On 8 December 2023, the Court of Appeal handed down judgment in 89 Holland Park (Management) Ltd v Dell & Dell, a case concerning the recoverability of legal and professional costs through the service charge provisions contained in a lease.

Edward Blakeney was led by James Fieldsend and instructed by Faye Didcote at KDL Law on behalf of the appellant lessor.

Factual Background

89 Holland Park is a detached block in West London ("**the Building**") divided into 5 flats, each of which is held on a long lease. The freehold of the Building is held by 89 Holland Park (Management) Ltd ("**ManCo**"), a lessee run company, and the Dells are the leasehold owners of Flat 5.

The Building is neighboured by a plot of (currently unused) land ("**the Land**") that used to be part of the garden of the Building, and the Building enjoys the benefit of restrictive and positive covenants over the Land. The restrictive covenants preclude the development of the Land without the consent of the owner of the Building.

Many years ago, there was a dispute between the owner of the Building and the owner of the Land arising out of the aforementioned positive covenants – a fence had not been erected within the time stipulated. The quantification of damages arising from that breach was considered in *Radford v de Froberville [1977] 1 WLR 1262*.

In 2012 the Land was acquired by the architect, Sophie Hicks. She sought to develop the Land and create a modern residential dwelling, notably with a 'glass cube' at street level, which was resisted by ManCo on various grounds. That led to ManCo incurring a number of costs as there were disputes about the scope of the restrictive covenants and whether ManCo was withholding consent unreasonably – see the various reported Judgments at [2013] EWHC 391 (Ch), [2019] EWHC 1303 (Ch), [2021] Ch. 105, and [2022] 2 P&CR 13. Those costs included legal costs incurred in the litigation, professional costs for taking expert advice in relation to Ms Hicks' plans, and planning costs incurred when objecting to the grant of planning permission.

ManCo ultimately prevailed (albeit after the matter had gone to the Court of Appeal and remitted for a retrial), and it was held they had legitimate concerns for the safety and amenity of the Building when resisting Ms Hicks' proposals. Nevertheless, they only recovered a proportion of their incurred costs from Ms Hicks, and ManCo sought to pass the remainder through the service charge contained in the residential leases for the flats.

At first, all leaseholders had agreed to resist Ms Hicks' plans and incur the associated costs. However, in 2014 the Dells objected to paying further moneys in respect of the dispute with Ms Hicks.

The Proceedings Below

With ManCo continuing to demand contributions to fund the dispute, the Dells brought proceedings in the First-tier Tribunal (Property Chamber) ("**FTT**") to determine their liability to pay the same. Challenges were raised to the form in which the demands had been made (being 'ad hoc' demands which was said to be outside the machinery contained in the leases), the recoverability of the charges through the leases, and the reasonableness of the charges. ManCo also argued that the charges had been admitted by the Dells and thus were outside the jurisdiction of the FTT.

At this stage, ManCo relied on two service charge provisions as encompassing the costs in question, both of which were 'sweeper' provisions of varying breadth:

1. Clause 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."*
2. Clause 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."*

The FTT decided that the Dells had not admitted the charges in question, but found in ManCo's favour on the other three issues:

1. There was an estoppel by convention which precluded the Dells from challenging the form of the demands.
2. The costs came within the scope of both clauses as ManCo was motivated by structural and aesthetic concerns for the Building.
3. The costs, although high, were reasonably incurred and reasonable in amount.

There was no appeal against (1), the FTT gave permission to appeal against (2), and the Upper Tribunal (Lands Chamber) ("**UT**") gave permission to appeal against (3).

In the end, the UT (Judge Cooke) did not determine the appeal against the reasonableness of the costs because it held the costs in question fell outside the scope of the leases. The appeal was therefore allowed on issue (2). In its Judgment:

- The focus of the two provisions was on management and not litigation; it concerned ManCo's obligations to maintain the Building.
- In the circumstances of the case, express wording would have been used had the parties intended for costs of this type to be recovered through the service charge, not least because of the history of litigation over the Land (i.e. *Radford*).
- That conclusion that was reinforced by commercial common sense, as leaseholders would not be taken to commit themselves to 'potentially ruinous' costs that rendered the leasehold interests unmarketable.
- The obligation to pay the costs did not clearly belong in the provisions.
- Although *Assethold Ltd v Watts [2015] L & TR 15* decided that litigation costs, which were incurred in a dispute with a third party where the safety of the block was at risk, were recoverable under virtually wording to that in Clause 4(4)(l), that case could be distinguished on the basis that the risk of damage was more proximate than that in this case.

The Court of Appeal

ManCo appealed on a single ground – that the UT's interpretation of the provisions was wrong and unduly narrow. As part of that ground of appeal they relied, for the first time, on a third provision as permitting recovery of the disputed costs, arguing that those fell within the second limb of the definition of 'General Expenditure' in the lease which read:

> *"'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 including without prejudice to the generality of the foregoing…"

The Court of Appeal (Lady Justice Falk, with whom LJJ Arnold and Philips agreed) dismissed the appeal, and although their reasoning differed slightly to the UT they largely agreed with its approach and the reasoning. In summary:

- The wording in paragraphs 4(4)(g)(ii) and (l) was general in nature rather than ambiguous. The task, therefore, was to apply the principles in *Arnold v Britton [2015] AC 1619* and determine whether the expenditure fell inside or outside the wording of the lease.
- The Court of Appeal agreed that the focus of the clauses was on management and maintenance of the building, particularly in light of the surrounding clauses which concerned routine maintenance of the Building. It would stretch that wording too far to encompass the costs in issue.
- Whilst ManCo was motivated by structural/ aesthetic concerns, there was no immediate threat to the Building and the purpose of the expenditure was (in reality) to stop Ms Hicks' proposed development rather than to maintain the Building or keep it safe.
- Given the substantial liabilities the Dells would face and the substantial obligations ManCo would face if ManCo were correct, there would need to be clear wording to permit such costs to be incurred and passed onto leaseholders.
- As litigation costs were specifically mentioned elsewhere in the lease, that indicated that they would be explicitly provided for where they are to be recoverable.
- Whilst the Court of Appeal accepted that some litigation costs could fall within Clauses 4(4)(g)(ii) and (l), such as litigation over poor quality repair work, each item of expenditure would need to be treated separately.
- The identity of the landlord was irrelevant when construing the lease, even when (as in this case) the leases expressly envisioned the freehold being held by a lessee run management company, which would necessarily have no funds other than those recovered through the service charge.
- Although the *Radford* litigation was relevant, the Court of Appeal focused primarily on the existence of the Land itself, which meant there was a clear potential for litigation. But the absence of specific (i.e. express) wording in the leases addressing litigation of that type was telling.
- *Assethold* had also been correctly distinguished on its facts.

The Court of Appeal permitted ManCo to raise the new argument relating to the definition of 'General Expenditure', but then dismissed the argument on its merits. It took the matter no further than the analysis of the other two provisions – it was too narrow to allow the recovery of the costs in question.

A copy of the Judgment can be found **here**.

Comment

This is the third time in three years that the Court of Appeal has addressed the question of whether legal and professional costs can be recovered through a service charge. Whilst this further guidance

is welcome, it seems unlikely to settle the issue conclusively – the fact sensitive nature of the enquiry, both of the lease under analysis and the costs incurred, was emphasised by the Court repeatedly.

In any event, there are a number of interesting takeaways from the Judgment:

- The Court of Appeal noted a tension in the principles set out in *Arnold v Britton* (see paragraph 22 of the Court's Judgment), and although they considered this to be more apparent than real it may need to be clarified in the future.
- The breadth of general wording/ sweeper clauses has been given a relatively limited scope in this case. As this type of clause is invariably found in most leases, the decision could impact a great number of leaseholders.
- The Court's apparent preference for express (rather than clear) wording could lead to even greater torrential drafting in leases.
- The identity of the landlord forms no part of the matrix of fact when construing a lease, even if specifically contemplated in the lease itself. Tenant run management companies will thus be put in a difficult position, as they could face levying these types of costs elsewhere or going insolvent if individual leaseholders object to an otherwise agreed course of action.

The Judgment of the Court of Appeal raises additional questions, however, by introducing dividing lines where none were express. When is clear wording required and when is express wording required? How does one distinguish between types of litigation costs that are and are not recoverable? How proximate does damage have to be before a lessor can act in the interests of the safety of the building? How does one distinguish between aesthetic/ safety concerns, and other concerns motivated by aesthetic/ safety issues? Although the Court said each case had to be determined on its own facts, that does not greatly assist parties who wish to know their rights and obligations (preferably without the involvement of lawyers) from the outset.

With the Leasehold and Freehold Reform Bill proposing to limit the recovery of legal costs unless ordered by a Court or Tribunal, we may be seeing more and more disputes being fought over precisely these issues.

ManCo is seeking permission to appeal from the Supreme Court.