UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – Service Charges- failure of demand to comply with section 47 Landlord and Tenant Act 1987- whether legal costs of tribunal proceedings and costs of surveyor recoverable pursuant to service charge clause in lease- reimbursement of tribunal fees – appeal allowed in part

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

BETWEEN:

(1) PATRICK CANNON
(2)TAMARA CANNON

Appellants

- and -

38 LAMBS CONDUIT LLP

Respondent

Re: 38 Lambs Conduit Street,
London
WC1N 3LD

His Honour Judge Bridge

Royal Courts of Justice, London WC2A 2LL
on
12 July 2016

The Appellant *Mr Patrick Cannon* appeared in person
The Respondent was represented by *Mr Kester Lees* of counsel.
The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36
Assethold Ltd v Watts [2014] UKUT 0537
Beitov Properties Ltd v Elliston Bentley Martin [2012] UKUT 133 (LC)
Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101
Francis v Philips [2014] EWCA Civ 1395
Geyfords v O'Sullivan [2015] UKUT 683 (LC)
Iperion Investments Corp v Broadwalk House Residents Ltd [1995] 2 EGLR 47
Johnson v County Bideford Ltd [2012] UKUT 457 (LC)
London Borough of Brent v Shulem B Association Ltd [2011] EWHC 1663 (Ch)
MacGregor v BM Samuels Finance Group plc [2013] UKUT 471 (LC)
McHale v Earl Cadogan [2010] EWCA Civ 14, [2010] 1 EGLR 51
Reston Ltd v Hudson [1990] 2 EGLR 51
Sella House Ltd v Mears [1989] 1 EGLR 65
Tedla v Cameret Court Residents Association Ltd [2015] UKUT 0221 (LC)
Union Pension Trustees Ltd v Slavin [2015] UKUT 0103 (LC)
Willow Court Management Co v Alexander [2016] UKUT 290 (LC)

DECISION

Introduction

1. This is an appeal by Mr and Mrs Cannon by way of review against a decision of the First-tier Tribunal Property Chamber (Residential Property) ("the F-tT") dated 25 September 2015. The appeal is brought with the permission of this Tribunal granted on 4 February 2016.

2. The dispute between the parties concerns the recovery of service charges claimed by the respondent to this appeal. After a long running dispute, the F-tT determined that certain sums (contributions to the costs of a surveyor's report and to the landlord's legal costs in tribunal proceedings) were payable by the appellants and refused to make an order in their favour under section 20C of the Landlord and Tenant Act 1985. The F-tT made no order as to costs of the Tribunal proceedings under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The appellant now challenges all these rulings by this appeal.

3. At the hearing of the appeal the first appellant, a barrister specialising in stamp duty land tax, appeared on his own behalf and for Mrs Cannon. The respondent was represented by Mr Kester Lees of counsel. I am very grateful to them both for their assistance.

The facts

4. From the Decision of the F-tT and the primary documents contained in the agreed bundle, I adopt the following as the facts forming the basis of my decision in this appeal.

5. The respondent owns the freehold of the Building known as 38 Lambs Conduit Street, London WC1N 3LD. The appellants are the long leaseholders of a maisonette on the first, second and third floors of that building. The appellants' Lease is dated 27 May 1996 and grants to the Lessee a 99 year lease of the first second and third floors of 38 Lambs Conduit Street (the premises) from 29 September 1995 to 28 September 2094, at a premium, the rent reserved being £250 pa exclusive subject to review.

6. The ground floor and basement are let on a commercial lease to a clothing company, J Crew. There are therefore two tenants in the premises as a whole, one residential unit being occupied by Mr and Mrs Cannon and one commercial unit being occupied by the clothing company.

7. The respondent landlord acquired the freehold of the premises in May 2013. At that time, the service charges were apportioned as to 40% to the commercial unit and 60% to the residential unit. This apportionment was contested by Mr and Mrs Cannon who believed that they should not pay such a large share and that apportionment based on floor area was not appropriate where there was mixed commercial and residential use. There was also a dispute about whether the commercial tenants should be paying more than the residential tenants

towards the cost of buildings insurance. The landlord consulted a surveyor Mr Mark Hoffman FRICS who advised on 6 December 2013 that (having reviewed the Service Charge Code 2nd edition) the only logical and recommended basis of apportionment was floor area.

8. At this time, the landlord was seeking to impose on Mr and Mrs Cannon by way of service charge £3,300 annually, a sum which included a management fee of £2,500. The latter was challenged by Mr and Mrs Cannon who offered to pay an annual management fee of £500 instead. The offer was rejected by the landlord who continued to claim the higher sum until after the date that tribunal proceedings were commenced by Mr Cannon in February 2015.

9. Eventually another surveyor, Mr Eric Shapiro FRICS, FCIArb, was instructed by the landlord, and he reported to them in writing ('the Shapiro Report') on 15 January 2015. In his Report, Mr Shapiro advised that a management fee of £2,500 pa was unjustified and that it should be no more than £250 pa. He confirmed by a later letter (6 February 2015) that apportionment of the repair expenditure giving rise to the service charge should be in proportion to the floor areas of the two units, that with regard to external decoration the total cost should be apportioned according to the number and size of the windows, and that in relation to repairs and decorations the managing agent should be entitled to charge a fee for managing the works which should be apportioned in the same percentages as the expenditure was apportioned. He also gave specific advice on the issue of apportionment of the insurance premium.

10. When the Shapiro Report was disclosed to Mr and Mrs Cannon, they accepted the new management fee and sought to compromise on the issue of service charge apportionment. The apportionment ultimately agreed was based on floor area, being 63.9% to the residential unit and 36.1% to the commercial unit. The proportions were not those given in the Shapiro Report, as there was some remaining dispute about the accuracy of the measurements of the respective floor areas of the two units upon which Mr Shapiro relied.

11. These matters took time to resolve, but in March 2015 a credit note was issued in the sum of £7,645.97 to the appellant and on the same day a revised invoice was issued in the sum of £2,696.52. As recorded by the F-tT, this reduction was due to the respondent reducing its management charge from £2,500 to £250 pa following the advice obtained from Mr Shapiro.

12. Proceedings before the F-tT were commenced by Mr and Mrs Cannon on 13 February 2015, before they received the Shapiro Report. The application for a determination of liability to pay and reasonableness of service charges, made under section 27A of the Landlord and Tenant Act 1985, asked the F-tT to consider service charges payable for 2013, 2014 and 2015. The tenants, required to provide a list of the items of service charge in issue stated:

> Quarterly "on account" service charge of £825 per quarter plus annual buildings insurance of £896.16 (no itemised service charge accounts having been supplied by the Respondent).

13. The tenants indicated in the terms of the application that they wished the F-tT to decide upon the apportionment of the landlord's expenses as they did not accept an apportionment

based on floor area and the apportionment of the insurance costs as commercial use involving retail premises was more risky than private residential occupation.

14. It seems that these particular issues had been resolved prior to the Case Management Conference held on 10 March 2015. A Scott Schedule was directed, and from the replies elicited, the issues which remained included the floor area measurements to be used for the apportionment process and the ground rent payable. These issues were in turn resolved before the application came before the F-tT for hearing on 10 June 2015. By that time, the remaining issues requiring determination by the F-tT were:

(1) Whether Mr and Mrs Cannon could lawfully be required to pay one half of the fee for the Shapiro Report;

(2) Whether the legal fees amounting to £16,000 incurred by the respondent in the course of the dispute were recoverable under the terms of the lease;

(3) If the legal fees were recoverable, whether the F-tT should make an order under section 20C of the Landlord and Tenant Act 1985;

(4) Whether it should make any order for costs pursuant to rule 13 of the Property Chamber Rules 2013.

15. As at the date of the hearing, the landlord had not served service charge notices which were properly compliant with section 47 of the Landlord and Tenant Act 1987. The F-tT decided that the landlord's legal costs were not recoverable as an administration charge because, by the date of the hearing, no valid demand (that is, a demand which complied with section 47 of the Landlord and Tenant Act 1987) had been made. While that decision is not challenged by the landlord, I must consider the effect of non-compliance with section 47 generally on the application being made before the F-tT.

Section 47 of the Landlord and Tenant Act 1987: failure to comply

16. Mr Cannon submits that as a consequence of the respondent's admitted non-compliance with section 47 the F-tT had no jurisdiction to decide that legal costs were recoverable as a service charge and that it was therefore wrong of the F-tT to make the decision that it did.

17. Section 47(1) of the Landlord and Tenant Act 1987 provides (so far as is relevant) that where any written demand is given to a tenant of premises to which Part VI of that Act applies the demand must contain the landlord's name and address. It is accepted that this provision is engaged in the circumstances of this case.

18. By section 47(2):

Where-

(a) a tenant of any such premises is given such a demand, but

(b) it does not contain any information required to be contained in it by virtue of [section 47(1)],

then… any part of the amount demanded which consists of a service charge ('the relevant amount') shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant.

19. Mr Cannon submits that the effect of section 47(2) is that, unless and until a valid demand is made, the service charge is not due. That being the case, the F-tT could not exercise jurisdiction under section 27A of the Landlord and Tenant Act 1985 as it purported to do. If section 47(2) was engaged, it followed that the service charge was not 'payable'.

20. Section 27A provides:

An application may be made … 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.

21. Section 27A(2) states that the above applies 'whether or not any payment has been made', and section 27A(3) permits an application for a similar determination if costs were incurred for services (etc.) of any specified description. Section 27A(4) prohibits applications where matters have been agreed or admitted by the tenant, have been the subject of determination by a court or an arbitral tribunal or have been or are to be referred to arbitration.

22. Mr Cannon has referred me to the decision of the Upper Tribunal in *MacGregor v BM Samuels Finance Group plc* [2013] UKUT 471. He submits that this decision illustrates the correct approach which should have been taken by the F-tT in the circumstances of this case. He concedes that the F-tT could have offered its view (*obiter*) on the reasonableness of the legal costs in the event of a valid demand being made in due course but contends that the F-tT erred in law when it decided that the legal costs were recoverable as a service charge.

23. The point being made by Mr Cannon is a technical point, which is not to say that it is necessarily without merit. He does not (and could not) contend that he is in any doubt who his landlord is, or that he has any difficulty in communicating with him. Far from it, there is extensive and wide-ranging correspondence between him and the landlord from the time the respondent acquired the freehold reversion in 2013. It is somewhat ironic that it is his application which has put the F-tT in the position where he claims it lacks jurisdiction.

24. The purpose of section 47 is two-fold, as explained by the Tribunal in *Beitov Properties Ltd v Elliston Bentley Martin* [2012] UKUT 133 (LC) at [9]: to enable the tenant to be sure of the landlord's identity by providing an address at which he can be found, and to provide the tenant with an address at or through which he can communicate with him. It is for this reason that the Tribunal held in *Beitov Properties* that it is the address of the landlord, and not the address of the landlord's agent, that must be provided.

25. The effect of section 47(2) is aptly described as 'suspensory' by the Tribunal in *Tedla v Cameret Court Residents Association Ltd* [2015] UKUT 0221 (LC) at [38]. Any service charge (or other sum) is treated as not being due 'at any time before the information is furnished by the landlord by notice given to the tenant.' This clearly carries the implication that, all other things being equal, the service charge will become due when the tenant is given written notice by the landlord of the landlord's name and address. That can be done at any time. As stated in *Tedla* at [38], 'From the time at which such a notice has been given the service charges will be treated for all purposes as being due' from the tenant to the landlord.

26. Unless and until a compliant notice is served, the service charge will not be due. It is possible that the lease contains specific requirements concerning the demand which, if not fulfilled, may mean that no demand at all has been made: *London Borough of Brent v Shulem B Association Ltd* [2011] EWHC 1663 (Ch). But in the absence of any such contractual requirements, a demand which does not comply with section 47(1) may nevertheless be treated as a demand: *Johnson v County Bideford Ltd* [2012] UKUT 457 (LC).

27. Section 20B of the Landlord and Tenant Act 1985 imposes a time limit on making demands for payment of service charges: where any 'relevant costs' have been incurred more than 18 months before a demand for payment is served on the tenant, then the tenant shall not be liable to pay so much of the charge as reflects the costs so incurred. Where a demand is served on the tenant which does not comply with section 47, it is treated as a demand, with the effect that the landlord's claim to payment of the service charge will not be statute barred: see *Johnson v County Bideford Ltd*, above. However, in order to bring a successful claim for the service charge owing, the landlord will have to serve a section 47 compliant notice on the tenant. In *Johnson*, the Tribunal made reference to this at [10] when the President stated,

> An invalidity that arises by virtue of a failure to comply with the requirements of section 47(1) is… one that can be corrected and can be corrected with retrospective effect.

28. A similar issue arose in *MacGregor v BM Samuels Finance Group Ltd*, above. On an application under section 27A of the 1985 Act, the F-tT determined that a building insurance premium was payable pursuant to service charge provisions contained in a lease. On appeal to the Tribunal, it was conceded by the landlord that no demand compliant with section 47 of the 1987 Act had been served by the landlord on the tenant and that the premium was not therefore currently payable. That was, on the basis of the authorities considered above, a correct concession. It was however contended by the landlord that such non-compliance could be corrected 'retrospectively' by the service of another notice. The tenant disputed this, submitting that as more than 18 months had elapsed since the premium had been incurred it was too late for the landlord to take effective remedial action.

29. The Tribunal took the view (at [64]) that the landlord would not be prevented in principle by section 20B from correcting the invalidity of the original demand for payment of the insurance premium with retrospective effect. The Tribunal, as it acknowledged, did not have the benefit of detailed submissions, and it proceeded with due caution, but I consider that its reasoning is sound. I agree that there is nothing in section 20B which would prevent the landlord from correcting the invalidity of the original demand at some time later than the 18 month time limit.

30. In this case, the question is different as it concerns the relationship between section 47 of the 1987 Act and section 27A of the 1985 Act. The question is whether non-compliance with section 47 deprives the F-tT of jurisdiction it would otherwise have to make a determination under section 27A.

31. I do not consider that a failure to comply with section 47 has such an effect. Section 27A is intended to provide a low cost, easily accessible machinery for dispute resolution. It is facilitative, enabling parties to resolve whatever their service charge dispute may be by referring the issue to the tribunal. The provision itself is, consistent with this objective, widely drawn. The tribunal is required to consider the provisions of the lease, and then to consider whether 'a service charge' is 'payable'. If it is 'payable', then the tribunal may be asked to determine the persons by or to whom it is payable, the amount payable, and (significantly for this case) the date at or by which it is payable. It does not have to be satisfied that the charge is payable here and now (the appropriate word might be 'due').

32. Section 47 has a quite different purpose, as I have explained above. That purpose is achieved by requiring the landlord, as a pre-condition to successful enforcement of the service charge, to provide the tenant with his name and address in writing. Unless and until that is done, then the charge is not 'due'. But it does not follow that where the charge is not due, the F-tT cannot consider an application under section 27A. As long as there is a service charge, the F-t T may be asked, and required to answer, the questions that naturally arise. If a demand has been made which does not comply with section 47, but the F-tT takes the view, having considered the application, that the tenant is otherwise obliged to make payment under the service charge, it retains jurisdiction. It may determine that the charge (which it may quantify if required to do so) is payable if and only if a section 47 compliant demand is served by the landlord on the tenant.

33. In my judgment, the contentions of Mr and Mrs Cannon in relation to section 47 are not sound and the F-tT had ample jurisdiction to make a determination pursuant to section 27A of the Landlord and Tenant Act 1985.

Legal costs

34. The largest amount in issue between the parties is the sum of £16,000. This sum represents a claim for legal costs incurred by the landlord before and during the F-tT proceedings. A demand was first made for these costs on 21 May 2015, an invoice being issued by Wellbeck Asset Management who act for the landlord. Mr Cannon requested the F-tT to consider the issue of the landlord's legal costs in the course of its determination, and the F-tT obliged, holding that the legal costs were recoverable under the service charge provisions of the tenants' lease and that the sum claimed was a reasonable sum. It should be noted at this stage that while Mr Cannon accepts (subject to the issue of liability) the quantum claimed, he does not accept that the work done by the landlord's solicitors was reasonable or necessary. I shall put this contention on one side for the time being.

35. The issue of the recoverability of the landlord's legal costs pursuant to a service charge in the lease is one that has been aired with increasing frequency before the courts and tribunals in recent years. As a consequence, there are a number of previous decisions to which I have been referred in the course of legal argument. It must be said that the precedential value of previous decisions may be limited, when one takes into account the nature of the task faced by a court or tribunal in deciding whether legal costs are so recoverable. It may assist therefore, before I consider the arguments further, to set out the general principles upon which I am expected to act. I proceed with caution, conscious of the prudent health warning administered by the Tribunal in the recent decision of *Geyfords v O'Sullivan* at [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 outcome.

36. Whether a landlord is entitled to recover legal costs which have been incurred in relation to tribunal proceedings depends upon the true construction of the provisions of the lease upon which reliance is placed. There are no special rules of interpretation applicable to service charge clauses which should be construed as any other written contractual provision. Those principles were set out by Lord Neuberger in *Arnold v Britton* at [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 Ltd v Persimmon Homes Ltd* [2009] AC 1101 at [14]. And 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 common sense, but (vi) disregarding subjective evidence of any party's intentions.'

37. What must be construed is the particular clause in the particular lease of the particular property. It is this important point which often renders the decisions in previous cases which concerned different clauses in other leases of other property unlikely to be of much assistance and of limited precedential value. In determining the natural and ordinary meaning of a clause from the point of view of a reasonable person with the relevant background knowledge, the court or tribunal is to apply commercial common sense and to take into account the context of the grant. But as Lord Neuberger emphasised at [17] it is important that the language of the provision should not be undervalued by over reliance upon commercial common sense and the surrounding circumstances. Context is not therefore everything.

38. In *Francis v Philips* [2014] EWCA Civ 1395 at [74], Sir Terence Etherton C made the point 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'. While this does not mean that service charges are to be construed restrictively (see Lord Neuberger in *Arnold v Britton* at [23]) or *contra proferentem,* the court or tribunal should not 'bring within the general words of a service charge clause anything which does not clearly belong there.': see Rix LJ in *McHale v Earl Cadogan* [2010] EWCA Civ 14, [2010] 1 EGLR 51 at [17]. This same point is made in the somewhat older case of *Sella House Ltd v Mears* [1989] 1 EGLR 65 where Taylor LJ required 'clear and unambiguous terms' before he would permit a landlord to claim the legal costs of proceedings against defaulting tenants from another tenant who had paid his rent and service charges in compliance with the terms of his lease. With these principles in mind, I turn to the provisions of the lease and what the respective contentions of the parties.

39. Mr Lees contends that the landlord's legal costs are recoverable. His claim is based upon the following provisions of the tenants' lease.

40. Under the terms of the demise, the lessee covenants to pay throughout the term the rent and, by clause 3.2, the Service Charge 'payable on the days and in the manner prescribed by clause 4.31 and the Sixth Schedule.'

41. By Clause 4.31 the lessee covenants:

> "To pay to the Lessor without any deduction a fair proportion (to be fairly determined by the Surveyor) of the expenses (including Architects' and Surveyors' fees) and outgoings

> incurred by the Lessor in the repair maintenance renewal and insurance of the Building and the provision of services therein and the other heads of expenditure as the same are referred to or set out in Clause 5.3 and the Sixth Schedule hereto such additional rent ("the Service Charge") being subject to the following terms and provisions …"

42. Clause 5 of the Lease contains the Lessor's covenants, being covenants to insure, to permit quiet enjoyment, and to repair the exterior and structure of the Building. The Sixth Schedule is titled 'Costs Expenses Outgoings and matters in respect of which the Lessee are to Contribute', in relation to which Mr Lees places specific reliance on paragraphs 1 and 4:

> 1. All reasonable costs and expenses incurred by the Lessor for the purpose of complying with or in connection with the fulfilment of its obligations under the terms of clause 5 of this Lease.
>
> 4. The cost of management of the Building including (without prejudice to the generality of the foregoing) all accountancy management agents' surveyors' and audit costs and the establishment of such reserved funds as the Lessor's Managing Agents shall consider reasonably desirable.

43. Mr Lees accepts that there is no specific reference in these provisions to the costs of lawyers or litigation. However, he submits that that is not necessary, and that when one considers what the proceedings were about, the costs incurred by the landlord in instructing and engaging solicitors can and should be fairly characterised as 'a cost of management' within paragraph 4. While his case is primarily based on that provision, he contends that the landlord's legal costs are also recoverable by reference to paragraph 1, that is as a reasonable cost or expense incurred by the landlord in connection with the fulfilment of its obligations (in particular its repairing obligations).

44. Mr Lees submits that the principal issue in the proceedings before the F-tT was the apportionment of liability to pay for the services as between the residential unit and the commercial unit. He makes the point that the issue of the excessive management fee being charged to Mr and Mrs Cannon had been resolved before proceedings were commenced and that the issue of apportionment- together with the closely related issue of liability for the fees of Mr Shapiro- was essentially all that remained following their commencement. He submits that the proper apportionment of liability between the two parts of a building which contained only one residential tenant was an issue of management and that the costs of resolving that issue incurred by the landlord fall therefore squarely within the Sixth Schedule and Clause 4.31.

45. It is accepted that there is no hard and fast rule that legal costs cannot be recovered where the clause relied upon employs 'general words', making no specific mention of legal costs. That much is clear from *Assethold Ltd v Watts* [2014] UKUT 0537 which was a decision relied upon by Mr Lees. In *Assethold Ltd v Watts*, the Tribunal was required to consider whether legal costs incurred by the landlords in engaging solicitors to obtain an injunction, restraining a neighbour from carrying out works potentially damaging to the tenants' building without first obtaining a party wall award, could be recouped from the tenants. The words in the tenants' lease were

general, the tenant being obliged to pay as a service charge an agreed percentage of the 'Annual Expenditure' which included 'all costs expenses and outgoings whatever reasonably and properly incurred by the Landlord during the Financial Year in or incidental to providing all or any of the Services'. The Services included an obligation on the Landlord 'to do or cause to be done all works installations acts matters and things as in the reasonable discretion of the Landlord may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Development.'

46. The Tribunal adopted an orthodox approach to construction of the lease, emphasising at [55] that the 'proper question was not whether specific, or 'magic', words appeared in the paragraph, but whether the costs in question had been incurred for the purposes mentioned in the paragraph.' The Tribunal concluded that the solicitors' costs incurred in the landlord's defence of the building were recoverable from the tenants. In doing so, it did make reference to the importance of clarity at [58]:

> I accept that, as a general principle of interpretation, if contracting parties intend that a payment obligation such as a service charge should cover a particular type of expenditure they will wish to make that clear. Unclear language should therefore be read as having a narrower rather than wider effect. Nonetheless, I do not think that principle should be pushed to the point where language which was clearly intended to encompass expenditure in a wide variety of situations which the parties have not explicitly catalogued should be so restrictively construed as to deprive it of any real effect. It seems to me to be wrong in principle to start from the proposition that, with certain types of expenditure, including the cost of legal services, unless specific words are employed no amount of general language will be sufficient to demonstrate an intention to include that expenditure within the scope of a service charge. Language may be clear, even though it is not specific.

47. The Tribunal concluded that, although there was no specific reference to the costs of legal services, the language of the lease was sufficiently clear to permit recovery of the legal costs expended by the landlord in bringing proceedings against the neighbour for the benefit of the tenants of the building.

48. On his part, Mr Cannon has made reference to two decisions of this Tribunal subsequent to *Assethold Ltd v Watts*, namely *Union Pension Trustees Ltd v Slavin* [2015] UKUT 0103 (LC) and *Geyfords v O'Sullivan* [2015] UKUT 683 (LC).

49. In *Union Pension Trustees Ltd v Slavin*, the landlord sought to recover from the tenant the legal costs it incurred in the course of prior tribunal proceedings before the LVT. The relevant words relied upon by the landlord were contained in clause 5(4)(g):

> …any other costs and expenses reasonably and properly incurred in connection with the landlord's Property including without prejudice to the generality of the foregoing (a) the cost of employing Managing Agents and (b) the cost of any Accountant or

> Surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder.

50. The Tribunal dismissed the landlord's appeal from the F-tT which had disallowed its claim in this regard. The Deputy President stated at [61]:

> Looking at the service charge provisions of the lease as a whole, the costs of managing and administering the Building and the employment of professionals is covered extensively in clause 5(4)(g). Entirely absent from that clause is any reference to lawyers or the cost of proceedings. While I agree that the absence of a specific reference to legal expenses is not fatal, provided there is other language apt to demonstrate a clear intention that such expenditure should be recoverable, when considering the scope of any general words relied on for that purpose it is necessary to have regard to other relevant provisions of the lease.

51. The Tribunal took into account the fact that there were other provisions contained in the lease which made express reference to solicitors' and counsel's costs incurred in connection with specific categories of legal proceedings (sections 146 and 147 of the Law of Property Act 1925). It also had regard to the date of the grant of the lease, 1981, long before tribunals were resolving service charge disputes in a 'largely costs-free environment' and when disputes over liability would be heard in the county court with costs orders usually being made against the unsuccessful party:

> The idea that leaseholders should be collectively responsible through the service charge for litigation costs which had not been recovered from one or more of their number with whom the landlord had been in dispute would not have been at all obvious.

52. In *Geyfords v O'Sullivan*, a similar claim was made under a service charge clause to recover the expenses of legal proceedings between the landlord and the leaseholders. In this case, the clause permitted the recovery from the tenant of:

> 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.'

53. The Tribunal accepted that 'management' may sometimes include obtaining legal advice and that it might in some circumstances involve litigation, the particular example given being that of *Reston Ltd v Hudson* [1990] 2 EGLR 51 where the costs of proceedings commenced by the landlord to establish whether the repair of external windows in the building was its responsibility were held to fall within 'the cost of management of the estate'. In the words of the Tribunal in *Geyfords* '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 every leaseholder.' However, the Tribunal distinguished *Reston Ltd v Hudson* on the facts, holding at [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'.

54. The Tribunal then considered, as it had in *Union Pension Trustees Ltd v Slavin*, other relevant provisions in the lease and the 'relevant statutory landscape' as it existed at the time of the grant (in this case 1978). It concluded that the clause at para 52 above was insufficiently clear to demonstrate an intention that the service charge should cover costs incurred by the landlord in bringing or responding to legal proceedings over the extent of the leaseholders' liability to pay.

55. Mr Lees has sought to support his submissions with reference to the 'relevant statutory landscape' at the time of the grant of the lease. The lease was granted on 27 May 1996. The introduction of what was referred to in *Slavin* as a 'largely costs-free environment' followed the enactment of the Housing Act 1996 which obtained Royal assent on 24 July 1996 and which made significant amendments to existing legislation regulating residential tenancies. Mr Lees contends that the changing legislative climate can and should be taken into account as a factor affecting those engaged in the formulation of provisions contained in the lease. It is not material that the legislation was not yet enacted or implemented as a competent draftsperson would be aware of the impending changes and would make appropriate provision to accommodate them. Mr Lees goes further and seeks to append to the statutory landscape current at the time of the grant the state of the common law as it then was, making the point that the decisions in *Reston Ltd v Hudson* (referred to above) and *Iperion Investments Corp v Broadwalk House Residents Ltd* [1995] 2 EGLR 47 were relatively recent and in the collective consciousness of those engaged and advising upon the proper formulation of the terms of the lease.

56. I have some reservations about this approach. First, as I have already said, it is important that in the exercise of construction, an exercise which is focussed primarily upon discerning the intention of the parties from the natural and ordinary meaning of the words they have used, that meaning is not distorted by over-reliance on decisions in other cases, almost inevitably construing different clauses in different leases in different factual contexts. Secondly, while I am not dealing with a lease which was granted many years before the advent of the tribunals' jurisdiction (as in both *Slavin* and *Geyfords*) where the contracting parties could safely be assumed to have expected that a successful action against a defaulting tenant would have led inexorably to costs liability being imposed on that individual, I do not accept that I can make any solid assumptions to the contrary. The lease was granted in 1996 before the jurisdictional changes took place. The parties to the lease may or may not have been aware that it was soon to become easier to have disputes concerning service charges resolved without party and party costs orders being made. I therefore consider that the legal 'landscape' as at the date of the grant is a factor which should attract limited weight when one comes to ascertain the meaning and effect of the words of the lease.

57. Returning to the lease itself, Mr Cannon has urged me to take into account when construing it certain other provisions which make express reference to lawyers and their costs. It is clearly right and proper that I should do so, as it is my duty to interpret the lease as a whole.

He takes me to Clause 4.22 where the Lessee covenants to pay and to indemnify the Lessor against:

> all reasonable costs fees charges disbursements and expenses properly incurred by the Lessor including but not limited to those payable to solicitors counsel architects surveyors and bailiffs
>
> 4.22.1 In relation to or in contemplation of the preparation and service of a notice under section 146 of the Law of Property Act 1925 and of any proceedings under section 146 or 147 of that Act (whether or not any right of re-entry or forfeiture has been waived by the Lessor or a notice served under 1.46 is complied with by the Lessee or the Lessee has been relieved under the provisions of the Act and notwithstanding forfeiture is avoided otherwise than by relief granted by the court.
>
> 4.22.2 In relation to or in contemplation of the preparation and service of all notices and schedules relating to wants of repair whether served during or after the expiration of the Term (but relating in all cases only to such wants of repair to occur not later than the expiration or sooner determination of the Term).
>
> 4.22.3 In connection with the recovery or attempted recovery of arrears or rent or other sums due from the Lessee or in procuring the remedying of the breach of any covenants by the Lessee.
>
> 4.22.4 In relation to any application for consent required or made necessary by this lease (such costs to include reasonable management fees and expenses) whether or not the same is granted (except in cases where the Lessor is obliged not to unreasonably withhold its consent and the withholding of its consent is held to be unreasonable). Or whether the application be withdrawn.

58. Mr Cannon submits that these provisions clearly entitle the landlord to charge to the tenant legal costs (that is, solicitors' and counsel's costs) which have been incurred in the particular circumstances specified. In so doing, they cast important light on the intended scope of the service charge clause in the sense that the parties, while willing expressly to cater for the recovery of legal costs in these specific instances, made no such reference to such costs in the Sixth Schedule. I should emphasise that it has not been contended by the landlord at any stage that the provisions of Clause 4.22 give any right to recovery of legal costs in relation to the current claim.

Conclusion

59. I approach construction of the tenants' lease in this case asking whether it is sufficiently clear to demonstrate an intention of the parties that the lease as a whole, and the service charge clause in particular, permits recovery of the legal costs incurred by the landlord in the course of the proceedings before the F-tT.

60. There is no express reference to the recovery of the landlord's legal costs in these circumstances. That is not by any means fatal to the landlord's claim, but it is a consideration that I must take into account. It is for the landlord to establish that the clear intention of the parties to the lease as stated in the words used was that legal costs would be recoverable, and in the absence of express words there is no doubt that the landlord has a more difficult task to perform.

61. I do not accept that the landlord's legal costs are captured by the words of paragraph 1 of the Sixth Schedule. If I accept the landlord's contention, as I am prepared to do, that the principal issue between the parties in the tribunal proceedings was the apportionment of service charge between the residential and commercial units I do not see how it can be said without considerable departure from the natural and ordinary meaning of the words used that the landlord's legal costs were 'for the purpose of complying with' the fulfilment of its obligations to insure, to confer quiet enjoyment and or to repair (the three obligations contained in Clause 5 of the lease). The landlord has a slightly stronger case to argue that the landlord's legal costs were 'in connection with' the fulfilment of those obligations, but I still do not accept it. The necessary clarity of the wording is absent.

62. Nor do I accept that the landlord's legal costs are captured by the words of paragraph 4 of the same Schedule. The term 'the cost of management of the Building' is general and unspecific. The clause qualifies the term by stating certain costs which are intended to fall within it, none of which are legal costs, and no reference is made to solicitors or to counsel, although specific reference is made to other professionals either directly (management agents and surveyors) or obliquely (accountants and auditors). I accept that this is not intended to be a comprehensive list of the costs that are recoverable as costs of management ('including' prefacing the costs listed) and there are, in parentheses, words ('without prejudice to the generality of the foregoing') which emphasise this point. I am tempted to the view that those words are 'meaningless verbiage' as the Tribunal put it in *Union Pension Trustees v Slavin* at [64] although I recognise that it is important to consider words even of such vacuity in the context in which they are set.

63. The provisions of the Sixth Schedule contrast starkly, in their generality, with the highly specific language of Clause 4.22 which as has been shown clearly indicates specific circumstances in which legal costs incurred by the landlord are recoverable. A comparison between the two sets of provisions confirms me in my view that the parties cannot have intended the cost of legal proceedings between landlord and tenant to be included within the scope of the general words contained in the Sixth Schedule.

64. I have referred above to a number of previous decisions, expressing as I have done my concerns that previous decisions are unlikely to carry a great deal of precedential weight. I do not find *Assethold Ltd v Watts* of particular assistance. The clause was more general than that in this case, there were no provisions in the lease akin to Clause 4.22, and the legal costs claimed related to proceedings between the landlord and a third party which had obvious benefits for the tenants of the building. *Reston Ltd v Hudson*, above, was decided principally with reference to a very wide clause allowing for recovery of 'All outgoings, costs and expenses whatsoever which the lessor might reasonably incur in the discharge of its obligations…', and, again, there were no

provisions elsewhere in the lease specifically permitting recovery of legal costs in other circumstances. Mr Lees also referred me to *Iperion Investments v Broadwalk House Residents Ltd* [1995] 2 EGLR 47, a decision which, with the benefit of judicial hindsight, now fits somewhat uneasily with the weight of other authority. The Court of Appeal held in favour of a landlord that legal costs incurred against a defaulting tenant in the course of ultimately unsuccessful forfeiture proceedings could be recoverable from the tenants as a whole by means of a service charge as a 'proper cost of management of the property' although there was no specific reference made in the lease to recovery of the costs or expenses of lawyers. It is perhaps not surprising that the Court then exercised its discretion under section 20C of the 1985 Act to direct that these costs be excluded from the service charge.

65. Taking all these matters into account as I have done, Mr Lees has failed to persuade me that the intention of the parties to the lease, as expressed by the words used, and giving those words their natural and ordinary meaning, was to allow the landlord to recover the legal costs of tribunal proceedings between itself and its tenants. I doubt that the F-tT had the benefit of the extensive legal argument afforded to me in the course of this appeal, and I note that it found itself able to deal with this issue in a single paragraph without any reference to authority of any kind. I consider, however, that the decision of the F-tT to allow recovery of those costs was wrong and in the circumstances the tenants' appeal must be allowed in this regard.

66. I mentioned above the tenants' contention that, even if legal costs were recoverable under the service charge provisions as a matter of principle, the costs being claimed were not 'reasonably incurred'. As I understand the argument advanced by Mr Cannon in this respect, it is based upon the landlord's failure to comply with section 47 of the Landlord and Tenant Act 1987 in making its demand for the service charge. Mr Cannon submits that if no section 47 demand had been served, it could not be said that the legal costs incurred in seeking to establish that the charges claimed were payable were reasonably incurred, the landlord's lawyers not acting as any reasonable lawyers would have done.

67. I do not consider that this argument has any merit, principally for the same reasons that I have explained above when considering the potential impact of a demand failing to comply with section 47. I mention this here in deference to the parties' submissions. It has no effect on the outcome of the appeal insofar as it relates to the claim for the landlord's legal costs.

Surveyors' fees: the Shapiro Report

68. Mr Cannon resists the claim by the landlord that he should be required to pay under the service charge provision of the lease a proportion of the fee for the report prepared by Mr Eric Shapiro and disclosed to him shortly after he commenced proceedings before the F-tT.

69. Mr Lees contends that the tenant is clearly liable to pay, as Clause 4.31 makes express reference to the expense of 'Surveyors' fees', that Mr Shapiro is a surveyor (that much is not in dispute), and that his report was instrumental in resolving one of the main areas of dispute between the parties.

70. It is necessary to outline briefly the background to the Shapiro Report. Mr Cannon and the landlord disagreed about the method of apportionment being used in relation to the service charge liability. Mr Cannon had expressed his concern about the level of management fees being charged to the tenants by the landlord. Mr Hoffman gave the landlord advice in December 2013 in the form of an email which was forwarded to Mr Cannon. There were continuing discussions (and disagreements) between Mr Cannon and the landlord's managing agents and solicitors over the months which followed until Mr Cannon threatened the landlord that he would make an application to the F-tT. Mr Shapiro was then instructed by the landlord, he provided a report, and that report was disclosed to Mr Cannon. By the time the report was disclosed, the application had been made to the F-tT.

71. Mr Cannon denies that he is liable to pay for the Shapiro Report. He contends that the landlord had appointed Mr Hoffman as its surveyor as it was entitled to do under Clause 4.31 of the lease. That was made clear to Mr Cannon by an email from the managing agent dated 6 December 2013 which indicated that Mr Hoffman was being treated as the Surveyor for the purpose of Clause 4.31. It was not open to the landlord thereafter to appoint another surveyor in order to have 'a second bite at the cherry' when it became clear that Mr Hoffman's advice had not been effective in resolving the differences between the parties.

72. Mr Lees contends that the fees for the Shapiro Report were reasonably incurred and are recoverable pursuant to Clause 4.31. He submits that the Hoffman advice was provisional only, that it was not following a formal instruction under Clause 4.31, and that it was Mr Cannon's refusal to accept Mr Hoffman's advice which led the landlord to instruct Mr Shapiro. Mr Shapiro's recommendations were ultimately acted upon, Mr Cannon conceding in the course of the tribunal proceedings that the apportionment of the service charge should be effected by reference to floor area, and the landlord conceding that it had been charging an excessive management fee.

73. No challenge has ever been made to the reasonableness of the fee charged by Mr Shapiro. Moreover, as observed by the F-tT, the landlord only invoiced Mr Cannon for 50% of Mr Shapiro's fees rather than the agreed apportionment of 63.9%.

74. I agree with the F-tT that there is nothing in the lease which restricts the number of occasions upon which a surveyor might be retained. I do not accept that once the landlord had instructed one surveyor (albeit a surveyor whose costs it did not seek to recover under the service charge) it could not instruct another. I do not consider there is any basis for such an argument in the terms of the lease.

75. I do not find Mr Cannon's submissions at all persuasive or indeed attractive. Mr Cannon was never invoiced for Mr Hoffman's fees (indeed, Mr Lees appeared to indicate that Mr Hoffman has never charged the landlord for the advice he gave in December 2013). The principal beneficiary of Mr Shapiro's report was Mr Cannon, as it is absolutely clear that the disclosure of that report led to the substantial reduction of the annual management fee being charged to him from £2,500 to £250.

76. In my judgment, the landlord was entitled to seek to recoup Mr Shapiro's fees from the tenant under Clause 4.31. I do not consider that the F-tT can be criticised for finding that these were costs that were reasonably incurred and that Mr and Mrs Cannon were liable to pay their share of Mr Shapiro's fees. In this respect, therefore, Mr Cannon's appeal must be dismissed.

Section 20C application

77. Mr Cannon has contended that the F-tT, having decided that the legal costs incurred by the landlord were recoverable under the service charge clause, should have made an order under section 20C of the 1985 Act. In view of the decision of this Tribunal to allow the tenants' appeal with regard to this part of the application, there is no need to review the decision of the F-tT on section 20C.

Costs and fees

78. Mr Cannon has appealed the refusal of the F-tT to make a costs order in his favour under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169).

79. The F-tT dealt with the issue of costs at the conclusion of its decision. It first recorded that an application had been made under rule 13(2) by the respondent (that is, the landlord) and that it had been said by the respondent that the applicants (that is, the tenants) had acted unreasonably and/or vexatiously in bringing and conducting the proceedings. It then recorded that the applicants 'likewise made an application for their costs under rule 13 on the basis that the Respondent had acted unreasonably in the conduct of the proceedings.' The F-tT directed itself, correctly, that an order for costs should only be made where a party 'has clearly acted unreasonably in bringing, defending or conducting the proceedings', reminding itself that the tribunal was essentially a no costs jurisdiction. Having done so, it decided that it was not appropriate to make an order under rule 13 because the parties were still in dispute on a number of matters when proceedings were issued and the landlord had been slow to resolve some of the issues, notably the management fee, which were later resolved in the tenants' favour. It concluded by stating that it did not consider that the tenants' conduct of the proceedings had been unreasonable.

80. In the course of argument before me, some concern was raised by the F-tT's reference to rule 13(2) which does not deal with costs at all. Having given this matter further thought since hearing submissions from Mr Cannon and counsel, it has become clear to me that the F-tT misunderstood the true nature of the applications being made, in particular the application being made by the tenants.

81. By rule 13(1), the F-tT has power to make a costs order in a residential property case such as this, but only against a person who has acted unreasonably in bringing, defending or conducting the proceedings. That is clearly intended to provide a significant hurdle or threshold for a costs applicant to overcome. The point has been made time and again that the F-tT's

residential property jurisdiction is essentially a no costs jurisdiction, or to put it another way, 'a costs shifting jurisdiction by exception only and parties must usually expect to bear their own costs' (see *Willow Court Management Co v Alexander* [2016] UKUT 290 (LC) at [62].) It is therefore understandable why the F-tT decided not to make a costs order against the tenants although the landlord had largely succeeded at first instance.

82. By rule 13(2), the F-tT has power to make an order requiring a party to reimburse to any other party the whole or part of any fee paid by that other party. Reimbursement of fees does not require the applicant to prove unreasonable conduct on the part of an opponent. It is a matter for the tribunal to decide upon in the exercise of its discretion, and (as with costs orders) the tribunal may make such an order on an application being made or on its own initiative.

83. The tenants' application, while treated by the F-tT as an application for costs, was in fact an application for reimbursement of fees. The tenants have not instructed any solicitors, Mr Cannon having acted throughout on his own behalf and on that of his wife. The application he made was for reimbursement of the £250 application fee and the £190 hearing fee. The F-tT wrongly treated this as an application for costs which required proof of unreasonable conduct on the part of the landlord. It may well have been that in view of the result in the proceedings below, the F-tT would not have made an order for reimbursement under rule 13(2) in the exercise of its discretion, but as a result of the tenants' relative success in this appeal, the position has changed significantly.

84. In my judgment, this Tribunal, having allowed the tenants' appeal in part, should revisit the issue of reimbursement of fees. As the tenants have succeeded on the principal substantive issue, I am of the view that an order for reimbursement of fees paid in relation to the application before the F-tT is appropriate and I make an order that the respondent reimburse the appellants in the sum of £440 claimed.

85. There remains the question of costs of the proceedings before this Tribunal. The same position has prevailed as in the F-tT, Mr Cannon having acted for both tenants. While he is minded to make an application for costs before the Tribunal, as he indicated in the course of oral submissions, he is actually seeking reimbursement of the fees he has expended to prosecute his appeal: a fee of £200 for the application for permission to appeal, and a hearing fee of £250.

86. The power of this Tribunal to order reimbursement of fees is contained in rule 10(14) of the Land Chamber Rules which allows an order to be made that one party pay to the other 'costs of an amount equal to the whole or part of any fee paid that has not been remitted by the Lord Chancellor'…'that is not otherwise included in an award of costs.' Unlike the Property Chamber Rules, the order for reimbursement of fees is framed as one of costs. By rule 10(11) an order for costs may not be made against a person without first giving that person an opportunity to make representations.

87. At the conclusion of argument, I informed the parties that I would invite written submissions on costs within 28 days of my decision being published. That I now do.

His Honour Judge Bridge

Dated 11 August 2016