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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00/00BE/LSC/2015/0466**
Property	:	**Peabody Estate, Camberwell Green, London SE5 7BD**
Applicants	:	**The Governors of The Peabody Trust**
Representative **Also in attendance**	:	**Ms T O' Leary- Counsel** **Mr S Shillingford- Asset Management surveyor** **Ms Ruchi** **Mr S Collins- Peabody Leaseholder Compliance**
Respondent	:	**The 26 Long leaseholders of the Peabody estate**
Representative **Also in attendance**	:	**Mr F Sadiq** **Mr & Mrs Jones** **Ms Julia Evans** **Miss J Garioni*{not sure if in attendance but noted by me as lessee}*** **Mr A Shillam - Leaseholders**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge Daley** **Mr S Mason FRICS**
Date and venue of Hearing	:	**26 February 2016 at 10 am 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**13 April 2016**

DECISION

Decisions of the tribunal

(1) The tribunal makes the determinations as set out in paragraphs 59-83 of this Decision

(2) The tribunal notes the circumstances in which this case was brought, and the Applicant's assertion that legal costs would not be sought as a service charge. Nevertheless. The Tribunal considers that in all the circumstances it is reasonable to make an order under section 20C of the Landlord and Tenant Act 1985] [so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge]

The application

1. The Applicant sought a determination pursuant to s.27A(3) of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the respondents' liability to pay a service charge in respect of the projected cost of replacing the window and door frames of the long leaseholders flats.

2. Directions were given on 11 December 2015. The Tribunal noted that-: *"The issue raised is one of pure lease interpretation. If the tribunal finds in favour of the Applicant the respondent will still be entitled on a separate application to challenge the reasonableness of the actual cost of the work."*

3. At the case management conference on 11 December, The Tribunal noted as follows-: *"... the applicant is proposing to replace all the window and door frames on the estate other than those in the respondents' flats at a cost of £190,000. However it proposes to recover part of the cost from all the long leaseholders under the service charge provisions of their leases. Thus if the applicant's interpretation of the respondents' lease is correct the respondents will have to contribute towards the cost of replacing the window and door frames in the other flats on the estate even though their window and door frames will not be replaced.*

4. The Tribunal directed that if both sides are represented they should exchange skeleton arguments and copy authorities by 19 February 2016.

The background

5. The Applicant owns the freehold of land and buildings at and known as Peabody Estate Camberwell Green London Se5 7BD ("the Estate"). The

Estate comprises blocks A-P, excluding Block I) with flats arranged in terraces of three.

6. There are forty seven (47) flats on the Estate held on long leases; the remainder of the flats are held under tenancy agreements.

7. Twenty one (21) of the long leases have excluded from the respective leaseholders' demise, the windows and external doors, and frames. The remaining twenty six (26) of the long leaseholders have leases which demise the windows and their frames and the internal and external doors and their frames to the leaseholders.

The issue

8. The sole issue is as set out in paragraph 2 of the decision.

The Hearing

9. At the hearing the Applicant was represented by Ms O'Leary. The Respondents were represented by Mr Sadiq. Mr Sadiq stated as a preliminary matter that Mr Shillam wished to address the Tribunal on a specific point that was no longer being pursued by Mr Saddiq on behalf of the Respondents. Ms O Leary stated that she objected to that course of action. Whilst she accepted that there was a degree of informality applied to the Tribunal proceeding, she stated that the general position was that unless a party was giving evidence, matters were dealt with through counsel, if this was departed from then every leaseholder would have a right to address the Tribunal.

10. The Tribunal determined that it would not hear separately from Mr Shillam unless it became clear during the hearing that there was substance in the issue that he wished to advance, and that the Tribunal would derive assistance from hearing from him.

11. Ms O' Leary informed the Tribunal that of the properties the applicable service charge contribution varied from7.14 % to 12 %. The Blocks were of various ages, and the major work related to two of the blocks on the estate.

12. In the statement of case, the Applicant stated that the works commenced on 19 October 2015 and are due to be completed in December 2016.-: 6. "*...The works include, inter alia, the supply and fit of double glazed purpose made softwood sash windows and hardwood cills to all leaseholder flats where the window frames are reserved to the Applicant, and the repainting and redecoration of the door frames of all leaseholder flats where the frames have been reserved to the Applicant. These works will also be carried out on all tenanted flats together with supply and fit of one hour fire doors to the front*

entrance of the tenanted flats. In effect the works programme will concern all window frames and all external door frames on the Estate other than those in the Respondents' leaseholds..."

13. Ms O'Leary stated that there was no application under section 27A of the 1985 Act on the reasonableness of the costs of the work. The Application was made solely on the basis of the interpretation of the contract.

14. Counsel referred to the leaseholders leases as type A leases in her Skeleton argument she referred to the following lease terms-: "The Flat is described as including:"*1 The windows of THE FLAT and their frames 2 The internal and external doors their frames and glass therein*

[...] 10 The glass in all window frames and the internal fixtures and fittings of the windows"

15. Counsel noted that "The Building" was defined as "*the building of which THE FLAT forms part known as Block [X] Camberwell Estate",* and marked on an attached plan" and that this was the only definition of the building. "... other sub-sets of "the Building" are – e.g. "Building Common Parts")."

By Clause 3(A) (1) (b) the leaseholder covenants to pay to the landlord "*The SERVICE CHARGE (calculated as in clause 4(H))"* This entails the following definitions:

The Service Charge is defined as "*the sum of THE ESTATE SERVICE CHARGE and the BUILDING SERVICE CHARGE"* **[36];**

The Building Service Charge is defined as "*The Building Service Charge Percentage set out in the Particulars of the cost (whether incurred prior to the grant of this Lease or otherwise) of providing THE BUILDING SERVICES together with all professional fees [...] [etc.]"*

a. The Building Services are defined as "*the services set out in Schedule 2"* Schedule 2 provides as follows:

"*1 Keeping in such repair and decorative order as is reasonable having regard to its class and age replacing with new including reinstatement renewal and replacement and where appropriate rebuilding where necessary:*

(1) Roofs foundations and main structure of the BUILIDNG and all external parts thereof and including all load bearing walls and their interior surfaces

(2) CONDUITS serving the BUILDING but excluding such as exclusively serve THE FLAT or OTHER FLATS and such as belong to any statutory undertaker or utility supplier

(3) the BUILDING COMMON PARTS

and also excluding anything that the tenant or any other tenant is under an obligation to repair and maintain under the terms of this or their lease

> *Provided that where the landlord undertakes major or structural works such works may include the replacement renewal or restoration of windows of the FLAT or OTHER FLATS and such doors as give access to THE FLAT and OTHER FLATS"*
>
> 'Other Flats' are defined as "*Other flat(s) and dwellings in THE BUILDING or the Estate as applicable*" **[34]**.
>
> By Clause 4(A) the landlord covenants to "*provide the BUILDING SERVICES and ESTATE SERVICES*". By Clause 4(C) it covenants to "*Carry out all improvements to THE BUILDING and to THE ESTATE which the Landlord shall in its absolute discretion consider appropriate or necessary*" **[47]**.
>
> By Clause 4(J) the landlord also covenants as follows **[49]**:
>
> *"The landlord while OTHER FLATS shall not for the time being be let under a lease in the same terms of this lease (mutatis mutandis) the landlord shall as far as practicable be liable to make such payments and observe and perform such obligations as the tenant will be liable to make observe and perform if the OTHER FLAT were so let."*

16. Counsel noted that the other 21 leaseholders had the benefit of type B leases. In her skeleton argument counsel stated-: *The leases are substantially similar, except that the following are included within the demise of the Flats (with the important differences from the Class A Leases underlined):*

> *"1 The windows of THE FLAT and <u>the internal surfaces of</u> their frames*
>
> *2 The internal and external doors of THE FLAT and the glass therein <u>the frames of the internal doors and the internal surfaces of the frames of the external doors</u>" ".The definition of the "Building Common Parts" also differs between Class A and B Leases. The definition of Building Common Parts in the Class A Lease is silent as to windows, doors and frames. In the Class B Lease, the Building Common Parts are defined as including "...and the door frames and window frames of THE FLAT and THE OTHER FLATS (excluding the windows or glass therein and the internal surfaces thereof)".*

17. Counsel noted in paragraphs 23 and 24 of her skeleton argument that *"The Tribunal must determine the liability of the 26 Respondent*

leaseholders to pay, as part of the service charge, a proportion of the cost of replacing and refurbishing windows, window frames, doors and door frames within individual flats other than those flats leased to the Respondents (i.e. those flats on the Class B leases and the Short Term Leases). However, a different but important way of asking the same question is to determine whether the Landlord's repairing responsibilities for the purposes of calculating the service charge under the Class A Leases extend to the doors, windows and their frames of "the Other Flats". The Applicant's position is that in the ordinary scheme of things the answer to this question must be yes:"

18. In Ms O'Leary's submission the Landlord was responsible for the repairing of the doors and windows of the 21 flats which had not been demised to the leaseholders. In counsel's submission the obligations of the leaseholders of the 26 flats in which the windows were demised to them was to contribute to the service charges which included all of the building costs, including the costs of repairing windows frames and door frames which had not be demised to the 21 leaseholders under the terms of the lease. This was expressly so, even if they did not benefit from the scheme of work, as the landlord was proposing that their windows and doors would not be up graded.

19. Ms O'Leary accepted that clause 1(3) *Provided that where the landlord undertakes major or structural works such works may include the replacement renewal or restoration of windows of the FLAT or OTHER FLATS and such doors as give access to THE FLAT and OTHER FLATS"* Gave the landlord the right to replace the existing windows within the 26 flats so as to ensure that the design and appearance of them was in harmony with the building. However, in her submission, whether this work was undertaken was at the absolute discretion of the landlord, and as such could not be relied upon by the tenant as a requirement conferring on the leaseholders the right to have their windows and doors replaced in accordance with the proposed scheme.

20. Counsel in her skeleton argument cited the case of *Southend-on-Sea v Skiggs* [2006] 2 EGLR 87 (LT). Noting that the jurisdiction of the Tribunal was to determine whether a service charge was payable; that is whether the liability exists. This was in counsel's view distinct from the Tribunal concluding in its discretion what liability *should* exist between the parties. In counsel's submission there was no discretion as to fairness, when considering the issue of whether under a construction of the lease the service charge was payable.

21. In Paragraph 17 page 7 of the Southend decision (referred to above) His Honour Judge Huskinson stated *"... I consider this to be confirmation that Section 27A was introduced to confer jurisdiction on leasehold valuation tribunals to decide the legal rights of parties on points which previously could only have been dealt with by the county court. This is quite different from conferring discretion on the leasehold*

valuation tribunal to adjust these legal rights in such manner as the leasehold valuation tribunal may think just and equitable."

22. Ms O'Leary submitted that the terms of the lease were clear and unambiguous. She stated that the recent case of *Arnold-v- Britton* and others (2015) A.C gave useful guidance on how to interpret unclear clauses of a lease. In this case the clauses of the lease were extremely harsh in the results that they produced. In paragraph 15 page 1627 Lord Neuberger in his judgement stated – " When interpreting a written contract , the court is concerned to identify the intention of the parties by reference to " *what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*" Referring to the quote Lord Hoffman in *Charterbrook Ltd v Persimmons Homes Ltd (2009)* Lord Neuberger stated -: " *That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause(ii) any other relevant provisions of the lease(iii) the overall purpose of the clause and the lease(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."*

23. Lord Neuberger gave seven factors that were useful in considering interpretation. At paragraph 19 page 1628, Lord Neuberger *stated "... The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of its parties is not a reason for depart from the natural language..."* In paragraph 23 of Britton Lord Neuberger stated-: *" I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if 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 fact that the lease is easier for the Landlord to address does not of itself mean that the term is inherently flawed.

24. In reply, counsel for the respondent, Mr Saddiq, stated that *Arnold and Brittan* added nothing that was new to the question of interpretation which arose in this case. Counsel referred to the terms of the lease in Brittan he stated that the language used in the lease was incredibly clear, there was no ambiguity. Mr Saddiq stated that when faced with the terms of a lease which were clear, the literal interpretation could be applied even if it appeared to be unjust. However a literal interpretation could not be applied where the result was absurd. In those cases the parties were required to look beyond the literal meaning to ascertain if they could find the actual meaning.

25. He referred the Tribunal to page 1627 15 H of *Brittan* He stated that it was necessary to look at the whole document, and to consider the

purpose, the facts and the surrounding circumstances if the circumstances were known.

26. Counsel in his skeleton argument also referred to Chapter 13 of Chitty on Contract (31st Ed), he stated that -: *the following principles of construction have been recognised by the courts: The function of contractual interpretation is to ascertain the objectively determinable intentions of the parties when contracting – having regard to the relevant factual matrix: Para 13-043*

(a) Where a literal construction would result in absurdity, inconsistency, is clearly an obvious linguistic mistake, or would result in an unreasonable result, a literal construction is not to be preferred: Para 13-056

(b) When construing any phrase / clause in a contract, regard is to be had to the whole contract: 13-065

(c) The courts are entitled to read the contract with modifications in the case or error or to make sense of the contract: 13-077

(d) The courts are entitled to correct grammatical errors when construing the contract: 13-083

(e) The contract is to be construed against the grantor: 13-086

27. Counsel for the Respondent accepted that section 27A of the 1985 Act could not be used to rectify the lease. Mr Saddiq stated that the whole lease should be considered and that this might mean that it was necessary to look beyond the normal meaning of the words used. Counsel referred to 13-077 which set out the principle that the terms of a lease could be modified to avoid an obvious absurdity.

28. Mr Saddiq submitted that on a whole reading of the lease it was clear that the use of the wording *or* in clause 1 (3) should be read as *and. Provided that where the landlord undertakes major or structural works such works may include the replacement renewal or restoration of windows of the FLAT* **or** *OTHER FLATS and such doors as give access to THE FLAT and OTHER FLATS"* Counsel in his skeleton argument stated in paragraph 25-:

(i) The use of the word "or" in the sub-clause "...the replacement renewal or restoration of windows of the FLAT or OTHER FLATS..." is to be contrasted with the use of the word "and" in the subsequent sub-clause "such doors as give access to THE FLAT and OTHER FLATS".

(ii) *The "or" could be read as indicating that when replacing windows, A can recover for replacing the windows to the flat* ***or*** *the windows to the other flats but not both.*

(iii) *The "and" could be read as indicating that when replacing doors, A can recover for replacing the doors to the flat but only when it is also replacing the doors to the other flats.*

29. Counsel submitted that the lease contained an implied fetter on the landlord's power to charge service charges. He submitted that the landlord cannot recover where it would not be fair, or reasonable.

30. Counsel for the Applicant Ms O'Leary stated that there was broad agreement between the parties on the principles to be applied concerning interpretations of a lease, however counsel did not accept that the terms of the lease fell within the principles set out in *Chitty*. Ms O'Leary noted that counsel accepted that the definitions set out in the lease. Likewise the terms of the lease which set out the tenant's duties and the service charge provisions were also accepted.

31. Insofar as the lease referred to *building common parts,* it was accepted that the building was either repairable by the landlord or the leaseholder under the leaseholder obligations. Where it was repairable by the landlord, then the service charge contribution from the leaseholder in accordance with the service charge clause applied.

32. Counsel submitted that clause 1 (sub clause 3) provided the landlord with a degree of flexibility in that the landlord could choose to overrule the tenant's choice of windows, notwithstanding that the tenant owned and was responsible for the upkeep of the windows.

33. Counsel argued that the landlord could choose not to carry out works of replacement or refurbishment of the windows to the type A leaseholders' flats. Given this, the use of the wording *or*, in sub clause 3, rather than *and* was not inconsistent. For example any communal door naturally fell within the definition of other doors, although it may appear unfair, given the definition of building services, this could include other windows and doors that were owned by the landlord for the benefit of other leaseholders or occupiers.

34. Counsel, Ms O'Leary did not accept that there was absurdity; that is that the natural wording of the lease would in her view lead to an absurd interpretation. In her view the wording of the clause provided

the landlord with a wide degree of flexibility, the clause read as it was intended to be read as a broadly phrased clause.

35. Mr Saddiq stated that this was a strong area of disagreement between the parties. He stated that there was no rule that the service charges had to cover all of the costs incurred by the landlord. There were some costs that the landlord might have to bear themselves. Given this it did not automatically follow, that if the landlord was responsible for window repairs for some flats within the building that all of the leaseholders were required to contribute to the costs.

36. Counsel for the Respondents noted that the Applicant stated that the lease was carefully crafted and as such delineated flat from building. And that the obligations were defined He referred to the fact that the Applicant had stated that that clause 3 intended the lease to provide a subsidy. Mr Saddiq took issue with this. He referred the Tribunal to schedule 3 of the lease which set out the landlord's responsibility in relation to the Estate Services. Clause 1 (3) of schedule 3 was similarly worded to sub-clause 3. There were 193 flats on the estate in approximately 15 blocks. Given this a literal interpretation of the lease as accepted by the Applicant was that you could replace all of the windows and external front doors and seek to say that the type A leaseholders were obliged to contribute to the costs of these replacements without receiving the benefit of having their windows replaced. Applying such an interpretation created an absurdity.

37. Counsel Mr Saddiq referred the Tribunal to paragraph 27 of his skeleton argument-: *The lease was drafted with the intention of requiring the tenants to pay for the services from which they were to derive a benefit.*

It was never the intention of the parties that A was to be able to derive a profit or subsidise its major works by having the Rs pay for works that they would not benefit from.

38. The meaning of the lease was clear even if the wording was ambiguous the Applicant could replace the windows and doors of the type A leaseholders' flats or those of the other flats or was synonymous with 'either' and the addition of *'and'* was only engaged when major works were being carried out. This was because where major works were undertaken the landlord could take away the tenants' rights to object to the scheme or assert their rights as owners of the windows and doors of their flats. The landlord was able to replace all of the windows and doors of the block and the tenant was required to contribute to the costs of the scheme.

39. The normal course of events was that the type A leaseholders were responsible for the costs of their window and door replacement this clause was an exception carefully crafted to allow the landlord to over-ride the leaseholders' rights.

40. The background to the landlord's application was that upon until of July last year all windows and doors were to be replaced. There was an open day held in April. In the witness statement of Joanna Jones one of the leaseholders, at paragraph 10, Joanna Jones stated-; *10. The Applicant (and its contractor Vinci) held an open day on 30/04/2015. Those of the Respondents who attended the open day were informed that all windows on the whole estate would be double glazed as part of the major works. None of us were told that our windows would not be replaced. At this point the Applicant did not give any indication of estimated costs of the major works. None of us were told that our windows would not be replaced. At this point the Applicant did not give any indication of estimated costs of the major works even when expressly asked by those Respondents who attended."*

41. Counsel stated that this was confirmed by a note of the meeting prepared by Julia Evans, which was exhibited in the bundle. Counsel stated that at some point between 30 April and the Application being made. The Applicant's position changed and they decided to argue that the lease amount to a "bad bargain" for the Respondents.

42. Ms O'Leary did not accept that this was the Applicant's position. She stated that the Applicant had considered the lease, and in the light of their conclusions wanted to ensure that the terms were construed appropriately.

43. In reply to the point made by Counsel concerning schedule 3 of the lease, Ms O'Leary did not accept his interpretation. Ms O'Leary noted that the percentage contribution for estate service charges was much smaller, given this it would not have the effect that Mr Saddiq suggested. Presumably this referred to windows and doors which might be part of the estate such as a caretaker's flat. Counsel for the Applicant stated that the major works clause was in her view largely redundant in schedule 3 clause (3). It was also strange that this provision was in the lease, as in her view it did not add anything to the lease.

44. In relation to the use of the word "*or*" this did not make the clause in the lease absurd. The meaning was that which a reasonable person would have understood it to mean.

45. Counsel Mr Saddiq in his skeleton argument set out that terms could be implied into the lease, in paragraph 28 of the skeleton argument he stated-: "*... A term can be implied into a lease where the term is necessary for the efficacy of the lease and / or the implied term would*

have been viewed as obvious to an objective bystander: Chitty on Contract (31st Ed), Paras 14-001 to 14-011."

46. In Chitty on Contract Implied Term paragraph 14-005 "*In many cases where it is sought to imply a term as a matter of fact, one or other of the parties will seek to imply a term from the wording of a particular contract and the facts and circumstances surrounding it. The court will not make a contract for the parties... Traditionally, an implication of this nature may be made in two situations: first where it is necessary to give business efficacy to the contract, and secondly, where the term implied represents the obvious, but unexpressed intention of the parties...*"

47. Mr Saddiq stated that the obvious but unexpressed intention could be discerned by using the test of an objective bystander.

48. Ms O'Leary stated that there was no evidence of what parties intentions were, regardless of business efficacy or what was intended by the parties. Ms O'Leary referred to terms that had been implied by parliament or the courts by case law or legislation. Parliament has implied terms by way of Landlord and Tenant legislation, Had Parliament intended to imply further terms limiting service charges contributions and the circumstances in which they can be paid then parliament would have done so.

49. Counsel Mr Saddiq, referred to the *Unfair Terms in Consumer Contracts Regulations 1999*. He stated that the terms still applied for contracts entered into up to the repeal of the Act in 2015. It was accepted by the Applicant that the legislation applied to the Peabody Trust. It was clear that it would not assist all of the leaseholders, for example it would not assist professional landlords as it only applied to consumers

50. Regulation 5 of the Unfair Terms regulations stated-: *5 (1) A contractual term which has not been individually negotiated shall be regarded as unfair if contrary to the requirement of good faith, it causes a significant imbalance in the parties rights and obligations arising under the contract to the detriment of the consumer.*

51. Schedule 2 of the unfair contract terms referred to an indicative and non –exhaustive list of the terms which may be regarded as unfair. Mr Saddiq stated that the effect of the terms was that the type A leaseholders subsidised the Applicant's flats. Counsel referred to regulations 8(1) and Reg 7(2) In particular in regulation 7(2) if the terms were considered unfair the provisions permitted you to read the terms down. However, this would not benefit non consumers such as professional landlords, and accordingly the leaseholders who owned more than twoproperties and was therefore classed as a professional landlord, would not benefit from the terms of the regulation.

52. Counsel referred to *Levitt and Levitt and L B of Camden (2011) UKUT 366,* in this case, the unfair contract terms were considered by Her Honour Judge Wadden Smith, who found that although the unfair contracts terms applied to service charges provisions of the lease, that in the Camden case, they were not unfair, as they were not contrary to the requirements of good faith. Counsel Ms O'Leary stated that similarly in this case, the type A lease was not contrary to good faith.

53. Counsel for the Applicant accepted that the Unfair Contract Regulations legislation applied to The Peabody trust as landlords. She did not however accept that the terms caused a significant imbalance between the parties. She stated that all of the leaseholders stood to benefit from the repairs as they stood to have a building which was significantly improved. In paragraph 48 of her skeleton argument, she referred to guidance that was derived from case law-:

54. *Taking into account the guidance provided in Director General of Fair Trading v First National Bank plc [2001] UKHL 52 [at paras. 17, 36-37, 45 and 54], it is submitted that the service charge is neither contrary to the requirements of good faith nor creates a significant imbalance between the parties:*

(i) *The fairness or unfairness of the contract must be examined in the context of the bargain which the lease strikes as a whole;*

(ii) *The service charge mechanism imposes burdens on the leaseholders by allowing the landlord on the one side to recover costs, but on the other confers reciprocal rights for the leaseholders who benefit from having a well-run and maintained property;*

(iii) *It is not open to the leaseholders to identify certain aspects of the mechanism which are less attractive or beneficial to them and claim they are 'unfair'; the scheme must be looked at in the round;*

Tenants are commonly required to contribute to works which do not directly affect their flat or from which they take no direct benefit. Consider the tenant of a ground floor flat who must contribute to the cost of roof repairs or the maintenance of a lift for which he has no need, or the tenant who must as a matter of fact contribute towards structural work to remedy damp which is unlikely ever to reach his flat...";

55. In conclusion counsel stated in paragraph 48 of the skeleton argument that-: "... *The service charge mechanism is expressed in plain and intelligible language. As stated at para. 34(f) of this Skeleton, above, a reasonable reader of the Class A Lease having all of the background knowledge which would have been available at the time would have understood that the Landlord had to repair all parts of the Building, and would have been entitled to recover back via service charge,*

proper work to all parts of the structure which other tenants were not themselves liable to do and pay for."

56. Mr Saddiq did not accept that there was a benefit to the type A leaseholders, he referred the Tribunal to two a letters sent to Mr J P Jones& Miss J Bullock. The letter dated 9 July 2015 dealt with the Respondent's estimated cost for the major works which was in the sum of £23,679.76.

57. The letter dated 7 July 2015, dealt with the additional costs to the type A leaseholders. In the letter from Clive Morrison the Leasehold Compliance & Revenue Officer, the leaseholders were informed that -: *"According to your lease agreement the windows to your flat are your responsibility to repair and renew. Certain leaseholders have however expressed an interest in Peabody carrying out this work. The following estimated costs will apply if you were interested in having your windows replaced...Total Cost £16,800..."*

58. Mr Saddiq in conclusion stated-: *"If the Class A leases do entitle R to recover service charge in the manner contended, this causes a significant imbalance in the rights and obligations of the parties. A is, in effect, able to compel the Rs to subsidise works to its own properties in circumstances where the Rs derive no notional or actual benefit from the works.*

The Rs contend that:

Pursuant to Reg. 7 of the 1999 Regulations, the FTT ought to interpret the Class A leases of those tenants that are consumers in the manner most favourable to them. This requires the FTT to construe the leases as per Paragraph 27(e), above.

Pursuant to Reg.8 of the 1999 Regulations, if the lease cannot be construed in the manner contended for by Para.27(e), the relevant parts of Para.1 of Sch.2 and 3 are not binding on those Rs that are consumers.

The Rs submit that the FTT ought not to accept the construction of the Class A leases contended for by A.

The tribunal's decision and Reasons for the tribunal's decision

59. The Tribunal asked the parties for their submissions in respect of whether a section 20 C order ought to be made. Ms O' Leary stated that the Applicant would not be seeking costs. The Application was applied for in order to determine whether the Applicant's interpretation of the contract was correct prior to the works being finalised.

60. The Tribunal noted this and stated that in the circumstances, the Applicant would then have no objection to a Section 20C order being made. The Tribunal also considered that this matter raised important issues both for the benefit of the Applicant and the Respondent, and that in all the circumstances it was just and equitable for an order to be made.

61. The Tribunal accepts the submissions of Mr Saddiq on behalf of the Respondent, that there is ambiguity in the wording of the lease, and in order to give effect to the wording of clause 1(3) finds that it is necessary to interpret the word ***or*** in clause 1(3) as ***and***. So that the clause in its application would read as-:

62. *Provided that where the landlord undertakes major or structural works such works may include the replacement renewal or restoration of windows of the FLAT* ***and*** *OTHER FLATS and such doors as give access to THE FLAT and OTHER FLATS."*

63. The tribunal noted that both the Respondent and Applicant in their submissions accepted that there was ambiguity in the terms of the lease. The Tribunal noted that although the Applicant stated that the wording of the lease was clear, Counsel in her submission, stated that the wording of schedule 3 which applied to the estate charges was in many ways unnecessary and redundant in that it repeated the wording of 1(3) of the lease in its use of ' flats or other flats'

64. Given the ambiguity of the wording the Tribunal considered that it was necessary to look beyond the mere linguistic meaning of the clauses in the lease. In doing so the Tribunal were assisted by the tests set out by Lord Neuberger in Arnold-v- Britton at Paragraph 15 H, in referring to interpreting the contractual provisions of the lease, Lord Neuberger stated -: *"... [M]meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause (ii) any other relevant provisions of the lease,(iii) the overall purpose of the clause and the lease (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed and (v) commercial common sense, but, (vi) disregarding subjective evidence of any party's intention..."*

65. The Tribunal noted that in relation to the premises there were three classes of occupants, those who occupied pursuant to a tenancy agreement, and those who had a leasehold interest pursuant to a type A lease and finally those who had a legal interest pursuant to a type B lease.

66. The Tribunal is aware however of the nature of the Applicant landlord in clause 11 of the specimen B lease. Clause 11 which deals with Declarations states-: *The landlord is a Housing Association and registered social landlord registered with the Housing Corporation under the Housing Act 1996 registered number L0014.*

67. The Tribunal were not given any background information as to why the two leases were different or as to chronologically which came first, accordingly the tribunal has not speculated as to what the answer to these questions might be, or what information can be derived from this about the intention of the parties.

68. The Tribunal have noted that both parties accept that although the windows and doors are owned by the Applicant, clause 1(3) has the effect of allowing the landlord to override the ownership of the windows and doors where a scheme of major work is to undertaken.

69. The Tribunal notes that in accordance with the terms of the lease, it is possible that windows have been replaced by the leaseholder over the years, the effect of this clause is to allow the landlord when undertaking major works to regulate, what may have become a piecemeal looking building by harmonizing the exterior of the building, and in the event of undertaking major work to impose uniformity in the standard and nature of the windows and doors. This is an important provision which preserves the structure and integrity of the building.

70. The Tribunal noted that the service charge provisions are limited in that they merely calculate the sum payable by the tenant by reference to *"THE ESTATE SERVICE CHARGE and the BUILDING SERVICE CHARGE"* The Provisions then go on to exempt any charge that relates to-:"*...anything that the tenant or any other tenant is under an obligation to repair and maintain under the terms of this or their lease..."*

71. This would in the normal course of events exclude the windows and doors of the type A leaseholders. However the proviso set out in clause 1(3) enables the landlord to bring the windows and doors within the scope of the major works, for all of the reasons that have been set out above.

72. The Tribunal, have also noted the curious wording of clause 5 A in both the type A and B leases which states -: *A The landlord may change the BUILDING SERVICES and the proportions specified in the BUILDING*

SERVICE CHARGE and ESTATE SERVICE CHARGE in the interests of good estate management of if THE ESTATE OR THE BUILDING may be enlarged or reduced or anything happens that would make it appropriate to do so."

73. Accordingly in applying the test set out by Lord Neuberger, the Tribunal have considered clause 1(3) firstly, in the light of its natural and ordinary meaning, by doing so the Tribunal has determined that the clause as it reads is ambiguous, and that the tribunal must go further in order to correctly determine the meaning of the lease provisions.

74. In leaving aside the other relevant provisions of the lease, and considering for a moment the overall purpose of the clause and the lease, the tribunal notes that the nature of the premises is such that it is subject to mixed ownership and that the majority of the dwellings are tenanted and are for the purpose of social housing. The clause itself is to enable the landlord to continue to control the standard of workman - ship and structure of the building, which in the Tribunal's view is control that is to be exercised for the benefit of the occupants.

75. In the statement of case at paragraph 6 the Applicant stated-: " *The works included, inter alia, the supply and fit of double glazed purpose made softwood sash windows and hardwood cills to all leasehold flats where the window frames are reserved to the Applicant... These works will also be carried out on all tenanted flats together with supply and fit of one hour fire doors to the front entrance doors of the tenanted flats."*

76. In the response to the Respondent's letter dated 7 August 2015 (the collective observations the applicant's employee *stated "... We are unable to agree that the proposals are of little or no benefit to residents. We believe there will be a significant positive impact... We are aware that leaseholders doors will not be replaced as part of the works... for fire safety purposes we would prefer if all leaseholders properties would install fire safety doors of similar specifications..."* it was clear to the Tribunal that the purpose of changing the doors is to improve on the safety of the occupants by reducing the spread and impact of fire.

77. This leads on to point (iv) of *the Neuberger test* the facts and the circumstances known to the parties. The Tribunal notes that the Applicant is a social landlord, and given this, it would surprising if the landlord intended that the wording would create a circumstances were the type A leaseholders were required to subsidise the landlord by contributing service charges which are entirely for the benefit of the socially owned flats, and flats where the window and door frames are owned by the landlord.

78. The lease itself also appears to provide for circumstances which may mean that the landlord may enlarge or reduce the building. This would give rise to a situation in which the overall service charges might change if the landlord decided that it was in the interest of good estate management.

79. Given this, it would appear to the Tribunal that the landlord may choose to invoke clause 1(3) and replace all the windows and doors and invoke clause 5(A) and enlarge Building services so as to include the work to the type A leased flats within the scope of building services and accordingly recover under the building services charge for the work undertaken to the type A lease windows and doors, or decide not to carry out the work on the type A leased flats and change the proportions specified in the building services charge, so as to require only those leaseholders who have received the work to contribute to the costs of the replacement windows and doors, excepting of course, the inclusion of any communal windows and doors.

80. In the tribunal's view, even if the tribunal is wrong concerning the meaning of the lease,(which is not accepted; then in the Tribunal's view, the wording of clause 5(A) enables the Applicant to take the decision that good estate management requires only those who will benefit from the work to contribute to the costs.

81. The Tribunal having determined that it was necessary to look beyond the words used in the lease, and having done so, has reached the determination set out above.

82. Accordingly, the Tribunal found that it was not necessary to consider the terms of the 1999 Regulations, insofar as whether the terms were unfair, and if so, how these provisions were to be applied.

83. The Tribunal makes no findings of whether the provisions applied in this matter.

Application under s.20C and refund of fees

84. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines] [Although the landlord indicated that no costs would be passed through the service charge, for the avoidance of doubt, the tribunal nonetheless determines] that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Name: Judge Daley **Date:** 13 April 2016

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement, to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
  (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
  (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
  (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
  (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
  (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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

Leasehold Valuation Tribunals (Fees) (England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
  (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to a leasehold valuation tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).

Schedule 12, paragraph 10

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—
(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
(a) £500, or
(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.