FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BE/LSC/2020/0230**
Property	**:**	**36 Silverthorne Loft Apartments, 400 Albany Road, London SE5 0DJ("The Premises")**
Applicant	**:**	**Michael Comiskey ("the tenant")**
Representative	**:**	**In person**
Respondent	**:**	**Silverthorne RTM Company Limited ("the landlord")**
Representative	**:**	**Mr Gardner**
Type of Application	**:**	**Determination as to the payability and reasonableness of service charges**
Tribunal Member	**:**	**Judge Jim Shepherd** **Mr Trevor Sennett FCIEH**
Date of Decision	**:**	**2nd December 2020**

DECISION

The Application is dismissed. The service charges claimed by the Respondent to cover the cost of external repairs and decoration are payable under the lease and reasonable. The application under s.20C is dismissed.

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was A:BTMMCOURT. A face-to-face hearing was not held because it was not practicable and no-one requested the same.

The application

1. The applicant seeks a determination as to the payability and reasonableness of service charges order pursuant to s.27A of the Landlord and Tenant Act 1985 (as amended) ("the 1985 Act"). The application dated 18th June 2020 states that the amount in dispute is £6324. This sum consists of major works costs incurred by the Respondent for the building in which the Applicant lives. The costs were spread over two financial years with £3162 charged for 2019 and the same for 2020.

2. The applicant is the leaseholder of premises at 36 Silverthorne Loft Apartments, 400 Albany Road, London SE5ODJ ("The Premises"). The Respondents are the RTM company that own the freehold of the building which consists of a converted school into 36 residential units ("The Building").

3. The central dispute relates to the external repair and decoration of the Applicant's windows. He says that the lease does not entitle the Respondent to repair or decorate his windows or indeed to charge for this work. His argument is two - fold: Firstly he says that the s.20 notice served by the Respondent on 30th August 2018 which dealt with the external works was invalid because it stated that the works due to be carried out including redecoration to the windows were in compliance with the lease - he says they were not; Secondly there is the connected point that the sums are not recoverable under the lease. Accordingly, the answer to both challenges lies in the interpretation of the lease. There is no challenge in relation to the reasonableness of the costs incurred or standard of the works already carried out.

The Relevant lease provisions

4. The lease provisions are not unusual. Clause 1.7 describes the demise of the premises. Significantly it states that the premises are part of "the building" and include doors, windows and window frames and the interior faces of the ceilings, floors and main structural walls together with internal walls which are not structural walls. Excluded from the premises are the structure external and load bearing walls and foundations of the building.

5. Clause 3.6 and 3.7 of the lease require the tenant to keep in repair the premises save for that which is the landlord's responsibility under the lease and decorate the inside of the premises every five years.

6. Under the Fourth schedule of the lease the Respondent is responsible for repairing the roof outside, main structure and foundations of the building (para 1) and decorating the outside of the building once every three years (Para 3).

The s.20 notice

7. The notice served on 30th August 2018 described the proposed works as redecorating all external elevations to include inter alia windows. The reason given for the works were to maintain the building and comply with the lease.

Relevant law

8. The leading case on contractual interpretation is *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 where Lord Neuberger summarised the principles of contractual interpretation beginning at para.14 onwards:

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

9. In summary the Applicant says the windows form part of his demise therefore the Respondent has no right to decorate them let alone charge for the privilege. The Respondent says although the lease is not clear it is common sense that they are responsible for repairing and decorating the external parts of the building.

The Tribunal's interpretation of the lease

10. Despite the submissions by the Respondent that the lease is unclear the Tribunal finds that it is very clear in its division of responsibilities. Although the windows are part of the demise they are also part of the building (clause 1.7) and the Respondent is responsible for repairing the main structure of the building and decorating the outside of the building including the outside of the premises and in turn the windows of the premises.

11. There is no contrary provision in the lease which raises any doubt about where liability lies. The fact that the premises and the windows are demised to the tenant does not negate from the landlord being liable for repairing the structure and decorating the exterior of the building. The tenant is responsible for decorating and repairing the interior but not the

exterior. This makes common sense because the landlord is required to preserve the external envelope of the building. If the Applicant was right and he is the responsible party this would mean 36 tenants could repair or not repair the windows in their own way and paint them or not paint them in their own way. This would make management and maintenance of the building impossible. In addition as pointed out during the hearing by Mr Sennett the Applicant would need to enter the landlord's demise in order to carry out necessary works. The landlord could refuse to allow entry meaning that the tenant would have to trespass in order to comply with his obligations.

12. In light of the clarity of the lease provisions there is no need to apply the guidance in relation to interpretation provided in *Arnold v Britton* but were one to do so the same result would be obtained:

a) A reasonable reader of the lease would regard the landlord as liable for painting and repairing the windows.

b) The words used in the lease are clear in their meaning and effect.

c) The question of commercial common sense does not come into play as the words are clear and do not lead to bizarre consequences.

d) Similarly the arrangements in the lease are not ill advised and it is inevitable that the parties intended the landlord to keep responsibility for the external envelope.

e) The facts known to the parties do not play a role as both parties to the lease would have the same knowledge in relation to the provision in question.

f) An unintended event does not come into play in the current circumstances.

g) Finally, no special rules of interpretation are being used by the Tribunal. The clauses in the present lease are not unusual. Indeed, it would be an unusual result if the Tribunal were to find that the tenant was liable for painting and repairing the external envelope of the premises.

Section 20C

13. In light of the findings above the Applicant's application under s.20C Landlord and Tenant Act 1985 is refused. The application was misconceived. The Respondent has been put to time and cost in dealing with it.

Name: Jim Shepherd **Date:** 30th November 2020

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).