and reasonable proportion of the cost of the Building Services attributable to the commercial premises”

3. Both parties have made written submissions on this preliminary issue and a hearing was held on 30th October 2014 at which oral submissions were made.
4. The Property comprises 14 residential flats on the first to fifth floors and a commercial unit on the ground floor and in the basement.

Points of clarification at start of hearing

5. It was agreed at the hearing that the lease to be referred to when analysing the preliminary issue would be the lease for Flat 3 (“**the Lease**”). Mr Armstrong and Mr Dovar both confirmed that all of the residential leases are in the same form for all purposes relevant to this preliminary issue.
6. The Lease is a three party lease between the landlord, the lessee and the management company. Whilst there is seemingly a question as to how active the management company is in practice, under the Lease the

management company covenants to provide services and the lessee covenants to pay a service charge to the management company.

7. At the start of the hearing, Mr Dovar for the Respondent said that currently only 72% of the cost of the Building Services is charged to residential lessees. However, the Respondent's view was that the management company would be entitled to charge the residential lessees 100% (between them) of the cost of the Building Services if it chose to do so.
8. Mr Armstrong for the Applicants clarified a point made in written submissions. Whilst in paragraph 6 of his written submissions he had stated that "*in the present case the Tribunal can determine that the Respondent should pay a higher proportion*", what he meant was that such a determination would merely be a means to an end, so as to enable the tribunal – pursuant to section 27A of the 1985 Act – to determine the amount payable by the Applicants.

Applicants' case

9. In written submissions Mr Armstrong notes that the Lease provides for two different types of service, namely Apartments Services and Building Services. The Apartments Services relate to the common parts of the residential parts of the Property and it is common ground between the parties that the cost is payable only by residential lessees. The Building Services relate to the main structure and exterior of the Property and external common parts.
10. The percentages specified in each of the residential leases for both the Apartments Services and the Building Services add up to 100% in aggregate. However, in relation to the Building Services the Lease also contains a covenant on the part of the landlord (in paragraph 5.2 of the Eighth Schedule) to "*pay to the Company [i.e. the management company] a fair and reasonable proportion of the costs incurred by the Company in performing the Building Services as is attributable to the Commercial Premises*".
11. In his written submissions and at the hearing Mr Armstrong argues that this tribunal could determine that the residential lessees are liable to pay less than 100% in aggregate of the cost of the Building Services.
12. At the hearing Mr Armstrong took the tribunal through the relevant provisions of the Lease. In clause 4 the lessee covenants to perform the "Rent and Service Charge Covenants", these being set out in the Sixth Schedule, and in paragraph 1 of the Third Schedule the lessee covenants to "*pay the Rent and Service Charge in accordance with the Rent and Service Charge covenants contained in the Sixth Schedule*". Under paragraph 2.1 of the Sixth Schedule the lessee covenants to pay "*such*

sum as is demanded by the Company on account of the Service Charge Percentage by half yearly instalments in advance on the Service Charge Payment Dates or otherwise within 21 days of the date of any demand made by or on behalf of the Company". There is also a procedure for making a balancing adjustment at the end of each service charge year in Part III of the Fourth Schedule, pursuant to which the actual cost of services for that year is calculated and the lessee pays any balance or (if the lessee has overpaid) receives a credit.

13. The phrase "Service Charge Percentage" used in paragraph 2.1 of the Sixth Schedule is a defined term and is defined as "*the relevant percentage of the Service Charge applicable to the Apartments*". Part I of the Fourth Schedule contains a list of percentages for the Building Charge, the Apartment Charge and the Accessway Charge (this last charge not being relevant to the preliminary issue). Specifically in the Flat 3 lease the percentage specified is 7.93% for both the Building Charge and the Apartment Charge.
14. Mr Armstrong submits that on their true construction the residential leases do not require the residential lessees to pay (collectively) 100% of the total cost of Building Services. Instead, pursuant to paragraph 5.2 of the Eighth Schedule the Respondent is itself obliged to pay the fair and reasonable proportion of this cost attributable to the commercial premises and then each residential lessee is obliged to pay its specified percentage (i.e. that specified in Part I of the Fourth Schedule) of the remaining amount.
15. In construing the lessee's obligations Mr Armstrong argues that one must look at the Lease as a whole in order to ascertain the parties' intentions and he refers the tribunal to certain passages from Chitty on Contract (31st Edition). In his submission the Respondent's covenant in paragraph 5.2 of the Eighth Schedule to pay the fair and reasonable proportion of the Building Services cost attributable to the commercial premises is absolutely clear and the tribunal must seek to give effect to it.
16. As regards the construction of the lessee's obligations, Mr Armstrong notes that the covenant in paragraph 2.1 of the Sixth Schedule is to pay the "Service Charge Percentage", which (as stated above) is defined as "*the relevant percentage of the Service Charge applicable to the Apartments*". In his submission the words "*applicable to the Apartments*" are crucial as they show that the obligation is not to pay the relevant percentage of the total service charge but rather the relevant percentage of so much of the service charge as is applicable to the Apartments. Therefore the residential lessee is not required to pay anything in respect of costs which are applicable to the commercial premises.

17. Applying the above, Mr Armstrong argues that the lessees are each obliged to pay the relevant percentage of the whole cost of the Apartments Services, as these services only benefit the residential lessees and there is no provision for the Respondent to contribute towards the cost of these services on behalf of the commercial premises. However, as regards the Building Services, these benefit both the residential and commercial parts of the Property and the commercial premises expressly bear a proportion of this cost, therefore the amount “applicable” to the Apartments is less than 100%. Therefore the process that needs to be gone through is that one first calculates the amount attributable to the commercial premises and then each residential lessee pays its specified percentage of the rest. The alternative construction would either mean that the management company was entitled to collect more than 100% of the building service charge or that no contribution was due in respect of the commercial premises contrary to the clear wording of paragraph 5.2 of the Eighth Schedule.
18. In the alternative, Mr Armstrong argues that if the Lease does, as a matter of construction, contain a covenant for the lessee to pay the specified percentage of the whole of the cost of Building Services there would still be an inherent inconsistency between this provision and the Respondent’s obligation to contribute the proportion attributable to the commercial premises. In those circumstances the tribunal should strive to give effect to the presumed intention that the management company can recover 100% (but not more) of the cost of Building Services from the residential lessees and the commercial premises in aggregate.
19. In the above context Mr Armstrong argues by reference to Chitty that one needs to look at what a reasonable person would have supposed the parties to understand. In the case of ambiguity a court/tribunal must adopt the construction which is consistent with business common sense and should also construe the contract against the grantor. The whole contract is to be considered and the court/tribunal should give effect to the meaning that can reasonably be discerned even if this involves departing from, modifying, supplying or rejecting words.
20. As to whether one is entitled to consider all of the leases in order to interpret any one of them, Mr Armstrong submits that one can look at the whole factual matrix, and this can include for example the fact that the calculation of the percentages payable by each lessee is by reference to the net internal area of each flat as a percentage of the whole.
21. At the hearing Mr Armstrong also referred to the two cases cited by Mr Dovar in written submissions, namely the Supreme Court decision in *Rainy Sky SA and others v Kookmin Bank (2012) 1 All ER 1137* and the Court of Appeal decision in *Cherry Tree Investments Ltd v Landmain Ltd ((2013) Ch 305*.

22. In *Rainy Sky*, which was a case involving the construction of certain contractual performance bonds, Mr Armstrong noted that in paragraph 14 Lord Clarke states that *“the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant”* and that the reasonable person in this context is *“one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”*. In paragraph 21 Lord Clarke goes on to state as follows: *“The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.”*
23. In Mr Armstrong’s submission, the more likely natural interpretation of the relevant provisions in the Lease is the one advanced by him. However, in the alternative, he submits that the tribunal is entitled to interpret it in the way that is most consistent with business common sense. In so doing it can take into account the information that would have been available to *“one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”* (as per Lord Clarke in *Rainy Sky*) which would include such information as would have been obtained at the time from making reasonable enquiries as to how the service charge was calculated.
24. In *Cherry Tree* the parties to the dispute entered into two separate documents, one of which was registered at the Land Registry and one of which was not (and was not required to be). The question arose as to whether the unregistered document could be used to interpret the registered one, the Court of Appeal ruling on the facts of the case that the unregistered document could not be so used. Arden LJ gave a dissenting judgment in which she stated (at paragraph 20) that *“interpretation is not just about finding the ordinary or natural meaning of words in a document. The court has to find the meaning that the document would convey to a reasonable person having the background known or available to the parties. That meant that the approach was contextual and not purely objective”*. In delivering one of the majority judgments Lewison LJ stated that *Cherry Tree* was not a case in which the language under consideration was difficult to interpret or did not make sense.

25. In Mr Armstrong's submission *Cherry Tree* was a case in which there was no ambiguity on the face of the document and in any event the document which could have been used to import a different interpretation was not publicly available. In his view in the present case the language of the Lease either favours his interpretation or is ambiguous and the other leases can be considered as part of the factual matrix as they are all registered at the Land Registry and are therefore publicly available.
26. In addition to the above arguments Mr Armstrong submitted that on the basis of *Rainy Sky* and *Cherry Tree* even if the Lease was not ambiguous on its face a court/tribunal was still entitled to interpret it on the basis of what a reasonable person would have understood the parties to have meant, with the reasonable person being someone with all the background knowledge which would reasonably have been available to the parties.
27. Mr Armstrong also commented that the fact that the percentage for the Building Services charge and the Apartments Services charge was identical indicated that the Building Services charge percentage must be wrong if simply taken at face value, given the contribution attributable to the commercial premises anticipated by the Lease.

Respondent's case

28. In written submissions Mr Dovar argues that the Lease contains no ambiguity which allows for a construction other than one in which the residential lessee must pay the specified percentage of the total cost of the Building Services.
29. In relation to the *Rainy Sky* case, Mr Dovar notes that at paragraph 23 Lord Clarke states that "*where the parties have used unambiguous language the court must apply it*". The Applicants' case is predicated upon the basis that the actual figures set out in each residential lease cannot prevail as this would amount to more than 100% if one includes the contribution due from the Respondent in respect of the commercial premises. However, in Mr Dovar's submission, in order to arrive at that conclusion one needs to look at all of the leases together, and in his view this is not a permissible approach.
30. In Mr Dovar's submission one first looks at the Lease itself and then only if there is an inherent ambiguity does one try to decide through other means what the parties intended. In this case the stated percentage contribution is unambiguous. It is also clear that the residential lessee's percentage contribution is to be applied to the whole of the cost of the Building Services. The definition of Service Charge is that it "*means all expenses incurred by the Company for or incidental to observing and performing the Building Services and the Apartment Services*". Therefore the lessee pays a set percentage of the total cost of

the Building Services and there is no ambiguity which needs interpreting.

31. As regards the proposition that there is an inherent inconsistency between the residential lessee's service charge payment obligations and the Respondent's obligation to make a contribution in respect of the commercial premises, in Mr Dovar's submission there is no inconsistency apparent on the face of the individual lease. Again it is only when all of the leases are read together that a possible issue arises, something that it would not have been possible to do at the time of execution of all but the last lease to be completed.
32. In relation to Mr Armstrong's reliance on the words "*applicable to the Apartments*" in the definition of "Service Charge Percentage", in Mr Dovar's submission Mr Armstrong is reading too much into those words. Mr Armstrong is taking a two-stage approach to the interpretation of the service charge provisions of the Lease but such an approach is simply not referred to in the Lease.
33. Specifically in relation to *Cherry Tree* and the scope of admissible evidence, in Mr Dovar's view reliance on background documents should be limited to those noted on the relevant title and not be extended to documents registered under, or noted on, a different title.
34. In Mr Dovar's view if the Applicants are aggrieved then their remedy is not through re-interpreting the Lease but by making a claim for rectification on the basis of mistake or by making an application for a lease variation under the Landlord and Tenant Act 1987.
35. In the alternative, if the tribunal does consider that there is an inherent ambiguity then in Mr Dovar's submission the proper construction would be to alter the fixed percentage to the lower amount currently charged based on floor area. In Mr Dovar's submission, whilst the Lease refers to the commercial premises bearing "a fair and reasonable proportion" of the costs this needs to be seen in the light of the fixed percentage specified in respect of the residential premises. He also noted at the hearing that the word "attributable" is used in both paragraph 5.1 (which relates to unlet residential units) and paragraph 5.2 (which relates to the commercial premises) of the Eighth Schedule to the Lease, arguing that a natural reading of the word "attributable" suggested in each case that the intention was to fix a specific percentage.

Tribunal's analysis and determination

36. It is common ground between the parties that the residential leases provide for the lessees to pay specified percentages adding up to 100% in aggregate in respect of the Building Services. It is also common

ground that each residential lease contains a covenant on the part of the landlord to pay to the management company a fair and reasonable proportion of the costs incurred by the management company in performing the Building Services as is attributable to the commercial premises. Therefore, on the face of it, if the specified percentages were to be applied to the whole of the cost of the Building Services the management company would seemingly be entitled to receive more than 100% of the cost of Building Services.

37. This can be contrasted with the position relating to the Apartments Services. Again the residential leases provide for the lessees to pay specified percentages adding up to 100%, but in the case of the Apartments Services there is no provision for the landlord to make a contribution towards the cost in respect of the commercial premises. The reason for the difference seems clear: the Apartments Services only relate to the residential units and therefore the commercial premises do not benefit from these services, whereas the Building Services are services which benefit both the residential and commercial premises.
38. In these circumstances is the tribunal entitled to interpret the residential leases as not in fact requiring the residential lessees between them to pay 100% of the cost of Building Services and, if so, on what basis?
39. Counsel for each party has argued the case in the alternative. One argument advanced by Mr Armstrong is that even if the residential leases are seemingly unambiguous on their face, nevertheless the tribunal is entitled to – and presumably by implication should – interpret them in the light of what a reasonable person would have understood them to mean. The ‘reasonable person’ in such a case is understood by him to be someone with all the background knowledge which would reasonably have been available to the parties.
40. As noted by Mr Dovar, in *Rainy Sky* Lord Clarke states that “*where the parties have used unambiguous language the court must apply it*”. This would seem to indicate that one should apply any unambiguous language without looking any further, whether by analysing other documents or by considering other evidence of the parties’ intentions or by trying to decide what a ‘reasonable person’ would have meant by those words. Yet other statements by Lord Clarke could perhaps be seen as starting from the assumption that in order to ascertain whether the language is unambiguous one needs to do more than simply consider its plain meaning. Where Lord Clarke states (in paragraph 14 of *Rainy Sky*): “*the ultimate aim of interpreting a provision in a contract ... is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant*” and that the reasonable person in this context is “*one who has all the background knowledge which would reasonably have been available to the parties ...*”, is he

advocating an approach which, regardless of the apparent clarity of the language, requires the court/tribunal to contextualise the wording so as to take into account what a reasonable person with all the background knowledge would have intended by that language? Similarly, where in paragraph 21 of *Rainy Sky* he states that “*the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person ... would have understood the parties to have meant*” is he envisaging that this is always the process through which one must go, regardless of the circumstances?

41. In our view, part of the key to addressing the above questions may be to consider the level of knowledge that it is envisaged the reasonable person would have. If, as Mr Armstrong seems to suggest, the reasonable person would have asked all questions relevant to a full understanding as to how the service charge was calculated, then it is hard to see how that reasonable person could be ever agree something that appears to the objective observer to be irrational or even commercially imprudent. It cannot be the case, in our view, that such a process should be gone through even in relation to apparently clear language. Therefore, there would first have to be some basis for either considering particular wording to be ambiguous or considering there to be a conflict between different sets of wording within the document under consideration before going on to consider external evidence or what a reasonable person would have understood by the relevant words.
42. In this regard we note that Lord Clarke prefaces his comments in paragraph 21 of *Rainy Sky* about the exercise of construction with the statement “*The language used by the parties will often have more than one potential meaning*” and it seems to us that he was envisaging a situation in which there was reason to consider – based on the wording itself – that more than one meaning was possible. In the alternative, we note Lord Clarke’s statement that the aim of interpretation is one of “*ascertaining what a reasonable person would have understood the parties to have meant*”. In the case of a provision which is unambiguous on its face, we anticipate that the most that Lord Clarke would regard it as reasonable for a court or tribunal to do would be to ask itself whether for example a provision has a specific legal or industry-related or other specialist meaning such that the reasonable person would have understood it in a particular way.
43. The wider approach which Mr Armstrong has invited us to take would, in our view, lead to a situation in which any contractual provision which was irrational and potentially even any contractual provision which was commercially very imprudent could be reinterpreted by the courts on the basis that no reasonable person could have intended it or would have agreed to it given the information that such person would have possessed at the time. This does not seem to us to be a workable result and therefore we do not consider that this is what was intended either

by the Supreme Court in *Rainy Sky* or by the Court of Appeal in *Cherry Tree*.

44. We turn now to the question as to whether the wording of the Lease itself, insofar as it relates to payment of Building Services charges, is in fact ambiguous or self-contradictory or problematic for any other reason. Mr Dovar argues that it is completely clear. The Fourth Schedule sets out the percentages payable by the lessee of the cost of various services, the "Service Charge Percentage" is the relevant percentage of the Service Charge and the "Service Charge" is (broadly) all expenses relating to the Building Services and the Apartments Services. He accepts that there is a landlord's covenant to pay the proportion of the cost of Building Services applicable to the commercial premises but sees no inherent contradiction between this and the lessee's obligation to pay a specific percentage of the cost of Building Services. Whilst he notes that the definition of "Service Charge Percentage" includes the words "applicable to the Apartments" he does not regard this as particularly significant, seeing these words essentially as superfluous.
45. Mr Dovar does not accept that one is entitled to look at all of the leases in order to interpret any one of them. We agree with Mr Dovar on this point. The leases were granted at different times, and when the first one was granted it was done so in isolation. Interpreting a document by referring to another document which was publicly available at the time is one thing. However, interpreting it by reference to a document which relates to a separate property and which (in the case of all leases granted subsequently to the subject lease) does not yet exist is quite something else.
46. We therefore agree with Mr Dovar that in order to establish that there is an ambiguity or contradiction in the Lease, such that one can take further steps to interpret what was intended, one needs to find such an ambiguity or contradiction by looking at the Lease in isolation.
47. Looking at the Lease in isolation there is, in our view, no intrinsic contradiction between the lessee of Flat 3 paying 7.93% of the Building Services charge and the landlord paying to the management company the proportion of the cost of performing the Building Services attributable to the commercial premises. However, that is not the end of the matter as there are other provisions contained in the Lease which need to be considered.
48. We note that the Service Charge Percentage is defined as "*the relevant percentage of the Service Charge applicable to the Apartments*", and yet the phrase "relevant percentage" itself is not defined and nor is it referred to elsewhere in the Lease. Instead, Part I of the Fourth Schedule simply lists the different types of charge and states a percentage next to each one under the heading "Proportion Payable".

There is no therefore cross-referencing between these percentages and any of the operative provisions of the Lease. However, whilst this is unsatisfactory, it seems clear that the reference to relevant percentage must have been intended by the parties to the Lease to have been a reference to the respective percentages set out in Part I of the Fourth Schedule.

49. How should one interpret the words “applicable to the Apartments” within the definition of Service Charge Percentage? Mr Armstrong argues that these words are crucial whereas Mr Dovar effectively argues that they are meaningless and should simply be disregarded. In our view, the correct approach is somewhere between the two. We do not accept that by themselves these words are sufficient to justify an inference that the lessee’s percentage of the cost of the Building Services is intended to be applied to what remains of those costs once the contribution applicable to the commercial premises has been factored in. However, we do not accept that these words should simply be disregarded. It is reasonable to assume that the draftsman had a reason for including these words, and therefore in our view one should endeavour to invest them with meaning if reasonably possible by viewing them within the context of other provisions within the Lease and looking at the Lease as a whole.
50. The fact that the Lease contains a landlord’s covenant to pay the proportion of Building Services costs attributable to the commercial premises does not by itself – considering the Lease in isolation – show that the lessee of Flat 3 cannot have been intended to pay 7.93% of the whole of the Building Services costs. However, we consider it significant and relevant that the Lease in Part I of the Fourth Schedule provides for the lessee to pay exactly the same percentage of the Building Services charges and the Apartments Services charges and yet only in relation to the Building Services does the Lease also contain a landlord’s covenant to pay the proportion of costs attributable to the commercial premises. It is therefore clear within the Lease itself that Building Services and Apartments Services were intended to be treated differently. The logic for this is obvious; as noted above, the Building Services benefit the whole building, including the commercial premises, whereas the Apartments Services benefit only the residential units.
51. With the above in mind we return to the definition of Service Charge Percentage, namely “*the relevant percentage of the Service Charge applicable to the Apartments*”. In our view, a plausible interpretation of this phrase is that it represents an attempt by the draftsman to make a distinction between the different categories of service charge and that the draftsman is expressing the idea – albeit imperfectly – that the amount payable by the lessee is limited by reference to that which is (properly) applicable to the Apartments. In the light of the landlord’s contribution referable to the commercial premises it seems clear that the intention was for there to be more contributors towards the Building Services costs than towards the Apartments Services costs and

yet the percentage contribution by each residential lessee as set out in Part I of the Fourth Schedule is identical for each of these two categories of service. In the circumstances, it seems to us to be reasonably arguable that the intention was that the total amount of Building Service charges to which the lessee of Flat 3 (and by extension all residential lessees) should contribute would be the amount applicable to the Apartments, namely the total amount less the proportion attributable to the commercial premises.

52. It should be emphasised that the above interpretation is not considered to be either clear or obvious but rather a possible and reasonable interpretation as to what was intended. In our view it is sufficiently plausible to entitle one to apply Lord Clarke's statement in *Rainy Sky* that "*if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.*" In our view it is clearly more consistent with business common sense to prefer the construction which would result in the management company receiving 100% of the cost of Building Services to the construction which would result in the management company receiving more than 100%. Therefore, the tribunal is entitled to determine that the residential lessees between them are liable to pay less than 100% (collectively) of the costs of the Building Services.
53. Regarding Mr Dovar's alternative submission, he submits that if there is an inherent ambiguity then the lessees should still pay a percentage of the whole of the Building Services cost but should pay a smaller percentage, with the lessee of Flat 3 for example paying 5.71% rather than 7.93%. The rationale for this submission is referred to briefly in written submissions and was explained briefly in oral submissions but did not in our view get fully aired or tested. In any event, the question before us is simply whether the tribunal can determine that the residential lessees are liable to pay less than 100% (collectively) of the costs of the Building Services. In our view the tribunal can so determine. However, to go further than that at this stage and to specify the actual amount or percentage payable would go beyond the ambit of the preliminary issue which has come before us and would therefore be obiter dictum. Whilst there are circumstances in which it can be helpful for a court or tribunal to comment on matters not before it, in this case as the question as to what the actual amount or percentage payable should be was not fully argued we do not consider that it would be helpful to comment further at this stage.

Further Directions

54. The Further Directions were discussed and agreed at the hearing. In particular, it was common ground between the parties, and accepted by the tribunal, that it would not be practical to agree detailed further directions until after the parties had been notified of, and had an

opportunity to consider, the tribunal's decision on this preliminary issue.

55. By **16th December 2014** the Applicants shall write to the Respondent, with a copy to the tribunal, stating how they wish to proceed in the light of the tribunal's decision on this preliminary issue.
56. By **30th December 2014** the Respondent shall write to the Applicants, with a copy to the tribunal, responding to their statement.
57. After it has received the parties' statements the tribunal shall decide how to proceed, including whether to call a further case management conference and/or to issue further directions.

Cost Applications

58. No cost applications were made.

Name: Judge P Korn

Date: 25th November 2014