UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

SERVICE CHARGES – compromise agreement – nature and effect - whether prevents landlord from claiming service charge arrears compromised by the compromise agreement separately under the lease

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

BETWEEN:

THE JAM FACTORY FREEHOLD LIMITED

Appellant

and

Mr SAM BOND

Respondent

Re: The Jam Factory, 27 Green Walk, London

Before: His Honour Judge Nigel Gerald

Sitting at: 45 Bedford Square, London,WC1B 3AS
on
19 September 2014

Mr N. Duckworth of counsel represented the Appellant
The Respondent appeared in person

The following case is referred to in this decision:

BCCI v Ali [2001] 1 AC 251

DECISION

Introduction

1. The appellant landlord appeals against the 7th May 2014 decision of the Leasehold Valuation Tribunal ("the LVT") that the compromise agreement reached between these and other parties on 11th October 2011 (the "Compromise Agreement") absolved the respondent lessee of any further liability to pay certain service charges arrears, permission to appeal having been granted by the LVT on 18th June 2013.

2. The background to the decision is not in dispute. The appellant completed the acquisition of the freehold of the residential block of 197 flats known as The Jam Factory at 27 Green Walk, London SE1 4TX on 14th January 2010 from the by then insolvent previous freeholder and developer Angel Property (Hartley Buildings) Limited ("Angel"), contracts having been exchanged on 9th September 2009. The respondent is the lessee of flat B604 in Block B of The Jam Factory pursuant to a lease granted by Angel on 15th August 2003.

3. On 21st September 2009 the respondent had obtained judgment in default against Angel for breach of agreement for lease in the net sum of £16,142.74 inclusive of damages, interest, costs and court fees after credit had been given for monies paid into court by Angel. The respondent was granted an interim charging order over the freehold of The Jam Factory on 21st October 2009 notwithstanding that Angel had gone into insolvent liquidation on 7th October 2009 following advertisement of the petition on 24th September 2009, shortly after the judgment in default and around a month after the appellant had contracted to purchase the freehold. That charging order was discharged after a contested hearing on 30th April 2012 owing to it not being binding upon the by then new owner, the appellant. The question of the interim charging order therefore remained extant at the time of the 11th October 2011 Compromise Agreement.

4. Meanwhile proceedings had been issued between Angel and Carol Marshall ("Miss Marshall"), a long lessee of flat BG08 of The Jam Factory, who had issued a counterclaim against Angel claiming damages in excess of £90,000. That claim had been stayed by the Brentford County Court on 6th October 2009 in anticipation of Angel's winding up. That action therefore remained extant, or stayed, at the time of the 11th October 2011 Compromise Agreement.

5. On 9th November 2010 the respondent, Miss Marshall and 12 other long leaseholders who owned 11 of the long leases in The Jam Factory applied to the LVT for a declaration as to the reasonableness of the actual service charge for 2006 to 2009 and the on account service charge for 2010 and also for an order disallowing the appellant landlord from recovering its costs of those proceedings *via* the service charge under sections 27A and 20C respectively of the landlord and Tenant Act 1985 ("the Application"). Two other long leaseholders were joined to the Application bringing the total to 16 (collectively, "the Applicants"), and by agreement the dispute was extended to include the reasonableness of the on account service charge for 2011.

6. Thus, the reasonableness of the *actual* service charges for 2006 to 2009 were in dispute as were the reasonableness of the *on account* – not the actual – service charges for 2010 and 2011. In this regard, it is worth bearing in mind that challenging on account service charges is sometimes a fairly sterile affair because what really matters, in terms of ultimate liability, is the actual service charge calculated at the end of any service charge year.

7. Be that as it may, the Application related to both actual and on account service charges. The total arrears claimed, and the subject of dispute before the LVT, was £97,617.43 of which £10,486.79 related to the respondent and £36,640.14 to Miss Marshall, bringing the net total claimed against the other Applicants to £50,490.50. The precise amount claimed against each of the Applicants was not in dispute and is helpfully set out in a schedule of arrears ("the Service Charge Schedule").

8. On 9th December 2010 those applicants issued a further application seeking the appointment of a manager to assume responsibility for management of the block under section 24 of the Landlord and Tenant Act 1987. That was conjoined with the earlier application on 18th January 2011 which were heard over seven days from 25th to 29th July and then on 10th and 11th October 2011. The focus of attention was the application to appoint a new manager, rather than the service charge issues which would require the LVT to reconvene for a third time for detailed consideration and determination. The application to appoint a manager was dismissed by dated 2nd December 2011.

9. The applications were, by common consent, complex, extending to 65 odd pages. So far as the service charge issues were concerned, the applicants did not adopt a common stance but each took separate and different points in relation to the reasonableness or otherwise of the service charges, consideration of which would have been lengthy, complex, time consuming and expensive. It is also fair to say that there had been a considerable degree of acrimony between the applicant long leaseholders on the one hand and the respondent landlord on the other, which is and was owned by 100 of their fellow long leaseholders. Thus, whilst battle was ostensibly between landlord and tenant, it was in reality, and regrettably, between tenants.

10. In additional to the "conventional" issues before the LVT the respondent claimed that he had a right to set off the £16,142.74 judgment entered against Angel against his £10,486.79 share of the arrears claimed from him and the subject of the Application. Miss Marshall also claimed the right to set off her £90,000 counterclaim for damages against Angel against her £36,640.14 share of the arrears claimed from her and the subject of the Application.

11. Whatever the merits of either defence of set off, at the outset of the hearing back on 25th July 2011 the LVT made clear that those issues would have, if necessary, to be determined by the county court.

The Compromise Agreement

12. It was in those circumstances that the parties were given time on the seventh day of the hearing to reach a consensus which, I was told, resulted in around two hours of discussion the upshot of which was the Compromise Agreement dated the 11th October 2011, the last day of the hearing, signed by all 16 applicants or their representatives and also by the Respondent landlord. The Respondent landlord was represented counsel who appears before this tribunal in the appeal. Only one of the applicant tenants was represented by counsel. I am told that the Compromise Agreement was the product of the draftsmanship of both counsel who typed out the agreement there and then, outside of the doors of the LVT.

13. After the usual heading identifying the parties, the Compromise Agreement provides as follows.

> "COMPROMISE AGREEMENT
>
> "Upon the parties having agreed terms of settlement in respect of the Applicants' application dated [] 2011 for a determination of the reasonableness of service charge pursuant to section 27A of the Landlord and Tenant Act 1985 ("the Section 27A Application") as set out in the Schedule annexed hereto
>
> "AND upon the Applicants having agreed to withdraw the Section 27A Application and their application under section 20C of the Landlord and Tenant Act 1985 ("the Section 20C Application") as set out in the Schedule annexed hereto
>
> "IT IS ORDERED THAT:
>
> "(1) The Section 27A Application and the Section 20C Application having been withdrawn, there be no order on either application
>
> "SCHEDULE
>
> "1. In this Schedule
>
> " "The Aina Works" means such works as are necessary to remedy any breach or breaches of the Respondent's repairing obligations under Ola Aina's lease in so far as such breach or breaches relate to Flat A001
>
> " "The Cabral Works" means such works as are necessary to remedy any breaches of the Respondent's repairing obligations under Saradha Cabral's lease in so far as such breach or breaches relate to Flat B009
>
> " "The Reserve Fund Deficit" means such amount as from time to time represents the difference between (i) the sum which would be held by the Respondent in the reserve fund if of the lessees on the Jam Factory had paid their respective reserve fund contributions to the Respondent (ii) and the sum which the Respondent in fact holds in the reserve fund PROVIDED THAT "The Reserve Fund Deficit" shall not include:
>
> (a) Any arrears of reserve fund contributions payable by Sam Bond and/or Carol Marshall in respect of any their respective flats
>
> (b) Any arrears of reserve fund contributions payable by Angel Property (Hartley Buildings) Limited and/or Angel Property

> " "Service Charge Arrears" means any sums claimed by the Respondent in the Section 27A application which remain outstanding from the Applicants as at the date hereof PROVIDED THAT such arrears shall not be deemed to include service charge arrears payable by Sam Bond and/or Carol Marshall in respect of any of their respective flats
>
> " "The Join Statement" means a statement to be sent to the all lessees on the Jam Factory in the following terms: "On 25th – 29th July and 10th/11th October 2011, the Leasehold Valuation Tribunal heard an application brought by certain of the lessees at the Jam Factory against JFFL, as landlord, for a determination of service charge in respect of the years 2006 – 2011. On 11th October 2011, those proceedings were settled by the parties on terms commended by their respective lawyers and the LVT having heard the evidence."

"2. The Respondent agrees that it will within a period of 14 months from the date hereof ensure that the Reserve Fund Deficit is reduced to nil and such funds to be held in accordance the RICS Code

"3. The Respondent agrees that in pursuance of its obligations under paragraph 2 above, it will use its best endeavours to obtain payment of service charge arrears from those lessees on the Jam Factory who are not parties to these proceedings

"4. The Applicants agree that they will discharge the Service Charge Arrears within 28 days hereof.

"5. The Respondent agrees to carry out the Aina Works and the Cabral Works within a period of 3 months from the date hereof unless otherwise agreed between the Respondent and Ms Aina or Mr Cabral as the case may be.

"6. The Applicants and the Respondent agree that the Respondent will issue the Joint Statement within 28 days hereof and that neither party shall publish an alternative analysis or account of the Section 27A Application.

"7. The Respondent agrees that hereafter it will use its best endeavours to obtain an appropriate contribution towards the estate service charge costs from the owner for the time being of Blocks D and E.

"8. The Respondent agrees that in respect of the budged for 2012 and every year thereafter it will in ensure that the budget is approved by a qualified surveyor."

Subsequent to the Compromise Agreement

14. All applicants to the Application have since paid their respective shares of the Service Charge Arrears (as defined)) as set out in the Service Charge Schedule which were the subject of that Application except, of course, for the respondent to this appeal and Miss Marshall.

15. On 8th June 2012, eight months after the Compromise Agreement had been reached, the appellant issued new proceedings against Miss Marshall claiming service charge arrears in respect of *inter alia* the same periods as had been in dispute in the Application, the defence being that they had been compromised by the Compromise Agreement. This new claim has been stayed by the Brentford County Court who has

referred the matter as to the effect of the Compromise Agreement to the LVT and also, if appropriate, for determination of the reasonableness of the service charges.

16. On 15th December 2012 the respondent, again faced with a claim for service charge arrears for inter alia the same periods as had been in issue in the Application, applied to the LVT for determination of the reasonableness also asserting that the claims had been compromised by the Compromise Agreement.

17. On 23rd January 2013 the LVT directed that there be determination of a preliminary issue as to whether the Compromise Agreement satisfied the respondent's liability to pay the arrears, which was determined by the LVT on 7th May 2014. Although it was intended that Miss Marshall's application be determined at the same, she did not for unrelated reasons participate so, strictly speaking, was not bound by that decision and will not be bound by this appeal.

The issue before the LVT

18. The LVT accurately defined the issue which it had to determine thus:

> "34. The issue which has arisen under the Compromise Agreement is simple. Does the agreement absolve Mr Bond (and Miss Marshall) of any further liability in respect of the service charges for the years 2006 to 2011 which were the subject of the section 27A application before the Tribunal, as Mr Bond asserts, or did the Compromise Agreement leave the Respondent free, as it argues, to bring separate proceedings against Mr Bond and Miss Marshall to recover the same service charges?"

Miss Marshall appears in brackets because, of course, she was not a party to the hearing before the LVT so, strictly speaking, neither she nor the appellant is bound by it.

The decision of the Tribunal

19. Having referred to the well known passage from *BCCI v Ali* [2001] 1 AC, cited below, the LVT summarised what it regarded as the material background circumstances in the following paragraphs of its decision.

> "53. In any event, we consider that the relative strength of the agreements on set off was largely beside the point in the context of the application as a whole. The arrears claimed by the Respondents from all of the applicants totalled £106,668, of which Mr Bond's contribution was approximately £11,000 and Miss Marshall's £38,000. The full sum was disputed by all of the applicants, as was the Respondent's entitlement to add the costs of the proceedings to the service charge.
>
> "54. We are left with the very clear impression that the main motivation for the compromise was not the relative strengths or weaknesses of the parties' respective legal positions, but was rather their mutual anxiety to bring the dispute to an end. The parties had fought themselves to a standstill over seven days without yet having touched seriously on the service charge issues. A huge amount of time, effort and expense had already been absorbed in the preparation of the Scott schedule and numerous files of material, but that effort had succeeded only in bringing the Application to the starting line. If it was to be fought out it

would have required the Tribunal to reconvene for a third session which would have been expected to last many more days.

"55. We were told that, by 11 October 2011 the Respondent had already spent £130,000 on both applications. The likelihood was, therefore, that to pursue the Application to a conclusion at another hearing would have brought the total amount spent by the Respondent on that application alone to a sum similar to the total service charge in dispute. We have no comparable figures for the expenditure of the leaseholders, but it would have been obvious to both parties, and to any informed observer, that the resolution of the dispute would be achieved only by further very substantial expenditure of time and money. Whatever the outcome of the Application, neither party could be sure how the Tribunal would rule on the ability of the Respondent to add its own costs to the service charge.

"56. These practical and financial factors form a very important part of the background to the Compromise Agreement. They seem to us to make the detailed arguments over the parties' strict legal rights largely an irrelevance."

20. The kernel of the decision, and those parts appealed against, is to be found in the following paragraphs of the decision:

"57. Against that background we consider that the most significant aspect of the Compromise Agreement was the withdrawal of the Application itself. While technically Mr Duckworth is correct when he points out that the Application was not a claim by the Respondent for the payment of service charges, but rather was a request by the leaseholders for their liability to be quantified which would never, by itself, have resulted in a judgment, it is clear from the Compromise Agreement that the parties did not have that subtlety in mind. The Service Charge Arrears are defined as "*sums claimed by the Respondents in the section 27A application which remain outstanding*" excluding those of Mr Bond and Miss Marshall. For the parties and for all practical purposes, the Application was the Respondent's claim for the outstanding service charges, and it was the Application, in its entirety, which was being compromised by the terms of the Schedule.

"58. It would, we consider, have been inconceivable to the parties that the Compromise Agreement should leave either of them free, on 12 October 2011, to commence litigation or to issue a new application under section 27A relating to the same service charges. Such proceedings would have involved a duplication of much of the effort and expenditure which had already been put in to the withdrawn application; they would have required the commitment of the additional time, effort and cost which the parties had sought to avoid by entering into the Compromise Agreement; they would have negated one of the main objects of the compromise, namely to bring this disproportionately expensive and unpredictable dispute to a conclusion.

"59. Mr Duckworth floated the slightly cynical point that, for the Respondent, there was a positive advantage in reducing the number of leaseholders it had to fight from sixteen to two while preserving the right to pursue the same claims, since that would lay the expense and burden of the dispute on far fewer shoulders. We did not understand him to suggest that such had actually been the Respondent's intention (which would in any case have been irrelevant) but that an objective observer would understand the attraction for the Respondent of proceeding in that way. The same observer would equally appreciate the disadvantageous position which Mr Bond and Miss Marshall would be placed in by a temporary settlement on those terms, and would, we consider, have been confident that such an outcome cannot have been intended by all of the parties to the Compromise Agreement.

"60. If the Respondent's construction of the Compromise Agreement is correct, it is difficult to see what reason Mr Bond could have had for entering into it. He derived no significant personal benefit from the payments which the Respondent became entitled to receive, and none at all from the works which the Respondent agreed to carry out. He and Miss Marshall conceded the Respondent's entitlement to add its costs to the service charge,

and lost the strength in numbers they had enjoyed when making common cause against the Respondent with their fourteen fellow leaseholders. It is obviously not impossible that Mr Bond and Miss Marshall might have been prepared to put themselves in that weak position, or that they may have felt unable to continue in the face of the willingness of their fellow leaseholders to compromise, but given the lengths Mr Bond had gone to obtain his judgment and charging order, as the Respondent knew, such a capitulation would be surprising.

"61. For these reasons we consider that the true interpretation of the terms of discontinuance of the Application is that they involved an agreement by all of the parties that the liability of the applicants as a whole was limited to the Service Charge Arrears as defined in the Compromise Agreement. We consider that that conclusion derives support from paragraph 4 of the schedule, which we read as an agreement that all of the applicants would see to it that all of the Service Charge Arrears were discharged within 28 days. We acknowledge that that construction leaves open the theoretical possibility that some of the applicants could have found themselves responsible for paying a greater share than was attributable to their own lease, if one or more of their fellow leaseholders defaulted. We do not think that the assumption of that risk is so extraordinary an outcome as Mr Duckworth suggested; the leaseholders were neighbours who had co-operated in the proceedings for more than a year; there is no suggestion that the arrears had accumulated because leaseholders could not afford to pay; there is no reason to doubt that the leaseholders were able to make their own assessment of the risk involved in assuming collective responsibility for the full amount of the Service Charge Arrears. In those circumstances we do not regard a choice to settle the dispute on terms which provided for collective responsibility in preference to continuing the struggle to be an irrational or uncommercial one.

"62. We are not diverted from our conclusion by the absence from the document of a general release of claims by the parties. The Compromise Agreement equally lacks any express preservation of the right to resume hostilities, and in the circumstances we regard that feature as more significant. So clear is the intention of the Compromise Agreement to deal once and for all with the disputed service charges, and so counter intuitive is the suggestion that the parties intended to preserve the right to fight on the same ground on another day, that no additional release of rights was required. Had the parties really intended that each should be entitled to resurrect the dispute at will, we think it inevitable that they would have reserved that right specifically."

The appeal

21. The grounds of the appeal are that the LVT erred in law in its construction of the Compromise Agreement. The lynch-pin of the appellant's argument is that before the Compromise Agreement was entered into the respondent was contractually liable to pay the arrears under his lease and remained in precisely the same position afterwards because the Compromise Agreement contains no express release of his pre-existing liability or relinquishment of his claim to a set-off, from which it follows that he would have remained free to issue new proceedings to challenge the reasonableness of those arrears under section 27A the very next day.

22. By contrast, the other Applicants, apart from Miss Marshall, were not entitled to challenge the reasonableness of the arrears under section 27A after signing of the Compromise Agreement. In that regard, therefore, the Compromise Agreement produced an asymmetrical result amongst the Applicants even though all are referred to in the plural throughout, without distinction amongst their number. However, adopting a somewhat different argument from that advance in the LVT, it was said that all 16 Applicants were free to issue a new section 20C application so as to

disallow all or part of the Respondent landlord's litigation costs of the withdrawn section 27A application.

23. It was the respondent's case that the Compromise Agreement did what it said, namely "compromised" and "settled" all issues relating to the arrears in dispute in the Application as well as some other issues, including payment of the arrears. It comprehensively and exhaustively sets out the parties' respective rights and obligations. Although each of the Applicants, including the respondent himself, was liable to pay the whole of the Service Charge Arrears (as defined) under paragraph 4, they were not obligated to pay anything else, and specifically, the Respondent landlord's only undertaking to enforce the terms of the leases under paragraph 3 was confined to non-party long leaseholders. In short, the respondent is not now liable to pay anything in respect of the Service Charge Arrears because all have all been paid – by, as a matter of fact, the relevant long leaseholder in accordance with their respective shares as set out in the Service Charge Schedule.

Discussion and decision

24. There have been many iterations of the appropriate approach to the construction of a contract, the Compromise Agreement being no different from any other contract. In broad terms, the contract is to be construed in the context of its surrounding as known to the parties or, as it is sometimes put, in its factual matrix, so as to give effect to the intention of the parties. In *BCCI v Ali* [2001] 1 AC 251 Lord Bingham put it thus:

> "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 the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course enquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified."

25. I am bound to say that the appellant's arguments are somewhat surprising. Where parties enter into a compromise or settlement agreement withdrawing proceedings and reaching express terms as to who should do and pay what, it is a rather remarkable thing for one of those parties to say that it was not really a compromise or settlement at all, or at any rate was not a compromise or settlement of all of the issues which it apparently sought to compromise or settle and certainly two of the other parties were free the very next day to issue proceedings in precisely the same form raising the same issues to the very proceedings (the section 27A application) which had just been withdrawn and that *all* of the Applicants were free to do the same in respect of the withdrawn section 20C application. Certainly, on any reasonable or rational basis, it is not one which could be so promulgated to fellow residents of this 197 strong block of flats as *per* The Joint Statement.

26. In my judgment, when read as a whole and in context, it is plain that the parties intended to reach a permanent resolution of all matters relating to *inter alia* the reasonableness of the amount of the service charge arrears in dispute and liability to

pay those sums without any further litigation between the parties in relation to them. Not only does that accord with common sense, it accords with the actual wording of the Compromise Agreement, consistent as it is with its surrounding circumstances as identified by the LVT in paragraphs 53 to 56 of their decision. It is a clear, succinct, straightforward and well-drafted agreement, particularly bearing in mind that it was drafted in a fairly short space of time at the end of a no doubt gruelling and certainly expensive seven day (adjourned) hearing.

27. The desire to settle, and the nature of the settlement, is evident from the introductory recitals and the order comprised within the Compromise Agreement and also from the form the parties chose to record their agreement. In this regard, it is first to be noted that the Compromise Agreement does not take the form of a *Tomlin* order, which would have *stayed* the Application, but takes the form of an order recording the *withdrawal* not only the section 27A application but also the section 20C application. The difference between the two being that if the terms of a *Tomlin* order are broken the stay is lifted solely for the purposes of carrying into effect the terms set out in the schedule to the *Tomlin* order, whereas the withdrawal of the applications meant that they would not be pursued and any party wishing to enforce the terms of the Compromise Agreement would have to issue proceedings in the county court, the LVT having no jurisdiction to enforce a contractual agreement by order for specific performance or otherwise.

28. Thus, a party in breach of the Compromise Agreement would have been liable to be sued for breach of contract in the county court by any other party not in breach. Such a party plainly would not have been free to simply start over by making a fresh application in the LVT as that would render the Compromise Agreement a pointless exercise, not worth the paper it was printed on and cause the parties to spend more time and money. Putting it another way, if a party in breach was sued in the county court and was then free to reignite his or her section 27A or section 20C application only to have the county court stay that county court claim pending resolution of the new applications by the LVT, that would be so circular as to be a *reductio ad absurdum*. Although withdrawal of an application does not *per se* amount to *res judicata*, it is very difficult to see that making a new application in precisely the same form as one which has just been withdrawn would not have been some sort of abuse of process, although I was not addressed fully on this point and it does not form part of my reasoning.

29. The second point of note is that the Compromise Agreement is not only headed "compromise", a well-understood word, but recites that the "parties" have agreed terms of "settlement" of the section 27A application and also to "withdraw the Section 27A Application… in consideration of the agreements set out in the Schedule". Thus, it is reasonable to infer, that whatever had been in issue in the Application between the Applicants and the Respondent landlord (whose members comprised 100 of the Applicants' fellow long leaseholders), those issues had been "settled" *i.e.* they had resolved their differences on the terms set out in the Schedule. The price of withdrawal was the terms in the Schedule.

30. The first recital does not explicitly extend to the Applicants' section 20C application. This, however, is of no significance because the second recital records that the Applicants have agreed to withdrawal both applications "in consideration of the agreements contained in the Schedule", which is repeated in the order itself. As a matter of logic and practicality, this makes sense. The section 20C application was to disallow the landlord from adding its litigation costs of the section 27A application to the service charge. Once the section 27A application had been settled, there was nothing for the section 20C application to bite upon *ergo* the section 20C application goes. It would have been out-with the contemplation of the parties for any of the Applicants to have been free to issue a new section 20C application the next day, If that were wrong, the only way in which the LVT could have resolved a new section 20C application would have been to trawl through the rights and wrongs of the section 27A application to see whether or not the landlord had acted reasonably and or not. The minute that is recognised, the unreality of the appellant's submission is revealed.

31. Putting it slightly more fully, the Applicants withdrew their challenges to the reasonableness of the service charges arrears in return for the agreements set out in the Schedule. They therefore "agreed" or "admitted" the reasonableness of those service charges, whereupon the LVT ceased to have jurisdiction to determine them *vide* section 27A(4)(a) of the 1985 Act, whether by application by the Applicants or the Respondent landlord. It of course could not be sensibly argued that the respondent and Miss Marshall had not agreed or admitted to the reasonableness of the arrears because they were party to the Compromise Agreement even though their share of the arrears was excluded from the various definitions within the Compromise Agreement. Once the section 27A and 20C applications had been withdrawn, it was no longer open to any of the Applicants to renew the section 20C application because they had already made and withdrawn the application and could not simply start again as that would be contrary to what they had agreed and an abuse of process, *vide* section 20C(2)(b) of the 1985 Act. Again, no sensible distinction can be drawn between the respondent and Miss Marshall and the other Applicants.

32. Pausing here, it follows that what the respondent, and Miss Marshall and the other Applicants, gave up was the statutory right to challenge the reasonableness of the service charge arrears and seek disallowance of the landlord's associated litigation costs from future service charges. They also gave up any right to claim that any of the arrears did not fall within the service charge provisions of their leases. This is because they agreed to pay the Service Charge Arrears (as defined). I am therefore unable to accept Mr Duckworth's argument that either the respondent or Miss Marshall was entitled to issue any new applications covering the very same ground as those which had been withdrawn. The LVT ceased to have jurisdiction to determine those issues the minute the ink of the last signature had been applied to the Compromise Agreement.

33. All of this is consistent with and reflected in the wording of The Joint Statement, the obvious intent being that it be released without, putting it colloquially, any party being able to put their own spin on it: see paragraph 6 of the Schedule. That no doubt was with the laudable intent of promoting reconciliation amongst fellow residents and long leaseholders of The Jam Factory; to signal to all that an end to

hostilities and acrimony and costly disputes relating to the service charge. It is reasonable to infer that the parties intended that the reasonable reader of The Joint Statement would conclude that whatever had been in dispute had been resolved, and permanently so. Any reasonable reader of that Statement would have been quite astonished to be told that the respondent and Miss Marshall were free to start their dispute afresh the very next day and that, as it was put before me, all 16 Applicants were free to reissue their section 20C applications.

34. The next point to consider is the nature and effect of the Compromise Agreement. Had the parties intended to reach agreement merely as to the disposal of the section 27A and 20C applications, the Compromise Agreement would have taken a quite different form. All that was required was a withdrawal of those applications possibly coupled with an express agreement that the disputed amounts were reasonable and the associated litigation costs recoverable although that would have been an irresistible from the fact of the withdrawals. It would not have been necessary to impose upon the Applicants any obligation to pay those arrears in the Compromise Agreement because they would have remained liable for them under their leases.

35. Rather, the parties in time-honoured fashion adopted a more comprehensive agreement extending to matters which were not, and jurisdictionally could not have been, the subject of determination by the LVT. And so it was that the Respondent landlord agreed to remedy breaches of its repairing obligations owed to Ola Aina and Saradha Cabral. Agreement was reached to regularise future conduct, the Respondent landlord agreeing to obtain contributions from neighbouring blocks within the estate and also to ensure that service charge budgets would be approved by a qualified surveyor. That no doubt was an attempt to reduce the scope for future disputes by introducing a suitably qualified professional surveyor into the equation who might reasonably be expected to bring a level of impartiality and independence to bear.

36. The parties went on to address the issue of depleted reserves, again strictly out-with that which was in dispute before and capable of resolution by the LVT. The Respondent landlord agreed to replenish, or make good, The Reserve Fund Deficit within 14 months (paragraph 2). But the Respondent landlord did <u>not</u> agree to replenish the deficit caused by the respondent or Miss Marshall's or Angel's or Angel Property (Jam Factory) Limited's service charge arrears. But it <u>did</u> agree to replenish the arrears of all of the other Applicants and long leaseholders. That is significant: to underline the point: the Respondent landlord assumed no obligation to make good the non-payment of the respondent's and Miss Marshall's arrears. Instead of complete replenishment of depleted reserves, a partial solution was agreed.

37. The parties then addressed their minds and reached agreement as to the source of funds to replenish the deficit. The Respondent landlord agreed to do its best to recover arrears from all other lessees "who are not parties to these proceedings" *i.e.* <u>not</u> from *any* of the Applicants (paragraph 3). That is significant: the Respondent landlord would not be suing the respondent or Miss Marshall under their respective leases or any of the other Applicants. Paragraph 3, it is reasonable to infer, was important to the Applicants to ensure that their fellow long leaseholders who were not

party to the Compromise Agreement would be paying their arrears, but strictly speaking was of no financial concern to them because the Respondent landlord was obligated to make good those arrears under paragraph 2 whether or not recovery was made from the non-party lessees under paragraph 3.

38. And the Applicants agreed to pay the as-defined Service Charge Arrears (paragraph 4). That is significant. First, read literally and naturally, *each* of the Applicants assumed an obligation to pay the *whole* of the as-defined Arrears which, they agreed, were "reasonable" so could no longer challenge under section 27A or otherwise. That was important to the Respondent landlord as it removed the otherwise potent section 27A obstacle to recovery of those Arrears from the Applicants. By making each Applicant liable for the whole additional protection against default was afforded to the Respondent landlord who otherwise would be at risk of having to itself fund the arrears of any party in default from its own resources. Secondly, there is no obligation on the Respondent landlord to use best endeavours to recover the Service Charge Arrears from any of the Applicants or from anyone else. That is because each of the Applicants had agreed to pay them as *per* the Compromise Agreement.

39. Pausing here, there was therefore perfect symmetry between the obligation of the Respondent landlord to replenish the deficit caused by the Service Charge Arrears (as defined) *and* the Applicants' obligations to pay them. Both were co-extensive, perfectly dovetailed, reciprocal obligations. No one, it was agreed by the parties, was obligated to replenish, pay or recover the deficit caused by the respondent or Miss Marshall's service charge arrears.

40. The Compromise Agreement therefore formed a new contractual arrangement between the parties whereby they compromised or settled not only the matters in dispute between them in the applications before the LVT but also various other matters. As I have said, the Applicants gave up their rights to challenge the arrears under statute and also the leases and assumed liabilities greater than and different from those set out under their leases as well as getting other advantages which they could enforce against the Respondent landlord. By the same token, the Respondent landlord gave up its right to enforce the terms of the leases in respect of the disputed arrears and also apply for determination under section 27A in return for a right to sue each of the Applicants on the Compromise Agreement. It also assumed new obligations, different from those set out in the leases.

41. The lynch-pin of the appellant's argument is therefore misconceived. Neither the respondent nor Miss Marshall nor any of the other Applicants remained liable under the leases for the arrears after execution of the Compromise Agreement. That liability had been replaced or substituted by the liabilities set out in the Compromise Agreement which was, in respect of the arrears in dispute, the sole and exclusive legal foundation of liability and hence title to sue. In short, by entering into the Compromise Agreement each of the Applicants, and the Respondent landlord, assumed a new and independent obligation enforceable separately from their respective obligations under the leases which replaced their previous rights and obligations under statute and the leases.

42. Without wishing to labour the point, the bundle of contractual *and statutory* rights and obligations relating to the disputed arrears was replaced by a new singular contractual obligation to pay the Service Charge Arrears *without complaint or statutory challenge* which, if broken, would entitle the Respondent landlord to sue each of the Applicants for the whole to which there would and could have been no statutory or other defence. This is not altered by the fact that the Compromise Agreement dealt with other matters. Nor is it altered by the fact that there is no express release or reservation of any rights or clams: such would be otiose as the nature and effect of the Compromise Agreement was clear and unambiguous.

43. The minute it is recognised that the effect of the Compromise Agreement was to oust the LVT of jurisdiction in relation to the service charges arrears in dispute, it is plain that it could not have been intended that the Respondent landlord could the next day sue the respondent or Miss Marshall under the lease: that would have been grossly unfair, as they would have given up their statutory "defences", and had that right been intended to be kept alive it should, and, would, have been expressly reserved to the Respondent landlord. It would also have been quite unreal, and, to a reasonable observer, absurd. As the LVT said, the absence of an express reservation of a right to sue the respondent and Miss Marshall is of much greater note and significance than the absence of any release.

44. The principal way in which the appellant sought to get around this was to argue that paragraphs 1 and 4 of the Compromise Agreement should be construed to the effect that each of the Applicants was only severally liable for his or her actual personal share of the Service Charge Arrears, from which it would follow that the respondent and Miss Marshall were liable for nothing. This was because, it was submitted, each of the Applicants could not have intended to assume a new and enlarged obligation for the whole of the Service Charge Arrears. By way of dramatic illustration of the point, Mr Duckworth submitted that it could not have been intended that Mr Cabral, one of the Applicants, would have entered the negotiations on the afternoon of the seventh day of the hearing on the 11th October 2011 with an £880.52 liability under his lease only to walk out two hours later having taken on a potential liability of £50,490.50 under the Compromise Agreement.

45. I do not see why not. The Compromise Agreement is clear, and unambiguous. It is perfectly possible that the Applicants, who knew each other and had been comrades at arms against the Respondent landlord for some years, were perfectly content to enter into what they regarded as a purely theoretical risk, knowing as they did the precise amount of their respective actual shares (if any) of the Service Charge Arrears and trusting that each would pay up, as they in fact did. But the argument is, in my judgment, misconceived because it erroneously focuses upon the intention of only one side of the equation, *the Applicants*, whereas the correct approach is to focus on the intention of *both parties*, Respondent landlord included. If that is done, it can be well-imagined that the Respondent landlord was not only delighted but required that each Applicant assume a several liability for the whole so as to remove as many obstacles as possible to enforcement and reduce its own risk of having to make good any non-payment from its own resources in discharge of its obligation to replenish

The Reserve Fund Deficit. There is therefore, viewed objectively, a sound commercial reason for the contractual provision.

46. The other main argument deployed by Mr Duckworth was that it could not have been intended that the Respondent landlord would waive the respondent's and Miss Marshall's £10,486.79 and £36,640.14 alleged liability for arrears when their set off defences were without any legal foundation and were bound to fail. Had that been intended there would have been express or mutual releases or apportionments or similar provisions in respect of the £16,000 and £90,000 set offs, it was submitted. Writing off these arrears was, in the circumstances, said by Mr Duckworth to defy commercial reality and common sense.

47. The rhetorical question which underlay this argument was "why would the Respondent landlord have given up the £47,126.93 arrears claims to which there was no defence?" That implicitly asserts that the Respondent landlord regarded the set offs as being without merit. There was however no such evidence from the Respondent landlord (which of course would have been inadmissible): the Respondent landlord may well have been far less confident as to their merits than the certainty professed to the tribunal by their counsel Mr Duckworth. Or it may have thought that the defences had a nuisance value which was worth buying off: this would not be the first time that a party has settled a claim which it regarded as worthless. Or it had just had enough and wanted to draw stumps.

48. The question, or argument, therefore invites the tribunal to speculate as to the subjective rationale or motivation or intent of the Respondent landlord and use that to control the meaning of what had, in clear and unambiguous language, been agreed by the parties. That is not permitted because such is not "known to the parties": see *BCCI* (*supra*). Specifically, there is no suggestion that the respondent and Miss Marshall or any of the other Applicants "knew" or realised that the set off claims were hopeless and therefore worthless. Quite the opposite, certainly so far as the respondent and Miss Marshall were concerned.

49. Even if it were permissible to speculate as to the rationale or motivation or intention of one party to a contract, the Respondent landlord, there are any number of reasons which, viewed objectively, would or might have been taken into account and led a reasonable landlord in the position of the Respondent landlord to agree to writing off the £47,000 odd. For example, it might have looked at the total Service Charge Arrears (as defined) and been concerned that some might be disallowed by the LVT under section 27A; it might have been concerned that all or part of its litigation costs might be disallowed by the LVT under section 20C; it might have been concerned that, having already run up £130,000 of costs, it could not fund or run up or justify running up further costs to properly deal with the section 27A application and that if it did some or all might be disallowed under section 20C. It is quite possible that the Respondent landlord took a broad brush approach and concluded that the £47,000 odd was a price worth paying to resolve those uncertainties. Overall, it may well have taken the view that it had secured a good deal – recovery of over half of the amount in issue without any further obstacles.

50. None of this is known. It is all pure speculation. That is why it is inadmissible. Parties to litigation compromise claims for all manner of reasons; some rational, some irrational; some surprising, some unsurprising; some identified, some unidentified or unidentifiable; some fathomable, some unfathomable; sometimes because they have just had enough. But it has long been established that the commercial wisdom, or subjective motivation or rationale or intent, for entering into an agreement is of no materiality to the construction of the explicit language used in the contract itself. Contracts are to be construed objectively, not by reference to subjective concerns or issues or motivations or intent of any of the parties. As I have said, it is telling that there was no express reservation of a right to sue the respondent or Miss Marshall in respect of their arrears.

51. For those reasons, although differently expressed, I agree with the decision of the LVT and dismiss this appeal. For completeness I should say that Mr Duckworth cited an armoury of authorities relating to the correct approach to the construction of contractual documents, and also relating to the distinction between implying and inferring terms and the process of construction. I have not referred to them because, in my judgment, the *BCCI* passage cited above is sufficient for these purposes.

Dated: 7 October 2014

His Honour Judge Gerald