FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LSC/2023/0236**
Property	**:**	**Flat 47, Globe Wharf, 205 Rotherhithe, London SE16 5XS**
Applicant	**:**	**Melissa Billington**
Representative	**:**	**In person**
Respondents	**:**	**Globe Wharf Freehold Company Limited (1)** **Globe Wharf RTM Company Limited (2)**
Representative	**:**	**Mr Granby of Counsel**
Type of application	**:**	**Liability to pay service charges**
Tribunal members	**:**	**Judge N Hawkes** **Mr J Naylor FRICS FIRPM**
Date and venue of hearing	**:**	**30 October 2023 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**20 November 2023**

DECISION

Decisions of the Tribunal

(1) Globe Wharf RTM Company Limited is, by consent, added as Second Respondent to these proceedings pursuant to rule 10 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").

(2) The Tribunal grants the Respondents permission, pursuant to rule 6(3)(c) of the 2013 Rules, to amend their statement of case so as to

contend that the insurance excess is recoverable from the Applicant alone pursuant to the terms of the Lease as a variable administration charge.

(3) By consent, the Tribunal determines that, of the disputed service charge costs which form the subject matter of the Applicant's application, the sum of £4.16 is recoverable from the Applicant.

(4) The Tribunal determines that the sums which form the subject matter of this application are not recoverable from the Applicant, either in whole or in part, as a variable administration charge.

(5) The Tribunal makes an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing the Applicant's liability, if any, to pay an administration charge in respect of the Respondents' costs of these proceedings.

The application

1. The Applicant holds a long lease of Flat 47, Globe Wharf, 205 Rotherhithe, London SE16 5XS ("the Property") which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the Applicant's lease ("the Lease") will be referred to below, where appropriate.

2. By an application dated 30 June 2023, the Applicant sought a determination under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether a service charge item in the year 2022/23 (namely, an insurance excess in the sum of £1,000) was reasonable and payable.

3. The Applicant's case is set out in the application and includes the following:

"My position is that this excess charge is explicitly called out in our lease under Schedule 6, which outlines the shared costs to be covered by the service charge. Schedule 6, part B, section 3.4 covers the building insurance. It outlines that, where the money receivable by the insurance claim is insufficient for the repair, that amount should be treated as a further item of expense under this Schedule, and explicitly calls out the example of excess limitations under the policy."

4. Directions were given on 14 July 2023 ("the Directions") leading up to a final hearing.

5. Neither party requested an inspection, and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

The hearing

6. In accordance with the Directions, the final hearing took place on 30 October 2023 at 10 Alfred Place, London WC1E 7LR.

7. The Applicant appeared in person at the hearing, accompanied by Mr Justin Stillman. The Respondents were represented by Mr Richard Granby of Counsel who was accompanied by Mr Dominic Freake, a Managing Director of the First Respondent, and by Mr Sanjay Thackery of the Respondents' Managing Agents.

8. The Tribunal heard oral evidence from the Applicant. The Respondents did not call any witnesses to give oral evidence.

The issues

9. By letter dated 27 October 2023, an application was made for Globe Wharf RTM Company Limited, which manages the Property, to be added as a respondent to these proceedings.

10. At the commencement of the hearing, the Applicant informed the Tribunal that she consented to this application. Accordingly, Globe Wharf RTM Company Limited was, by consent, added as Second Respondent to these proceedings pursuant to rule 10 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").

11. Mr Granby had already been instructed to act on behalf of both of the Respondents and no application was made for any further directions on account of the addition of the Globe Wharf RTM Company Limited as Second Respondent.

12. The Applicant's Lease includes provision at clause 2 that the Applicant is to required pay *"on demand by way of further or additional rent the Tenant's Proportion"*.

13. As regards building costs, by Schedule 7 paragraph 1.2 of the Lease, the Tenant's Proportion means the "Part 'B' Proportion of the amount attributable to the matters mentioned in Part 'B' of Schedule 6 and whatever of the matters referred to in part 'F' of Schedule 6 are expenses properly incurred by the Manager which are relative to the matters mentioned in Part 'B'. Part F costs are costs which are applicable to the other costs, for example, VAT.

14. The "Part 'B' Proportion" which is payable by the Applicant is 1.04%.

15. The matters mentioned in Part 'B' of Schedule 6 to the Lease include (emphasis supplied):

"To insure and keep insured the Development including (without prejudice to the generality of the foregoing) and all other structures ancillary thereto at all times against all usual comprehensive risks applicable to a reasonably normal insurance policy covering this type of property in the full reinstatement value and other such risks (including marine impact and terrorism) as the Manager shall reasonably decide and causing all monies received by virtue of such insurance to be laid out as soon as reasonably possible in rebuilding and reinstating that part or parts of the Development in respect of which it is received Provided Always That

...

3.4 If notwithstanding the extent of the risk and value as aforesaid the money receivable under such insurance shall be insufficient to meet the cost of the necessary works or the rebuilding repair or reinstatement then ***the deficiency shall be treated as a further item of expense under this Schedule recoverable from the tenants (as the case may be) accordingly insofar as any deficiency may relate to any excess limitation or exclusion under the terms of the Manager's insurance policy from time to time.***

3.5 the insurance cover shall extend to the tenant for the time being of the Premises and their mortgagees (if any)."

16. The Development which is to be insured is defined in Schedule 1 of the Lease as:

"ALL that land situate at Globe Wharf Rotherhithe Street London SE16 now or formerly comprised in Title Number SGL489839 together with the Parking Bays comprised in a lease dated ..."

17. The Applicant contends that if, which is denied, the amount of the insurance excess is reasonable, this cost is to be shared between the lessees in accordance with the terms of the Lease. Accordingly, her liability to pay a service charge in respect of the insurance excess is limited to her Part B proportion (1.04%) of that excess, insofar as it is found to be reasonable.

18. Further, the Applicant contends that the reasonable cost of completing the remedial work which gave rise to the insurance claim is lower than £1,000 excess and states: "*The total that could be considered reasonable*

would have been £422.50 (excl. VAT) or £507 (incl. VAT). This amount is well below the charged excess fee of £1,000."

19. At hearing, the Respondents agreed (i) to limit the sum potentially recoverable from the Applicant in respect of the insurance excess to £400 and (ii) that 1.04% of £400 is the sum which is recoverable from the Applicant by way of service charge in respect of the insurance excess. The Applicant was content with this analysis of the service charge dispute. Accordingly, the Tribunal determined by consent that, of the disputed service charge costs which form the subject matter of the Applicant's application, the sum of £4.16 is recoverable from the Applicant.

20. It is apparent from the Applicant's application form and from the Tribunal's Directions that these proceedings concern service charges alone, and not administration charges. At the hearing, the Respondents orally sought permission to argue that the insurance excess (in the agreed sum of £400) is recoverable from the Applicant alone as a variable administration charge. The Applicant consented to this new issue being raised.

21. The Tribunal's overriding objective pursuant to rule 3 of the 2013 Rules provides that dealing with a case fairly and justly includes: "*avoiding unnecessary formality and seeking flexibility in the proceedings*". On the basis that (i) the Applicant had expressly agreed to the introduction of this new issue and (ii) the Tribunal was satisfied that the time estimate for the hearing was unlikely to be exceeded, the Tribunal granted the Respondents permission pursuant to rule 6(3)(c) of the 2013 Rules to amend their statement of case so as to contend that the insurance excess is recoverable from the Applicant alone as a variable administration charge.

22. The Respondents' case, as initially presented, was set out in a skeleton argument and the Tribunal did not require an updated Respondent's statement of case to be filed and served. The Respondents' case was later modified orally so as to rely upon the indemnity clause set out below. This indemnity clause is not relied upon or referred to in the Respondents' skeleton argument. However, the Tribunal was satisfied that the Applicant was able to respond effectively to the significant change to the Respondents' case and no objection was made by the Applicant.

23. In summary, the Respondent's case as ultimately presented is that, on 2 June 2022, there was a water leak from the toilet in the Applicant's flat which caused damage to Flat 21, which is situated below the Property. An insurance claim was made in respect of the cost of remedying damage outside the Applicant's flat. The Respondent contends that the leak from the Applicant's flat caused the damage which formed the subject matter of the insurance claim and that the insurance excess (limited to the sum

of £400) is recoverable from the Applicant alone as a variable administration charge pursuant to an indemnity clause in the Lease.

24. The Applicant stated at the hearing that she disputes liability for the damage which formed the subject matter of the insurance claim on the grounds that the Respondent has failed to establish causation. It is her case that this has been her position throughout and that may well be correct. However, if and insofar as it is necessary to do so, the Tribunal permits the Applicant, who is acting in person, to amend her statement of case orally at the hearing so as to raise this issue.

25. The Tribunal has given the Respondent considerable latitude to alter its case and, as stated above, Tribunal's overriding objective pursuant to rule 3 of the 2013 Rules provides that dealing with a case fairly and justly includes: "*avoiding unnecessary formality and seeking flexibility in the proceedings*".

The Tribunal's determination

26. The Respondent relied orally at the hearing upon an indemnity at clause 3.1 of the Lease which provides (emphasis supplied):

"3. THE TENANT'S COVENANTS

The Tenant for the mutual protection of the Landlord and of the manager and of the tenants and of the Properties hereby covenants

3.1 with the Landlord to observe and perform

(a) the obligations on the part of the Tenant set out in Part One and Part Two of Schedule 8 and

(b) all covenants and stipulations contained or referred to in

(i) the Charges Registers (if any) of the Titles and

(ii) the Planning Agreement(s)

Insofar as the same relate to or affect the Premises ***and to indemnify the Landlord against all actions proceedings costs claims and demands in respect of any breach or non-observance or non-performance thereof.****"*

27. The Respondents contend that the damage which formed the subject matter of the insurance claim was caused by a breach on the part of the Applicant of a covenant at paragraph 9 of Part One of Schedule 8 to the Lease ("Paragraph 9"). Accordingly, on the Respondents' case, the

insurance claim was "in respect of" a breach of covenant on the part of the Applicant.

28. By Paragraph 9, the Applicant covenanted:

"To repair and keep the Premises and all Service Installations exclusively serving the same (but excluding such parts of the Premises that are included in the Maintained Property) and every part thereof and all landlord's fixtures and fittings therein and all additions thereto in good and substantial repair and order and condition at all times during the Term including the renewal and replacement forthwith of all worn or damaged parts but so that the Tenant shall not be liable for any damage which may be caused by any of the risks covered by the insurance referred to in Schedule 6 (unless such insurance shall be wholly or partially vitiated by any act or default of the Tenant or of any member of the family employee or visitor of the Tenant or other such occupiers) or for any work for which the Manager may be expressly liable under the covenants on the part of the Manager hereinafter contained."

29. The evidence concerning causation is limited and the Tribunal has had to do its best on the limited evidence available. The Applicant gave evidence of fact at the hearing, which the Tribunal accepts, that when the leak in her bathroom was investigated, the water was located solely behind the tiling. The invoice for work carried out within the Applicant's flat refers to a filing valve and such a valve can be located behind bathroom tiling.

30. Applying our general knowledge and experience as an expert Tribunal, the Tribunal finds as a fact, on the balance of probabilities, that a water leak behind tiling is likely to be within the service stack. Having carefully considered the photographs of the damage within Flat 21 below which gave rise to and formed the subject matter of the insurance claim, the Tribunal finds that water within the service stack is unlikely to have penetrated into the flat below so as to puddle in the middle of the bathroom floor. Further, it is extremely unlikely that water within the service stack of the Applicant's flat could have passed over the kitchen of the flat below so as to have caused the damage to the living room of Flat 21 which formed part of the insurance claim.

31. The Applicant gave oral evidence, which the Tribunal accepts, that there were, at the material time, multiple leaks within the block in which the Property is situated. She gave, as one example, a leak which the concierge thought had stopped at a flat above hers, but which was ultimately found to have "gone down lower". She stated that there were so many other issues in the building including multiple instances of water penetration through the roof that it cannot be established that the leak to her toilet was the cause of the damage to the flat below which gave rise to the insurance claim.

32. The Respondent did not rely upon any expert report dealing with the issue of causation; upon any oral evidence of a witness of fact; upon any signed written witness statement; or upon any document expressly recording that the water penetration into Flat 21 stopped when repairs were carried out within the Applicant's flat. The Respondent did not refer the Tribunal to any evidence concerning when and how the water penetration into Flat 21 was discovered or concerning how longstanding it was.

33. Further, there are inconsistencies in the documents. For example, an email dated 22 November 2022 to the insurance company states that the date of loss is 1 August 2022 whereas the leak within the Applicant's flat occurred on 2 June 2022.

34. Having carefully considered the available evidence and having made the findings of fact which are set out above, the Tribunal is not satisfied on the balance of probabilities that the defect to the toilet within the Property on 2 June 2022, which is relied upon by the Respondent, caused the damage which gave rise to the insurance claim.

35. It has therefore not been established on the facts of this case that the insurance claim was "in respect of" the matters which the Respondent contends amount to a breach of covenant on the part of the Applicant. Accordingly, whether or not the Respondent's interpretation of the Lease is correct, the insurance excess is not, on the facts of this case, recoverable from the Applicant pursuant to the indemnity clause which is contained in the Lease.

Additional observations

36. Having heard oral argument from both parties concerning the matters which are set out below, the Tribunal makes the following additional observations which, in light of the findings above, do not form part of the Tribunal's substantive determination.

37. In making the observations which are set out below, the Tribunal has applied the principles set out in *Arnold v Britton and others* [2015] UKSC 36 and notes that at [15] - [23] the Supreme Court stated that:

> *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] UKHL 38, [2009] 1 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 at pp 1384-1386 and 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 (in liquidation) v Ali [2002] 1 AC 251 , para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky , per Lord Clarke at paras 21-30.

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 , 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 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 [2011] UKSC 56, 2012 SCLR 114 , 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 17 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] EWCA Civ 14, [2010] 1 EGLR 51 , 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.

38. In accordance with its express terms, the indemnity clause which is relied upon by the Respondent applies when there has been any breach, non-observance or non-performance of a tenant's covenant.

39. As stated above, by Paragraph 9, the Applicant covenanted:

"To repair and keep the Premises and all Service Installations exclusively serving the same (but excluding such parts of the Premises that are included in the Maintained Property) and every part thereof and all landlord's fixtures and fittings therein and all additions thereto in good and substantial repair and order and condition at all times during the Term including the renewal and replacement forthwith of all worn or damaged parts but so that the Tenant shall not be liable for any damage which may be caused by any of the risks covered by the insurance referred to in Schedule 6 (unless such insurance shall be wholly or partially vitiated by any act or default of the Tenant or of any member of the family employee or visitor of the Tenant or other such occupiers) or for any work for which the Manager may be expressly liable under the covenants on the part of the Manager hereinafter contained."

40. The Tribunal accepts that, in the case of a covenant to "keep" in repair, the law is as set out at 13.048 of Woodfall:

"A tenant who has covenanted to repair and keep in repair the demised premises during the term must have them in repair at all times during the term; and if they are at any time out of repair he commits a breach of covenant. A covenant in this form takes effect as a covenant not to allow the premises to get out of repair, and is broken as soon as the premises fall out of repair."

41. However, the tenant is not liable for breaching the covenant at Paragraph 9 in every instance in which there is a failure to keep in repair because Paragraph 9 includes express provision that: *"the Tenant shall not be liable for any damage which may be caused by any of the risks covered by the insurance referred to in Schedule 6 (unless such insurance shall be wholly or partially vitiated by any act or default of the Tenant or of any member of the family employee or visitor of the Tenant or other such occupiers) or for any work for which the Manager may be expressly liable under the covenants on the part of the Manager hereinafter contained."*

42. Paragraph 9 begins with the words "To repair and keep the Premises…" and the Tribunal accepts that the reference to "any damage which may

be caused by any of the risks covered by the insurance" is a reference to any damage to the Premises. However, the Tribunal notes that questions of fact may potentially arise as to whether damage within the Premises caused by any of the risks covered by the insurance is itself the cause of damage outside the Premises.

Applications concerning costs

43. At the conclusion of the hearing, the Applicant informed the Tribunal that she did not seek an order under section 20C of the 1985 Act but that she did wish to apply for an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. No submissions were advanced in opposition to this application.

44. Having considered the degree of success of the Applicant and as well as the late introduction of the administration charge issue by the Respondents, the Tribunal determines that it is just and equitable to make to an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing the Applicants' liability, if any, to pay an administration charge in respect of the Respondents' costs of these proceedings.

Name: Judge N Hawkes **Date:** 20 November 2023

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 should be made on Form RP PTA available at https://www.gov.uk/government/publications/form-rp-pta-application-for-permission-to-appeal-a-decision-to-the-upper-tribunal-lands-chamber
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).