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Residential
Property
TRIBUNAL SERVICE

LON/OOBC/LSC/2010/0037

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER THE LANDLORD AND TENANT ACT 1985 (as amended) SECTIONS 27A and 20C

PROPERTY: **35 THE HOLLIES NEW WANSTEAD LONDON E11 2SL**

APPLICANT: **MR ALEXANDER SMOLEN**

RESPONDENT: **FORSCHELL PROPERTIES LIMITED**

Represented by: **Messrs Seddons**

Appearances:

For the Applicant: **The Applicant represented himself**

For the Respondents: **Ms Ellodie Gibbons of Counsel**
Mr M Garfield and Mr A Shaw, Directors of the Respondent

Date of Hearing: 5th July 2010

TRIBUNAL
Mrs T I Rabin JP
Mrs H Bowers MRICS
Mr O Miller

Date of Tribunal's decision: 23rd July 2010

35 THE HOLLIES NEW WANSTEAD LONDON E11 2SL

FACTS

1. The Tribunal was dealing with an application by the Applicant, Mr Alexander Smolen, the long leaseholder of Flat 35, The Hollies, New Wanstead, London E11 2SL("the Flat"), for a determination as to whether the service charges for service charge years 1998 to 2009 and the estimated service charges for service charge year 2010 were reasonable and payable by him. The Respondent is the freeholder of The Hollies, New Wanstead, London E11 2SL("the Building"). The service charges related to the Building. The application has been made under Section 27A (1) Landlord and Tenant Act 1985 as amended ("the Act"). A copy of the lease of the Flat ("the Lease") is in the file.

2. The Building comprises 34 flats with garages in the grounds let to the long leaseholders. The Respondent is a tenant owned company who acquired the freehold and all the long leaseholders in the Building, including the Applicant, are shareholders in the Respondent. The Respondent is operated by directors who are shareholders and long leaseholders within the Building.

3. The sum of £19,043.02 was stated to be outstanding in service charges for the Applicant. This sum included legal costs and ground rent demanded in excess of that sum reserved by the Lease. The Respondent conceded that the legal costs were not recoverable from the Applicant and this sum was withdrawn, as was the overcharged ground rent, leaving a sum of £15,745.02 in dispute.

4. The Tribunal made directions on 23rd February 2010. The Tribunal directed that the issues should be narrowed and, at the start of the hearing, it was agreed that the following issues were before the Tribunal:

   (a) The payability of the service charges for service charge years 1998-2009 and the estimated service charge budget for service charge year 2010. Mr Smolen was not questioning the reasonableness of the charges levied, merely whether he had a liability to contribute towards them and at what proportion
   (b) Whether the cost of insurance had been properly apportioned to the Flat
   (c) Whether all or any of the sum of £15,745.02 is owed by the Applicant, bearing in mind the requirements of Section 20B of the Act.

5. The Applicant submitted that the Tribunal should take account of the fact that he was not represented and that the Tribunal had an obligation to ensure that all aspects of the law as it applied to the Applicant were taken into account. The Tribunal can only deal with application before and will apply the relevant law to the issues before it. The Tribunal is an expert

Tribunal and will ensure that where an applicant is unrepresented, he should not be prejudiced by any lack of knowledge of the law or procedure. However, in the Tribunal's view, this obligation does not extend to broadening the scope of any application made by an applicant in the absence of a specific request to do so and the comments of any other parties having been sought.

THE LAW

6. The relevant legal principles that the Tribunal has taken into account in arriving at its decision are set out in the Schedule below.

THE HEARING

7. The hearing of the application took place on 5th July 2010. The Tribunal did not consider it necessary to inspect the Building in view of the nature of the dispute between the parties, as inspection would have taken matters no further. Mr Smolen represented himself and Ms Ellodie Gibbons of Counsel represented the Respondent. Mr Maurice Garfield and Mr Aubrey Shaw attended to give their evidence. Mr Garfield was taken ill during the hearing and before he gave evidence. There was an adjournment whilst he received first aid assistance but he was unable to give evidence due to his state of health and left the hearing.

8. Mr Smolen provided a bundle and at the hearing he produced a further copy invoice from the Respondent dated 1st January 2000. The Respondent produced a number of insurance premium invoices and a copy of a letter dated 1st June 2010 from Messrs Seddons to Mr Smolen containing copies of demands with the required summary of rights and obligations as well as a supplementary statement from Mr Garfield addressing some of the issues raised by the Applicant in the pleadings. Ms Gibbons produced a skeleton argument together with a copy of the case of **Gilje and others v Charlgrove Securities and another [2003] EWHC 1284 (Ch).** She had quoted the relevant extract on which she relied in full in the skeleton argument. In view of the fact that Mr Smolen had not had an opportunity of seeing the skeleton argument before the hearing there was a short adjournment to allow him to read it and to ask any questions on any aspect that he did not understand. Mr Smolen confirmed that he understood the skeleton argument.

ADJOURNMENT REQUEST

9. Mr Smolen made a request for the hearing to be adjourned. He said that he had a number of questions that he wanted to ask Mr Garfield regarding the apportionment of the insurance premium and the service of service charge demands that were not addressed in either of Mr Garfield's statements. Ms Gibbons objected to the adjournment. She told the Tribunal that Mr Garfield had a medical condition that required regular

blood transfusions and she was concerned about the effect the stress of the hearing had on him. She was satisfied that she could make the Respondent's case without Mr Garfield's evidence in reliance on his statements. She indicated that, even if an adjournment were to be granted, she would advise her instructing solicitor that Mr Garfield should not be called due to the risk of appearing at another hearing could have to his health.

10. The Tribunal is aware that it is for a party to proceedings to determine which witnesses need to be called. The Tribunal has no power to order the attendance of any witness. The Tribunal was concerned about Mr Garfield's health and the evident stress caused to him. There are full statements from Mr Garfield in the file and, in view of the fact that he will not be called, an adjournment would be of no effect. The request for an adjournment was refused.

EVIDENCE AND DECISION

11. The Tribunal will deal with each of the issues in dispute separately.

Insurance premium

12. Mr Smolen submitted that until 21st January 2006 he was charged 1/34th of the insurance premium and that it had always been divided equally between the long leaseholders. He referred to the expenditure account for 2006/7 at page 203 of the bundle in which there was a note by the insurance premium figure stating "not subject to 1/34th". He had never been charged 4.762% for his proportion of the insurance premium in the past. It was only in 2006 when the Chairman, Mr Garfield, mentioned that the insurance was not at 1/34thth that Mr Smolen was alerted to the change. To illustrate his point, he referred to an analysis of the insurance payments at page 347 o the Bundle and he referred for example to the service charge year 2009 where the sum demanded of £683.48 did not equate to 4.762% of the demand, that being the proportion the Respondent alleged was payable. Mr Smolen acknowledged that he had no evidence that the sum demanded was 1/34th or that the Respondent ever proposed such a sum.

13. Mr Shaw gave evidence. He had been a director and treasurer of the Respondent at various times since 1999. As treasurer he dealt with the financial aspects of managing the Building. The shareholders had determined that they would not appoint a managing agent, in order to keep the costs down and that the Board of Directors would undertake the management of the Building.

14. Mr Shaw's duties as treasurer included drafting the budget each year and submit it for approval to the shareholders at the Annual General Meeting,

and, once approved, this budget would form the basis of the quarterly service charges.

15. Mr Shaw said that during the time he was treasurer, he paid the insurance premium once a year and that the premium was usually due in January of each year. He referred to a schedule showing the percentages payable by each of the long leaseholders towards the insurance premiums and this was at page 346 of the bundle. The percentages were based on the rateable values of each of the flats as there were a number of different types of flats in the Building, including two penthouses with patios, two very large flats and the rest of them smaller. He had been handed these percentages by the previous treasurer and he used these for apportioning the insurance premiums from the time he became a director in 1999 and these are the current percentages used by the Respondent. He has never used an apportionment of 1/34th

16. Mr Shaw was referred to a schedule at Page 347 of the bundle, setting out the insurance premiums for each of the years in question. He said had never seen the schedule prior to the hearing and had not prepared it. Ms Gibbons told him that this had been prepared by those instructing her by extracting the figure for insurance for each year out of the audited accounts produced. Mr Shaw acknowledged that the sums demanded were not 4.762% of the premium but pointed out that there were a number of policies, including lifts, terrorism and public liability and these may have been allocated elsewhere in the accounts. Since he had not been given an opportunity to consider this point as it had been sprung on him at the hearing, he was unable to comment on the exact figures but re-iterated that all demands to Mr Smolen would have been at the rate of 4.762%

17. Although Mr Garfield was unable to give evidence, the Tribunal has had regard to his statement at pages 301 to 308 and his short supplementary statement. The Tribunal noted that Mr Garfield agreed that the apportionment had been on the basis of percentages based on rateable value for over 26 years and had never been based on 1/34th per flat. Mr Garfield has been a director of the Respondent since 1994/5 and, before that, he was aware that his predecessor used the same figures. Mr Garfield stated that there had been no challenge to the apportionment by Mr Smolen until the present application was made and that he does not challenge to level of he premiums.

DECISION

18. The terms between the parties are governed by the provisions in the Lease, which is a contractual document. The obligation of the tenant to pay for insurance under the Lease is contained in Clause 1 which provides:

AND ALSO PAYING by way of further or additional rent from time to time during the said term a sum equal to the due proportion attributable by the Lessor to the demised premises of the sums which the Lessor shall by way of premium expend in keeping The Hollies or any part or parts thereof insured against loss or damage by fire and such other risks (if any) as the Lessor thinks fit in such amount or amounts as the Lessor shall deem to be adequate and in such Insurance office as the Lessor shall think proper such further sum to be paid on the quarter day next ensuing for the payment of rent after the expenditure thereof.

19. This clause effectively gives the Respondent the ability to charge whatever proportion it deems appropriate and to make changes if appropriate. The clause does not make reference to a "reasonable " amount but under modern practice, the Respondent is required to use a reasonable basis for apportionment of the premium.

20. Both Mr Shaw and Mr Garfield gave evidence that the Respondent has apportioned the insurance premium on what has been considered a fair basis for at least 26 years. Mr Shaw explained that the apportionments were made bearing in mind that some of the flats were considerable larger than others and adopted the rateable value proportions. In the Tribunal's view this is a perfectly reasonable manner in which the premiums should have been apportioned.

21. Mr Smolen produced a number of demands but none of them indicated that there was a proportion of 1/34th applied to his premium. It was unfortunate that the instructing solicitor had extracted what he considered to be the appropriate insurance premiums from the audited accounts in the bundle without checking the figures with Mr Shaw as these figures are misleading and have led to confusion. Mr Shaw was unable to comment, as he had not seen the figures until they were presented to him at the hearing and the instructing solicitor who had prepared them was not in attendance. In the circumstances, the Tribunal will disregard the figures at page 347 as these are more of a hindrance than a help.

22. Mr Smolen has made it clear that he is not questioning the level of the insurance premiums and, accordingly, this is not a matter to be considered by the Tribunal. The Lease allows the lessor to charge a due proportion of the insurance premium and there is no indication that the proportion is to be 1/34th. Mr Smolen has been unable to provide the Tribunal with any evidence to show that he has been charged 1/34th at any time during his ownership of the Flat, but has made an assumption that this was the sum demanded.

23. On the other hand, both Mr Shaw (in person) and Mr Garfield (in his witness statement) have confirmed that they have been personally involved in the preparation of the budgets and the collection of insurance contributions from the long leaseholders for many years. They have both given credible evidence that the proportion used for the Flat is 4.762% and

that is in accordance with the terms of the Lease. The Tribunal prefers the evidence of Mr Shaw and Mr Garfield to that of Mr Smolen.

24. **The proportion of the insurance premium payable is properly demanded in accordance with the terms of the Lease at 4.762% and is a reasonable proportion. Any insurance premium unpaid is overdue and payable forthwith.**

Section 20B

25. Mr Smolen stated that he had received no service charge demands and that the Respondent said that the sum in excess of £15,000 but he has never received a bona fide service charge demand for any part of this sum. He produced a service charge demand from 2000 and referred to the demands on pages 401-409. In his view, these were meaningless pieces of paper as they were not headed, did not refer to the Building and there was nothing to indicate that these were service charges. He pointed out that, since October 2007, there was a requirement to include the parties' rights and obligations and the long leaseholders had not been provided with this information until December 2009. The Respondent does not appear to have kept copies of the demands and the papers served on him were meaningless. He was unaware of his rights to be served with statutory information until he made the application to the Tribunal.

26. Mr Smolen acknowledged at the hearing that he had been served by hand with copies of the demands on a quarterly basis during the service charge years in question. However, the demands for large sums of arrears were meaningless and the Respondent has not provided a breakdown of the service charges as requested by the Tribunal in the directions. Mr Smolen made it clear that he was not disputing receiving the demands but simply that they were not proper bona fide demands and that, in the absence of bona fide demands for the period up, he was not obliged to make payments of any sums demanded

27. Mr Shaw stated that he had a handwritten record of demands sent to Mr Smolen and this was reproduced in the bundle at pages 348 and 349. He had prepared this information from the demands sent to Mr Smolen as and when they were sent. The ledgers were included in the papers sent to the accountants when the figures were audited. Mr Shaw confirmed that the sum of the percentages charged to each of the long leaseholders added up to 100%.

DECISION

28. The Tribunal noted that Mr Smolen acknowledged that he had received quarterly demands by hand from Mr Shaw and/or Mr Garfield. The service charges have been demanded in accordance with the terms of the Lease which provides that the service charges are demanded in advance of

costs being incurred and no balancing payment is required. He confirmed that he has no complaint about the level of the service charge demands.

29. Mr Smolen also claimed that a number of the demands served since October 2007 have not included a summary of the tenant's rights and obligations as tenants of a dwelling in accordance with the obligations imposed from 1st October 2007 by the **Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations SI 2007/1257** ("the Regulations"). There is a requirement of Section 21B(1) of the Act that a demand for payment of service charges is to be accompanied by a summary of rights However, although Section 21B(3) of the Act entitles a tenants withhold payment of the service charge in the case of non-compliance by a landlord with the requirements of Section 21B (1) of the Act, this does not in itself extinguish the liability to pay.

30. The bundle includes at page 412 an itemised demand dated 11th December 2009 showing all service charges due from 1st January 2005, including arrears of £8,663.24. This was accompanied by a summary of the rights and obligations as required under the Regulations and was in the requisite form and all demands served since then have been accompanied by the necessary information as specified in the Regulations. Since the Regulations are now complied with and have been since December 2009, the service charges cannot be withheld in accordance with Section 21 B (3). In addition, the Respondent served Mr Smolen with copies of all demands served after 1st October 2007, each of which had the statutory information attached. Mr Smolen pointed out that the copies in the bundle had some pages of the statutory information missing on some of the demands but a copy of the demands posted were produced and these were complete.

31. The purpose of Section 20B(1) is to ensure that the tenant is advised of ascertainable costs within eighteen months of the demand being made. Such a notice is served when the costs have been fully determined and the intention is to ensure the tenant is informed within a reasonable time of costs being incurred that he has to pay for services provided in accordance with the terms of the lease. The landlord will be penalised if he fails to provide this information within the time limit set out by having the amount recoverable limited to £250 for each unit.

32. Mr Smolen accepts that he was served with quarterly demands throughout the service charge years in question and has been aware of the expenditure incurred. Indeed, he was invited to annual general meetings as a shareholder when the annual budgets were presented for approval. Although he refers to the demands as "meaningless pieces of paper" in the Tribunal's view these are perfectly clear. Forschell Properties Ltd is the landlord, the Building is mentioned and each of the items charged is identified. There can be no merit in Mr Smolen's argument that he did not know to which items these demands referred.

33. The Tribunal accepts that the demands served between 1st October 2007 and 11th December 2009 did not comply with the Regulations and Section 21B(1) of the Act and that Mr Smolen was entitled to withhold payment. However, as soon as the necessary statutory notice had been served, the sums demanded became due as Mr Smolen had been notified of the sums incurred or to be incurred by the quarterly demands as well as being asked to approve the budget each year. There is no question that he ever found himself in a position where he was presented with a bill for which he was not prepared and for which he had not had the opportunity to make provision. He was therefore well aware of the expenditure that he would be asked to meet and falls within the intention of Parliament when Section 20B (1) was drafted. In addition, Mr Smolen has never questioned the service charge expenditure itself, merely the mechanics of the demands made.

34. **There is no current breach of the Regulations or of Section 20B (1) of the Act. Mr Smolen has been made aware at all times during the service charge years in question of the expenditure incurred and to be incurred from time to time. There are considerable arrears of service charges which are overdue and payable immediately.**

CONCLUSION

35. The Respondent is a company whose purpose is to own and manage the Building. Each and every one of the 34 long leaseholders is entitled to one share in the Respondent. Although no evidence was given, it is the Tribunal's experience that tenants acquire freeholds in order to give them control of the management of the property in which they all live and to keep the costs within acceptable bounds and a level agreed by all the long leaseholders. Mr Shaw has described how the board prepare the budget and submits it to the shareholders for approval every year.

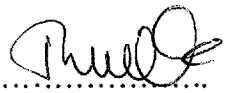
36. The directors are volunteers. They take on the responsibility of managing the Building for no reward in order to minimise the costs. They are not professionals and, until October 2007, there is no evidence that they have failed to comply with any of the statutory requirements imposed on landlords. Mr Smolen has failed to pay his service charges for a number of years, even though he had been given an opportunity at each annual general meeting to put any concerns that he might have. The failure of one long leaseholder to make payments causes problems for the whole Building with planned works compromised through lack of funds.

37. Mr Smolen has made a number of claims, unsupported by evidence to show that he had no liability for the service charge in dispute. The Tribunal is satisfied that he has at all times been aware of the amount of expenditure planned and expended since, by his own account, he has been in receipt of quarterly demands.

SECTION 20C OF THE ACT AND REFUND OF FEES

38. An application was made by the Applicant for an order under Section 20C of the Act to the effect that the costs of these proceedings are not proper costs to be included in the service charges. The Tribunal noted that the Applicant has withheld payment of the service charges and continued to query charges without any credible evidence in support of his objections. The Applicant determined to make an application to the Tribunal and this involved the Respondent in extensive legal proceedings. These costs will have to be met by all the long leaseholders. There is no provision in the Lease for payment of costs in connection with proceedings such as these. Nonetheless since an application has been made, the Tribunal must make a determination and accordingly the application for a Section 20C order is refused.

39. Mr Smolen requested refund of the fees he had paid for this application. In view of the Tribunal's findings, no such order will be made.



Mrs T Rabin JP
Chairman

Dated: 23rd July 2010

The Schedule

The Relevant Law

Law of Property Act 1925

Section 62(1) of the Act provides that a conveyance of land shall be deemed to include and shall by virtue of the Act operate to convey with the land all buildings, erections, fixtures, hedges, fences, water-courses and other matters and advantages whatsoever appertaining or reputed to appertain to the land at the time of conveyance, demised, occupied or enjoyed with the land or any part thereof.

Landlord and Tenant Act 1985

Section 18(1) of the Act provides that, for the purposes of relevant parts of the Act 'service charges' means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

Section 19(1) of the Act provides that relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services are of a reasonable standard;

and the amount payable shall be limited accordingly.

Section 20C(1) of the Act provides that a tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a leasehold valuation tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

Section 20 B of the Act provides:

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant the (subject to subsection (2)) the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred

(2) Subsection (1) shall not apply if within the period of 18 months beginning with the day when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and the he would subsequently be required under the terms of his lease to contribute to them by payment of the service charge

Section 21B of the Act provides

(1) A demand for payment of service charge must be accompanied by a summary of the rights and obligations of tenants of buildings in relation to service charges
(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations
(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

Section 20C(3) of the Act provides that the tribunal may make such order on the application as it considers just and equitable in the circumstances.

Section 27A of the Act provides that an application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to-

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable.
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

Leasehold Valuation Tribunals (Fees) (England) Regulations 2003
Regulation 9(1) provides that subject to paragraph (2) a Tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or any part of any fees paid by him in respect of the proceedings.

Construction of Leases

1. The general legal principles.

Lord Diplock said in *Antaios Compania Naviera SA v. Salen Rederierna 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.'

2. 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 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 inadmissible 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...'

3. 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.'

4. 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.'

5. 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.'

6. Regard may be had to the general background as part of the factual matrix in order to help construe words in a document - see *Partridge & others v Lawrence & others* [2003] EWCA Civ 1121

7. Sometimes as part of the process of construction of a document it is necessary to imply a term or terms into it. In order for a term to be implied the following conditions must be fulfilled:

1. the term must be reasonable;
2. the term must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
3. the term must be so obvious that it goes without saying;
4. the term must be capable of clear expression;
5. the term must not contradict any express term of the contract.

A clear statement of the criteria was set out in *B.P. Refinery (Westernport) Pty Ltd v Shire of Hastings* [1978] 52 ALJR 20.

8. In the context of the construction of service charges provisions in a residential lease, we believe that it is trite law that a lease has to be construed in the same way as any other instrument or commercial contract. Words used must be given the ordinary natural meaning in the context. It is also trite law that a tenant is only obliged to pay what the lease provides for him to pay. See *Riverplate Properties Ltd v Paul* [1975] Ch 133.

9. In *Sella House Ltd v Mears* [1989] 12 EG 67 the service charge provisions in the lease provided for the recovery of expenditure incurred by the lessor in carrying out its obligations. Those obligations included:

> *'(i) to employ at the lessor's discretion a firm of managing agents to manage the building and discharge all proper fees salaries charges and expenses payable to such agents or such other persons who might be managing the building including the cost of computing and collecting the rents and service charges in respect of the building, and*
> *(ii) to employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as might be necessary or desirable for the proper maintenance safety and administration of the building.*

The Court of Appeal held that legal expenses incurred in recovering rent and service charges from defaulting tenants were not recoverable.

In the context of discussion on the terms of the lease relating to legal expenses, Taylor LJ made the following comment:

> *'For my part, I should require to see a clause in clear and unambiguous terms before being persuaded that that result was intended by the parties.'*

10. The approach to construction of a service charge provision in a residential lease was reviewed in *Gilje v Charlesgrove Securities Ltd*

[2001] EWCA 1777, where ambiguous provisions were looked at in respect of a notional rent on the caretaker's accommodation. Laws LJ said:

> *'On ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so. The lease, moreover, was drafted or proffered by the landlord. It falls to be construed contra proferentum.'*

In the same case Mummery LJ said:

> *'First, I note what is stated in paragraph 55 on page 71 of the 5th Edn of the Encyclopaedia of Forms and Precedents Vol 23 on Landlord and Tenant in the section relating to the drafting of provisions in leases for services charges. It is stated as follows:*
>
> > *'The draftsman should bear in mind that the courts tend to construe the service charge provision restrictively and are unlikely to allow recovery for items which are not clearly included.'*

He went on to say:

> *'The proposition is obvious. Indeed the proposition reflects a particular application of the general principle of construction in the contra proferentum rule.'*

11. The contra proferentum rule is one to be applied only where the court is unable on the material before it to reach a sure conclusion on the question of construction. See *St Edmundsbury v Clark (No.2)* [1975] WLR 468.

The view that a grant should be construed *contra proferentum* i.e. against the grantor has been losing significance since the judgment of Sir John Pennycuick in *St Edmundsbury* when he said:

> *'...this presumption can only come into play if the court finds itself unable on the material before it to reach a sure conclusion on the construction of the reservation. The presumption is not itself a factor to be taken into account in reaching the conclusion.'*