

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2017] UKUT 232 (LC)
UTLC Case Number: LRX/121/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT -- service charge -- construction of lease -- whether tenant required to contribute to expenditure upon the development or only upon the building containing the tenant's flat

IN THE MATTER OF AN APPEAL AGAINST A DECISION
OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

MS T AMIN

Appellant

and

BARKING CENTRAL MANAGEMENT COMPANY (NO.2) LIMITED

Respondent

**Re: Flat 702
87 Axe Street
Barking
Essex
1G11 7FS**

His Honour Judge Huskinson

**Royal Courts of Justice, Strand, London WC2A 2LL
5 May 2017**

Amanda Gourlay, instructed by the appellant through Bar Public Access
Michael Paget, instructed by Swaine Allen for the respondent

© CROWN COPYRIGHT 2017

The following cases were referred to in this decision:

Redrow Regeneration (Barking) Limited v Edwards [2012] UKUT 373
(LC)

Arnold v Britton [2015] UKSC 36

Jacob Isicki & Co v Goulding & Bird Ltd [1989] 1 EGLR 237

Lloyds Bank Plc v Bowker Orford [1992] 2 EGLR 44

Universities Superannuation Scheme v Marks & Spencer Plc [1999]
L&TR 237

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal Property Chamber (Residential Property) (“the F-tT”) dated 22 July 2016, given under section 27A of the Landlord and Tenant Act 1985 as amended, whereby the F-tT gave a decision as to the extent of the expenses towards which the appellant could be required to contribute pursuant to the service charge provisions in her lease.

2. The present case is not concerned with whether any particular expenditure has been reasonably incurred nor with whether any works have been provided to a reasonable standard. Instead the dispute can be summarised as follows.

3. The appellant holds the lease of her flat, namely Flat 702 at 87 Axe Street, Barking, Essex from the freeholder Redrow Regeneration Barking Limited (or its successor). The respondent is a party to the lease as the company responsible for providing services etc and recovering the service charges. 87 Axe Street is referred to in the appellant’s lease as “the Building” and I will hereafter refer to it as the Building. The appellant’s lease makes reference to a more extensive development than merely the Building, which in the lease is referred to as “the Development” and I shall use that term hereafter. The Development incorporates not merely the Building but also two other buildings namely the Lemonade Building and the Bath House. The appellant’s lease requires her by way of service charge to pay to the respondent a certain percentage of certain expenditure. The point of principle which is raised in the present case is whether on the proper construction of the lease the total expenditure, in respect of which the appellant is required to pay a percentage by way of service charge, is expenditure which, anyhow as regards certain heads of expense, relates only to the Building or whether it is expenditure in respect of the Development including the Lemonade Building and the Bath House. By way of example, there is a dispute as to whether the relevant total expenditure (a percentage of which the appellant is required to pay to the respondent by way of service charge) includes only the costs of repairing and decorating and insuring the Building, or whether instead the relevant total expenditure also includes the costs of repairing and decorating and insuring the Lemonade Building and the Bath House.

4. The F-tT decided that the relevant total expenditure was not limited to expenditure in relation only to the Building but instead included expenditure relating to the Lemonade Building and the Bath House.

5. As I understood the position between the parties, if the present appeal fails then it is common ground that the appellant is liable to pay by way of service charge her relevant percentage in respect of a total expenditure as calculated by the respondent. On the other hand if the appellant's appeal succeeds then the appellant accepts that there will be expenditure towards which she will be liable to contribute her appropriate percentage by way of service charge – but the total of such expenditure (i.e. to which her percentage is to be applied) will have to be properly calculated in accordance with the Tribunal's decision so as to ensure that there is not included within this total expenditure any expenditure upon matters towards which the appellant is not required to contribute.

The Facts

6. The appellant holds flat 702 in the Building from the lessor upon a long lease at a low rent. The respondent is a party to the lease and is defined therein as “the Company”. There are various obligations placed upon the respondent to carry out repairs and provide services. There are various rights given to the respondent to recover monies by way of service charge.

7. It is necessary to set out various provisions in the lease because these are central to the issues arising in the present case.

8. The appellant's flat is identified as being “the flat comprising the rooms in the Building within the Development and shown for the purpose of identification only edged red on Plan No: 2...”, see the first schedule to the lease which, curiously, states that the flat is known as “Flat number 703”. The definition of the Demised Premises also refers to flat 703, whereas it is common ground to that in fact the appellant holds flat 702 as proclaimed on the front sheet of the lease. This oddity may be taken as a further infelicity in the drafting of the appellant's lease.

9. The expression the Building is defined as meaning the building erected within the Development and shown edged blue on “Plan No: 1.” This plan does indeed show the Building edged in blue.

10. The lease is less clear when it comes to the meaning of "the Development" which is defined as meaning "the development of the flats within the land." There is no definition of what is meant by "the land" or what other flats beyond those in the Building are being referred to. This lack of clarity in the drafting of the lease has already given rise to an appeal to the Upper Tribunal (the President, George Bartlett QC) in *Redrow Regeneration (Barking) Limited v Edwards* [2012] UKUT 373 (LC) dated 22 October 2012. In summary the Tribunal concluded:

"The LVT should proceed to deal with the matters raised by the tenants in their schedule on the basis that the relevant costs in respect of the Development for the purpose of calculating percentages payable are those relating to all three buildings."

The Tribunal concluded that the Development extended to more than just the Building itself and included the Bath House and the Lemonade Building. It should be noted that this decision does not decide the point in issue in the present case. This previous decision decides that the Development includes the Building and the Lemonade Building and the Bath House. What the previous decision does not decide is how there should be calculated the total of the expenditure to which the relevant percentage should be applied for the purpose of calculating the appellant's liability to pay service charge. The issue in the present case does not concern the question of whether the Development includes the Lemonade Building and the Bath House (because the Upper Tribunal has already decided that it does include them) but instead concerns the question of how the relevant total expenditure is to be calculated – because it is the appellant's case that, while it is accepted that Development includes all three buildings, the proper construction of the lease directs the total of the relevant expenditure to be calculated by taking into account (anyhow as regards certain heads of expenditure) only expenditure in relation to the Building.

11. The following further definitions are also of relevance:

- (i) "The Material Charges" means the aggregate of the charges computed in accordance with the Sixth Schedule and payable under clause 3(4).
- (ii) "The Material Charges Percentage" means 0.51% of the Material Charges relating to the Building and the Development (or such other proportion as may be determined pursuant to clause 6 of the Sixth Schedule).

(iii) “The Common Areas” means the boundary walls fences gates Service Installations the communal bin stores (if any) all grass paved flagged and landscaped areas together with all other parts of the Development and the Building not demised by this Lease or any lease of any other flat in the Development.

12. By clause 3(4) the appellant covenanted with the lessor and with the respondent to pay to the respondent the Material Charges Percentage in respect of each year of the term.

13. Clause 5 contains the following provision:

“5. The Company covenants with the Tenant and as a separate covenant with the Lessor as follows:

5.1 the Company will during the Term carry out the repairs and provide the services specified in the Seventh Schedule and in the Eighth Schedule ... [there then follow some provisos].”

14. The Sixth Schedule makes provision in relation to the computation of the Material Charges. Paragraph 2 of the Sixth Schedule provides:

“The Material Charges shall consist of:

A sum comprising:-

- (i) The expenditure estimated as likely to be incurred in the year commencing the 1st April by the Company for the purposes mentioned in the Seventh Schedule together with
- (ii) An appropriate amount as a reserve for or towards those of the matters mentioned in the Seventh Schedule as are likely to give rise to expenditure after such calendar year being matters which are likely to arise either only once during the then unexpired term of this Lease or at intervals of more than one year during such unexpired term including (without prejudice of the generality of the foregoing) such matters as the decorating of the exterior of the Building and repair of the structure thereof and the repair and/or renewal of the Service Installations.

- (iii) A reasonable sum to enable the Company to employ managing agents for its administrative and management obligations in respect of the Development."

15. The Seventh Schedule is entitled "Purposes for which the Material Charges is to be applied". The respondent pursuant to clause 5 of the lease is, as shown above, bound by a covenant to carry out the repairs and provide the services specified in, inter alia, the Seventh Schedule. I set out the whole of the Seventh Schedule:

"Decoration and Repair of Structure and Maintenance of Grounds

1. (a) As often as may in the reasonable opinion of the Company be necessary to prepare and decorate in appropriate colours with good quality materials and in a workmanlike manner all the outside rendering wood metalwork and other parts of the Building usually decorated in accordance with the covers agreed with the planning authority
- (b) To keep the interior and exterior walls and ceilings and floors of the Building and the whole of the structure roof foundations and main drains boundary walls and fences of Building (but excluding such parts thereof as are included in the Demised Premises and the corresponding parts of all other dwellings in the Building) in good repair and condition
- (c) Properly to cultivate and preserving good order and condition the Common Areas referred to in this Schedule and to keep all parking spaces paths fences screens and bin stores (if any) and walls properly maintained and surfaced and (where appropriate) lighted
- (d) to regularly clean both the interior and the exterior of the glass in the windows of all the common parts of the Building

Decoration and Repair of Common Hallway Areas

2. (a) To keep all entrance hall staircases and landings leading to the flats in the Building and used in common by the Tenants and occupiers of such flats and all Service Installations now laid or hereafter to be laid in or upon the Development or any part

thereof (other than those serving exclusively individual Dwellings) in good repair and condition and as often as may in the opinion of the Company be necessary in a suitable and workmanlike manner to prepare and decorate with good quality materials the interior of the said common parts

(b) To keep the common hallway areas suitably furnished lighted cleaned and supplied with electricity

Payments of outgoings

3. (a) To pay all existing and future rates taxes duties assessments charges impositions and outgoings whatsoever whether parliamentary parochial local or of any other description which are now or during the term shall be assessed charged or imposed or payable on or in respect of the entirety of the Development or its curtilage or Common Areas.

(b) To pay all costs and expenses incurred by the Company in maintaining a supply of water to the Development.

To Employ Staff

4. Unless prevented by any cause beyond the reasonable control of the Company to employ such staff (including auditors) to perform such services as the Company shall think necessary in or about the Development but so that the Company shall not be liable to the Tenant for any act default or omission of such staff.

Television Aerial Radio Relay Internal Telephone and alarm system

5. To pay all expenses of providing maintaining repairing renewing servicing or otherwise relating to the communal television aerial or aerials the relay service for radio or television broadcasts and alarms or other similar apparatus in the Building and any entry phone system including any entry system to the car parking areas (if any of the foregoing are installed) together with any fees or charges payable to any contractor person or corporation in respect of the same.

Enforcing Covenants of Other Tenants in Favour of The Company

6. If so required by any tenant of a Dwelling in the Building to enforce the covenants and conditions contained herein on the part of the Tenant or similar covenants and conditions entered into or to be entered into by the tenants of other Dwellings in the Development in favour of the Company so far as the same affect the Demised Premises requiring such enforcement and on such tenant indemnifying the Company against all costs and expenses in respect of such enforcement and (if so required by the Company) giving reasonable security for such costs and expenses.

Insurance Against Fire etc

7. To keep the Building (including the Lessor's fixtures and fittings and the furnishings of the common parts thereof but not the contents of any dwelling therein) insured during the Term in the joint names of the Company and the Lessor (with the interest of the Tenant and its mortgages noted thereon) against loss or damage by fire lightning storm tempest flood escape or water explosion impact aircraft or anything dropped therefrom riot or civil commotion and all other risks normally covered by a comprehensive buildings insurance policy and such other risks as may from time to time be prescribed by the Council of Mortgage Lenders and its successors and together with such other risks as the Lessor shall think fit acting reasonably for a sum equal to not less than the full replacement value thereof including all Architect's Surveyor's and other fees necessary in connection therewith in some insurance office of repute and through such agency as the Lessor shall in its absolute discretion decide and to produce to the Tenant and the Lessor on request the policy of insurance and the receipt for the current premium and following damage or destruction by an insured risk to obtain all necessary consents to reinstate the Building and the Development and forthwith to utilise the proceeds received of any such policy so far as the same will extend to rebuild or reinstate the Building or any part of the same and the Tenant hereby authorises the Company to receive the insurance monies for this purpose but without prejudice to the Tenant's liability to pay or contribute to the costs thereof as hereinbefore provided in the event of the insurance money being wholly or partially irrecoverable by reason of any act or default of the Tenant his servants agents

guests invitees or licensees PROVIDED THAT the Building shall be deemed to be insured for a sum equal to the full replacement value thereof notwithstanding that any policy or policies of insurance in force contains a provision whereby the first part of any loss shall not be borne by the Insurers (hereinafter called “an excess provision”) so long as the Company and the Lessor is satisfied that the inclusion of such an excess provision in any policy of insurance is in the general interest of the tenants of the Development having regard to the additional costs of insuring without such excess provision.

Third Party Insurance

8. To effect insurance against the liability of the Company to third parties and against such other risks and in such amount as the Company shall think fit acting reasonably (but not against the liability of the individual tenants as occupiers of the flats, in the Development).

Payment of Taxes

9. To pay any taxes (including VAT) which may be assessed or charged on the Material Charges or the income arising from any investment of the same.

Other Services and Expenses

10. (a) To carry out all repairs to any other part of the Development and the parking spaces for which the Company may be liable and to provide and supply such other services for the benefit of the Tenant and other tenants of the flats in the Development and to carry out such other repairs and such improvements works additions and to incur such other costs (including the modernisation or replacement of plant and machinery) as the Company shall consider necessary to maintain the Development and the parking spaces to a good class residential standard.
- (b) To the cost of employing or engaging solicitors, counsel and other professional persons in connection with the Company’s obligations herein contained and the collection of the Material Charges Percentages payable by the Tenant and by the Owners together with the costs of bringing or defending any action or proceedings and the making of any application.”

16. The Development includes 272 flats across the three buildings. The Building contains 40 flats made up of 18 housing association flats and 22 flats which are non-housing association flats and which are let out on long leases at low rents to lessees, one such flat being held by the appellant. The Lemonade Building and the Bath House between them comprise some 232 further flats all of which are let on long leases at low rents.

17. The Eighth Schedule of the appellant's lease contains certain covenants by the Company (i.e. the respondent) including a covenant:

“That every lease or tenancy of a flat within the Development shall be substantially on the form of this Lease and contain covenants on the part of the Tenants similar in all material respects to those contained in this Lease.”

There was no evidence regarding the terms of the leases of the other non – housing association flats in the Development, but having regard to the above mentioned provision I indicated that I was minded to assume that the leases of the other flats within the Development were in substantially the same terms as the appellant's lease. I was told that this was in fact the case and that I should indeed proceed upon this assumption.

18. The housing association flats were let to Southern Housing Group Ltd there being (I understand) a separate lease in respect of each flat. Unfortunately the provision regarding service charge in the housing association leases was wrongly drafted. The housing association leases confined the obligation to contribute towards service charge to an obligation to contribute the appropriate percentage in respect of expenditure relating solely to the Building. There was no obligation under the housing association leases to pay by way of service charge any contribution towards the wider expenditure of the respondent in relation to those parts of the Development which went beyond the Building. However the housing association leases each required the lessee to pay 5.56% of the relevant expenditure in relation to the Building. 18 times 5.56% gives a total of 100.08%. Thus as drafted the housing association leases required the housing association lessee, which was the lessee only of 18 of the 40 flats in the Building, to pay effectively 100% of the expenditure of repairing insuring and generally running the Building. The respondent and the housing association recognised this error from an early time and the respondent never required the housing association to pay more per flat than 2.5% of the relevant expenditure relating to the

Building. In due course a deed of variation was executed so as to make formal this variation. 18 times 2.5% gives a total of 45%. Thus the housing association pays (and was always intended to pay despite the original drafting error) 45% of the relevant expenditure relating to the Building through the service charges attributable to the 18 housing association flats.

19. Accordingly if the respondent is to achieve 100% recovery of the relevant expenditure relating to the Building it is necessary that the respondent recovers from the other lessees in the Development (or in the Building) 55% of the relevant expenditure relating to the Building.

20. A further drafting error emerged in relation to the Material Charges Percentage appropriate for each of the non-housing association flats, because there was originally allocated to each flat a certain percentage (in the appellant's case 0.51%) such that across the whole of the 254 non-housing association flats there was effectively a 100% recovery (see paragraph 24 of the respondent's statement of case before the F-tT). The calculation of the appropriate percentage for each flat upon the foregoing basis overlooked the fact that the housing association flats were going to be contributing towards the relevant expenditure relating to the Building. If the originally adopted Material Charges Percentage (in the appellant's case 0.51%) is applied and if the true construction of the lease is that the appellant's service charge is to be calculated by applying this percentage to the relevant expenditure relating to the whole Development (rather than just relating to the Building) then the respondent would recover more than 100% of the relevant expenditure relating to the Development. This is because the respondent would be recovering effectively 100% of this expenditure from the 254 lessees of non-housing association flats but would then on top of that be recovering 45% of the relevant expenditure relating to the Building from the housing association flats. This error having been spotted, the respondent has in fact sought to recover from the relevant lessees a percentage which is less than that printed in their leases. In the case of the appellant the percentage which the respondent uses (and as regards which there is no complaint by the appellant because it is less than the percentage printed in her lease) is 0.4807%. However for the purpose of analysis (and as it is 0.51% which is stated in the appellant's lease) I shall continue to refer to the appellant's percentage contribution as 0.51%.

21. It is apparent from the foregoing that if the leases of the other flats in the Development are in substantially the same terms as the appellant's lease (which I assume and which is the case) and if the appellant's argument is correct that her Material Charges Percentage of 0.51% is applied (as regards certain heads of expenditure) only to such expenditure in relation to the Building then there will be an under recovery for the respondent. Take by way of example costs of repairing and decorating and insuring the Building. Upon the appellant's argument she is liable to pay 0.51% of these costs. The other 21 lessees in the Building are required to pay a similarly low percentage. The lessees of flats in the Lemonade Building and the Bath House would, upon the appellant's argument, not be required to pay any percentage towards the costs of repairing and decorating and insuring the Building because their flats are not within the Building. Thus even if the other 21 flats in the Building were required to contribute 0.51% (some flats contribute less than that) the position for the respondent would be as follows. The respondent would recover 45% of the relevant expenditure relating to the Building from the lessee of the housing association flats. The respondent would recover about 11% of the relevant expenditure relating to the Building (i.e. $22 \times 0.51\%$) from the 22 non-housing association flats of which the appellant's is one. The total recovery would therefore be only about 56% of the relevant expenditure relating to the Building.

The F-tT's Decision

22. The F-tT referred to the terms of the lease and in particular the Seventh Schedule and paragraph 10 of the Seventh Schedule, which had been referred to in argument as the "sweeping up clause". The F-tT decided that the appellant was liable to contribute towards all the costs incurred in respect of all three Buildings and the Development as a whole. The reasons for this decision were given in paragraphs 23-25 of its decision in the following terms:

"23. The Tribunal formed the view that the purpose and intention of the service charge provisions in the lease was to enable the Company to recover the costs reasonably incurred in fulfilling its obligations under the terms of the lease from all the service charge payers in the Development on an equitable basis. The lease clearly defines that each tenant is required to contribute towards the Material Charges and the due proportion that each tenant is required to pay is the Material Charge Percentage specified and this can be varied in accordance with Clause 6 of the Sixth Schedule. Whilst on one view

it may be considered that since the Seventh Schedule distinguishes Building costs and Development costs, certain costs incurred in respect of the Building should only be borne by the leaseholders of that Building, that argument did not find favour with the tribunal because the lease only makes a provision for one Material Charge Percentage relating to the Building and Development which suggests that the intention of the parties was to aggregate all the costs incurred (the Material Charges) as the Material Charges are defined as “the aggregate of the charges computed in accordance with the Sixth Schedule and payable under clause 3(4). “The Sixth Schedule makes provisions for the computation of the Material Charges and states inter alia that “The Material Charges shall consist of:- A sum comprising (1) the expenditure estimated as likely to be incurred in the year commencing the 1st April by the Company for the purposes mentioned in the Seventh Schedule.”

24. The tribunal considered the terms set out under paragraph 10(a) of the lease and agreed with Mr Cannon’s submissions that this may be construed as a sweeping up clause as a similarly worded clauses were considered in the authorities that he referred the tribunal to.

25. The application form specified service charge items in issue and it was agreed that the items were recoverable under the terms of the lease. What remained in dispute appeared to be the method used to calculate the service charge payable by the Applicant. The question of whether the costs incurred were reasonable was not raised as an issue. In the light of the tribunal’s decision on this issue, the tribunal considered that a determination as to reasonableness was not required.

The Appellant’s Submissions

23. On behalf of the appellant Miss Gourlay advanced the following arguments.

24. She drew attention to the well established principles of construction applicable to contracts as recently set forth by the Supreme Court in *Arnold v Britton* [2015] UKSC 36. The principal consideration to guide the construction of the lease was the words which the parties had chosen to use. If the language the parties had used was clear then effect should be given to it even though for one of the parties this might result in a bad or even disastrous outcome.

25. Miss Gourlay submitted that the terms of the lease are absolutely clear.

26. The Seventh Schedule in numerous paragraphs makes reference to works or services to be provided by the respondent in relation to “the Building”. The expression “the Building” in the Seventh Schedule means 87 Axe Street and only 87 Axe Street. It cannot be read as a reference to the other buildings, namely the Lemonade Building and the Bath House. (Mr Paget, correctly, conceded this point). There is a clear distinction in the lease between the Building and the Development. When the Seventh Schedule refers to repairs and services relating to the Building the result is that the respondent is obliged under clause 5 to provide these repairs and services in relation to the Building and can recover the appropriate percentage from the appellant of the relevant expenditure incurred in providing these repairs and services to the Building – i.e. solely to the Building rather than to all three buildings within the Development.

27. During the course of the argument it was conceded (correctly in my view) by Mr Paget, that the outcome of the present appeal turned upon paragraph 10(a) of the Seventh Schedule. In other words if the respondent was to succeed in resisting the appeal the respondent would need to justify the charging of the appellant for a percentage of the relevant expenditure in relation to other buildings in the Development (i.e. other than the Building) by reliance upon this paragraph 10(a). It was recognised by the respondent that if paragraph 10(a) did not permit it to charge the appellant her relevant percentage of Development wide expenditure then it would be necessary to recalculate the amount owing by the appellant in the light of the true construction of the lease as determined by the Tribunal. Each party reserved their respective positions as to what the situation would be in these circumstances and as to what expenditure could in these circumstances be included in the total expenditure to which the appellant's percentage was to be applied.

28. Miss Gourlay made detailed submissions in relation to paragraph 10(a) of the Seventh Schedule. She contended that paragraph 10(a) could be divided up into four separate portions, the first of which is self standing and the second third and fourth of which are all qualified by the words at the end of the paragraph. The self standing portion is: “To carry out all repairs to any other part of the Development and the parking spaces for which the Company may be liable”. The remaining wording can be divided into three portions each of which is the subject of the

words at the end of the clause, namely: “as the Company shall consider necessary to maintain the Development and the parking spaces to a good class residential standard.” This wording attaches to the word "such" where it appears at various places in the later three portions of paragraph 10(a).

29. Miss Gourlay drew attention to the fact that paragraphs 1-9 of the Seventh Schedule had made express provision regarding certain repairs and services to be provided in respect of the Building. The lease contemplated that the respondent was bound by a covenant to provide these repairs and services and that the appellant was bound through the service charge to contribute to the costs of these repairs and services. It was against this background that paragraph 10(a), which was in the nature of a sweeping up clause, should be construed.

30. Miss Gourlay referred to *Jacob Isicki & Co v Goulding & Bird Ltd* [1989] 1 EGLR 237. There a question arose as to whether the tenant was obliged through the service charge to pay a contribution towards the costs of sand blasting the external walls of the building. There was a list of heads of expenditure set out in the fourth schedule of the lease in respect of which the tenant was liable to pay a proportion by way of service charge, but work on the external walls was not included. There was however a proviso giving the landlord power at his discretion to add to or make any alteration in the rendering of services so listed. The landlord contended it was entitled to rely on this proviso so as to add to the services to be provided and thereby entitle itself to recover a proportion of the costs of the sand blasting. The relevant wording was:

“Provided always the landlord may at his reasonable discretion hold, add to, extend, vary or make any alteration in the rendering of the said services or any of them from time to time if the landlord at his like discretion deems it desirable so to do for the more efficient conduct and management of the building.”

Mervyn Davies J held that what this provision meant was that, within the limits of the work for which the landlord could recover, the landlord had a limited right to alter those works but not wholly to extend and make the tenant liable for a kind of work that was never contemplated by the principal clause under which the tenant had to pay a contribution. Miss Gourlay submitted that in the present case paragraphs 1-9 of the Seventh Schedule made clear the kind of repairs and services which the respondent was required to provide and for which the appellant was

required to pay. The sweeping up clause in paragraph 10(a) should not be construed as driving a coach and horses (as Miss Gourlay put it) through what had gone before in these earlier paragraphs in the Seventh Schedule, so as to allow for recovery of expenditure upon a kind of work or in a geographical location which was not contemplated by the earlier provisions in the Seventh Schedule.

31. Upon the same theme Miss Gourlay also referred to *Lloyds Bank Plc v Bowker Orford* [1992] 2 EGLR 44 (a decision of Mr David Neuberger QC, as he then was, sitting as a deputy Judge of the Chancery Division). A question arose as to whether the landlord was entitled, through the service charge provision, to recover a due proportion of the costs of external repairs to the Building. It was agreed that the landlord was only entitled to do so if external repairs could be brought within paragraph 5 of the list of items for which a service charge could be levied which read:

“Any other beneficial services which may properly be provided by the lessor.”

The court held that although these were wide words it was to be noted that the landlord had covenanted in a specific clause to carry out external repairs. It was pointed out that, given the parties had the concept of external repairs so clearly in mind, it would be remarkable if they did not expressly deal with them in section 2 of the relevant part of the lease (which dealt with the matters for which a charge could be made) if they had intended external repairs to be included in the ambit of section 2. It was also held that the landlord was not entitled to claim a due proportion of the internal decoration and/or repairs to the common parts of the building because once again paragraph 5 (on which the landlord was required to rely) was not phrased in such a way as to indicate that the draftsman intended that paragraph 5 should stand free of the preceding paragraphs. Thus a limited interpretation was given to paragraph 5 having regard to the matters which had been expressly dealt with in the other provisions in the document. The court observed that the draftsmen of legal documents are normally well aware of the words and phrases which can be incorporated in a provision such as paragraph 5 to indicate that its construction should not be affected by more specific provisions which immediately precede it. It was held that it was unrealistic to read paragraph 5 in such a way as to enable the landlord to add to the service charge over and above what the parties had specifically agreed as to the extent of the tenant's liability under the relevant clause.

32. In summary Miss Gourlay submitted that the parties had carefully considered what was to be included within the respondent's obligation by way of provision of services and repairs and had carefully considered what in consequence was to be included in the categories of expenditure to which the appellant must contribute. The results of this careful consideration were the express provisions in paragraphs 1-9 of the Seventh Schedule. The sweeper clause in paragraph 10(a) could not properly be used to broaden the category of services and repairs which the respondent was obliged to provide and for which it was entitled to charge to items of a different kind or relating to a wider geographical area.

33. As regards the opening words of paragraph 10(a) namely:

“To carry out all repairs to any other part of the Development and the parking spaces for which the Company may be liable ...”

Miss Gourlay submitted that this was not intended to expand the covenanted for obligations to which the parties had already applied their minds in paragraphs 1-9 of the Seventh Schedule. This wording did not impose upon the respondent an obligation to perform the repairing obligations which lay upon the respondent pursuant to the leases (in similar terms to the appellant's lease) in relation to the flats in the Lemonade Building or the Bath House. If such an obligation had been intended then the lease could simply have been drafted with an obligation upon the respondent in paragraph 1 of the Seventh Schedule to repair etc not merely the Building but instead all of the buildings in the Development. That had not been done in paragraph 1-9 of the Seventh Schedule. This wording in paragraph 10(a) was intended to cover a liability of a different kind, not a liability to other lessees in other parts of the Development. For instance the wording could cover the imposition of a liability by a valid notice served by a local authority or pursuant to some party wall procedure. In other words a one-off and unexpected expense not covered by the previous provisions of the Seventh Schedule. Miss Gourlay emphasised the wording in paragraph 10(a) where what is being referred to is to provide and supply such "other" services, to carry out such "other" repairs, and to incur such "other" costs. This use of the word "other" suggested that what was being referred to was something different from the categories of repair and services which had previously been referred to in paragraph 1-9.

The Respondent's Submissions

34. On behalf of the respondent Mr Paget advanced the following arguments.

35. I have already recorded in paragraph 27 above a concession (correctly made in my view) by Mr Paget that if the respondent was to succeed in resisting this appeal then the justification for charging the appellant with a percentage of the Development wide expenditure must be found in paragraph 10(a).

36. Mr Paget drew attention to the definition of the Material Charges Percentage, namely as meaning 0.51% of the Material Charges "relating to the Building and the Development". This indicates the Material Charges will include charges relating not merely to the Building.

37. He referred to the definition of the Common Areas. Bearing in mind that so far as the flats themselves were concerned the demise was only of the internal space and plaster coverings but excluded the structure and walls etc, all of the structure of all three buildings (not merely the Building) would fall within the definition of the Common Areas. It may be noted that paragraph 1(c) of the Seventh Schedule contains an obligation, inter alia, to preserve in good order and condition the Common Areas. Accordingly paragraph 1 of the Seventh Schedule is not confined to works in relation to the Building. The same is to be found in several other places in paragraphs 1-9 of the Seventh Schedule. For instance paragraph 2(a) refers to the Service Installations in the Development; paragraph 3 refers to certain outgoings in respect of the entirety of the Development or its curtilage or Common Areas; paragraph 4 refers to the employment staff "in or about the Development"; Paragraph 7, while making express provision for the insurance of the Building, curiously refers in two places to the Development.

38. Mr Paget submitted that, reading for the moment only paragraphs 1-9 and leaving paragraph 10 on one side, paragraphs 1-9 involve looking through a prism (as Mr Paget put it) which involves taking into consideration not merely the Building but also the Development. When one comes to the proper interpretation of paragraph 10(a) one must have in mind that paragraphs 1-9 are not solely devoted to dealing with the Building.

39. Mr Paget submitted that the whole thrust of paragraph 10(a) is in relation to other costs in respect of the Development, being costs of the same type as have been dealt with in paragraphs 1-9. For instance paragraph 1 is dealing with, inter alia the repair of the Building. Paragraph 10(a) is dealing with the repair of any other part of the Development for which the respondent may be liable (and the respondent will be liable to repair the other buildings because the respondent has covenanted to do so in the leases of the other flats in these other buildings).

40. Mr Paget submitted that the wording of the lease was clear and should be interpreted in the manner contended for by him quite apart from the point next mentioned. However he also referred to the fact that, upon the appellant's contention, the appellant was merely required to contribute 0.51% of the relevant expenditure referable to the Building in circumstances where she was the lessee of one out of 40 flats in the Building. So small a percentage contribution as 0.51% did not make sense if it was to be applied only to the relevant expenditure relating to the Building. So small a percentage as 0.51% only made sense if the percentage is to be applied to expenditure which was more extensive than just expenditure relating to the Building. Mr Paget referred to *Universities Superannuation Scheme v Marks & Spencer Plc* [1999] L&TR 237 where it was recognised at page 243 that service charge provisions have a clear purpose – the landlord who reasonably incurs liability for expenditure in maintaining the relevant premises for the benefit of its tenants should be entitled to recover the full costs of doing so from those tenants and each tenant should reimburse the landlord a proper proportion of those service charges.

Discussion

41. I remind myself of the principles of construction of contracts as recorded in *Arnold v Britton*. In paragraph 15 Lord Neuberger stated:

"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] AC 1101, para 14. And it does so by focusing on the meaning of the

relevant words in their documentary, factual and commercial context."

42. In paragraph 16 and following of his judgement Lord Neuberger emphasised seven factors. The first factor recorded that reliance on commercial common sense and surrounding circumstances 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. Accordingly it is of first importance to have regard to the language used in the present lease. Lord Neuberger recognised (his second factor) that the less clear of the wording is (or to put it another way the worse the drafting of the document) the more ready the court can properly be to depart from the natural meaning of the words. He also recognised (his fourth factor) that 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.

43. With these principles in mind I go to the relevant words used in the lease.

44. The Material Charges are to be computed in accordance with the Sixth Schedule, which provides that the Material Charges are to consist of expenditure estimated as likely to be incurred in the relevant service charge year for the purposes mentioned in the Seventh Schedule (or by way of a reserve towards certain of these matters).

45. The covenant given by the respondent in clause 5.1 is to carry out the repairs and provide the services specified in the Seventh Schedule. It may be noted that this wording contemplates that everything which is listed in the Seventh Schedule as something to be done by the respondent is recognised as being capable of being described either as repairs or services. So for instance the placing of insurance is a service.

46. Coming to the Seventh Schedule it is agreed for the purposes of the present appeal (and I also agree) that it is the construction of paragraph

10(a) that is of crucial importance. I agree with Miss Gourlay's submission that this paragraph can properly be divided into four portions. The first portion is self standing. Each of the remaining three portions refers at various points to "such " other repairs and "such" improvements etc and "such" other costs, all of which are qualified by the closing words of the paragraph.

47. Accordingly, dividing up the paragraph 10(a) obligations into these four portions, the respondent was obliged to provide the following other services and expenses (and was entitled to charge for the same through the service charge) namely:

- (i) To carry out all the repairs to any other part of the Development and the parking spaces for which the Company may be liable;
- (ii) To provide and supply such other services for the benefit of the Tenant and other Tenants of the flats in the Development...as the Company shall consider necessary to maintain the Development and parking spaces to a good class residential standard;
- (iii) To carry out such other repairs and such improvements works additions ... as the Company shall consider necessary to maintain the Development and the parking spaces to a good class residential standard;
- (iv) To incur such other costs (including the modernisation or replacement of plant and machinery) as the Company shall consider necessary to maintain the Development and the parking spaces to a good class residential standard.

48. As regards the provision in subparagraph 47 (i) above, I consider the meaning of this to be clear. Paragraph 1 of the Seventh Schedule imposes an express obligation upon the respondent to repair and decorate etc the Building. Paragraph 10(a) refers to "repairs to any other part of the Development and the parking spaces". The other buildings in the development, namely the Lemonade Building and the Bath House are comprised within the expression "any other part of the Development". The next question to ask is whether repairs to these other two buildings (being part of the Development) are repairs "for which the Company may be liable". The answer is: yes the respondent (i.e. the Company) is liable to carry out such repairs -- it is liable under the leases of flats in the

Lemonade Building and the Bath House, which are in substantially the same terms as the appellant's lease.

49. Accordingly the provision referred to in subparagraph 47 (i) above imposes upon the respondent the obligation to carry out repairs to the Lemonade Building and to the Bath House (in so far as it is liable to carry out those repairs under the leases of flats in those buildings) and allows the respondent to include the expenditure on carrying out these repairs within the Material Charges to which the appellant's relevant percentage of 0.51% is to be applied for the purpose of calculating the Material Charges Percentage.

50. I am unable to accept Miss Gourlay's submission that the provision referred to in subparagraph 47 (i) above is only concerned with one-off and unexpected expenses of a kind different from those covered in the previous provisions of the Seventh Schedule. This would be to give an unnatural and restricted meaning to words which I consider to be clear and general.

51. As regards the second third and fourth portion of paragraph 10(a) as discussed in paragraph 47 above, the respondent is entitled to consider it necessary, in order to maintain the Development and the parking spaces to a good class residential standard, to provide services and take other steps as contemplated within these three portions of paragraph 10(a). For instance the placing of insurance in relation to the Lemonade Building and the Bath House does not constitute the carrying out of repairs to other parts of the Development and therefore cannot fall within the first portion of paragraph 10(a), but it is the provision of the service. The respondent is in my view entitled to consider it necessary to provide or supply this service (namely the maintenance of insurance) for the benefit of other tenants of flats in the Development in order to maintain the Development to a good class residential standard.

52. Accordingly I conclude that the F-tT was correct in its decision. The Material Charges, in respect of which the appellant is required to pay her relevant percentage, include expenditure upon carrying out repairs (for which the respondent is liable) to other parts of the Development, which include the Lemonade Building and the Bath House. They also include expenditure upon the other matters referred to in the second, third and fourth portions of paragraph 10(a), notwithstanding that this expenditure may be expenditure made upon parts of the Development other than the

Building, in so far as these are matters that the respondent considers necessary to maintain the Development and the parking spaces to a good class residential standard.

53. I note that, apart from the wording of paragraph 10(a), there are other passages in the lease pointing towards the conclusion set out above. The definition of Material Charges Percentage expressly contemplates that the relevant 0.51% is to be applied to the Material Charges "relating to the Building and the Development". This gives a clear recognition that the total expenditure, a percentage of which the appellant is to pay, is a total which includes expenditure upon not just the Building but also the Development. Further, paragraphs 1 to 9 in the Seventh Schedule are by no means exclusively limited to expenses relating to the Building. I see force in the points made by Mr Paget as recorded in paragraph 37 above. These points confirm me in my conclusion as stated above.

54. I consider that paragraph 10(a) is a self standing and important part of the Seventh Schedule. It is not some form of sweeper up clause as discussed in *Jacob Isicki & Co v Goulding & Bird Ltd* and *Lloyds Bank Plc v Bowker Orford*.

55. I reach the foregoing conclusion upon the words used in the lease and without the need to resolve ambiguous provisions by reference to commercial common sense.

56. I accept however that the provisions are not well drafted. If I am wrong and the meaning of the provisions is not sufficiently clear without using commercial common sense as an aid to construction, then I consider that the use of commercial common sense confirms rather than confounds the construction of the lease which I consider to be correct. This is for the following reasons.

57. First, a single percentage is to be applied to the Material Charges rather than two separate percentages, one percentage relating to expenditure referable to the Building and another percentage relating to expenditure referable to the other parts of the Development. The adoption of a single percentage suggests as a matter of commercial common sense that there is to be a single global pool of expenditure referable to the Development. Secondly it would be remarkable, as a matter of commercial common sense, for a percentage as low as 0.51% to be

applicable as the appellant's contribution towards the expenditure relating to the Building if it was only to be lessees of flats within the Building who were to contribute, bearing in mind there are only 40 flats in the Building. Thirdly, if the appellant's argument is correct, the respondent will achieve substantially less than a 100% recovery of the expenditure in properly repairing and servicing the Building and the other parts of the Development. This is because the appellant (and other lessees in the Building) would not contribute towards expenditure referable to the Lemonade Building or the Bath House; the lessees in the Lemonade Building would not contribute towards expenditure referable to the Building or the Bath House; and the lessees in the Bath House would not contribute towards expenditure referable to the Building or the Lemonade Building. However each lessee would be paying a percentage calculated at so low and amount that there would only be a 100% recovery (or anything approaching that) if the total expenditure to which these percentages are to be applied is Development wide expenditure.

Conclusion

58. For the reasons given above I dismiss the appellant's appeal. I find that the appellant is obliged to pay service charges calculated in accordance with the conclusions in paragraph 52 above.

59. The appellant made an application to me under section 20C of the Landlord and Tenant Act 1985 as amended for an order that the costs incurred by the respondent in connection with these proceedings before the Upper Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by her.

60. Section 20C of the Landlord and Tenant Act 1985 provides in subsections (1) and (3):

“(1) A Tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before ... the [Upper Tribunal]... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) ...

(3) The Court or Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.”

61. Miss Gourlay said that this application was made whether the appellant was successful or unsuccessful in this appeal. She submitted that that the present litigation had become necessary because of difficulties caused by the poor drafting of the lease. She also pointed out that an argument previously taken in this appeal on behalf of the respondent as to the meaning of the expression "the Building" in the Seventh Schedule had rightly been abandoned.

62. I note that the costs incurred by the respondent in connection with these proceedings before the Upper Tribunal will in any event only be recoverable through the service charge provisions if such costs have been reasonably incurred, see section 19 of the 1985 Act.

63. The appellant will only be required, through the service charge provisions, to pay 0.51% (or in fact only 0.48%, see paragraph 20 above) of the respondent's costs incurred in relation to these proceedings. It is the appellant who has caused these costs to be incurred by unsuccessfully pursuing an appeal to the Upper Tribunal. I do not consider it would be just and equitable in the circumstances of this case to make the order under section 20C which the appellant seeks -- the effect of which would appear to be that all the other lessees, who have not pursued an unsuccessful appeal to the Upper Tribunal, would have to contribute towards the relevant costs but the appellant, who has done so, would not have to contribute.



His Honour Judge Huskinson

3 July 2017