



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

Case reference : LON/00AL/LSC/2015/0097

Property : 85 & 85A Frederick Place, London SE18
7BH

Applicant : David Cannon Properties Limited

Representative : Mr Amit Lamba, Michael Richards & Co
Managing agents

Respondent 1 : Mr Stephen John Sexton Holland Flat
85

Representative : Mr Stephen Holland and his wife Ms Z
Cole

Respondent 2 : Ms Elena Jones - Flat 85A

Type of application : Section 27A Landlord and Tenant Act
1985 - determination of service charges
payable

Tribunal members : Judge John Hewitt
Mr Luis Jarero BSc FRICS

**Date and venue of
paper determination** : 17 June 2015
10 Alfred Place, London WC1E 7LR

Date of decision : 22 June 2015

DECISION

Decision

1. The decision of the tribunal is that the sums of service charges demanded on account by the applicant landlord mentioned in paragraph 9 below, are not presently payable by either of the respondents because the demands are not compliant with the provisions of the respective leases.
2. The reasons for the decision are set out below.

NB Reference to a number in square brackets '[]' is a reference to the page number of the trial bundle provided to the tribunal.

Background

3. The Property at 85 Frederick Place was originally constructed as a house and subsequently has been adapted to create two self-contained flats. Both flats have been sold off on long leases.
4. The freehold interest in now vested in the applicant. The lease of flat 85 is vested in the first respondent and the lease of flat 85A is vested in the second respondent. Copies of the leases are at:

Flat 85	dated 14 May 1987 [105]
Flat 85A	dated 14 July 1987 [80]

5. The leases impose an obligation on the landlord to insure the Property and to carry out repairs and provide services as set out in the Third Schedule to each lease. Each lease imposes an obligation on the tenant to contribute 61% of the costs incurred by the landlord on the matters set out in the Third Schedule. In practice the applicant has sought to recover only 50% of costs incurred from each tenant. Mr Holland told us that he no objection to paying the lower percentage of 50% and we infer that Ms Jones would be content with that position as well because 50% is lower than the contribution of 61% mentioned in her lease.
6. Evidently the Property requires very little management; there are no common parts and no services have been provided for a number of years. The applicant insured the Property but has otherwise left it to the two lessees to provide and pay for any services, repairs or maintenance that might have been required.
7. In October 2013 the applicant gave notice to Mr Holland (and we infer to Ms Jones also) that the self-management arrangement could no longer continue and indicated an intention to appoint a managing agent unless the lessees decided to exercise the right to manage (RTM) conferred by the Commonhold and Leasehold Reform Act 2002.
8. In the event the two respondents did not exercise the RTM and in April 2014 the applicant appointed Michael Richards & Co to be its managing agent.
9. So far as material to these proceedings Michael Richards & Co have issued demands as follows:

Flat 85

09.07.2014	Half-yearly service charge in advance 22.04.2014 – 28.09.2014 [130]	£355.07
10.09.2014	Half-yearly service charge in advance 29.09.2014 – 24.03.2015 [131]	£405.00

Flat 86

09.07.2014	Half-yearly service charge in advance 17.04.2014 – 28.09.2014 [133]	£367.97
10.09.2014	Half-yearly service charge in advance 29.09.2014 – 24.03.2015 [134]	£407.00

These demands appear to have been based on a *Statement of Anticipated Service Charge Expenditure* dated 9 July 2014 [131(1)] which was to cover anticipated expenditure over the period 25 March 2014 to 24 March 2015 of:

Insurance	£750
Repairs/maintenance	£300
Management fees	£600

Evidently some apportionment has taken place and although it was intended that each lessee would bear one half of the sums claimed the (slight) differences in the amounts demanded was due to error in the preparation of the demands.

10. On 2 March 2015 the tribunal received from the applicant an application pursuant to section 27A Landlord and Tenant Act 1985 [2]. A case management conference was held on 19 March 2015 and directions were issued [13]. At the CMC it was established that the principal issue to be determined was the reasonableness of the sums demanded on account:

Insurance	£750
Repairs/maintenance	£300
Management fees	£600

and whether the sums demanded of the respondents were payable by them.

The hearing

11. At the hearing the applicant was represented by Mr Lamba of Michael Richards & Co. Mr Holland represented himself supported by his wife. Ms Jones was neither present nor represented and has not taken any part in these proceedings.
12. It became clear that directions had not been complied with fully and the hearing file provided by the applicant was defective. It included a number of documents in duplicate and omitted key documents served by Mr Holland. The day prior to the hearing Mr Holland provided files of his own documents but they were not page numbered.
13. Having considered the issues and discussed them with the parties present the view was taken that the tribunal was able to determine the matters in issue before it with the materials provided by the parties even though they were not

presented in best order. The tribunal also decided to proceed with the hearing in the absence of Ms Jones because we were satisfied that Ms Jones had been notified of the hearing and that it was in the interests of justice to proceed with the hearing.

The service charge regime set out in the lease

14. The material provisions of the lease are as follows:

Clause 3 (21) [117] a covenant on the part of the tenant:

“(a) To pay to the Landlord 61% of all costs and expenses incurred or (as hereinafter provided) to be incurred by the Landlord in carrying out the works or performing the obligations set out in the Third Schedule hereto

(b) To pay such percentage of such costs and expenses as are attributable to the matters referred to in paragraphs 3 5 and 11 of the Third Schedule ... within fourteen days after the Landlord shall have provided the Tenant with a copy of the invoice or demand received by the Landlord in connection therewith

(c) In regard to any of the matters referred to in the Third Schedule other than in paragraphs 3 5 and 11 thereof to pay to the Landlord such sums on account of the anticipated cost thereof as the Landlord may reasonably from time to time require to receive in advance of carrying out the work or fulfilling the obligation in question and to pay to the Landlord the balance (if any) due in respect thereof forthwith upon demand therefor by the Landlord accompanied by evidence of payment of the whole of such cost”

The Third Schedule [124]

1. *To keep the Retained parts in good and substantial repair...*
2. *To redecorate or treat as appropriate the parts of the Retained Parts which are usually or which ought to be so treated...*
3. *To pay and discharge all rates taxes duties charges and assessments whatsoever...*
4. *...*
5. *To meet the cost of insuring the Building and other risks referred to in clause 4(5)*
6. *...*
7. *...*
8. *...*
9. *...*
10. *...*

11. *At the Landlord's discretion either:*

(a) to employ a reputable firm of Surveyors for the purposes of collecting rent and managing the Building in accordance with this Schedule and such other Surveyors Valuers ... or other professional firms as may be necessary or appropriate in connection with the valuation of the Building for insurance purposes the enforcement of the covenants and conditions herein or otherwise in connection herewith, or

(b) to fulfil such functions itself

and in either case to pay or to charge a reasonable fee therefor”

15. Following the October 2013 notification by the applicant of its intention to appoint a managing agent if the two lessees did not elect to exercise the RTM there followed an exchange of correspondence between Mr Holland and the applicant in which Mr Holland appeared to challenge the applicant's entitlement to appoint a managing agent. It appears that Mr Holland and his advisers may have misunderstood the lease terms and/or the implications of the RTM regime.
16. At the hearing Mr Holland accepted that under the lease the landlord was entitled to appoint a reputable firm of surveyors to manage the building and that the tenant had the obligation to contribute to the reasonable fee agreed between the landlord and the appointed firm.
17. Mr Lamba said that following their appointment, Michael Richards & Co, worked on the basis of a service charge year commencing 25 March 2014 and prepared the budget as set out in paragraph 9 above. The decision was taken that the contributions would be collected from the tenants by way of two equal half-yearly payments on account – 25 March and 29 September. Evidently this model was one commonly adopted in his office. At the hearing Mr Lamba accepted that this model was not the model set out in the subject leases.
18. Mr Lamba also accepted that the demands sent out for insurance and managing agents fees contributions were not accompanied by supporting invoices or demands of the type mentioned in sub-clause 3(21)(b) of the leases. Mr Lamba also said that the demand in respect of proposed repairs/maintenance was not explained and sum claimed was not an estimate of a specific items of repair or maintenance proposed to be carried out but was a sum generally to be held just in case some form of repair or maintenance might be carried out during the course of the year.

Discussion on the proper construction of the service charge regime set out in the leases

19. The leases, like any other written instruments fall to be construed in accordance with the guidance and principles handed down by the Court of Appeal, and, more recently by the Supreme Court.

20. The general principles may be summarised:

The Construction of Leases

1. The general legal principles.

Lord Diplock said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201E, that

'...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'

2. The definitive modern approach came from Lord Hoffman in *Investors' Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896, 912H - 913F when he set out the modern rules of interpretation.

'The principles may be summarised as follows:

- (1) *Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having 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.*
- (2) *The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and subject to the exception to be mentioned next, includes absolutely anything which could have affected the way in which the language of the document would have been understood by a reasonable man.*
- (3) *The law excludes from the admissible background the previous negotiations of the parties and their subjective intent. They are inadmissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
- (4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words*

which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: See Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd. [1997] A C 749.

(5) *The rule that words should be given their ‘natural and ordinary meaning’ reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had...’*

3. Lord Hoffman added a slight qualification to these principles when in *Jumbo King Ltd v. Faithful Properties* Unreported 2 December 1999, Hong Kong Court of Final Appeal, he said,

‘The overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail.’

4. Emphasis was made on the correct approach and the importance of the background in *Holdings and Barnes plc v. Hill House Hammond Ltd (No.1)* [2001] EWCA Civ 1334 when Clarke LJ said, about the above authorities,

‘Those cases are to my mind of particular assistance here because they show that the question is what a reasonable person would understand the parties to mean by the words of the contract to be construed. It is important to note that the reasonable person must be taken to have knowledge of the surrounding circumstances or factual matrix. As appears below, that knowledge is of particular importance on the facts of the instant case.’

5. Lord Bingham in *BCCI (SA) v. Ali* [2002] 1 AC 251; [2001] 2 WLR 735 said,

*‘In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties’ relationship and all relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties’ intentions the court does not of course inquire into the parties’ subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffman in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, 912-913 apply in a case such as this.’*

6. Regard may be had to the general background as part of the factual matrix in order to help construe words in a document – see *Partridge & others v Lawrence & others* [2003] EWCA Civ 1121.

7. Similarly obvious mistakes can be corrected by construction in order to give effect to the written intention of the parties. Once corrected, the lease is interpreted in and has effect in its corrected form. See for examples *St Edmundsbury v Clark (No.2)* [1975] WLR 468 and *Littman v Aspen Oil (Broking) Limited* [2005] EWCA Civ 1579; [2006] 2 P & CR 2

8. In *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38 the House of Lords held that although a court would not easily accept that linguistic mistakes had been made in formal documents, if the context and background drove a court to conclude that something had gone wrong with the language of a contract the law did not require it to attribute to the parties an intention which a reasonable person would not have understood them to have had; and where it was clear both that there was a mistake on the face of the document and what correction ought to be made in order to cure it, in that it was clear what a reasonable person having all the background knowledge which would have been available to the parties would have understood the parties by using the language in the contract to have meant, the court was entitled to correct the mistake as a matter of construction. The House went on hold that a material definition in the contract was ambiguous and obviously defective as a piece of drafting and to interpret the the definition in accordance with the ordinary rules of syntax made no commercial sense.

9. In *Multi-Link Leisure Developments Limited v North Lanarkshire Council* [2010] UKSC 47 Lord Hope cited with approval (at paragraph 21) the words of Lord Steyn in *Deutsche Genossenschaftsbank b Burnhope* [1995] 1 WLR 1580:

“The Court must not try to [divine] the purpose of the contract by speculating about the real intention of the parties. It may only be inferred from the language used by the parties, judged against the objective contextual background.”

Although this was a Scottish case Lord Clark noted (at paragraph 45) that he *“detected no difference between the principles applicable to the construction of a lease in Scotland and in England.”*

10. Sometimes as part of the process of construction of a document it is necessary to imply a term or terms into it. In order for a term to be implied the following conditions must be fulfilled:

1. the term must be reasonable;
2. the term must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
3. the term must be so obvious that it goes without saying;
4. the term must be capable of clear expression;
5. the term must not contradict any express term of the contract.

A clear statement of the criteria was set out in *B.P. Refinery (Westernport) Pty Ltd v Shire of Hastings* [1978] 52 ALJR 20.

However, in the context of residential leases a more restrictive approach is generally taken. See *Woodtrek v Jezek* [1982] 1 EGLR 45.

Similarly sweeping up clauses tend to be restrictively construed. See *Jacob Isbicki & Co Ltd v Goulding & Bird Ltd* [1989] 1 EGLR 236. An entitlement to recover interest on money borrowed to fund the cost of services will not be implied. See *Boldmark Limited v Cohen* [1986] 1 EGLR 47.

11. In the context of the construction of service charges provisions in a residential lease, it is trite law that a lease has to be construed in the same way as any other instrument or commercial contract. Words used must be given the ordinary natural meaning in the context. It is also trite law that a tenant is only obliged to pay what the lease provides for him to pay. See *Riverplate Properties Ltd v Paul* [1975] Ch 133.

12. In *Sella House Ltd v Mears* [1989] 12 EG 67 the service charge provisions in the lease provided for the recovery of expenditure incurred by the lessor in carrying out its obligations. Those obligations included:

- (i) *to employ at the lessor's discretion a firm of managing agents to manage the building and discharge all proper fees salaries charges and expenses payable to such agents or such other persons who might be managing the building including the cost of computing and collecting the rents and service charges in respect of the building, and*
- (ii) *to employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as might be necessary or desirable for the proper maintenance safety and administration of the building.*

The Court of Appeal held that legal expenses incurred in recovering rent and service charges from defaulting tenants were not recoverable.

In the context of discussion on the terms of the lease relating to legal expenses, Taylor LJ made the following comment:

'For my part, I should require to see a clause in clear and unambiguous terms before being persuaded that that result was intended by the parties.'

13. In *St Mary's Mansions Limited v Limegate Gate Investment Company Co Limited* [2002] EWCA Civ 149 the lease provided as part of the service charge:

'The reasonable and proper fees of the Lessor's Auditors and the reasonable and proper fees of the Lessor's managing agents for the collection of the rents of the flats in the said Buildings and for the general management thereof.'

The Court of Appeal held that such provision did not permit recovery of:

- ❖ proceedings to recover service charges;

- ❖ proceedings to recover ground rent; and
- ❖ obtaining general legal advice in relation to obligation under the leases

14. The approach to construction of a service charge provision in a residential lease was reviewed in *Gilje v Charlesgrove Securities Ltd* [2001] EWCA 1777, where ambiguous provisions were looked at in respect of a notional rent on the caretaker's accommodation. Laws LJ said:

'On ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so. The lease, moreover, was drafted or proffered by the landlord. It falls to be construed contra proferentum.'

In the same case Mummery LJ said:

'First, I note what is stated in paragraph 55 on page 71 of the 5th Edn of the Encyclopaedia of Forms and Precedents Vol 23 on Landlord and Tenant in the section relating to the drafting of provisions in leases for services charges. It is stated as follows:

'The draftsman should bear in mind that the courts tend to construe the service charge provision restrictively and are unlikely to allow recovery for items which are not clearly included.'

He went on to say:

'The proposition is obvious. Indeed the proposition reflects a particular application of the general principle of construction in the contra proferentum rule.'

15. The contra proferentum rule is one to be applied only where the court is unable on the material before it to reach a sure conclusion on the question of construction. See *St Edmundsbury v Clark (No.2)* [1975] WLR 468.

The view that a grant should be construed *contra proferentum* i.e. against the grantor has been losing significance since the judgment of Sir John Pennycuik in *St Edmundsbury* when he said:

'...this presumption can only come into play if the court finds itself unable on the material before it to reach a sure conclusion on the construction of the reservation. The presumption is not itself a factor to be taken into account in reaching the conclusion.'

21. It may also be added that in *Rainy Sky SA & others v Kookmin Bank* [2011] UKSC 50, Lord Clarke, at para 21 said:

'[T]he 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 be reasonably 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 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.”

22. In applying these principles we determine that the lease does not make provision for what might be termed a modern service charge regime with an accounting period, a budget for the period, half-yearly or quarterly payments on account, year-end accounts of actual expenditure and then balancing debits of credits as the case may be, which is the model adopted by the applicant’s managing agents.
23. The subject leases were both granted in 1987 and they must be construed against the understanding of the parties to them at that time.
24. We determine that the leases properly construed provide that in relation to insurance (Third Schedule paragraph 5) and managing agents fees (Third Schedule paragraph 11), the landlord may make a demand for the contribution payable and must attach to that demand a copy of the invoice or a demand for payment from the insurer or the managing agent as the case may be. We consider that the words of clause 3(21)(b) of the leases are very clear on this and that the proviso to attach a copy of the invoice of demand from the supplier amounts to a condition precedent to the obligation of the tenant to make the contribution. The demands given by the applicant’s managing agents to date have not complied with the condition precedent and thus we find the sums demanded are not yet payable by the respondents. Of course, the giving now of a compliant demand will trigger an obligation on the respondents to make their contributions provided that the sum(s) demanded have been reasonably incurred and are reasonable in amount. In the event of any issue about that it will be open to either party to make an application pursuant to section 27A of the Act for the issue to be determined.
25. As regards other sums that may be demanded, for example a contribution to the cost of repairs/maintenance under Third Schedule paragraphs 1 or 2 we find that the leases properly construed do not entitle the landlord to demand a sum where no works are actually planned or are in mind but where the landlord seeks to have a sum in hand just in case at some future time some repairs/works might be carried out. There is no express provision in the lease for a reserve fund. The lease does not provide for any accounting period. We find that the regime adopted in the lease is that the landlord is able to collect sums ad hoc as and when appropriate to recover expenditure that is either ascertained in amount or subject to a reasonable estimate, on a project by project basis.
26. We are reinforced in this conclusion by the words in clause 3(21)(c) of the leases – *“anticipated cost thereof as the Landlord may reasonably from time to time require to receive in advance of carrying out the work of fulfilling the obligation in question”*. There is express reference to ‘anticipated cost’ of ‘the

work' which suggests to us a pre-determined project and some estimate of the cost likely to be incurred. And then towards the end of the sub-clause that if the actual contribution payable is less than sum paid on account the landlord may give a demand for the balance which is to be "*accompanied by evidence of payment of the whole of such cost*".

27. Mr Lamba accepted that the sum included in the demands for 'repairs/maintenance' did not relate to any specific or proposed works or projects but were sought to be held on account generally just in case some repairs/maintenance might need to be carried out. As the demands made to date are not compliant with the leases we find that they are not payable by the respondents. Of course if the applicant does, as some time in the future, decide that repairs or maintenance is required to be carried out in compliance with the covenants given by the landlord, it will be open to the applicant to obtain an estimate of the cost of the proposed works and then to make a compliant demand on the respondents for the payment of their respective contributions to that ascertained cost.

Judge John Hewitt
22 June 2015