UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 169 (LC) UTLC Case Number: LC-2021-607

Location: via CVP

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT -SERVICE CHARGES – whether landlord's costs of litigation against a third party recoverable as a service charge – whether landlord's costs of objecting to a neighbour's planning application recoverable as service charges – the construction of service charge clauses – the focus of provisions in a lease

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

BETWEEN:

ANDREW LAWSON DELL (1)
JENNIFER SIMONE DELL (2)

Appellants

-and-

89 HOLLAND PARK (MANAGEMENT) LTD

Respondent

Re: 89 Holland Park,
London,
W11 3RZ

Judge Elizabeth Cooke

Heard on 23 June 2022

Decision Date: 1 July 2022

Mark Loveday and Mattie Green for the appellants, instructed by Howard Kennedy LLP
Shomik Datta for the respondent, instructed by KDL Law

The following cases are referred to in this decision:

89 Holland Park Management Limited and others v Hicks [2013] EWHC 391 (Ch)
89 Holland Park Management Limited v Hicks [2020] EWCA Civ 758
Arnold v Britton [2015] UKSC 36
Assethold Limited v Watts [2014] UKUT 537 (LC)
Bretby Hall Management Company Limited v Pratt [2017] UKUT 70 (LC)
Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38
Fairbairn v Etal Court Maintenance Ltd [2015] UKUT 639 (LC)
Gilje v Charlgrove Securities Limited [2003] EWHC 1284 (Ch)
Hicks v 89 Holland Park (Management) Limited [2021] EWHC 930 (Comm)
Kensquare v Boakye [2021] EWCA 1725
Liverpool Quays Management Limited v Moscardini [2012] UKUT 244 (LC)
McHale v Earl Cadogan [2010] HLR 412
Phillips v Francis [2014] EWCA Civ 1395
Radford v de Froberville [1977] 1 WLR 1262
Sella House Limited v Mears [1989] 1 E.G.L.R. 65

Introduction

1. When the award-winning architect Sophie Hicks planned to build an underground mansion in Holland Park, with a glass cube above ground which would glow at night, she met with stiff opposition from her neighbours. After several rounds of litigation her plans had to be scaled down and to that extent the neighbours were successful. But success has come at a heavy price in terms of litigation and other costs, and this appeal is one of the consequences of that protracted battle.

2. The appeal is from a decision of the First-tier Tribunal ("the FTT") about the payability and reasonableness of leasehold service charges in the sum of £430,411.50, said to be the appellants' share of the costs accrued between 2014 and 2020 by the freeholder of 89 Holland Park, the building in which they hold a long lease of a flat.

3. The appellants were represented at the hearing of the appeal by Mr Mark Loveday and Ms Mattie Green, and the respondent by Mr Shomik Datta, all of counsel, and I am grateful to them.

The facts

The dispute with Ms Hicks

4. The respondent is the freeholder of 89 Holland Park, a detached Victorian Villa at the end of a line of similar properties. In 1965 the then freeholder sold a small plot of land to the south of the building ("the garden plot"), measuring about 23 feet by 140 feet. The purchaser entered into a Deed of Covenant with the freeholder of 89 Holland Park, dated 10 July 1968. She covenanted not to make any application for planning permission in respect of the land without first having the plans approved by the freeholder of number 89, nor to start to develop the land until drawings and specifications had been so approved.

5. 89 Holland Park is divided into five flats. The respondent was incorporated in 1990 and later that year acquired the freehold of the building on behalf of the leaseholders, who each hold a share in it.

6. The lease of flat 5 was granted in 1989 for a term of 90 years from 25 March 1981. There followed two deeds of surrender and re-grant of the lease, the first in 2006 which extended the term to 25 March 2113, and the second in 2007 which extended the term to 999 years. All the rest of the terms of the lease remained as in the 1989 lease, which were incorporated by reference in the 2007 deed. The appellants acquired the lease in 2006.

7. Ms Hicks bought the garden plot in 2012, with the intention of developing it. Her plan for an underground dwelling with a glass structure above ground was unwelcome to the leaseholders of number 89. They were concerned about the threat to the structure of their building, to the trees beside it, and to the appearance and amenity of the surrounding. There followed a dispute which I can summarise as follows:

a. In November 2012 the respondent and the leaseholders of 4 of the 5 flats (including the appellants) issued proceedings in the High Court ("the First Claim") seeking a declaration that they had the benefit of the Deed of Covenant; Ms Hicks counterclaimed for a declaration that any consent or approval could not be unreasonably withheld. In the course of the First Claim the claimants obtained an interim injunction to prevent Ms Hicks applying for planning permission; they then accepted an undertaking so that no final injunction was sought. The outcome of that action was a declaration that the respondent and the leaseholders had the benefit of and could enforce the covenants, that Ms Hicks was bound by them, that the relevant consent was that of the respondent and that consent was not to be unreasonably withheld (*89 Holland Park Management Limited and others v Hicks* [2013] EWHC 391 (Ch)).

b. After that, Ms Hicks sought the consent of the respondent to her plans, which was refused. In June 2014 she commenced proceedings ("the Second Claim") against the respondent for a declaration that consent was unreasonably withheld. She discontinued that action in March 2017.

c. Meanwhile she had continued to seek the approval of the respondent for her plan, which went through a further iteration. Consent was refused, and in August 2017 Ms Hicks served further High Court proceedings on the respondent ("the Third Claim") again asserting that refusal was unreasonable.

d. Ms Hicks also applied for planning permission, in 2018 (not in breach of covenant, because the undertaking given in the course of the First Claim allowed Ms Hicks to make an application on her undertaking to abide by the outcome of the litigation). The respondent objected, with the agreement of all the leaseholders. At the request of the first appellant it had legal representation at the planning committee meeting. Planning permission was granted in January 2019.

e. In June 2019 judgment was given in the Third Claim. It was held that while the respondent had not refused consent for an improper motive, it had unreasonably refused consent on the basis that it was not entitled to consider the leaseholders' interests but only its own and therefore could not withhold consent on aesthetic grounds. The respondent appealed that decision and was successful; *89 Holland Park Management Limited v Hicks* [2020] EWCA Civ 758. The Third Claim was remitted to the High Court, where Judge Pelling QC on 29 April 2021 delivered judgment to the effect that the respondent had reasonably refused consent to the proposed development on aesthetic grounds and on the basis that the building was going to extend beyond the rear building line of 89 Holland Park (although not on the basis of damage to the trees or of the disturbance during construction) (*Hicks v 89 Holland Park (Management) Limited* [2021] EWHC 930 (Comm)).

8. And there the litigation with Ms Hicks rests, at least for now. Costs orders were made in favour of the respondent and the leaseholders in the First Claim; the discontinuance of the Second Claim meant that Ms Hicks had to pay the respondent's costs; and in the Third Claim she was ordered to pay 40% of the respondent's costs of the action.

The funding of the dispute and the charges in issue

9. The cost of the dispute to the respondent has been eye-watering. The summary narrative of events that I set out above does not convey the scale of professional advice and representation that it has had, including expert reports on arboriculture, engineering, heritage and aesthetics, as well as legal representation by solicitors and by leading and junior counsel. By 2021 when the FTT gave its decision the total costs incurred were over £2.7 million. Costs paid or to be paid by Ms Hicks are to be deducted from that figure, but further costs have been incurred since it was calculated; overall the costs to the respondent will have been in the region of £2 million - a salutary reminder that the recovery of costs in litigation may still leave a successful party seriously out of pocket.

10. The respondent is owned by the lessees and they have funded the litigation. They acted unanimously and shared the costs without dissent until the summer of 2014. The costs were demanded of the lessees (through the respondent's managing agent) as service charges under the lease. They were demanded as ad hoc charges, rather than being added to the regular interim charges in respect of maintenance and insurance etc.

11. The first appellant, Mr Andrew Dell, was a director of the respondent from 2006 to 2013, when he resigned because the appellants had moved abroad and so it was difficult to attend meetings. So he was at the heart of the resistance to Ms Hicks' plans from the outset and the appellants were no less involved than their fellow lessees. However, they were in a slightly different position from the others in practical terms; their flat is on the top floor and so they cannot see the garden plot from inside.

12. On 9 July 2014, while the Second Claim was still on foot and after an unsuccessful attempt at mediation with Ms Hicks, the first appellant sent an email headed "without prejudice" to the other lessees:

> "We are perhaps less concerned by the eventual outcome (rightly or wrongly), but have tried to be neighbourly and supportive to date. We have now reached a conclusion that we do not wish to spend any more on this series of legal actions. We also wanted to be very clear that we have no objection to anyone continuing with an action but we do not wish to be a party, either in law or financially."

13. The next service charge for legal costs demanded after that was in December 2014, and that is the first of the charges in issue in this appeal. The total charges in issue amount to £430,411.50, demanded between December 2014 and January 2020; whilst the December 2014 charge was £10,000, just under £20,000 was demanded for 2016, and the 2019 charges amounted to nearly £245,000 because the respondent spent over £1.2 million on the dispute that year. To put that in context, in 2019 the respondent spent £30,645 on routine insurance and maintenance, of which the appellants' share would have been about £6,000.

14. On receipt of the appellants' email of 9 July 2014 the directors of the respondent replied to explain what had been achieved in the proceedings so far and why they felt that it was right to continue to resist Ms Hicks' plans. On 19 January 2015 the second appellant replied to say that the appellants' position had not changed , and said "We are unclear about the legal

fees being classified as service charges and would be grateful if you could clarify." The respondent took advice from counsel and confirmed that the legal costs were properly demanded as service charges. The first appellant responded in May 2015 thanking the directors for taking advice on the point.

15. Later, the appellants paid the charges demanded in December 2014, and the further charges demanded until March 2017; after that they paid 50% of the charges demanded; all these payments were made without prejudice to their contention that the charges in issue were not payable as service charges. In correspondence with the other lessees from November 2016 onwards the appellants stated that their only concern was with the structural integrity of 89 Holland Park and repeatedly suggested a "more equitable split" of the charges on the basis that "the balance between structural and aesthetic is 50/50".

16. The appellants continued to attend meetings with lawyers alongside their fellow lessees, they asked the directors to submit an objection to planning permission in 2018 on their behalf, which was done; and they asked that the respondent have legal representation at the planning committee meeting, which it did.

The action in the FTT

17. In March 2020, after the first judgment in the Third Claim and before the Court of Appeal decision, the appellants made an application to the FTT for a determination of the reasonableness and payability of the service charges demanded in respect of the costs of the dispute from December 2014 onwards. The FTT had to decide four issues.

18. The first was whether the appellants had already agreed to pay some of the charges, so that the FTT had no jurisdiction to determine their reasonableness (section 27A(4) of the Landlord and Tenant Act 1985). The FTT found against the respondent on this issue and there is no appeal from that decision.

19. Second, were the charges recoverable as service charges under the lease? The FTT found that they were.

20. Third, the appellants challenged the validity of the demands for the charges. The FTT found that they were estopped from raising that challenge, and there is no appeal from that decision.

21. Finally the FTT assessed the reasonableness of the service charges pursuant to section 19 of the Landlord and Tenant Act 1985, which provides that service charges are not payable unless they were reasonably incurred. It found that they were reasonable, and refused permission to appeal its decision on this point.

The appeal

22. The FTT gave permission to appeal the second of those issues. This Tribunal gave permission on the issue of reasonableness, and the appellants have broken down that ground into three, namely the reasonableness of the charges representing the costs of the Second

Claim, of the costs incurred in the course of objecting to the application for planning permission and of the costs of the Third Claim. So there are four grounds of appeal, but only two legal issues, namely the construction of the lease (whether the charges fall within the scope of the service charge) and, second, the reasonableness of the charges. The second is relevant only if the appeal fails on the first ground.

23. At the hearing I asked counsel to present their arguments about ground 1 before I heard either of them on grounds 2 to 4. Argument on ground 1 took the whole of the day listed for the hearing. At the end of the day I said to counsel that the appeal succeeded on ground 1, and by agreement with them I did not therefore list the appeal for a further day for grounds 2 to 4 to be argued.

24. So the rest of this decision is about ground 1. The issue to be decided is simply whether the lease entitles the respondent to demand the charges in question, incurred as they were to fund the defence of proceedings brought against it by a third party (the Second and Third Claim) and to fund legal representation and expert advice taken for the purpose of objecting to Ms Hicks' planning application in 2018 ("the 2018 planning costs").

25. It is therefore irrelevant that the appellants for much of the course of the dispute were content with what the respondent was doing, even to the extent of asking that the respondent be legally represented at the planning committee meeting in 2018. Equally irrelevant is the fact that in 2015 the appellants asked the respondent whether the charges were properly demanded as service charges, and the respondent took counsel's advice before confirming that they were. The respondent does not argue that the appellants are estopped from denying that the charges are properly so demanded (the point was raised by the respondent in its Statement of Case before the FTT, but the FTT made no decision on it and perhaps it was not pursued; at any rate there was no application for permission to appeal on the point). Therefore the only question before me is the construction of the lease and the appellants' behaviour makes no difference to that. The outcome of this appeal does not rule out the possibility that the appellants are liable to pay some or all of these charges for a different reason and on a different legal basis. All that I can decide is whether or not the charges in issue are service charges under the lease.

26. I record the FTT's findings of fact that the respondent consulted the appellants and kept them informed of the charges being incurred, and that there is no doubt about the respondent's motives nor about the legal justification for incurring the costs that make up the disputed charges. It acted at all times on the basis of legal advice and with advice from technical experts, and its concerns about the threat to the structure of the building (which the appellants shared) were valid. None of this is relevant to the construction of the lease.

The appellants' lease

27. The appellants' lease is in unsurprising form. The 2007 surrender and re-grant incorporated all the terms of the 1989 lease, with its traditional torrential drafting style and aversion to punctuation.

28. At clause 3(4) the lessee covenants to pay the Service Charge (and the Interim Service Charge, which does not concern us). The Service Charge is defined to comprise 19.83% of the General Expenditure (and 24.67% of the Common Parts Expenditure, which does not concern us). The General Expenditure is defined as follows:

> "The General Expenditure means the total expenditure … incurred by the Lessor in any Accounting Period in carrying out her obligations under Clause 4(4) of this lease and any other costs and expenses reasonably and properly incurred in connection with the Building."

29. The charges in issue are said by the respondent to be costs incurred by it in carrying out its obligations under Clause 4(4) (and so the general words at the end of the definition are not relied on).

30. Clause 4 sets out the Lessor's covenants in sub-clauses (1) (quiet enjoyment), (2) (other leases in the building to be granted on similar terms), (3) (Lessor to enforce breaches of covenant against other lessees, subject to the lessee indemnifying it for its costs of doing so) and (4)(a) to (n). I set out clause 4(4)(a) to (n) below, summarising where appropriate, and I have emphasised clauses 4(4)(g)(ii) and 4(4)(l) which the respondent says are the provisions that justify the charges in issue in the appeal:

    a. To "maintain and keep in good and substantial repair and condition" the "main structure of the Building" including the walls, foundations and roof, the pipes, and the common parts.

    b. To paint the exterior at least once every five years;

    c. To insure the Building;

    d. To clean the windows in the common parts;

    e. To pay rates and taxes;

    f. "For the purpose of performing the covenants on the part of the Lessor herein contained at her reasonable discretion to employ … one or more caretakers porters maintenance staff gardeners…"

    g. "(i) At the Lessor's discretion to employ an Agent to manage the Building…

       (ii) **To employ all such surveyors builders architects engineers tradesmen solicitors accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building."**

    h. To maintain communal television aerials;

j. To maintain fire extinguishers;

k. To maintain an electric porter system;

l. "**Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the reasonable discretion of the Lessor may be considered necessary or advisable for the proper maintenance safety amenity and administration of the Building**."

m. To keep a reserve fund;

n. To pay the costs of the formation of a lessee-owned company.

31. The respondent relies principally on clause 4(4)(l), which has been described by both parties as a "sweeper clause" and also on 4(4)(g)(ii); it says that the charges in issue were incurred in carrying out its obligations under these clauses.

The arguments on the appeal

The law about the interpretation of service charge clauses

32. It is uncontroversial that the leading authority on the construction of leases is *Arnold v Britton* [2015] UKSC 36. Lord Neuberger said this at [15]:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 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."

33. At paragraph 23 Lord Neuberger went on to say:

> "… 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'."

34. In the absence of any "special rule of interpretation" for service charge clauses we have to be careful not to misunderstand dicta in a number of earlier cases, on which Mr Lovedaygrove relied, which stressed the need for clarity before a particular item would be found to be included in such a clause. Examples are *Sella House Limited v Mears* [1989] 1 E.G.L.R. 65, *Gilje v Charlgrove Securities Limited* [2003] EWHC 1284 (Ch) and *Phillips v Francis* [2014] EWCA Civ 1395 where Sir Terence Etherton C said at [74] that:

> "if the parties to a lease intend that the lessor shall be entitled to receive payment from the tenant in addition to the rent, that obligation and its extent will be clearly spelled out in the lease."

35. Those dicta have not been overruled or disapproved, but in the light of *Arnold v Britton* we know that those dicta do not require the lease to be construed restrictively and that the obligation to pay a service charge is not required to be any more clearly expressed than any other obligation. Mr Datta points out that Mummery LJ in *Gilje v Charlgrove Securities Limited* [2003] EWHC Civ 1777 at [32] regarded the requirement of clarity as an example of the *contra proferentem* rule, which means that a lease drafted by the landlord is to be construed against the landlord in case of ambiguity.

36. The problem in the present appeal is not ambiguity in the sense that a particular word or phrase may have more than one meaning. It is that an obligation in general terms is inevitably open to interpretation and a decision has to be made as to what specific obligations fall within it. Clause 4(4)(g)(ii) entitles the landlord, and obliges it if it considers it necessary or advisable, to employ professionals for the proper maintenance (etc) of the building. It is obvious, I suggest, that that includes taking specialist advice for example from a surveyor if necessary when the roof is damaged in a storm and requires replacement. There is no lack of clarity even though the specific work is not spelled out explicitly, and that clarity arises from the context of the obligation, following as it does the landlord's obligation to maintain and repair the structure of the building. The employment of professionals in those circumstances clearly belongs within the general words of the service charge. In saying that I echo Lord Neuberger's words at paragraph 23 of *Arnold v Britton*. But do those general words, and the words of clause 4(4)(l), include instructing legal professionals and expert

witnesses in litigation against a third party, or in connection with an objection to a third party's planning application? In order to answer that question the Tribunal has to go through the factors set out in *Arnold v Britton* (see [32] above), bearing in mind Lord Neuberger's instruction not to bring within the general words something that does not clearly belong there.

Litigation costs as service charges

37. The question whether litigation costs can fall within service charges has been considered on a number of occasions. These cases have to be regarded with caution because some of them pre-date *Arnold v Britton* and the reminder in that case that service charge clauses are not to be construed restrictively; and they all differ in the terms under consideration, the type of litigation in question, and the surrounding circumstances, and no general rule can be discerned. So I am not going to go through them all, but the following examples are helpful.

38. In *Sella House Limited v Mears* (above) the court did not allow the recovery of legal costs incurred in recovering rent from tenants of the building; the clause in question was in identical terms to clause 4(4)(g)(ii) in the present case but with the omission of the word "solicitors", so the result might be regarded as unsurprising.

39. In *Liverpool Quays Management Limited v Moscardini* [2012] UKUT 244 (LC) the President, George Bartlett QC, accepted that a lease entitled the management company to include in the service charges the legal costs incurred in recovering rent and service charges from lessees; but he did not accept that it could also charge the legal costs incurred in pursuing the developer for defects in the building. The clause in question was a broadly-worded "sweeper" clause, and the President had this to say about such clauses:

> "26. Paragraph 19 is expressed so widely that I find it hard to see what it might cover. As expressed ("All costs and expenses…of whatsoever kind incurred by the Management Company") it covers everything that the company might choose to spend money on, but if given effect to in this way it would render of no significance all the limitations contained, expressly or impliedly, in the earlier, specific paragraphs. For this reason, I do not think that it is possible to give effect to it in the terms in which it is expressed."

40. Clause 4(4)(l) in the present appeal is not so widely expressed, but the comment is a useful reminder that a "sweeper" clause should not be construed so as to bring into the service charge expenses of a kind that could not otherwise have been included.

41. In *Fairbairn v Etal Court Maintenance Ltd* [2015] UKUT 639 (LC) the landlord was not able to recover as part of the service charge its legal costs and sums paid in settlement of proceedings brought against it by another leaseholder for disrepair. In *Bretby Hall Management Company Limited v Pratt* [2017] UKUT 70 (LC) the Tribunal (HHJ Behrens) found that a management company was able to recover as part of the service charge its costs incurred in connection with proceedings threatened against it, but never actually issued, by the lessee. The clause relied upon obliged the lessee to pay for:

> "All other expenses (if any) incurred by the Manager … and any legal or other costs reasonably and properly incurred by the Manager and otherwise not recovered in taking or defending proceedings (including any arbitration) arising out of any lease of any part of the Development or any claim by or against any lessee or tenant thereof or by any third party against the Manager as owner lessee or occupier of any part of the Development."

42. *Assethold Limited v Watts* [2014] UKUT 537 (LC) is the only decision of which counsel are aware in which it has been decided that a landlord's litigation costs against a third party have been included in a service charge. Assethold Limited was the landlord of a block of 13 flats. The neighbouring landowner served notice upon Assethold Limited under the Party Wall Act 1996 of its intention to carry out work on the boundary between the two sites. Surveyors had been appointed but before agreement was reached the neighbour started work, and made a trial excavation for new foundations adjoining the wall of the block. The landlord issued proceedings and obtained, at a hearing on the day the proceedings were issued, an interim injunction requiring the neighbour to stop work; the injunction continued in force until a party wall award was published. The landlord sought to recover its costs of those proceedings from the lessees, relying upon a clause in materially identical terms to clause 4(4)(l) in the present case. The Deputy President said at [62]:

> "I am satisfied that, though general, the language of [the relevant provision] is sufficiently clear to entitle the appellant to recoup through the service charge the cost of engaging solicitors to take steps which in themselves are agreed to have been reasonable, to ensure that the protection afforded to the Building by a party wall award under the 1996 Act would not be lost. In my judgment those steps can appropriately be described as having been taken for the proper maintenance, safety, amenity and administration of the Building. There is nothing in the context or commercial purpose of the leases to suggest that the preservation of the Building from external interference ought not to be the responsibility of the Landlord. Indeed, the opposite is the case as the structure of the Building remains vested in the Landlord and the service charge puts it in a position to fund action for the common good which might be beyond the resources of individual tenants."

43. So it is certainly not the case that litigation costs against a third party can never be recovered under a service charge provision. It is significant that the clause in question in *Assethold* was almost identical to the one in question in this appeal. The decision is not binding on me but I give it very careful consideration before reaching a different conclusion in the context of this different lease and in the different circumstances of the present appeal, as I explain below.

44. The most recent decision referred to by counsel on litigation costs was *Kensquare v Boakye* [2021] EWCA 1825, where the Court of Appeal had to consider the scope of an obligation by the tenant to pay:

> "The cost of employing such professional advisers and agents as shall be reasonably required in connection with the management of the Building".

45. It determined that the clause did not enable the landlord to recover its costs in proceedings brought by the tenant to determine the reasonableness and payability of service charges. Newey LJ said at [54]:

> "I have concluded that, read naturally, paragraph 5 does not extend to litigation costs. While the reference to "professional advisers" is apt to apply to lawyers, they are not mentioned specifically and nothing is said about legal proceedings. … [T]he focus is on management services rather than litigation and, to adapt words of Rix LJ which Lord Neuberger quoted in *Arnold v Britton*, a decision in favour of Kensquare would involve "bring[ing] within the general words of a service charge clause" something "which does not clearly belong there"."

The construction of the service charge provisions in the appellants' lease

46. Bearing those principles and authorities in mind I consider the two sub-clauses relied upon by the respondent, 4(4)(g)(ii) and 4(4)(l) in light of the approach set out in *Arnold v Britton*.

47. The Tribunal must first consider the natural and ordinary meaning of the words. For ease of reference I set out again the two sub-clauses relied upon by the respondent:

> "4(4)(g)(ii) To employ all such surveyors builders architects engineers tradesmen solicitors accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building."

> "4(4)(l) Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the reasonable discretion of the Lessor may be considered necessary or advisable for the proper maintenance safety amenity and administration of the Building."

48. The appellants are required to pay by way of service charge the cost of the landlord fulfilling its obligations under clause 4, and these are the parts of clause 4 that the respondent relies upon. The costs incurred by the landlord are the legal and professional costs of defending the second and Third Claims and of objecting to the planning application in 2018.

49. Principally Mr Datta points to clause 4(4)(l); he notes that it is a "sweeping provision"; he argues that the costs incurred were "necessary or advisable for the proper maintenance safety and amenity of the building". He points out that the FTT and the High Court found that the respondent had valid concerns about the structure of the building, and that the lessees (other than the appellants) had reasonable concerns about the amenity of the building. He relies upon the passage quoted above (at [42]) from *Assethold Limited v Watts*. As to clause 4(4)(g)(ii) he points to the specific reference to solicitors, and argues that counsel would therefore fall within "other professional persons", and says that the employment of professionals was desirable for the safety and administration of the building, in protecting the legitimate interests of the respondent and the lessees in the structural integrity, amenity and value of the building and of the individual flats, both in the litigation and in the pursuit of planning objections.

50. I agree that the respondent, and the lessees, were motivated by concern for the structural integrity and safety of the building, and that the respondent and the lessees other than the appellants were legitimately motivated by concern about amenity. But that motivation does not assist in determining whether these are the sort of costs that fall within the general words of the sub-clause. It is not the case that any action whatsoever undertaken out of concern for, or interest in, the structure and amenity of the building falls within the landlord's obligations under the sub-clause. The natural and ordinary meaning of the words by itself does not tell us how far the landlord's obligations extend, although I would observe that they do not naturally suggest the inclusion of litigation against third parties, nor of objecting to a planning application.

51. To understand the scope of the sub-clauses we have to move on to "the other relevant provisions of the lease". Mr Loveday first points to the preceding and surrounding parts of clause 4(4), which are for the most part about the practical upkeep of the building – repair, decoration, insurance, cleaning, rates, staff, television aerials, fire extinguishers, entry phone, and some specific financial matters. Mr Loveday points out that the closing words of each sub-clause, beginning "as may be necessary or desirable" and "as may be considered necessary or desirable" are there to limit the purposes of the employment of professionals and the doing of "acts matters or things"; the words refer back to the landlord's primary obligations set out in the rest of the clause, and should not be seen as widening the landlord's obligations. Clause 4(4)(l) in particular is a sweeper clause and should not be regarded as extending the range of what the landlord can do. He observes that the obligations in clause 4(4) are spelt out in some detail; if the landlord is specifically required to maintain the fire extinguishers and the entry phone (and the lessees to pay for its doing so), for example, then the parties would have made specific provision if the landlord was obliged to defend litigation or to object to a neighbour's planning application (and the lessees to pay for its doing so). The focus of clause 4(4) is on managing and maintaining the building, not on actions to be taken against neighbours or in relation to neighbouring land. Clause 4(4) seems to me to have the same focus and purpose as the clause in issue in *Kensquare v Boakye* (see [44] above], and that is the case even though solicitors are referred to in 4(4)(g)(ii); the clause is about management and there is no hint of litigation. I agree with Mr Loveday's analysis.

52. Moreover, the lease does make specific mention of other kinds of litigation that the respondent must undertake and the lessees must pay for. I referred above to the provision for the lessee to pay for the landlord's costs of enforcing the covenants of the other lessees in clause 4(3). The lease also contains provision at clause 2(6) for the lessee to pay the costs of enforcing the lessee's own covenants to decorate and repair the flat, and to pay the landlord's costs in relation to forfeiture proceedings (a "*69 Marina* clause") at clause 2(9). Mr Loveday argues that if the parties had intended the lessee to have to fund the cost of defending proceedings brought by third parties or of objecting to planning applications they would have said so. Again, I agree.

53. The FTT in explaining its conclusion said this at paragraph [57]:

> "The costs can be said to relate to the maintenance and/or safety of the Building, particularly insofar as one of the key concerns related to the structural integrity of the Building could be compromised by the proposals … We also note that clause 4(4)(l) also makes specific reference to "amenity … of the Building", which in our

> finding, can also cover challenges to Ms Hicks' proposals on aesthetic grounds. Accordingly, the tribunal does not accept the argument that "other professionals" should be construed solely by reference to assisting with regard to management functions. In our determination, the wording of the clause is not so restrictive and, properly construed, extends to the type of costs in issue here, notwithstanding that there is no express reference to rights relating to building on "adjoining or contiguous land" in clause 4 or reference to spending to oppose planning applications."

54. I disagree; the FTT seems to me to give insufficient regard to the context in which the clauses appear, to the focus of clause 4(4) on the practical management and upkeep of the building, and to the presence elsewhere in the lease of express provisions relating to legal costs.

55. Moving on to the rest of the *Arnold v Britton* points, I note that the purpose of the clause is to fund the landlord's obligations as landlord. It is not to support its wider interests as freeholder. The purpose of clause 4(4) itself is to ensure that the landlord maintains the building and employs staff and professionals where necessary. To read that as covering the cost of litigation with a third party or of objecting to planning permission is too great a stretch.

56. What about the factual background that can be taken to have been in the original parties' minds (disregarding their subjective intentions, which in any event are not known)? The garden plot is a much-litigated piece of land; the parties to the lease in 1989 and to the surrender and re-grant in 2007 are to be taken to have been aware of *Radford v de Froberville* [1977] 1 WLR 1262, being the litigation about the covenant between the original parties to it. True, as Mr Datta observes, by 2007 that was decades ago; but it is unusual for a restrictive covenant to give rise to litigation, and Mr Datta in his skeleton argument says that the parties would reasonably have had the possibility of the development of the adjacent land in their contemplation and therefore also the possibility of dispute. I conclude from that that had the original parties wanted to include in the lease an obligation for the lessees to pay service charges such as those in dispute here they would have expressly so provided rather than leaving future parties and the courts to infer such an obligation with difficulty from a clause that is essentially about the upkeep and management of the building.

57. Finally (because there is no question of evidence of the original parties' subjective intentions), I have to consider commercial common sense. Mr Loveday points to the extraordinary level of costs incurred by the respondent in the Second and Third Claim and in objecting to the planning application. I agree that an obligation in the lease for the landlord to incur and for the respondent to fund costs of this level is implausible. If these costs are part of the service charge then so are the costs of any litigation brought against or by the owner of the garden plot in future; landlord and lessees would have an extraordinary commitment to potentially ruinous costs. The existence of such obligations would not make commercial sense because they would make the lease and freehold unmarketable. It is most unlikely that the original parties intended this, and if they did they would have made express provision. Obligations on this scale cannot be gleaned from a provision that is focused upon the practical maintenance and management of the building. To go back to Lord Neuberger's words at paragraph 23 of *Arnold v Britton*, these are not obligations that clearly belong in this clause.

58. I repeat that the respondent was entitled to refuse consent to the development, and entitled to defend the legal proceedings (in which it was to a large extent successful). That is not the issue here; the issue here was whether the respondent was obliged to do so under clause 4(4) of the lease, to which my answer is no.

59. The circumstances pertaining in these proceedings are very different from those in *Assethold Limited v Watts*. In that case there was an immediate physical threat to the party wall, with physical incursion being commenced by the neighbour which had to be stopped. Actual damage was being caused. I have no doubt that the Tribunal's decision in that case was correct. In the present case the structure of the building was not yet affected. Mr Datta argues that that distinction is, as he puts it, the opposite of "a stitch in time saves nine" and leaves the respondent obliged to wait until the last possible moment to take action. I do not accept that that is the consequence of that reasoning, and I make no decision about the level of threat or of damage that would bring legal proceedings within the scope of the clause, but the defence of the Second and Third Claim did not. And I have not succeeded in imagining any circumstances where objecting to a planning application made by a neighbour would fall within it.

Conclusion

60. The appeal succeeds; the appellants are not required to pay as service charges the respondents' costs of the Second and Third Claim and of objecting to Ms Hicks' planning application.

61. If the appellants wish to make an application under section 20C of the Landlord and Tenant Act 1985 they may do so in writing within 21 days of the date of this decision.

Judge Elizabeth Cooke

1 July 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.