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EASTERN RENT ASSESSMENT PANEL
LEASHOLD VALUATION TRIBUNAL

CAM/42UG/LVL/2006/0001

DECISION OF THE LEASEHOLD VALAUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 35 LANDLORD AND TENANT ACT 1987.

Applicant:		**Mr Alan Catchpole**	
Respondents:	**(1)**	**Mr N Dickin & Ms C Swinerd**	**(The Admirals Cellar)**
	(2)	**Mr & Mrs M Foley**	**(Flat 1)**
	(3)	**Mr A Catchpole**	**(Flat 2)**
	(4)	**Mr K Pettican**	**(Flat 3)**
	(5)	**Mr & Mrs Fisk**	**(Flat 4)**
	(6)	**Laurelin Investment Limited**	**(Flat 5)**
	(7)	**Mr E Watts**	**(Flat 6)**
	(8)	**Dr A Craggs**	**(Flat 7)**

Property: **Broke Hall, Nacton, Suffolk IP10 0ET**

Date of Application: **18th July 2006**

Date of Hearing: **17th October 2006**

Venue: **The Bowls Pavilion, Kesgrave War Memorial Community Centre, 12 Acres Approach, Kesgrave, Ipswich IP5 1JF**

Appearances for Applicant: **Mr A Catchpole**

Appearances for Respondents: **Mr N Dickin**
Ms C Swinerd

Also in Attendance: **Mr E Watts**
Mr K Pettican (Part time)

Date of Decision: **9th November 2006**

Members of the Tribunal:
Mr John Hewitt Chairman
Mr John Dinwiddy FRICS
Mr Roger Rehahn

DECISION

Decision

1. The decision of the Tribunal is that:

   1.1 The lease of The Admirals Cellar shall be varied by the insertion of the word 'internal' after the words 'of any common' in line 3 of clause 4(h) on page 6 thereof so that the clause shall read as follows:

   'The Lessee shall not be liable to contribute or pay towards the repair maintenance replacement decoration or renewal of any lift installed in the Building nor in respect of any common internal parts or communal areas of the Building which lie on or above the ground floor level of the Building.'

   NB the inserted word 'internal' is highlighted simply for ease of reference.

   1.2 An order shall be (and is hereby) made pursuant to s20C of the Landlord and Tenant Act 1985 to the effect that all and any costs whatsoever incurred by or on behalf of the Applicant in any way in connection with these proceedings or any aspect of these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by any Respondents to these proceedings.

2. The findings of the Tribunal and the reasons for our decision are set out below.

Background

3. Broke Hall is a listed Georgian Building which has been converted into 8 self-contained flats, all let on long leases. The Applicant (Mr Catchpole) is the landlord. The Respondents are the 8 long lessees.

4, On 18 July 2006 Mr Catchpole made an application under s35 Landlord and Tenant Act 1987 which provides that any party to a long lease of a flat may apply to a leasehold valuation tribunal for an order varying the lease in such manner as is specified in the application. Sub-section 35(2) provides that the grounds of such application are that the lease fails to make satisfactory provision with respect to one or more of the matters set out in sub-sub sections (a) to (g). Mr Catchpole relies on sub-sub sections:

   (e) the recovery by one party to the lease from another party to it of expenditure incurred...for the benefit of that other

party or a number of persons who include that other party; and

(f) the computation of a service charge payable under the lease

5. The application form and covering letter and attachments to it indicated that two variations were sought:

5.1 To vary the lease of the basement flat to clarify the lessees' obligation to pay a share of the maintenance rent for the main structure of the building **(the First Issue)**, and

5.2 To vary all 8 leases to change the percentage contributions to service charges, described in the lease as Maintenance Rent. Evidently the leases provide three separate elements of Maintenance Rent:

Estate Areas

Amenity Areas

Common Parts

And various percentages allocated to each lease

It seems that the Applicant wished to vary such provisions to a flat rate percentage to each flat as follows:

Flat 1 28.02 %

Flat 2 10.01%

Flat 3 5.22%

Flat 4 9.49%

Flat 5 9.92%

Flat 6 15.14%

Flat 7 7.57%

Flat 8 14.62%

(the Second Issue)

6. Shortly prior to the hearing Mr Catchpole withdrew his application in respect of the Second Issue claiming, amongst other things, that he was not able to prepare his case in time. Accordingly, only the First Issue was before the Tribunal for determination. Only the First

Respondent is immediately affected by this issue. At the hearing Mr Dickin and Ms Swinerd appeared in person and represented themselves. Two other Respondents, Mr Watts and Mr Pettican attended the hearing (or part of it) as observers. Mr Catchpole appeared in person and represented himself.

7. The members of the Tribunal had some familiarity with the Property and some service charge issues in connection with it having heard on 10 August 2006 an application made by a lessee under s27A Landlord and Tenant Act 1985 in which the percentages of service charges payable featured as an issue. Nevertheless prior to the hearing on 17 October 2006 the Tribunal again had opportunity to inspect the Property and The Admirals Flat in the company of Mr Dickin and Ms Swinerd. Mr Catchpole was invited to be present at the inspection but declined as he considered it was unnecessary for him to be there. The Tribunal was able to note the physical layout of Broke Hall and The Admirals Cellar and to understand the extent to which the Admirals Cellar has access to the main parts of Broke Hall and the limited range of services provided to it.

The Lease Structure

8. Before explaining the lease structure in respect of the Admirals Cellar it is helpful to record that it was common ground that the leases of flats 1-7 were granted in or about the late 1980s; they were intended to be more or less in common form. They granted terms of 99 years from date of grant. In respect of flat 1 a premium of £50,000 was paid and a ground rent of £150 per annum was reserved. Evidently the leases sought to set out a self-contained service charge regime. Broke Hall stands in extensive grounds enjoyed by a number of properties hence evidently the need for three categories of service charge expenditure, the Hall itself, the Amenity Areas adjacent to the Hall enjoyed by the lessees and possibly others and Broke Hall Park, or the Estate, enjoyed by a wider grouping.

9. The seven leases of the flats within Broke Hall were granted by Brookside Holdings Limited. Subsequently the reversion was transferred to Bideawhile 175 Limited a company controlled if not beneficially owned by Mr Catchpole. A large cellar beneath part of Broke Hall was unoccupied and the decision was taken to grant a lease of it as a shell to Mr Catchpole's daughter, Sophia. The lease was granted on 21st September 1995 for a term of 999 years from 25th March 1995 at a ground rent of a peppercorn. A premium of £20,000 was paid. Apparently, and we do not think it was disputed, that Ms Catchpole then fitted out the cellar and rendered it habitable creating living space with modern amenities.

10. At some point Ms Catchpole assigned the benefit of the lease and it is now vested in Mr Dickin and Ms Swinerd. It is this lease which is the subject matter of this decision.

11. In essence Mr Dickin and Ms Swinerd contend that it was intended to be a soft lease granted to Ms Catchpole and that as the cellar had no internal connection to Broke Hall, enjoyed no common parts or many of the services enjoyed by other lessees, the intention was that the lessee, Ms Catchpole, would not be required to contribute to any costs associated with the Hall above the ground floor level. Accordingly, they say that the words in clause 4(h)

'...any common parts or communal areas of the Building..'

should be construed as referring to the whole of the Building which lies above the ground floor level.

12. Mr Catchpole denied that the lease was intended to be a soft lease and as the Admirals Cellar did not have access to the lift, or the right to use it, and did not have access to the common parts or communal areas of the Building and did not have the right of access to them, it was part of the agreement that the lessee of the cellar should not be obliged to contribute to services charges in respect of the lift and those areas, but that in all other respects the lessee should contribute to the Services

and works relating to the Building, including for example the cost of any roof or main structure repairs and external redecoration.

13. Relevant extracts of the lease are as follows:

Definitions:

The Property:	Broke Hall Park, Nacton as shown edged red on Plan No. 2
The Building:	Broke Hall, Broke Hall Park, Nacton
The Estate Areas:	The areas shaded blue on Plan No. 2 but excluding those areas shown hatched brown
The Amenity Areas:	The areas shaded green and hatched yellow on Plan No.2
Demised Premises:	(a) the lower ground floor flat or basement apartment at the Building as the same is described in Part 1 of the First Schedule, together with (b) the double garage shown coloured yellow on Plan No. 3 (the Garage) (c) the piece or parcel of land which measures 12 feet deep out from the wall of the Building which is shown coloured purple on Plan No. 3 (the Patio) (d) the footpath measuring 4 feet or thereabouts in width and running in a northerly or a north easterly direction from the Patio and connecting onto the communal roadway serving the Garage and which is shown for identification purposes only coloured red upon Plan No. 3 (the Path)
Maintenance Rent:	In respect of the Services and works attributable to: the Estate Areas: 3.00% the Amenity Areas: 5.172% the Building: 5.172% of the cost to the Lessor of providing the Services and works to those Areas and Parts of the property or such proportion of the cost to the Lessor of providing the Services and works being the reasonable and proper proportion attributable to the Demised Premises TOGETHER ALSO WITH reasonable provision for future anticipated expenditure in respect of such Services and works ... PROVIDED THAT in the interpretation of the Services and works for which the

Lessee is to pay Maintenance Rent due regard shall be had to the terms of clause 4(h) of this Lease

Clause 3(a)(ii): A covenant by the Lessor...
That the Lessor subject to the Lessee paying the Maintenance Rent...shall cause the Services and Works referred to in the Second Schedule hereto (the Services) to be carried out...

Clause 4(h): A proviso that...
'The Lessee shall not be liable to contribute or pay towards the repair maintenance replacement decoration or renewal of any lift installed in the Building nor in respect of any common parts or communal areas of the Building which lie on or above the ground floor level of the Building.'

The Second Schedule: The Services
Part I

1. Maintaining and keeping in good and substantial repair and condition:
   - (i) the main structure of the Building including the foundations and the roof ...
   - (ii) ...
   - (iii) the common entrances paths and passages of the Building
2. Redecorating the exterior of the Building (including window frames but excluding internal common parts of the Building) ...
3. Paying all outgoings in respect of the Building ...
4. Keeping the Building insured...
5. Employing any workmen necessary for the proper maintenance of the Building and a Managing Agent Solicitor Accountant Surveyor or other professional adviser in connection with the management of the Property including Maintenance Rent calculation and collection including setting up a Management Company to manage the Building

The Case for the Applicant

14. In essence Mr Catchpole said that he thought the clause was quite clear as it stood. He only sought the variation because Mr Dickin and Ms Swinerd had argued a different position and he thought it helpful to him as landlord and to the other tenants for all to be very clear what

expenditure on the Building what shared between whom and on what basis.

15. In his evidence Mr Catchpole was quite certain that the lease to his daughter was not intended to be a soft lease. He said it was negotiated at arm's length. He rejected the arguments put forward by Ms Swinerd. He did however accept that the subjective intentions of the parties are not relevant to the canons of construction.

16. Mr Catchpole said that following the grant of the lease to his daughter the total services charges recoverable exceeded 100% of expenditure incurred. He appreciated that an adjustment was required and having taken advice he made adjustments as the leases appear to permit. He does however understand that his adjustments do not have universal approval and may be the subject of other tribunal Applications.

17. Mr Catchpole made detailed submissions to us on the construction of clause 4(h) and the meaning of the words,

> 'any common parts or communal areas of the Building which lie on or above the ground floor level of the Building.'

The Case for the First Respondent

18. Ms Swinerd accepted that she had no evidence as to what the parties intended the words at issue to mean when the lease was granted. She was however adamant that the arrangement was that the lessee would not have any service charge liability in respect of any part of the Building above the ground floor level. Her reasoning for this conclusion was that the Admirals Cellar had no access to any other part of the Building and had no right to use or enjoy any common parts. The Cellar had its own quite separate front door and means of access. The lift did not extend down into the cellar. The cellar was not connected to the door-entry system of the fire alarm system. She said that in many

ways her apartment was wholly self-contained andsimply not part of the Building.

19. As part of her reasoning Ms Swinerd explained that the Cellar suffers from acute damp problems and that whenever there was an escape or overflow of water from above it inevitably came down into the basement. She contrasted this with any leakage through the roof where the risk of incidence was much less and the effects by no means as severe. She believed that clause 4(h) was intended to be a swap or a quid pro quo, a release from potentially onerous contributions in return for the inherent problems of living in a damp basement with the risks that go with living in a basement.

20. The First Respondent relied upon and urged upon us the definition of 'common parts' in s60 of the Landlord and Tenant Act 1987,

> '*in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it.*'

Ms Swinerd was not able to explain why this definition, as opposed to definitions in other enactments, had been chosen save that it supported the argument she put forward.

21. Mrs Swinerd was not able to explain how, on her construction of clause 4(h), the service charge regime works in relation to expenditure on the Building at or below ground floor level for which there was responsibility, and the logic behind the 7.152% contribution.

Findings and Reasons

22. There was little factual evidence at issue between the parties. In order to consider where the lease fails to make satisfactory provision with respect to recovery of service charges or the computation of a service

charge we find it is first necessary to construe the lease to understand what it does mean and provide for. In undertaking this exercise we do not take into account the subjective intentions of the original parties and thus we do not take into account any evidence or explanations given to us as to the circumstances in which the lease came to be granted and what the parties intended the service charge obligations to be.

23. Our approach was as follows:

The general legal principles.

Lord Diplock said in *Antaios Compania Naviera SA v. Salen Rederiema AB* [1985] AC 191, 201E, that

'...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'

The definitive modern approach came from Lord Hoffman in *Investors' Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896, 912H - 913F when he set out the modern rules of set out interpretation.

'***The principles may be summarised as follows:***

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and subject to the exception to be mentioned next, includes absolutely anything which could have affected the way in which the language of the document would have been understood by a reasonable man.

(3) *The law excludes from the admissible background the previous negotiations of the parties and their subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

(4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: See Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd. [1997] A C 749.*

(5) *The rule that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had…'*

Lord Hoffman added a slight qualification to these principles when in *Jumbo King Ltd v. Faithful Properties* Unreported 2 December 1999, Hong Kong Court of Final Appeal, he said,

'The overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail.'

Emphasis was made on the correct approach and the importance of the background in *Holdings and Barnes plc v. Hill House Hammond Ltd (No.1)* [2001] EWCA Civ 1334 when Clarke LJ said, about the above authorities,

'Those cases are to my mind of particular assistance here because they show that the question is what a reasonable person would understand the parties to mean by the words of the contract to be construed. It is important to note that the reasonable person must be taken to have knowledge of the surrounding circumstances or factual matrix. As appears below, that knowledge is of particular importance on the facts of the instant case.'

Lord Bingham in *BCCI (SA) v. Ali* [2002] 1 AC 251; [2001] 2 WLR 735 said,

'In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffman in Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896, 912-913 apply in a case such as this.'

A lease is to be construed in the same way as any other commercial contract.

24. Applying the principles we find that the words;

'common parts or communal areas of the Building'

mean the communal entrance ways, passages, stairways and other areas used in common by all or some of the lessees. We reject the construction urged upon us by the First Respondent. If the words were intended to include the structure and exterior of the building the words are wholly superfluous and redundant. The draftsman could have achieved such a result by drafting the clause,

> 'The Lessee shall not be liable to contribute or pay towards the repair maintenance replacement decoration or renewal of any lift installed in the Building nor in respect of any areas of the Building which lie on or above the ground floor level of the Building.'

25. We are obliged to assume that the draftsman intended the words to have some meaning. We find that meaning was simply to exclude from the service charge liability for the internal common parts, that is those parts to which the lessee did not have a right of access, and not any other parts of the Building or services within it, the structure or exterior.

26. The lease does not include a definition of 'common parts' Many leases do. In our experience there is no generic definition of 'common parts' and each situation has to be looked at in context. We note for example different wording used in precedents of draft leases including Kelly, and the interpretation given to the expression in a number of authorities.

27. We prefer the submissions of the Applicant because they accord with our experience in these matters. Taking the lease overall and considering the context we find it was not intended that the lessee was not to have any responsibility for service charges in respect of every part of the Building that lies above the ground floor. Moreover, we reject the definition of 'common parts' set out in s60 Landlord and Tenant Act 1987 as being inappropriate and out of context. We find that it does not assist with regard to the meaning of the subject words as used in the lease as granted. We also note that other statutes define the expression in other ways.

28. Moreover from a practical point of view, when looking at the lease as a whole, the First Respondent's interpretation does not work and would lead, for example to the lessee paying 5.172% of the cost of the exterior decorations to the basement and yet paying no contribution to the cost of exterior decorations to the ground and upper floors. This is inconsistent with service regime set out in the ground floor flat, we have seen, and which Mr Catchpole tells us is broadly the same as all the leases of the other flats. It seems to us reasonable to assume that the draftsman of the subject lease would have had before him details of the service charge regime for the whole Building.

29. We find that the lease as drawn is unclear as to the scope of expenditure on the Building to which the lessee must contribute to. In our experience it is essential that both parties should be clear as to the expenditure which is to be brought into account so that the correct amount of service charge recoverable can be computed and ascertained. Accordingly we find that the Applicant has made out his case within the provisions of s35 Landlord and Tenant Act 1987 and that it would be appropriate to vary the lease by adding the word 'internal' as set out in paragraph 1.1 above.

Costs and s20C Landlord and Tenant Act 1985

30. Applications were before us under this section. Mr Catchpole said that he had incurred some costs, perhaps just under £1000 or so but had kept costs to a minimum by representing himself. He submitted that costs incurred were recoverable costs under the lease and came within paragraph 5 of Part 1 of the Second Schedule. We were minded to agree.

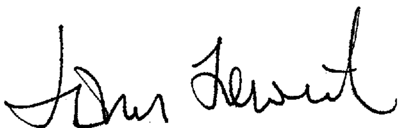
31. Mr Catchpole's attention was drawn to the direction given on 5 October 2006 to the effect that if he proposed to argue that he should be allowed to pass costs through the service charge he should provide details to the parties and the Tribunal by Friday 13th October 2006 and that he had not done so. Mr Catchpole said that he had misunderstood the direction.

32. Following submissions and discussion Mr Catchpole submitted that he ought to be allowed to pass 50% of the costs incurred by him through the service charge.

33. In arriving at a decision on s20C applications the Tribunal is required to make such order as is just and equitable in the circumstances.

34. As to the First Issue we find that the lease was poorly drafted which led to uncertainty and, ultimately to Mr Catchpole bringing this application, as he put it, to seek clarification. We consider that if a landlord drafts a poor lease such that clarification is required, it is not reasonable that the landlord should expect his lessees to pay for putting matters right. It seems to us that this is expenditure which a landlord should bear in full. Accordingly we find that no costs connected with the First Issue are to be regarded as relevant costs to be taken into account in determining any service charge payable by any of the Respondents to these proceedings because we do not find it just and equitable that the Respondents should be obliged to contribute to the costs incurred.

35. It appears that Mr Catchpole may have incurred some costs on the Second Issue. Mr Catchpole, for reasons of his own strategy, voluntarily withdrew the Second Issue from his application because it did not suit him to pursue it at this time. It seems to us that it would be wholly unjust and inequitable for Mr Catchpole to recover any of these costs through the service charge and we have no hesitation in making an order that no costs whatsoever in connection with the Second Issue in these proceedings shall be regarded as relevant costs to be taken into account in determining any service charge payable by any Respondent to these proceedings.



John Hewitt
Chairman
9th November 2006