UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – Service Charges – whether landlord's costs of proceedings in the county court to recover arrears of service charge, and in responding to tenants' application to the LVT to quantify service charges are recoverable as expenses incurred in "proper and convenient management and running of the development" – appeal dismissed

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

BETWEEN:

GEYFORDS LIMITED

Appellant

and

(1) MS L O'SULLIVAN
(2) MR A GRINTER
(3) MR B SHAW
(4) MS J MORGAN
(5) MR B M BONSOR

Respondents

Re: Flats 2, 3, 4, 5 and 8 Woodcote Court,
Woodcote Road,
Wallington,
Surrey

Before: Martin Rodger QC, Deputy President

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
26 November 2015

Mark Warwick QC, instructed by Judge Sykes Frixou, solicitors for the Appellant
Howard Lederman, instructed by direct access for the Respondents

The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36

Chartbrook Limited v Persimmon Homes Limited [2009] AC 1101

Francis v Philips [2014] EWCA Civ 1395

Gilje v Charlgrove Securities Ltd [2002] 1 EGLR 41

McHale v Earl Cadogan [2010] HLR 412

Reston Ltd v Hudson [1990] 2 EGLR 51

Sella House Ltd v Mears [1989] 1 EGLR 65

Introduction

1. The issue raised by this appeal is, once again, whether the language of a service charge provision in a lease permits the landlord to recover expenditure which it incurred in contesting legal proceedings against the leaseholders of flats in a residential building.

2. Because of the variety of expression used to define service charges, and the diversity of the leases in which they appear, the resolution of problems of this nature is often difficult, despite the frequency with which they arise. Leases are rarely identical in their language and in the circumstances of their creation, but while it is not possible to lay down strict rules of universal application, the proper approach to the interpretation of service charge provisions is the same in every case and is no different from the proper approach to the interpretation of other contractual terms. Consistency in the application of that approach provides the best hope of predictable outcomes.

3. In *Arnold v Britton* [2015] UKSC 36 the Supreme Court considered an appeal concerning the meaning of service charge provisions in a number of 99 year leases of plots of land on which holiday chalets were to be built. Lord Neuberger PSC, with whose speech Lord Sumption, Lord Hughes and Lord Hodge agreed, summarised the effect of the modern cases in which the House of Lords and the Supreme Court had discussed the correct approach to be adopted to the interpretation of contracts. He said this at paragraph 15:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Limited v Persimmon Homes Limited* [2009] AC 1101, para. 14. It does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of: (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial commonsense, but (vi) disregarding subjective evidence of any party's intentions."

4. Lord Neuberger went on to emphasise seven factors, three of which bear either generally or specifically on the subject of this appeal:

> "17. First, the reliance placed in some cases on commercial commonsense and surrounding circumstances (e.g. in *Chartbrook*) [2009] AC 1101 paras. 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial commonsense and the surrounding circumstances, the parties have control over the language they use in a contract and, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

> 18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve."
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> "23. Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. …. The origin of the adverb was in the judgment of Rix LJ in *McHale v Earl Cadogan* [2010] HLR 412, para. 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there"."

5. In this appeal the relevant language, shorn of its surrounding context, entitles the appellant landlord to recoup, through a service charge payable by the respondent leaseholders, its expenses incurred "in and about the maintenance and proper and convenient management and running of the Development". In a carefully reasoned decision given on 30 April 2015 the First-tier Tribunal (Property Chamber) ("the F-tT") concluded that that language was not apt to permit the appellant to add sums totalling a little over £54,000 to the service charge payable by five leaseholders where those had been incurred in two separate rounds of a dispute with the same leaseholders over their liability to contribute towards the cost of major works required to their building. The F-tT reached its conclusion "not without difficulty" and readily granted permission to appeal.

6. At the hearing of the appeal the appellants were represented by Mr Mark Warwick QC and the respondents by Mr Howard Lederman of counsel. I am grateful to them both for their helpful and persuasive submissions.

The relevant facts

7. The parties provided a helpful statement of agreed facts, from which (supplemented by details gleaned from the decision of the F-tT) I take the following as the basis of my consideration of the appeal.

8. Woodcote Court is a mixed use building which was constructed in the 1930's. The ground floor is occupied by a car showroom, garage and workshop from which the appellant has carried on business since before 1978. The appellant owns the freehold interest in the building and its surrounding curtilage. On the first and second floors of the building there are twelve flats, five of which are let on long leases granted by the appellant. Each of the respondents is the long leaseholders of one of those five flats. The remaining flats in the building are let by the appellant on assured shorthold tenancies.

9. The legal costs which are in dispute in this appeal were incurred by the appellant in two pieces of litigation: the first conducted in the County Court and the second in the Leasehold Valuation Tribunal ("the LVT").

10. The County Court proceedings comprised separate claims brought by the appellant in September 2010 against three of the leaseholders, Mr Grinter, Mr Bonsor and Ms Morgan. Each claim was for the payment of interim service charges said to be due under the terms of the relevant leases. The sum claimed from Mr Grinter was £12,186 of which £12,000 represented an interim service charge first demanded on 31 January 2008. I assume the sums claimed from Mr Bonsor and Ms Morgan were similar. The two remaining leaseholders, Ms O'Sullivan and Mr Shaw, had already paid the interim service charge (apparently under protest) and were not parties to the County Court proceedings.

11. The claims were strongly resisted, initially at least, and each leaseholder served a defence and counterclaim drafted by counsel. They denied all liability for the sums claimed on a number of different grounds. Each also brought a counterclaim in which they alleged that the appellant had failed to comply with its repairing obligations under their leases as a result of which damage had been caused to their flats, for which damages were claimed together with an order requiring the appellant to carry out work of repair.

12. The County Court actions were consolidated and eventually settled by a consent order made on 15 January 2012. By that order each defendant leaseholder agreed to pay £8,000 on account of the interim service charges within 28 days. The balance of the contribution claimed from each leaseholder was to be paid when the appellant delivered final tender documents for the works. The appellant itself agreed to pay £8,000 for each of the seven flats which it owned (presumably to the reserve fund). Finally, the parties agreed that they would each be responsible for their own costs of the proceedings.

13. Despite the settlement of the County Court proceedings, on 21 March 2012 all five leaseholders made an application to the LVT under section 27A, Landlord and Tenant Act 1985, asking it to determine the amount of the service charges which they were liable to pay in each of the six accounting years from 2005 to 2012 and for the then current year, 2012-13. The leaseholders were represented in the LVT proceedings by the chairman of their residents association; the appellant was represented by solicitors and counsel. After an oral hearing lasting two days the LVT gave a decision substantially in the appellant's favour on 31 August 2012. The leaseholders were successful in reducing the charge which the appellant wished to recover for its own administration of the proposed works, and other smaller items, but the LVT found that it had no jurisdiction to rule on the interim service charge which three of the five leaseholders had agreed to pay in settlement of the county court proceedings, and ruled that the interim charges demanded of the other two leaseholders were reasonable.

14. At the conclusion of its decision the LVT refused an application made by the leaseholders under section 20C of the 1985 Act in relation to the costs incurred by the appellant in connection with the LVT proceedings. The tribunal said that the appellant had had no option but to defend the applications and it could see no plausible basis for making a protective order in relation to the legal

costs it had incurred. The LVT did not make any finding as to whether the leases included a provision for the recovery of such costs.

15. The appellant had certainly incurred professional costs in both the County Court and the LVT proceedings and it subsequently sought to recover a contribution towards them through the service charges for the three accounting years from 2011 to 2014. The sum claimed for 2011-12 was £10,013; for 2012-13 it was £41,982; and for 2013-14, £2,061. I was told that the bulk of these expenses, in particular those claimed for 2012-13 were incurred by the appellant in responding to the leaseholder's application to the LVT.

16. The parties failed to agree on the leaseholders' liability and eventually, by an application under section 27A of the 1985 Act issued in November 2014, the appellant sought a determination from the F-tT. The parties agreed that the issue of the leaseholder's contractual liability to contribute towards the legal costs incurred by the appellant should be treated as a preliminary issue, and the F-tT so directed.

The Lease

17. The leases of the five flats owned by the respondents are in a common form. I was shown the lease of Flat 8 on the second floor, but I assume there is no material difference between its terms and those of the other leases.

18. The Lease of Flat 8 was granted on 23 June 1978 by the appellant, which is referred to throughout the document as "the Lessors". The address given for appellant in the Lease indicates that it was in occupation of the showrooms on the ground floor of the building at that time. The original Lessee (as the leaseholder is referred to) was not one of the respondents; they have each acquired their interest in the flats by a subsequent purchase.

19. The ground floor showrooms and the 12 flats on the upper floors are referred to in the Lease as "the Building", while the building and its surrounding pathways and other structures are referred to as "the Development".

20. The Lease was granted for a term of 99 years in return for a premium and the payment of a very modest ground rent. In addition to the ground rent, clause 4(ii) of the Lease requires the Lessee to contribute a sum called "the Maintenance Contribution" which was to be one-twelfth of the "costs expenses outgoings and matters" mentioned in the Fourth Schedule.

21. The Fourth Schedule itself is divided into eight paragraphs, the first five of which list expenses to be incurred by the appellant in maintaining and repairing the various parts of the building, cleaning and lighting the common parts, decorating and repairing the exterior of the Development, discharging rates taxes and outgoings, and obtaining insurance against third party and public liability risks. Paragraph 6 is the provision critical to this appeal, and refers to:

> "All other expenses (if any) incurred by the Lessors or their managing agents in and about the maintenance and proper and convenient management and running of the Development".

Paragraph 7 of the schedule is in two parts; the first refers to "the fees and disbursements paid to any managing agents appointed by the Lessors in respect of the Development", while the second entitles the appellant, if it decides not to employ a managing agent, to add a sum for administration not exceeding 15% to any of the expenses listed in paragraphs 1 to 6. Finally, paragraph 8 entitles the appellant to make a charge, including a profit element, in respect of any works of repair, redecoration or renewal which it carries out in its own right.

22. The Lease includes a number of other covenants which have been referred to in argument, and ought to be mentioned here.

23. Clause 3(i)(d) is a covenant by the Lessee to pay "all costs, charges and expenses (including solicitors' costs and surveyors' fees)" incurred by the appellant incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925. A notice under section 146 is required to be served as a preliminary step by a landlord who wishes to terminate a lease because a leaseholder has breached one of it terms.

24. Clauses 4(vii) and 4(viii) respectively require the Lessee to do everything in relation to the demised premises which may be required by any Act of Parliament or regulation, and to comply with the Town and Country Planning Acts. In each case the Lessee was required "at all times [to] keep the Lessors indemnified from and against all actions proceedings costs expenses claims and demands in respect thereof." The effect of these provisions is that if the appellant is caused to incur any expense as a result of the leaseholder breaching any statutory requirement in relation to the flat, the appellant is entitled to be reimbursed in full by the leaseholder.

25. Clause 5 of the Lease comprises a number of covenants on the part of the appellant, as Lessors, including for the repair, decoration, lighting and insurance of the Development. By clause 5(g) the appellant agreed:

> "That (if so required by the Lessee) the Lessors will enforce the covenants similar to those contained in clause 4 hereof entered into by the lessees of the other flats comprised in the Development on the lessee indemnifying the Lessors against all costs and expenses in respect of such enforcement and provided such security in respect of costs and expenses as the Lessors may reasonably require is provided by the Lessee."

The covenants contained in clause 4 referred to in clause 5(g) included the Lessee's covenants to keep the flat in good repair, to decorate it and to make good defects, to pay the Maintenance Charge, not to do anything which might avoid the insurance policies for the Development or for any flat, and finally the covenants for compliance with statutory provisions which I have already mentioned.

26. The First Schedule of the Lease comprised a series of regulations for the use and occupation of the flats in the Building (restricting use to residential purposes only, prohibiting excessive noise and nuisance etc). The Lease recited that, where leases of flats had already been granted, the First Schedule restrictions had been included, and the appellant agreed in clause 5(c) that any subsequent

lease would require compliance with the same restrictions. The parties also recorded their intention that any owner or lessee of any part of the Development or any flat should be able to enforce those restrictions against the owners or occupiers of the other flats. This intention was reflected in clause 2 of the Lease, by which the Lessee covenanted both with the appellant and with the owners of the other flats in the Development to observe the restrictions in the First Schedule.

27. The appellant's obligation in clause 5(g) to enforce covenants in neighbouring leases at the expense of the Lessee applied only to clause 4 and did not extend to the Lessee's covenant in clause 2. Thus, individual leaseholders could take their own steps to enforce compliance with the regulations in the First Schedule, but could not look to the Lessors to do so on their behalf.

28. As a general observation Mr Warwick QC suggested that the Lease was well put together and competently drafted. I agree.

The First-tier Tribunal's Decision

29. The F-tT recorded the parties' agreement that all of the costs in issue were attributable either to the County Court proceedings or to the application to the LVT (which it had not been invited to distinguish between). It directed itself that the ordinary rules for interpreting contracts applied to agreements for the payment of a service charges and said that its task was to determine whether the disputed costs had been incurred for purposes falling within paragraph 6 of the Fourth Schedule to the Lease.

30. The F-tT rejected a submission made by Mr Warwick on behalf of the appellant that the expression "management and running of the Development" was a broader concept than "management" alone. It had not been suggested that there was any activity covered by "running" which was not also "management" or *vice versa*, and it thought that heaping up synonyms did not broaden the meaning of the words. Nevertheless the F-tT accepted Mr Warwick's submission that taking legal advice would occasionally be a necessary part of "management", for example, where it was required in order to answer a leaseholder's reasonable query. That submission was not determinative because it was necessary to consider whether incurring these specific legal costs was within the scope of paragraph 6. The F-tT framed and answered the decisive question in this way:

> "The question is therefore – is the concept of "management" in this lease wide enough to include the recovery by way of service charge from the leaseholders of legal costs incurred in pursuing a dispute with those self-same leaseholders? We conclude that it is not. The other descriptions of "management" related activities are to core functions of "organisation, supervision or direction" (to adopt words from the Oxford English Dictionary definition of "management"), such as dealing with the physical fabric and straightforward outgoings like rates and insurance. There are no references in general to enforcement (apart from the indemnity provisions) or the costs thereof."

When the F-tT mentioned "the other descriptions of "management" related activities" it was, I think, referring to the activities described in the other paragraphs of the Fourth Schedule (see paragraph 21 above), making up the various costs, charges and expenses which could be recovered through the Maintenance Charge. Having thus considered paragraph 6 in its immediate context the F-tT then

widened its review by pointing out that where the Lease imposed an obligation which would necessary involve expenditure on legal costs, provision had been made for a specific indemnity, as in clauses 3(i)(d), 4(vii) and 5(g). It did not accept that, unless cut down by some specific language, a simple entitlement to recoup the costs of "management" would always allow a landlord to recover the costs of proceedings against leaseholders, and it concluded that the legal costs in issue in these proceedings were not recoverable under paragraph 6 of the Fourth Schedule.

Submissions

31. In his submissions on behalf of the appellant Mr Warwick QC emphasised the breadth of the language employed by the parties in paragraph 6. That the broad scope was controlled by the qualifying words "proper and convenient". The F-tT had erred in disregarding the composite expression "management and running" and construing only the word "management". It should be assumed that the parties intended additional words to cover different activities, and even if it was difficult to pin down precisely what distinction there might be between "running" and "management", the composite expression must be taken to be wider than either of its individual components. It was therefore impermissible for the F-tT to construe the Lease as if the word "running" had been absent.

32. The word "management" extended to the professional administration of property, which clearly included utilising lawyers in appropriate circumstances. It would be uncommercial to assume that the parties did not intend that eventuality to be included within the catalogue of service charges.

33. As far as the particular expenditure in question in this appeal was concerned, the appellant had been obliged to sue the three defaulting leaseholders in the County Court, and then, as the LVT itself had pointed out, had had no option but to defend (rather than to initiate) the subsequent section 27A applications concerning the same charges. As a limited company it was inevitable that involvement in legal proceedings required the engagement of lawyers and, giving the words of paragraph 6 their natural meaning, the cost of doing so formed part of the expenses of the proper and convenient management and running of the development.

34. For the respondents, Mr Lederman supported the reasoning of the F-tT and submitted that the ordinary meaning of the words "management and running of the development" did not clearly extend to a landlord's costs of legal proceedings against its own leaseholders. The categories of expenditure described in paragraphs 1 to 5 of the Fourth Schedule mirrored the Lessor's covenanted obligations under the Lease, so the reference in paragraph 6 to "all other expenses" should similarly be interpreted as referring to all other expenses incurred by the Lessor in carrying out functions imposed on it by the Lease. Moreover, in view of the other provisions of the Lease the expectation of the parties would have been that an individual leaseholder would not be required to contribute towards the costs of proceedings. In short, the language of paragraph 6 on which the appellant relied was not sufficiently clear to impose on the leaseholders an obligation to reimburse through the service charge the cost incurred by the Lessors in bringing proceedings against or responding to proceedings brought by some or all of their number.

Discussion and conclusion

35. This appeal turns on the words of paragraph 6 of the Fourth Schedule, namely:

> "All other expenses (if any) incurred by the Lessors or their managing agents in and about the maintenance and proper and convenient management and running of the Development".

There is justification in Mr Warwick's complaint that, by focussing only on "management", rather than on the composite expression "management and running", the F-tT adopted too narrow an approach. The starting point of the interpretative process is the language used, in its immediate context, and the technique of stripping away synonyms in order to isolate what the reader considers to be the critical expression risks diluting the cumulative impact of the words the draftsman and the parties have chosen to employ. That is particularly the case where, as here, the language used is relatively economical. It is not necessary to identify a distinction between management and running in order to give proper consideration to the scope of the expression "proper and convenient management and running of the Development".

36. The words "proper and convenient management and running", used in the context of a mixed residential and commercial building, are not words which have a precise meaning which either clearly includes or clearly excludes the activity of litigating over the collection or quantification of sums required to repair the building. It might be said that "running" suggests a focus on more day to day or mechanical activities, while "management" is more long term or strategic, but I do not think it is informative or helpful to dissect the language in that way. It might also be said that both management and running, when used of a building and its immediate environment, are concerned with the condition of the building and the activities which go on there, and that the composite expression is not apt to refer to litigation over the liabilities of individuals to the building owner, which are concerned with enforcing personal rights and obligations rather than with the physical fabric of the building. The qualifying words "proper and convenient", which Mr Warwick said were words of limitation, might also be thought to suggest expenditure which is routine rather than exceptional.

37. I think the F-tT was right to acknowledge that "management" may sometimes include obtaining professional advice, including legal advice, and I agree with Mr Warwick that in some circumstances it might involve litigation. In *Reston Ltd v Hudson* [1990] 2 EGLR 51 the landlord of a block of flats was entitled to recoup "the cost of management of the estate" through the service charge. HHJ Hague QC, sitting as a judge of the High Court, considered that the costs of proceedings commenced by the landlord to establish whether the repair of the windows in the building was its responsibility fell within "the cost of management". The assistance of the court was required in that case because the leases of each of the flats was unclear, so the outcome of the proceedings was of concern to both the landlord and to every leaseholder.

38. It seems to me rather less obvious that proceedings to enforce the obligation of an individual leaseholder to make a payment to the landlord fall naturally within the scope of "management and running". In *Sella House Ltd v Mears* [1989] 1 EGLR 65 Taylor LJ memorably stated that he would "require to see a clause in clear and unambiguous terms" before being persuaded the parties had intended that a tenant who paid his rent and service charges would be obliged to subsidise the landlord's costs of proceedings against his fellow tenants who were defaulters. The language of the *Sella House* lease, which was not sufficiently clear for the Court of Appeal, entitled the landlord to recover expenses of a managing agent "… or other person who may be managing the Building", and of employing "other professional persons as may be necessary or desirable for the proper

maintenance safety and administration of the Building". I refer to *Sella House* not for how the language of that lease struck the Court of Appeal, but because it illustrates the improbability that parties to a lease would regard general words as sufficient to express an intention that any shortfall in the landlord's cost of litigation between them should be a charge on the whole body of leaseholders.

39. *Sella House* has provided the basis in other cases for the submission that legal costs may not be recovered through a service charge unless there is specific mention of lawyers, proceedings or legal costs. Mr Warwick described that view as heretical and he went so far as to suggest that the dictum of Taylor LJ had been disapproved by the Supreme Court in *Arnold v Britton.* I do not think that is a fair reading of what Taylor LJ said in *Sella House,* although his remarks have often been wrongly elevated to a statement of principle. It is true that he noted the absence of specific mention of lawyers, but it should not be thought controversial that "clear and unambiguous terms" are required to impose what Taylor LJ obviously regarded as an onerous and unusual payment obligation.

40. That parties to any contract should wish to be clear when defining payment obligations is unsurprising. In *Francis v Philips* [2014] EWCA Civ 1395, at [74], the Chancellor, Sir Terence Etherton, referred to a "broad principle" which could be detected in service charge cases, that:

> " … it is reasonable to expect that, if the parties to a lease intend that the lessor shall be entitled to receive payment from the tenant in addition to the rent, that obligation and its extent will be clearly spelled out in the lease: see, for example, *Gilje v Charlgrove Securities Ltd* [2002] 1 EGLR 41 at [31] (Mummery LJ). It is to be expected that the tenant will wish to be fully aware of any such additional obligation on which his or her continuing right to possess the land and to occupy it may depend. It is to be expected that the lessor will wish to make such a continuing additional obligation clear because it arises under a lease which will subsist through successive ownerships of the reversion and the tenancy and because the lessor will not wish to be out of pocket in respect of services provided for the benefit of the tenant..."

An absence of clarity can therefore be treated as an orthodox aid to identifying the boundaries of payment obligations generally, including service charge obligations. In *Arnold v Britton* Lord Neuberger was (seventhly) unpersuaded that any special rules of interpretation apply to service charge clauses but found no difficulty in approving Rix LJ's observation in *McHale v Earl Cadogan* that "the court should not "bring within the general words of a service charge clause anything which does not clearly belong there"."

41. I therefore regard the language of paragraph 6 as less clear than is to be expected if the cost of proceedings against defaulting leaseholders had been intended to be recovered as costs and expenses of "proper and convenient management and running of the Development". I do not regard the qualification introduced by the words "proper and convenient" to be of assistance in this context; they are themselves words of imprecise scope and, if anything, seem to me to suggest routine or unexceptional expenditure. The fact that paragraph 6 is in the nature of a residual category of expenditure, covering "all other expenses (if any)" has a similar effect. I agree with Mr Warwick that the parties are likely to have contemplated that there might well be litigation between the Lessors and the Lessees at some point during the 99 year term, but I consider it improbable that they would have intended the costs incurred to be signified by inclusion in a residual "all other (if any)" category.

42. A consideration of the other relevant provisions of the Lease lends no positive support to Mr Warwick's case based on the language of paragraph 6. On the contrary the framework of obligations suggests the opposite. The obligations which leaseholders owe to each other, as covenanted by clause 2 and the regulations contained in the First Schedule, are capable of being enforced directly by each against the others and need not involve the appellant in action at all. The appellant, as Lessor, cannot be compelled (even at the expense of the leaseholder) to enforce those obligations, and is free, in its own interests, either to police or to overlook breaches of the regulations. There is no reason to assume that an indemnity was intended if the appellant chose to take such enforcement action. Only where direct covenants have been entered into both with the Lessors and with the owners of other flats is an individual leaseholder entitled to require enforcement by the Lessors, in return for an indemnity against the costs to be incurred. The only covenants which the appellant could be required to enforce are therefore those in clause 4, which include the obligation to contribute one-twelfth of the costs and expenses in the Fourth Schedule through the Maintenance Contribution. It does not seem to me to be likely that the parties intended that leaseholders should be required to contribute towards costs incurred in litigation to enforce clause 4 obligations which the Lessors have undertaken on their own initiative.

43. The Lease also contemplates that expenses incurred by the appellant in successful proceedings against defaulting leaseholders will be paid by those leaseholder: under clause 3(i)(d) in the event that steps are taken to forfeit the Lease, or under clause 4(vii) or (viii), if the default relates to non-compliance with a statute or regulation which applies to the demised premises. The reference in clause 3(i)(d) to the recovery of "costs, charges and expenses (including solicitors' costs and surveyors' fees)" is an example of clarity in contrast to the language of paragraph 6.

44. Nor is there anything in the overall purpose of the Fourth Schedule or the lease as a whole which would cause one to expect that the adverse costs consequences of unsuccessful or inconclusive litigation were intended to fall on the leaseholders. The appellant was and remains an occupier of a substantial part of the Building in its own right, the ground floor comprising the premises from which it runs its business of car dealing. The leaseholders are each obliged to contribute one-twelfth of the cost of repairing and maintaining the main structure of the Development and decorating its exterior, and it would appear that in its capacity as occupier of the ground floor the appellant is not required to make any contribution of its own towards those expenses, despite the benefit it obtains from the services. That arrangement might be regarded as rather inequitable, but it makes it less likely that the parties can have intended that payment obligations which are, to a significant degree, for the appellant's own benefit should be enforced entirely at the expense and risk of the leaseholders.

45. With regard to the facts and circumstances known to the parties at the time they entered into the Lease, Mr Lederman pointed out that in the 1970s it was standard practice for the payment of service charges to be enforced by proceedings in the County Court for forfeiture of the lease. Forfeiture would be avoided only by the leaseholder (or their mortgagee) paying what was owed and indemnifying the landlord against its costs of the proceedings. Nor, in 1978, would the parties have contemplated that the appellant might be required to incur expenditure in establishing the quantum of the service charge before a statutory tribunal operating in a largely costs-free jurisdiction; service charge disputes were determined in the County Court, where the successful party would recoup its costs from the unsuccessful party. The joint expectation would therefore have been that (barring any change to those ground rules) the appellant would not find itself out of pocket if it proved necessary

to collect service charge contributions by legal action, and so would have no need to recoup its legal expenses through the service charge. The only exception to that expectation might have been where the claim was defeated or had to be compromised without full recovery of costs; it seems to me even less likely that the parties can have intended that the service charge should bear the costs of unsuccessful litigation as an expense of the "proper and convenient management and running of the Development".

46. Both counsel agreed that the Lease should also be construed in its relevant statutory landscape as it existed in 1978. As Mr Lederman pointed out, at that time there was no statutory protection for leaseholders against a contractual liability to contribute through a service charge towards a landlord's cost of management. Section 91A of the Housing Finance Act 1972 limited a tenant's liability to contribute to a service charge by reference to a test of reasonableness, equivalent to the test now found in section 19 of the Landlord and Tenant Act 1985, but the definition of "service charge" in section 90(12) of the 1972 Act was more limited than its modern equivalent in section 18(1)(a) of the 1985 Act. A "service charge" then comprised only the costs of services, repairs, maintenance and insurance and did not embrace the landlord's costs of management. Although a term restricting the legal fees which might be recouped under paragraph 6 (were it otherwise apt to include them) to those which were reasonable might be capable of being implied, the absence of an express limitation at a time when no statutory limit was implied is a further reason for construing the language as insufficiently clear to extend to the cost of litigation between the parties themselves.

47. Finally, commercial commonsense does not seem to me to add significantly to the weight of the appellant's construction. Commercial commonsense would lead one to expect the employment of clear language to impose onerous and unpredictable burdens. It would cause one to expect that the more commercial party, the appellant, which carried on business from approximately one third of the building, would not expect to be able to collect debts owed to it for the upkeep of that building at the expense of the occupiers of the remaining two thirds. In the end Mr Warwick's argument that the words "proper and convenient management and running" have a wide application proves too much. There was no obligation on the appellant to grant further long leases including a service charge and it was free, as it has done, to retain flats for short-term letting provided only that it included the same regulations as in the First Schedule to the Lease. The cost of letting those flats, of periodically inspecting them, and even of bringing proceedings to recover unpaid rent, would all be acts of management and running of the Development, if those words were given as broad a meaning as Mr Warwick urged. Commercial commonsense would not lead one to expect that any part of the cost of managing flats occupied at rack rents by short term tenants would fall on the long leaseholders through the service charge.

48. For all of these reasons I am satisfied that the F-tT was correct. Paragraph 6 of the Fourth Schedule is insufficiently clear to demonstrate an intention that the service charge should cover costs incurred by the appellant in bringing or responding to legal proceedings over the extent of the leaseholders' liability to pay. Accordingly I dismiss the appeal.

Martin Rodger QC,

Deputy President

17 December 2015