



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

**Case Reference** : LON/00AY/LSC/2016/0068

**Property** : Flat 1 Tolpaide House Hotspur  
Street London SE11 6TP

**Applicants** : Teshome Gemedà

**Representative** : in person

**Respondent** : Watmos Community Homes

**Representative** : Mr Bastin of Counsel

**Type of Application** : For the determination of the  
liability to pay a service charge

**Tribunal Members** : Judge W Hansen (chairman)  
Mr M Cairns

**Date of hearing** : 9 May 2016

**Date of this Decision** : 13 May 2016

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**DECISION**

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## **Decisions of the Tribunal**

- (1) The Tribunal determines that the Applicant is liable to pay £778.14 in respect of service charges for the service charge year 2013-14;
- (2) The Tribunal determines that the Applicant is liable to pay £1,100.50 in respect of service charges for the service charge year 2014-15;
- (3) The Tribunal refuses the Applicant's application for an order under section 20C of the Landlord and Tenant Act 1985;
- (4) The Tribunal refuses the Applicant's applications under paragraphs 13(1)(b) and 13(2) of the 2013 Tribunal Procedure Rules.

## **Introduction**

1. This is an application by Mr Gemedá, the tenant of Flat 1, Tolpaide House, Hotspur Street, London SE11 ("the Flat"), for a determination of his liability to pay and the reasonableness of service charges allegedly due in respect of the service charge years 2013-14 and 2014-15. The relevant legal provisions of the 1985 Act are set out in the Appendix to this decision.
2. In fact, the main issue, upon which the application largely turns, is an issue of construction relating to Schedule 4, Part 2 of the Applicant's lease dated 18 August 1997 ("the Lease"), the issue being in essence whether the Applicant is liable to pay service charges in respect of the costs and expenses incurred by the Respondent in respect of services provided by the Respondent in relation to the Ethelred Estate, and not just in relation to the building of which the Flat forms part.
3. The Lease is poorly drafted. It was a lease granted pursuant to the provisions of the Housing Act 1985 by the London Borough of Lambeth, the predecessor in title to the Respondent, to the Applicant for a term of

125 years. The property demised was “*the Flat more particularly described in the First Schedule*”. The First Schedule described the Flat as “*ALL THAT FLAT shown hatched red on the Floor Plan ... and numbered ONE on the GROUND & FIRST floor of the Building known as 1-31 Tolpaide House which for the purposes of identification only is shown edged blue on the said location plan such Flat and Building being located on the Council’s Estate known as Ethelred*”.

4. Recital (2)(e) identifies “*the Flat*” as meaning the property described in the First Schedule. Recital 2(f) identifies the Building as meaning the property referred to as the Building in the First Schedule but there is no further definition of the Estate and the lease plans do not identify the Estate or its boundaries. However, the Estate is referred to in a number of other places in the Lease (see e.g. para 2, Sch 2 & para 2, Sch 3) and clearly plays a key role in the working of the Lease. We were told by Ms Barker, the Respondent’s Leasehold Services Officer, that the Estate is readily identifiable as such on the ground, a fact we accept, and in any event we are satisfied that its precise extent would be readily ascertainable by reference to extrinsic evidence.
5. By Clause 2.2 the tenant covenanted to pay a service charge in respect of the reasonable expenses and outgoings incurred by the Council in the repair etc. of the Building and the provision of services therein and the other heads of expenditure as the same are set out in the Fourth Schedule.
6. The Fourth Schedule is divided into two parts as follows:

*Part 1*

*AS TO THE BUILDING IN WHICH THE FLAT IS SITUATED  
All costs etc. in or about the provision of any Service ... in  
relation to the Building and in particular ... in respect of the  
following:*

*1...*

2...

7. There follows a fairly typical list of heads of expenditure in numbered paragraphs 1-10, including charges and assessments, management fees and installing and maintaining aerials. We refer to these three specific items for reasons that will become apparent shortly.
8. The second part of the Fourth Schedule provides:

*Part 2*

*AS TO THE ESTATE UPON WHICH THE BUILDING IS SITUATED  
All costs etc. in or about the provision of any Service ... in relation to  
the building and in particular ... in respect of the following:*

1...

2...

9. The language is identical save that Part 2 refers to “*THE ESTATE UPON WHICH THE BUILDING IS SITUATED*” and refers to the building with a lower case “b”. The list of numbered paragraphs that then follow, in this case paragraphs 1-6, substantially overlap with paragraphs 1-10 in Part 1; in particular, the provisions as to charges and assessments (paragraph 5 in Part 2, paragraph 7 in Part 1), management fees (paragraph 1 in Part 2, paragraph 8 in Part 1) and aerials (paragraph 4 in Part 2, paragraph 9 in Part 1) are effectively identical. The language used in Part 2 lacks consistency. As already noted, the preamble refers to building with a lower case “b”. Paragraphs 2-3 refer to Building with a capital “B”. Paragraph 2 refers to repairing and maintaining etc. all ways roads pavements etc. “*which may belong to or be used for the Building in common with other premises on the building*”. This makes no sense grammatically or otherwise but does if one interprets “*on the building*” as meaning “*on the Estate*”. Paragraph

3 refers to the upkeep of the gardens forecourts unadopted roadways and pathways within the curtilage of the Building. On the facts, and having regard to the definition of Building and the lease plan, this makes little or no sense. It does, however, make sense if one interprets this as intending to refer to the “Estate”. Paragraph 4 refers to aerials installed on the estate with a lower case “e”. If building in Part 2 means the same as Building in Part 1 there is substantial duplication and/or redundant wording. If building in Part 2 is interpreted as meaning Estate, as defined in the First Schedule, the Lease makes sense. We also note that the Fifth Schedule is very poorly drafted, in particular paragraph (d) which, as drafted, is missing a sub-paragraph (ii) and obviously missing other words which would make it intelligible.

10. Mr Gameda contends that the building in Part 2 should not be interpreted as meaning “Estate”. He says that there is nothing wrong with the Lease as drafted. However, he accepts that the word “building” in Part 2 must be intended to refer to something different from the Building as defined. As to what that other thing is, he contends that the “building” should be interpreted as referring to the other blocks in the vicinity (which he identifies as being Baltimore House, Gaysley House, Nainby House and Sambrook House) which he says are “*within the curtilage of the Building*”.
11. Mr Bastin contends that, as a matter of construction, “*the estate*” and “*the building*” in Part 2 should both be read as “the Estate” as defined in the First Schedule, namely the Council’s Ethelred Estate. Mr Bastin referred us to the well-known case of *Investors Compensation Scheme v. West Bromwich BS* [1998] 1 WLR 896 but the relevant principles are perhaps more conveniently (and recently) to be found in the decision of the Supreme Court in *Arnold v. Britton* [2015] UKSC 36 where Lord Neuberger said this:

*[15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been*

available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14, [2009] 4 All ER 677. And it does so by focussing on the meaning of the relevant words, in this case cl 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of:

- (i) the natural and ordinary meaning of the clause,
- (ii) any other relevant provisions of the lease,
- (iii) the overall purpose of the clause and the lease,
- (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and
- (v) commercial common sense, but
- (vi) disregarding subjective evidence of any party's intentions.

In this connection, see *Prenn* at pp 1384 – 1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* (trading as *HE Hansen-Tangen*) [1976] 3 All ER 570, [1976] 2 Lloyd's Rep 621, [1976] 1 WLR 989, 995 – 997 per Lord Wilberforce, *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2002] 1 AC 251, para 8, [2001] 1 All ER 961, per Lord Bingham, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras 21 – 30.

**[16]** For present purposes, I think it is important to emphasise seven factors.

**[17]** First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16 – 26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

**[18]** Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does

not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

**[19]** The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251, [1973] 2 All ER 39, [1973] 2 WLR 683 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201, [1984] 3 All ER 229, [1984] 3 WLR 592, quoted by Lord Carnwath at para 110, [1984] 3 All ER 229, [1984] 3 WLR 592, have to be read and applied bearing that important point in mind.

**[20]** Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

**[21]** The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

**[22]** Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group*

*Ltd [2011] UKSC 56, 2012 SCLR 114, [2011] 50 EG 58 (CS), where the court concluded that “any . . . approach” other than that which was adopted “would defeat the parties’ clear objectives”, but the conclusion was based on what the parties “had in mind when they entered into” the contract (see paras 17 and 22).*

*[23] Seventhly, reference was made in argument to service charge clauses being construed “restrictively”. I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant’s contribution. The origin of the adverb was in a judgment of Rix LJ in *McHale v Earl Cadogan [2010] EWCA Civ 14, [2010] 1 EGLR 51, para 17, [2011] RVR 106*. What he was saying, quite correctly, was that the court should not “bring within the general words of a service charge clause anything which does not clearly belong there”. However, that does not help resolve the sort of issue of interpretation raised in this case.*

12. Applying those principles, we determine the issue of construction in favour of the Respondent. We have no doubt that a reasonable person having all the background knowledge which would have been available to the parties would have understood the parties to be intending to draw a distinction in Part 2 between Building-related costs and expenses and Estate-wide costs and expenses. Clearly, the language has gone badly wrong, as indicated above, and as Lord Neuberger acknowledged, the worse the drafting, the more ready the court can properly be to depart from their natural meaning. In the present case, the overall purpose of the clause, read in the context of the Lease as a whole, combined with commercial common sense, indicate that the Respondent’s construction is to be preferred. We must of course resist the temptation to re-write the agreement to reflect what we consider the parties should have agreed. We are not doing this. We are construing the words used in their documentary, factual and commercial context and so construed the meaning is as the Respondent contends. There is no logic or other justification for construing the word “building” as the Applicant contends. By contrast, the Lease as a whole and Part 2 in particular makes sense if we adopt the Respondent’s construction which avoids significant overlap between



Parts 1 and 2 and the potential for multiple duplication of charges. We are entirely satisfied that the extent of the Ethelred Estate is readily identifiable by means of extrinsic evidence and that, when read in the context of the Lease as a whole, any reasonable person would have understood the parties to be referring to that Estate in Part 2 of Schedule 4 when identifying the expenditure in respect of which the Applicant was liable to pay a service charge.

13. Having determined the construction issue, little else remains in dispute. The Applicant accepted at the hearing that provided he was liable to pay no more than £778.14 in respect of service charges for the year 2013/14, he would not pursue his application in relation to that year. The Respondent agreed that figure and pursuant to the parties' agreement we determine that the service charge payable by the Applicant for the year 2013/14 is £778.14. In fact, this has already been paid, as acknowledged by the Respondent at the hearing.
  
14. As for 2014/15, the Applicant confirmed at the hearing that only remaining issue were the management charges, made up of a fixed charge of £72.00 and variable charge of £87.75 being 10% of the total costs attributable to the Flat, i.e. a total of £159.75. The Applicant produced no comparable or other evidence to challenge this figure. He relied instead on paragraph 1 of Part 2 of the Fourth Schedule which entitled the Respondent to charge a management fee of "not less than 10%". The Applicant contended, in the light of this, that anything more than 10% was excessive. However, this is not what the paragraph says. The figure of 10% is not a cap. We are satisfied that the total management charge, whether viewed as a percentage or otherwise, was reasonable and no valid basis for challenging it has been established. Accordingly, we determine that the sum payable by the Applicant by way of service charge for 2014/15 to be £1,100.50.

15. The Applicant applied for reimbursement of his fees and other costs under paragraph 13 of the 2013 Procedure Rules. He also applied for an Order under section 20C of the 1985 Act.
16. In view of our findings above we refuse both applications. As regards the section 20C application, the Tribunal has a discretion in the matter which must be exercised having regard to what is just and equitable in all the circumstances: *Tenants of Langford Court v. Doren Ltd* (LRX/37/2000). The Tribunal must also consider the overall financial consequences of any order it may make: *Conway v. Jam Factory Freehold Ltd* [2013] UKUT 0592. Having done so, we are entirely satisfied that it would be wrong to make a section 20C Order.
17. As regards the application for reimbursement of fees and costs, the only point that the Applicant really pressed in relation to costs was the delay by the Respondents in dealing with his correspondence, the suggestion being that had they dealt with matters more promptly, this application would not have been necessary. However, given the entrenched positions of both parties in relation to the construction issue, it was inevitable that the parties would have ended up before the Tribunal to have that issue determined, as in fact happened, and having determined it in favour of the Respondent, we consider that the fees and costs incurred by the Applicant should lie where they fall.

**Name:** Judge W Hansen

**Date:** 13 May 2016

## **Appendix of relevant legislation**

### **Landlord and Tenant Act 1985 (as amended)**

#### **Section 18**

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
  - (a) "costs" includes overheads, and
  - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

#### **Section 19**

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  - (a) only to the extent that they are reasonably incurred, and
  - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

#### **Section 27A**

- (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
  - (a) the person by whom it is payable,
  - (b) the person to whom it is payable,
  - (c) the amount which is payable,

- (d) the date at or by which it is payable, and
  - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
- (a) the person by whom it would be payable,
  - (b) the person to whom it would be payable,
  - (c) the amount which would be payable,
  - (d) the date at or by which it would be payable, and
  - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.