Neutral Citation Number: [2023] EWHC 618 (KB)
Appeal Ref: QA-2022-000112
On appeal from the Central London County Court F10CL215

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURT
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st March 2023

Before:

MR JUSTICE RITCHIE

- -

BETWEEN

KAUSHAL CORPORATION

Claimant/Appellant

- and -

MARIA CARMEL O'CONNOR
(By her son and Litigation Friend Justin Marciano)

Defendant/Respondent

Mr Daniel Dovar (instructed by **Collyer Bristow**) for the **Appellant**
Justin Marciano appeared in person

Hearing dates: 13th and 14th March 2023

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APPROVED JUDGMENT

Mr Justice Ritchie:

The Parties

1. The Defendant/Respondent, who lacks capacity and is represented in this action by her son (who is her litigation friend), was the sole shareholder and director of Red Rooster Restaurants Limited (RRR) which was the lessee of the basement and ground floor of a commercial premises at 84 Westbourne Grove, W2, London (the "Property").

2. The Claimant/Appellant (hereinafter called "KC") became the freeholder of the Property in 2012. The Claimant is a company registered in Tortola, British Virgin Islands under registration number 1518014. Its address for service is in Cyprus. The sole declared director and shareholder of the company is Mr C. Christodoulou.

Bundles

3. For the appeal I was provided with an appeal bundle and a supplementary bundle and an authorities bundle by the Appellant. I was also provided with skeleton arguments from both parties.

The Facts

4. This appeal concerns the interpretation of a lease of the Property dated 9.12.2002.

5. RRR ran a restaurant from the Property from 16.9.2005 when RRR took an assignment of the lease. At the time of the assignment the Defendant/Respondent provided a personal guarantee for RRR's obligations under the lease (the "Guarantee"). KC took an assignment of the freehold in 2012 and at the same time took the benefit of the Guarantee.

6. The parties fell out over covenants and RRR decided to try to assign the lease. Three prospective assignees were put forward to KC for approval for assignment. All were rejected. RRR then went into liquidation and the liquidator decided to bring proceedings against KC alleging that KC had unreasonably refused consent for the three proposed assignments. The action number ended in 612. I shall call that "claim 612". Those proceedings ended in an order made by District Judge Lightman on the 19th of October 2016 in which he dismissed the action and ordered RRR to pay 90% of KC's costs, to be subject to a detailed assessment if not agreed. He also ordered RRR to pay KC £30,000 on account of the aforementioned costs.

7. Because RRR was in liquidation the payment on account of costs was not made. Under the Civil Procedure Rules, r. 47.7, KC had three months to commence the detailed assessment proceedings. It did not do so and had not done so by the date of the hearing of the appeal. The delay in commencing the assessment was six years and five months. Under CPR r. 47.8 the paying party (RRR) had the right to apply to commence the detailed assessment if the receiving party (KC) had failed to do so. However, RRR was in liquidation and was dissolved in May 2018. Under subrule (3) KC can still apply to commence the assessment and if it does so the Court may disallow all or part of the interest otherwise payable. The rule goes on to say that the Court will not impose any other sanction except in accordance with CPR r. 44.11. Under rule 44.11 the Court has sanction powers in relation to a party who is guilty of misconduct, and under subrule (1)(a) if the Court considers the conduct of the party in the assessment proceedings was

unreasonable or improper the Court is empowered to disallow all or part of the costs which are being assessed.

8. HHJ Gerald noted that on 27.2.2017 KC forfeited the Lease of the Property for non-payment of rent by RRR. Agents were sent in to draw up a schedule of dilapidations.

9. On the 21st of June 2018, through their solicitors, Shakespeare Martineau, KC sent a letter before action to the Respondent asserting that the KC, whose address was given as flat 16, Leonard Court, Edward Square, London, W8 6NL, sought payment in respect of various outstanding liabilities of RRR. The proposed claim was made under the Guarantee. The claim was under clause 5.23 of the original lease which related to costs and fees incurred by the Landlord under the lease. I shall refer to that clause as the "Service Charge Clause". Without any explanation of the method of calculation the Appellant claimed £327,972. This was split up into £193,661 of legal costs; £2,745 of disbursements and £131,566 of dilapidation costs. Proceedings were threatened within 14 days.

10. KC commenced proceedings against the Respondent under an action number ending in 215 ("claim 215"). Judgment was entered for the rent arrears of £173,937 which were not contested. The rest of the claim was defended and tried on the 3rd, 4th and 5th of May 2022 before His Honour Judge Gerald. The claim was dismissed on all matters save as to £2,836. KC were ordered to pay 90% of the Respondent's costs. Those costs were to be set off against the judgment sum and the rent arrears.

The judgment appealed

11. As to the dilapidations relating to alterations done by RRR, those were dismissed because the alterations were not stripped out by the new tenant, who re-fitted the restaurant after taking on the lease in 2018. In relation to some of the heads of loss claimed KC called an expert he was not regarded by the Judge as an expert and the Judge allowed the costs of preparing the schedule of dilapidations which were a few thousand pounds. Thus the rest of the claim collapsed and was dismissed.

12. On the main issue for the appeal: whether the legal costs of claim 612 were recoverable from the Respondent under the Guarantee, that revolved around the proper interpretation of the Service Charge Clause. If the scope of that clause covered the legal costs of RRR challenging the Landlord's refusal to grant permission to assign the lease then the guarantor (Respondent) would be liable.

The Service Charge Clause

13. The Judge recited the clause in dispute:

> "28. The claimant's claim is based on clause 5.23(d) of the 2002 lease, which is entitled "Costs and fees". It provides as follows:
> "(1) The tenant shall pay on demand all fees, charges, costs, disbursements and expenses including, but without prejudice to, the generality of the foregoing **legal charges**; bailiffs' charges and surveyors' fees incurred or expended by the landlord of and incidental to and/or in contemplation of: …
> (d) **any application or request** for any approval or consent required by this lease, including costs on an interim basis whether or not any

> such approval or consent is granted by the landlord or the application or request is proceeded with by the tenant …"
> (I have highlighted the words in bold.)

Interpretation of the Clause

14. In relation to the correct interpretation of the Service Charge Clause the Judge ruled as follows:

> "34. Having said all of that, in my judgment, litigation costs do not, as a matter of construction, fall within clause 5.23 of the lease. Every contract is to be construed on its own words. In broad terms, the approach to the construction of provisions in a lease, specifically those which would considerably expand a tenant and, therefore, guarantor's liability beyond that which is usually to be found in a lease, should be construed strictly and narrowly (see *Sella House Limited -v- Mears* [1989] 1 EGLR 65 and *Morgan -v- Stainer* [1993] 33 EG 87).
> 35. Properly construed, the effect of clause 5.23(1)(d) is that the costs which are there being referred to are all of the costs which are relating to an application for approval or consent, but excluding the costs of litigation. There would be no reason for the costs of litigation to be encompassed within the wording which I have cited, because those costs would follow the event of the litigation. If the landlord had unreasonably refused to consent to an application for licence to assign which resulted in the tenant having to issue proceedings, it would be right and proper that the landlord should pay those costs and the situation would follow in reverse.
> 36. There is no need to construe this clause in a way which would enable the landlord, irrespective of the reasonableness or otherwise of its position in relation to the grant or refusal of an application for a licence to assign, to be able to recover the costs from the tenant and, indeed, it would be quite astonishing if, without the clearest of wording, any such finding could be made. Thus, even if there had been a demand for payment of these costs, in my judgment, it would have been of no effect, because the litigation costs in question do not fall within clause 5.23(1)(d). I therefore reject the claimant's submission to the contrary."

Was there any demand?

15. In relation to whether a demand was ever made by KC to RRR, which the Judge held was plainly required by the Service Charge Clause, the Judge ruled as follows:

> "29. The fundamental problem which the claimant faces is that it is a precondition of tenant liability that a demand for payment of costs be made. The burden of proving liability under this clause falls upon the claimant. Not only is there no pleaded allegation that there ever was any demand for payment of these costs from the tenant, but on the evidence before me, there is absolutely no evidence at all that the claimant ever demanded payment of these costs from the tenant.

> 30. That was accepted by Chris Christodoulou in evidence. The claimant's counsel deftly attempted to get around her lay client's frank acceptance of the factual position by submitting that there must have been a demand for payment for those costs from the tenant prior to the order of District Judge Lightman of 19 October 2016. That, of course, is a *non sequitur* because whilst there may well have been a submission for an order for costs, which self evidently was successful by reason of the learned District Judge's order, there is no evidence that there was any *subsequent* demand for payment of those costs from Red Rooster."

The appeal

16. By a notice of appeal dated 25.5.2022, KC appealed the dismissal of part of the claim it had brought. It did not appeal the dismissal of the claim for the dilapidation costs. It appealed the dismissal of the claim for £193,661 which it had alleged were the legal costs arising from the judgment of DJ Lightman in October 2016: claim 612.

The Issues

17. There are two issues in this appeal.

18. Were the legal fees incurred by KC when successfully defending claim 612, brought by RRR for damages for unreasonable refusal to grant a licence to assign, covered by the Service Charges Clause on the proper interpretation of that clause?

19. If so, did KC comply with the clause by making a demand to RRR for the fees under the clause and did the pleaded case support the claim?

The Law and applying it to the facts

Construction of the Service Charge Clause

20. The editors of *Woodfall on Landlord and Tenant Law* advise as follows at para. 11/007:

> "**General approach to construction**
> The object to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations which each assumed by the contractual words in which they sought to express them. For this purpose, however, the intention of the parties must be objectively ascertained, and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. The actual intention of the parties is irrelevant; a court of construction can only give effect to what it perceives as the actual intention of the parties "if that intention appears from a fair interpretation of the words which they have used against the factual background known to them at or before the date of the lease, including its genesis and objective aim". *Philpots (Woking) v Surrey Conveyancers* [1986] 1 E.G.L.R. 97.
> In other words, the intention of the parties is not that which it may be supposed the parties wished to effect, but the intention which is expressed by the meaning of the words they have used.

> "The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of those words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve an ambiguity create an ambiguity which, according to the ordinary meaning of the words, is not there." *Melanesian Mission Trust Board v Australian Mutual Provident Society* (1996) 74 P. & C.R. 297, PC.

The general principles have been summarised as follows:

1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

2. The background is referred to as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to (3) below, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

3. The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification.

4. The meaning which a document would convey to a reasonable man is not the same thing as the meaning of its words. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even to conclude that, for whatever reason, the parties must have used the wrong words or syntax.

5. The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. *Investors Compensation Scheme v West Bromwich Building Society [1998] 1 W.L.R. 896 HL*." …

"These principles have been qualified in subsequent cases. It has been emphasised that commercial common sense cannot trump the

> words of the instrument, and that commercial common sense cannot be applied retrospectively. *Arnold v Britton* [2015] A.C. 1619."
> (I have not transposed all of the footnotes setting out the authorities for each paragraph).

21. In its skeleton argument KC relied on *ICS v West Bromwich* and *Arnold v Britton* to submit that the Judge was wrong to rule that legal costs arising from claim 612 were excluded. In oral submissions Mr Dovar went further and submitted that the Judge erred by interpreting the Service Charge Clause contra-proferentem the drafter – the Landlord – or his assignee - KC. Relying in particular in *Arnold*, in which Lord Neuberger ruled that:

> "23 Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in *McHale v Earl Cadogan* [2010] 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".

22. In *Woodfall* at para. 11.012 construction against the grantor is considered. The editors advise as follows:

> "**Construction against grantor**
> Where there is a doubt about the meaning of a grant, the doubt will be resolved against the grantor. Similarly words in a contract, particularly exclusion clauses, are construed against the person for whose benefit they are inserted. In the case of a lease, this usually means that ambiguities are resolved against the landlord. This does not mean that the court should lean in favour of deciding the case against the landlord's interest in the particular circumstances; rather it means that a lease should be construed, in case of ambiguity, in favour of giving the tenant more freedom rather than less. However, in the case of a lease, where the end product is often the result of drafting by both parties, the application of this principle may be entirely arbitrary. In addition the principle does not come into play unless the court finds itself unable on the material before it to reach a sure conclusion on the construction of a reservation or other contractual term. The presumption itself is not a factor to be taken into account by the court in reaching its conclusion on construction."

23. In *Arnold,* having eradicated the restrictive construction approach (factor seven, set out at para. 21 above), Lord Neuberger set out the 6 relevant factors for me to consider when interpreting the Service Charge Clause in paras. 16-22 as follows:

"17 First, the reliance placed in some cases on commercial common sense 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 common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18 Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

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

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

> Accordingly, when interpreting a contract a Judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.
> 21 The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.
> 22 Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* [2012] UKSC 240, where the court concluded that "any . . . approach" other than that which was adopted "would defeat the parties" clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract: see paras 21 and 22."

24. It is clear to me from this judgment that in law there is no general contra-proferentem rule when interpreting service charges clauses. The standard rules of construction apply.

25. KC also relied on the following case law examples: *Sella House v Mears* [1989] 1 EGLR 65. *Morgan v Stainer* [1993] 2 EGLR 87; *Freeholders of 69 Marina v Oram* [2011] EWCA Civ 1258; *Khan v Tower Hamlets* [2022] EWCA Civ 831. As a comparison I have found these cases useful.

26. In *Sella*, Dillon LJ dealt with a service charge clause which required the tenant to pay for the landlord: "to employ at the Lessors' discretion a firm of Managing Agents and Chartered Accountants to manage the Building and discharge all proper fees salaries charges and expenses payable to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents and service charges in respect of the Building or any parts thereof (ii) To employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building." The landlord sought the solicitors and counsel's costs of recovering the rent arrears. The Judge's ruling was that legal fees fell outside the clause and this was upheld on appeal. There was no reference in the clause to "proceedings" or to "counsel" or "solicitors".

27. In *Morgan*, the clause in issue provided that: "each tenant was to pay all **legal and other costs** that may be incurred by the landlord in obtaining the payment of maintenance contributions from any tenant in the building." (My emboldening). An action was taken by the landlord which the tenant substantially won save for small sums of money. The landlord was required to pay the costs and sought to recover those through the clause from the very tenant to whom the costs were ordered to be paid. David Neuberger QC,

sitting as a deputy, found against the landlord on two grounds. First a narrow construction of the words of the clause and (page 6):

> "Second, in connection with any dispute which gets to court between the landlord and any tenants the court would of course have the power to award costs in the normal way. Accordingly, giving para 5(b) a restrictive rather than a wider effect does not result in any great unfairness to the landlord. Should he be involved in proceedings under the lease, which involve him incurring costs which do not fall within para 5(b), the court would normally award him costs if his position was right in law. The protection afforded to the landlord by para 5(b) on costs to the extent that the court does not think it right to award him his costs should, in my view, be given a limited, rather than a wider, effect accordingly."

28. It might therefore be said that in his younger years Lord Neuberger was prepared to interpret service charge clauses restrictively and in his later years he was less inclined to do so.

29. In *69 Marina* the Lord Chancellor in the Court of Appeal ruled as follows:

> "20. … Liability under that covenant extends to:
> (a) "**expenses**…incurred by the landlord…in or in contemplation of **proceedings** under s.146…"; and
> (b) "…all solicitors costs … incurred by the landlord of and incidental to the service of all notices and schedules relating to wants of repair…".
> Given that the determination of the Tribunal and a s.146 notice are cumulative conditions precedent to enforcement of the Lessees' liability for the Freeholders' costs of repair as a service charge it is, in my view, clear that the Freeholders' costs before the Tribunal fall within the terms of clause 3(12). If and insofar as any of them may not have been strictly costs of the proceedings they appear to have been incidental to the preparation of the requisite notices and schedules." (My emboldening).

30. In *Khan,* Newey LJ was interpreting the following clause: "To pay to the Lessors all costs charges and expenses including **Solicitors' Counsels'** and Surveyors' costs and fees at any time during the said term incurred by the Lessors in or in contemplation of **any proceedings** in respect of this Lease under Sections 146 and 147 of the Law of Property Act 1925 or any re-enactment or modification thereof including in particular all such costs charges and expenses of and incidental to the preparation and service of a notice under the said Sections and of and incidental to the inspection of the Demised Premises and the drawing up of Schedules of Dilapidations such costs charges and expenses as aforesaid to be payable notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court." (My emboldening). The Court of Appeal ruled that legal costs were covered.

Analysis

31. In the case before me the Service Charge Clause has two relevant parts. Firstly, the definition of the charges recoverable. In my judgment the words clearly cover legal fees. Secondly, the activity for which the landlord may recoup and such the costs from the tenant. Here the Appellant is in difficulty. The activity is defined clearly as: "**any application or request** for any approval or consent". It does not say any proceedings arising in connection therewith. On a plane reading of the wording it did not cover proceedings.

32. In addition, there is no commercial, common sense need for the Court to interpret the clause to cover the legal costs of an action in Court because the Court would award them at the end of the claim to the correct party. So an objective bystander would say – "no this clause does not cover Court costs and does not need to be interpreted in such a way so as to say that it does".

33. Whether or not the Judge made an error in applying an interpretation which was too restrictive does not matter. In my judgment his interpretation was correct. The lease did not require the tenant to pay the court costs of claim 612 so the Respondent guarantor is not liable so to do.

Demands

34. The wording of the lease was clear. The words "on demand" were a pre-condition of the liability under the Service Charge Clause. KC now seeks to overturn the Judge's twin decisions that no such demand was made or pleaded. I consider that on a plain interpretation of the clause the demand must be made by or on behalf of KC to RRR.

35. The Appellant relied on para. 41.271 of *Chitty on Contracts* (online) which states:

> "Where the loan is repayable on demand, the making of a valid demand is a pre-condition of the debt becoming due. In order to constitute a valid demand:
>
> "there must be a clear intimation that payment is required …; nothing more is necessary, and the word 'demand' need not be used, neither is the validity of a demand lessened by its being clothed in the language of politeness; it must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect." (*Re Colonial Finance, Mortgage, Investment and Guarantee Corp Ltd (1905) 6 S.R.N.S.W. 6, 9*; cited with approval in *Re a Company [1985] B.C.L.C. 37* and in *Bank of Credit and Commerce International SA v Blattner Unreported 20 November 1986, CA.)*

36. I accept this as the general rule in relation to the form of the demand required.

37. The relevant demand is a demand for the costs of claim 612 which were in a sum to be assessed and which never were assessed, so I ask rhetorically, what sum was KC to demand? Without a sum could any demand be made?

38. In evidence the director of KC accepted that no demand had been made to RRR. KC had pleaded no demand in the particulars of claim. Nor could it, because it would be impossible to demand an unspecified sum (save for the interim costs of £30,000) and no

demand for those was pleaded. In addition, RRR had been dissolved by early 2018 so could not have received any demand. Mr Dovar, on behalf of KC, informed the Court that KC had applied to restore RRR to the register so that a demand could be delivered, if that was needed, were they to win this appeal. I found that approach to be a sensible one.

39. I do not consider that a Court order for costs constitutes a demand by KC to RRR within the meaning of the covenant. I do not consider that the Judge made any error either of law or of fact when ruling that the Appellant had made no demand to RRR. I consider that even if the Service Charge Clause did allow for the recovery of legal fees, which I consider on its true construction it did not, the fees had not been demanded so the pre-condition had not been fulfilled.

40. As to ground 3 of the appeal, serious procedural irregularity in relation to the way the Judge viewed the pleadings and the evidence of KC's director, the decisions above make that ground unarguable and in any event I do not consider that the Judge was wrong to approach the pleading and the evidence as he did.

Conclusions

41. Under CPR r. 52.21(3) this Court can overturn the judgment if it was wrong or unjust due to a serious procedural or other irregularity.

42. The Judge properly interpreted the scope of the Service Charge Clause and decided, rightly, that it did not cover the legal fees claimed. In addition, the pleading of KC (the Appellant) did not set out that the fees had been demanded and the evidence did not support a demand made to RRR. The assertion that the Judge's costs order was a demand does not fulfil the criteria in my judgment.

43. Surprisingly, KC has never applied to have the fees assessed and has broken the 3 month requirement to apply for assessment. So the sum owed by RRR and which potentially might have been owed by the Respondent as guarantor (which in my judgment was not so owed under a proper interpretation of the clause) was completely unknown for 6.5 years and remained so on the date of the appeal. I pass no comment on whether any effort now to start the long overdue assessment would have been be permitted under CPR r.44.11 in the light of the Appellant's flagrant breaches of the CPR rules governing the costs assessment procedures.

44. In my judgment neither ground was made out. I dismiss the appeal on all grounds.

END