Practice and Precedents Editor's Notes

Litigation costs – can they be swept up?

Service charge provisions in long residential leases will usually contain what is commonly referred to as a 'sweeper' or 'sweeping up' clause.[1] In *Dell v 89 Holland Park (Management) Ltd*[2] Judge Elizabeth Cooke in the Upper Tribunal (Lands Chamber) had to consider the correct approach to the interpretation of such a clause and whether it covered the costs incurred by the freeholder of litigation in objecting to development on neighbouring land.

Construction of leases

The leading authority on the construction of leases is the decision of the Supreme Court in *Arnold v Britton*[3] which considered the interpretation of service charge contribution provisions in the leases of a number of chalets in a caravan park in South Wales.

In that case Lord Neuberger said:

"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 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."[4]

He 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] 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"."[5]

It was these points which Judge Cooke applied in *Dell v 89 Holland Park (Management) Ltd*.[6]

---

[1] Sometimes it may be referred to as a 'mopping up' clause instead.
[2] *Dell v 89 Holland Park (Management) Ltd* [2022] UKUT 169 (LC).
[3] *Arnold v Britton* [2015] UKSC 36.
[4] *Arnold v Britton* [2015] UKSC 36 at para 15.
[5] *Arnold v Britton* [2015] UKSC 36 at para 23.
[6] *Dell v 89 Holland Park (Management) Ltd* [2022] UKUT 169 (LC).

The facts

89 Holland Park (Management) Ltd is the freeholder of 89 Holland Park, a Grade II listed detached Victorian villa, which is divided into five flats. Sophie Hicks, the award-winning architect, owns a plot of land at the rear of at the rear of the property on which she wished to build an underground mansion with a glass cube above ground which would glow at night. Her plot is bound by a restrictive covenant which prohibits the making of any application for planning permission in respect of any plans, drawings or specifications until they have been approved by the freeholder of 89 Holland Park. The freeholder objected her plans. After several rounds of litigation her plans had to be scaled down and to that extent the freeholders were successful.[7] But success came at a heavy price in terms of litigation and other costs, and this case is one of the consequences of that protracted battle.

The costs of all the litigation were said to have been eye-watering and overall, the costs to the freeholder of 89 Holland Park were in the region of £2 million. The freeholder is owned by the lessees of the five flats in the property and they 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. In 2014 the lessees of one of the flats, Mr and Mrs Dell, moved abroad and advised the other lessees that they did not want to spend any more money on the litigation. However, the litigation continued and so did the service charge demands for legal costs. The eventual amount which the freeholder sought to recover from Mr and Mrs Dell amounted to £430,411.50. In 2019 the freeholder spent over 40 times as much on legal costs as on routine insurance and maintenance.

The lease

The service charge provisions in clause 4(4) of the lease includes the following sub-clauses:

"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."

and

"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."

Litigation costs as service charges

[7] See *Dell v 89 Holland Park (Management) Ltd* [2022] UKUT 169 (LC) where Judge Cooke summarised the litigation at para 7. See further *Hicks v 89 Holland Park (Management) Ltd* [2021] EWHC 930 (Comm); *89 Holland Park Management Ltd v Hicks* [2020] EWCA Civ 758; *Hicks v 89 Holland Park (Management) Ltd* [2019] EWHC 1301 (Ch); *Hicks v 89 Holland Park (Management) Ltd* [2014] EWHC 2962 (Ch); *89 Holland Park (Management) Ltd v Hicks* [2013] EWHC 391 (Ch).

The question whether litigation costs can fall within service charges has been considered in a number of cases.[8] However, Judge Cooke regarded these with caution because some of them pre-dated *Arnold v Britton* and they all differed in the terms under consideration, the type of litigation in question, and the surrounding circumstances, and so no general rule could be discerned.

However, there was one case which involved a service charge clause with near identical wording to the present case. The Upper Tribunal in *Assethold Ltd v Watts*[9] decided that a landlord's costs incurred in litigation against a third party were 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 etc Act 1996 of its intention to carry out work on the boundary between the two properties. 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 of flats. Assethold Limited issued proceedings and obtained, at a hearing on the day the proceedings were issued, an interim injunction requiring the neighbour to stop work. This injunction continued in force until a party wall award was published. Assethold Limited sought to recover its costs of those proceedings from the lessees. It relied on a sweeper clause in paragraph 6 of the First Schedule in the leases. This was in materially identical terms to clause in *Dell v 89 Holland Park (Management) Ltd*[10] as follows:

"To do or cause to be done all works installations acts matters and things as in the reasonable discretion of the Landlord may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Development."[11]

The Upper Tribunal held that this clause allowed the recovery of the legal costs even though it made no specific reference to them. The Deputy President said:

"I am satisfied that, though general, the language of paragraph 6 of the First Schedule 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."[12]

He also said:

"It seems to me to be wrong in principle to start from the proposition that, with certain types of expenditure, including the cost of legal services, unless specific words are employed no

---

[8] See *Sella House Ltd v Mears* [1989] 1 E.G.L.R. 65; *Liverpool Quays Management Ltd v Moscardini* [2012] UKUT 244 (LC); *Fairbairn v Etal Court Maintenance Ltd* [2015] UKUT 639 (LC); *Bretby Hall Management Company Ltd v Pratt* [2017] UKUT 70 (LC); *Assethold Ltd v Watts* [2014] UKUT 537 (LC).
[9] *Assethold Ltd v Watts* [2014] UKUT 537 (LC).
[10] *Dell v 89 Holland Park (Management) Ltd* [2022] UKUT 169 (LC).
[11] *Assethold Ltd v Watts* [2014] UKUT 537 (LC) at para 22.
[12] *Assethold Ltd v Watts* [2014] UKUT 537 (LC) at para 62.

amount of general language will be sufficient to demonstrate an intention to include that expenditure within the scope of a service charge. Language may be clear, even though it is not specific."[13]

It was subsequently suggested by commentators that this decision marked a shift in the approach to the recovery of legal costs.[14] However, whatever shift there might have been appears to have been short lived. In 2021 the Court of Appeal in *Kensquare Ltd v Boayke*[15] considered the scope of an obligation by the lessee in paragraph 5 of the Seventh Schedule of the lease to pay:

"The cost of employing such professional advisers and agents as shall be reasonably required in connection with the management of the Building".[16]

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 pay ability of service charges. Newey LJ said:

"…. 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. …… the 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 fact that paragraph 5 speaks of advisers and agents being employed "in connection with" the management of the Building, not "for" its management, does not seem to me to matter.[17]

Were the litigation costs recoverable in Dell v 89 Holland Park (Management) Ltd?

The First Tier Tribunal had decided that clause 4(4)(l) permitted the landlord to recover its costs. However, Judge Cooke decided that the First Tier Tribunal had given insufficient regard to the context of the clause. The focus of the clause was on managing and maintaining the building, not on actions to be taken against neighbours or in relation to neighbouring land. The Judge felt that the clause had the same focus and purpose as the clause in issue in *Kensquare Ltd v Boayke*.[18]

She also decided that the First Tier Tribunal had also not given sufficient regard to the presence elsewhere in the lease of express provisions relating to legal costs. Clause 4(3) provides 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[19] at clause 2(9). The Judge agreed with counsel for Mr and

---

[13] *Assethold Ltd v Watts* [2014] UKUT 537 (LC) at para 58.
14 See, for example, Howard Lederman, Recovery of legal costs as a service charge - what has changed since Arnold and Britton? L. & T. Review 2016, 20(2), 47-51.
[15] *Kensquare Ltd v Boayke* [2021] EWCA Civ 1725.
[16] *Kensquare Ltd v Boayke* [2021] EWCA Civ 1725 at para 11.
[17] *Kensquare Ltd v Boayke* [2021] EWCA Civ 1725 at para 54.
[18] *Kensquare Ltd v Boayke* [2021] EWCA Civ 1725.
[19] Judge Cooke referred to this as a "*69 Marina* clause", see *Freeholders of 69 Marina, St Leonards on Sea v Oram* [2011] EWCA Civ 1258.

Mrs Dell 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.

Judge Cooke noted 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 was too great a stretch.

The Judge then considered the factual background that can be taken to have been in the original parties' minds. The garden plot is a much-litigated piece of land and she felt that the parties were to be taken to have been aware of the first of these cases which was *Radford v de Froberville*,[20] being the litigation about the covenant between the original parties to it. As a result, she concluded 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 in the present case they would have expressly provided for these 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.

The final consideration was commercial common sense. Judge Cooke agreed that an obligation in the lease for the landlord to incur and for the lessees to fund costs of the level incurred was implausible. If these costs were part of the service charge, then so would the costs of any litigation brought against or by the owner of the garden plot in future and these were potentially ruinous. The existence of such obligations would not make commercial sense because they would make the lease and freehold unmarketable. It was most unlikely that the original parties intended this, and if they did, they would have made express provision. To go back to Lord Neuberger's words in *Arnold v Britton,*[21] these were not obligations that clearly belonged in this clause.

Assethold Ltd v Watts

The circumstances in *Dell v 89 Holland Park (Management) Ltd*[22] were very different from those in *Assethold Ltd v Watts*.[23] 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. Judge Cooke had no doubt that the Tribunal's decision in that case was correct. But in the present case the structure of the building was not yet affected.

Conclusion

Mr and Mrs Dell were successful in their appeal and so were not required to pay the freeholder's litigation costs as part of the service charge. The general words of the service charge clauses did not cover instructing legal professional and expert witnesses in litigation against a third party, nor in connection with an objection to a third party's planning application.

---

[20] *Radford v de Froberville* [1977] 1 WLR 1262.
[21] *Arnold v Britton* [2015] UKSC 36 at para 23.
[22] *Dell v 89 Holland Park (Management) Ltd* [2022] UKUT 169 (LC).
[23] *Assethold Ltd v Watts* [2014] UKUT 537 (LC).

Practical points

The RICS professional statement "Service charges in commercial property 1st edition, September 2018"[24] notes that a sweeper clause should not be used to attempt to recover services which have been omitted in error when drafting the service charge clause. A landlord should try to make sure that the service charge clause is widely drafted and the list of items which can be recovered is as comprehensive as possible in order to avoid difficulties arising in the future. A tenant should ensure that the landlord is obliged to exercise its discretion to recover under the sweeper clause reasonably and in the interests of good estate management.

Russell Hewitson

[24] *https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/real-estate/service-charges-in-commercial-property-1st-edition.pdf.*