FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY) & IN THE COUNTY COURT AT CENTRAL LONDON, sitting at 10 Alfred Place, London WC1E7LR

Case Reference	:	**LON/00BK/LSC/2019/0005**
Property	:	**17 Hamilton House, 1 Hall Road, London NW8 9PN**
Applicant	:	**Hamilton House RTM Company Limited ("the Applicant")**
Representative	:	**Hamlins Solicitors**
Respondents	:	**Sonal Sima Patel ("the Respondent")**
Representative	:	**Royds Withy King LLP**
Type of Application	:	**Payability of service charge.**
Tribunal Members	:	**Jim Shepherd** **Sarah Redmond MRICS** **Lucy West**
In the county court	:	**Judge Jim Shepherd, with Sarah Redmond MRICS as assessor**
Date of Decision		**14 October 2019**

DECISION

Those parts of this decision that relate to County Court matters will take effect from the "Hand Down Date" which will be:

(a) If an application is made for permission to appeal within the 28 day time limit set out below, two days after the decision on the application is sent to the parties, or;

(b)If no application is made for permission to appeal, 30 days from the date that the decision was sent to the parties.

Summary of the decision made

The following sums are payable by the Defendant within 28 days of receipt of this order:

a) Service charges of £ 12,166.56

b) Legal costs under clause 2 (16) of the lease are payable assessed at £42,041.71

c) Contractual Interest of £1343.97

Introduction

1. Hamilton House RTM Company ("the RTM") is claiming for unpaid service charges in the sum of £12,669.40 for the period from 26 March 2016 to 1 March 2018 in respect of 17, Hamilton House, 1 Hall Road, London ("the premises").

2. The case was transferred from the county court to the Tribunal pursuant to an order by DDJ Mendell dated 17th December 2018. The parties had consented to the transfer. On 5th February 2019 directions were given by Judge Andrew. In the directions it was confirmed that the judge who heard the case would deal with all issues, namely the payability of service charges, interest and costs. Following amendments to the County Courts Act 1984, made by schedule 9 of the Crime and Courts Act 2013, all First Tier Tribunal (FTT) judges are now judges of the county court. Accordingly, where FTT judges sit in the capacity as judges of the county court, they have jurisdiction to determine issues relating to interest and costs that would normally not be dealt with by the tribunal. Judge Shepherd presided over both parts of the hearing,

which has resolved all matters before the tribunal and the court. The Tribunal wing member, Sarah Redmond was appointed as assessor for the county court trial.

3. The Applicant is claiming unpaid service charges, interest and costs pursuant to contractual indemnity.

4. The Respondent, Ms Patel, has defended the claim. Originally there were several strands to the defence including a challenge to the disparity between the service charges for the flats and houses and the Respondent also sought to bring a counterclaim. In the event the amendment bringing the counterclaim was not allowed and the defence focussed on one issue namely an assertion that the service charge machinery in the Lease based upon rateable values has "*completely broken down*" as a result of the abolition of the domestic rating system by the Local Government Act 1988.

Background

5. Hamilton House, 1 Hall Road, London NW8 9PN is an estate which is comprised of a block of 44 flats ("the Building"), seven houses and some communal grounds ("the Estate"). The houses have all been enfranchised bar one.

6. Sassoon Developments Ltd is the landlord and registered freehold proprietor of the Building. The RTM is a 'right to manage' company managing the Estate pursuant the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). It acquired the right to manage in or around 2004/05.

7. The Respondent is the tenant and leasehold proprietor of the Flat under a lease granted on 23 September 2013 ("the Lease") (as lease extension). The Respondent's partner is Mr Laurence Nicholson. He provided evidence to the Tribunal which was endorsed by the Respondent. In his evidence he expressed concern about the way the service charge was calculated. He says that he had been concerned about this since 2014. In fact the Respondent stopped paying any service charges from 2016 onwards in protest although prior to this she had been paying the charge in full. The sum owed

was agreed to be £12,166.56 and this is the sum claimed by the Applicant together with contractual interest.

8. The RTM issued a claim in the County Court on 27 March 2018. A Defence dated 23 June 2018 was filed by Ms Patel. The Defence is that the machinery for collecting the service charge has *"broken down"* and that the RTM has attempted to implement an alternative method in a flawed way. As already indicated this defence was focussed down to the former allegation.

9. As indicated already the matter was transferred to the FTT on 17 December 2018 and directions were given on 5 February 2019 by Judge Angus Andrews. It was agreed between the parties that the Judge hearing the matter should deal with all issues, including contractual interest and costs, at the same time as deciding on the payability of the service charges.

The Lease

10. Pursuant to Clause 2(1)(B) of the Lease the Respondent covenanted to:

> "pay to the Landlord by way of further rent by the instalments and in the manner specified in the First Schedule hereto the service charge to be calculated and certified in accordance with the provisions of such Schedule"

11. The First Schedule of the Lease provides that the service charge is to be computed in accordance with paragraph 3(c) of the Schedule which states:

> "the annual amount of the service charge payable by the tenant as aforesaid shall be calculated either by dividing the aggregate of the said expenses and outgoings incurred by the Landlord in the year to which the certificate relates by the aggregate of the

rateable values or value (in force at the end of such year) of all the flats (including any porter's accommodation) in the said building the repair maintenance renewal insurance or servicing whereof is charged in such calculation as aforesaid and then multiplying the resultant amount by the rateable value (in force at the same date) of the flat "

12. It was acknowledged by Counsel for the Applicant, Lina Mattson, that the "either" was superfluous as there was no alternative to the mechanism based on rateable value. This distinguishes the present leases from others in which an alternative mechanism is included in the event of the abolition of the rateable value system- see for example the lease in *Bedford Court Mansions Ltd v Ribiere and others* [2017] UKUT 202 (LC).

The hearing

13. The Applicant was represented by Lina Mattson of Counsel and the Respondent by Mark Loveday of Counsel. The assistance of both was invaluable to the Tribunal. Ms Mattson called evidence from Alexander Norman of Lewis and Tucker, (the Applicant's managing agent) and Seyed Agar, director of the RTM. Mr Loveday called evidence from the Respondent and Mr Nicholson.

14. Mr Norman gave background to the service charge dispute. Originally Mr Nicholson had challenged the disparity between service charges for the houses and flats in 2016. However this challenge soon developed into a broader challenge in relation to the allegation that the apportionment mechanism as set out in paragraph 10 above was defunct due to the abolition of rateable values (the correspondence between the parties is located at pages 110-129 of the hearing bundle). Faced with this challenge Mr Norman and his colleagues sought details of rateable value figures from the local authority, Westminster Council. The council researched the figures and produced handwritten rateable value figures for 1973 (page 132). A typed version was also prepared (157). The council confirmed that the figures had remained constant between 1973 and 31st March 1990, the date of abolition. In further correspondence dated 4th October 2018 the Respondent's solicitors stated that the service charge would be paid once a full set of certified rateable values and the actual formula used since 2008 had

been provided. As far as Mr Norman was concerned this condition had been met and at paragraph 29 of his statement he set out the calculation for the premises: *The total rateable values of the flats combined is £49742. The flat's rateable value is £722. This is 1.451489687 per cent of the overall value (722/49742 x 100) so the percentage is charged the flat is 1.45%.*

15. Mr Norman also dealt in evidence with changes that had been made to the service charge proportions for Flat 46 which was a large flat. The RTM had sought to charge a higher proportion but under challenge had reverted to the rateable value mechanism.

16. It became clear during probing cross examination of both Mr Norman and Mr Agah that the RTM and the managing agents had recognised over time that the rateable value mechanism ought to be abandoned and a fairer mechanism of apportionment introduced. The managing agents wrote to all leaseholders on 2nd October 2018 canvassing views (page 162). Apparently more than 10% of leaseholders indicated that they would object to a change. Previously as detailed by Mr Nicholson in his statement at an AGM on 11th September 2017 Mr Agah had expressed dissatisfaction with the rateable value mechanism because of the anomalies it created (page 355). In the event the lease was not changed and the RV mechanism has been retained. The Respondent was originally arguing that the RTM were using an unofficial method of apportionment based on flat size but this argument was not pursued at the hearing.

17. The Tribunal found all of the witnesses to be helpful, reliable and honest. However it became increasingly clear during the hearing that the issue between the parties was a narrow one, namely whether the service charge apportionment mechanism had broken down such that there were no service charges lawfully due.

The relevant law

Rateable value

18. This is a value assessed in accordance with the General Rate Act 1967, s.19. Valuation lists were prepared until April 1973 but they are no longer maintained and the system of

domestic rates was abolished by s.117 Local Government Finance Act 1988 with effect from 1st March 1990.

Arnold v Britton

19. It was common ground that the leading case on contractual interpretation was Arnold v Britton [2015] UKSC 36; [2015] AC 1619 where Lord Neuberger summarised the principles of contractual interpretation beginning at para.14 onwards:

> *Interpretation of contractual provisions*
>
> *14 Over the past 45 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts in a number of cases starting with Prenn v Simmonds [1971] 1 WLR 1381and culminating in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900.*
>
> *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, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, 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. In this connection, see Prenn [1971] 1 WLR 1381, 1384-1386; Reardon Smith Line Ltd v Yngvar*

Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997, per Lord Wilberforce; Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in Rainy Sky [2011] 1 WLR 2900, paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC.

16 For present purposes, I think it is important to emphasise seven factors.

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

18 Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the

drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

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

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

21 The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22 Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd 2012 SC (UKSC) 240, where the court concluded that "any ... approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract: see paras 21 and 22.

23 Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in McHale v Earl Cadogan [2010] HLR 412, para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". However, that does not help resolve the sort of issue of interpretation raised in this case.

Submissions

20. Mr Loveday's argument was compellingly clear. As a result of the abolition of the rating system the apportionment mechanism in the lease was irretrievably damaged. In particular he argued that the dynamic nature of the scheme was lost because the rateable values for each flat were in effect set in stone at the 1973 level. He argued that the words "in force" (see para 10 above) were crucial in dictating the fluidity of the scheme. It was not enough he said to say that *in force* meant the last rates used at the date of abolition because this fluidity would necessarily be lost. He was robust in his argument accepting that if it was correct it meant that the Respondent and others had paid service charges for years when they were not due.

21. Mr Loveday unsurprisingly relied in particular on the case of *Bedford Court Mansions Ltd v Ribiere and others* [2017] UKUT 202 (LC). In that case there was a similar apportionment mechanism to the one in the present case save that there was an alternative provision available. Quoting the Upper Tribunal:

> *9. The provisions of clause 4(c)(iv) are central to the present case because this clause provides how the total relevant expenditure by the appellant is to be apportioned to the various flats in the building and to be recovered from the lessees of those flats. The clause contains two paragraphs, hereafter called paragraph (a) and paragraph (b) which read as follows:*
>
> *"(a) The annual amount of the service charge payable by the Lessee as aforesaid shall be calculated by dividing the Lessor's actual and anticipated expenditure defined in accordance with sub-paragraph (c)(i) hereof for the year to which the said certificate relates by the aggregate of the rateable values in force at the end of such year of all the flats in the said Mansions and then multiplying the resultant amount by the rateable value in force at the same date of the Flat.*
>
> *(b) In the event that it shall become impractical or impossible to apportion the Lessor's actual and anticipated expenditure between all the Flats in the said*

Mansions on the basis of relative rateable values the same shall instead be apportioned on such alternative basis as shall be fair and equitable."

The alteration as between the old leases and the new leases is that in the old leases it was only paragraph (a) of clause 4(c)(iv) which appeared. In other words there was no provision in the old leases which contemplated the possibility that it might become no longer possible or practical to use rateable values in order to apportion the service charges between the lessees. However in 1989 it was contemplated (correctly) that in due course the domestic rating system might be changed and that it could become no longer possible to apportion expenditure by reference to the rateable values of the relevant flats "in force" at the end of the relevant service charge year. It was for this reason that paragraph (b) was added so as to make provision for the apportionment of the relevant expenditure between all the flats in the building in the event that it should become impractical or impossible to apportion that expenditure on the basis of relative rateable values.

22. The First Tier Tribunal had found that the abolition of the rating system necessarily meant that the apportionment system had become *impractical and impossible* (as stated in the clause) to operate and therefore the alternative provision was triggered. In obiter comments the Upper Tribunal agreed:

There is no cross appeal from this decision by the F-tT. In any event I respectfully agree with the F-tT's decision upon this point. Accordingly for the years after 1990 it had become impractical and impossible to apportion the appellant's relevant expenditure between all the flats in the building on the basis of relative rateable values. In consequence the appellant could no longer apportion the relevant expenditure on the basis of paragraph (a). (at [10) see also [39] [41][61] [70])

23. Mr Loveday submitted that this was conclusive authority on the issue at hand and the Tribunal was bound by the decision. He also cited the cases of *Cain v Islington* [2015] UKUT 0017 (LC) and *Levitt v Camden* [2011] UKUT 366 (LC) but the key case as far as he was concerned was the *Bedford Court Mansions* decision.

24. Ms Mattson's submissions were equally clear and cogent. She submitted that the natural and ordinary meaning of *"rateable value"* in paragraph 3(c) is simply the latest of any valuation conducted in accordance with the 1967 Act, s.19. The words *"in force at the end of such year,"* merely recognised the possibility of the re-valuation of the rateable values. This was consistent with the proper interpretation being the *"latest"* rateable value valuation. This construction she stated was further supported by the fact that as at the date of the grant of the Lease, the abolition of the domestic rating system and the lack of any live valuation list was public knowledge. It must therefore have been the intention of the parties that the latest rateable value for the Flat would be used when calculating the service charge percentage. Indeed this latter argument was the lynchpin of Ms Mattson's case. When the parties entered into the lease in 2013 rateable values had already been abolished for 23 years. Further she cited the Leasehold Reform, Housing and Urban Development Act 1993, s57 (2) and (6) in relation to the fact that the Respondent's lease had been extended in 2013. This was the opportunity for amendment if the apportionment provision was defective. This opportunity was not taken.

25. In relation to the Bedford Court Mansions decision, Ms Mattson highlighted the fact that there was an alternative provision and that the clause in that case had to be read in the context of the availability of that provision. The parties in that case had anticipated the potential abolition of the rating system and made provision for that eventuality. In the present case in contrast the parties with open eyes had agreed a lease which maintained a rateable value provision notwithstanding the abolition of the domestic rating system.

Analysis

26. The Tribunal intends to apply the guidance given in *Arnold v Brittan* as follows:

(a)The natural and ordinary meaning of the present clause (para 10 above) is clear save for the interpretation of the words *in force* which is dealt with below. The rateable value mechanism used is not an unusual mechanism to see in leases even now. For whatever reason, an alternative mechanism was not incorporated in the lease. This may have been a slip up or it may have been the parties intending to maintain an existing system of apportionment albeit not a fluid one. The Tribunal

considers that the latter interpretation is the most cogent one. Solicitors agreeing lease terms would or ought be have been alive to the fact that rateable value was no longer a "currency". Accordingly they must have intended to maintain the last currency used.

(b) There is no apparent error in drafting in the present case. It may be said that the superfluous *either* and the absence of an alternative provision suggest that there was an error in leaving the latter provision out. Equally though there may have been a conscious decision to leave it out in order to maintain a clear formula. It is not for the Tribunal to speculate too much on this when the clause is clear. In relation to the meaning of *in force,* the continued use of the rateable value mechanism without a alternative mechanism (in contrast to Bedford Court Mansions) must mean that *in force* means the last rateable value used notwithstanding the fact that the apportionment will be set in stone. This case can be distinguished from *Bedford Court Mansions* where there was an alternative mechanism and it was in that context that the Upper Tribunal agreed with the First Tier Tribunal that the alternative mechanism had been triggered. In the present case there were no trigger words to set off the switch to an alternative method of apportionment.

c) It may be that a rateable value mechanism is not the best to use and creates disparities in some quarters but, as we have already decided, the natural meaning of the words used in the clause appear clear.

d) It may have been an imprudent method of apportionment for the parties to use in light of the abolition of rateable values but the Tribunal does not consider it appropriate to go behind that.

e) The Tribunal agrees with the Applicant that the timing in this case is crucial. When the clause was agreed between the parties in 2013 the rateable value mechanism had long since been abolished. This would have been known to the parties and their intention can be derived from that imputed knowledge - they wished to maintain the clause.

f) In relation to the intention of the parties with regard to an unexpected event this is not relevant in the present case because the parties already knew about the abolition of rateable value at the date that the agreement was entered into.

27. Accordingly the Tribunal determines that the apportionment clause is valid and the sum of £12,166.56 is payable.

Claims for costs and interest

28. A draft of this judgment was sent to the parties and they were invited to either agree the resultant costs and interest orders or make submissions in that regard. The parties agreed that costs were payable by the Defendant but disagreed as to the amount of the costs payable. There was a dispute about whether costs were to be assessed on the indemnity or standard basis.

Are indemnity costs payable?

29. The court considers that indemnity costs are payable in the present case. Clause 2 (16) of the lease is clear in stating the following:

In the event of the Tenant committing any breach of any covenants contained in this lease of any nature whatsoever....then if the landlord shall incur any reasonable costs charges or reasonable expenses in connection therewith(including solicitor's costs architects or other professional charges) to indemnify the landlord in respect thereof....

30. The parties agree that this is the operative clause and it is clear that CPR 44.5 is therefore triggered. The Defendant sought to argue that the use of the words *reasonable* in Clause 2 (16) dictated the fact that indemnity costs did not apply. She relied on *Euro Asian Oil SA v Credit Suisse AG* CL-2013-000605 for this proposition. In that case the judge took the view that on the clause before him, which was different from the clause here, the phrase "reasonable attorney's fees" meant that indemnity costs did not apply because *they would not be reasonable* [7].

31. The court considers that in the present case Clause 2[16] limited the indemnity costs to those which are reasonable but this did not preclude the benefit of any doubt being given to the Claimant in an assessment of reasonableness. The Tribunal considers the Claimant's costs to be reasonable overall. The Defendant has raised a number of issues challenging individual items. There are two factors which make this challenge unattractive. First the Defendant's own overall costs exceed those of the Claimant by some degree. Second in these proceedings and the build up to them the Claimant has been faced with a moving target in terms of the defence which only became fixed after the intervention of the court in refusing an application to amend. The court also notes that the Claimant was put to extra work and costs by the Defendant's inexplicable decision to submit its own bundle of almost identical documents.

32. In the event that the court is wrong in its interpretation of clause 2 (16) of the lease and that only standard costs are payable for the reasons already given it considers that the Claimant's costs are both reasonable and proportionate in all the circumstances.

33. For the avoidance of doubt the court decision includes approval of the Claimant's costs in relation to both the amendment and the additional work carried out by their counsel in responding to the extensive submissions made on behalf of the Defendant.

34. The parties were agreed as to the payability and amount of interest in this case.

Judge Shepherd

14 October 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).