

# TANFIELD

## Recovery of legal costs under “sweeping up” clauses

1. The question of whether legal costs can be recovered under a “sweeping up” clause is, ultimately, one of construction. The principles of construction are well known.
2. In *Arnold v Britton* [2015] UKSC 36 Lord Neuberger said 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 Limited v Persimmon Homes Limited* [2009] AC 1101 , para. 14. 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.”
3. At [23] he said:

“... 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. .... The origin of the adverb was in the 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”.

4. There is conflicting authority on what costs can be recovered under such clauses. In *Lloyds Bank v Bowker Orford* [1992] 2 EGLR 44 (Ch D) David Neuberger QC (as he then was) held that a clause which allowed the landlord to recover the costs of providing “any other beneficial services” did not entitle it to recover costs relating to external repairs, internal decoration and repair of the common parts.
5. In *Holding & Management Ltd v Property Holding & Investment Trust Plc* [1989] 1 W.L.R. 1313 the lease allowed the landlord to recover “such ... works ... as the maintenance trustee shall consider necessary to maintain the building as a block of first class residential flats”. The maintenance trustee was not entitled to recover the cost of substantial external works under the sweeping up clause. There was already a detailed repairing provision in the lease. The Court of Appeal held that the clause did not give the maintenance trustee “a free hand to require the residents to pay for all works, whatever they might be, which the [maintenance trustee] might consider necessary to maintain the building as a block of first class residential flats.” The clause was directed at works which were necessary to maintain the amenities and facilities which from time to time are appropriate for the building as a block of first class residential flats.
6. By contrast, landlords were successful in recovering the cost of works under sweeping up clauses in *Sutton (Hastoe) Housing Association v Williams* (1988) 20 H.L.R. 321 (replacing wooden windows with UPVC ones) and *Sun Alliance and London Assurance Co Ltd v BRB* [1989] 2 E.G.L.R. 237 (window cleaning systems).
7. In *Canary Riverside Property Limited v Schilling* LRX/65/2005 the Upper Tribunal held that the costs of resisting an application to appoint a manager under s.24 of the 1987 Act fell within a charging provision which entitled the landlord to recover the “proper and reasonable fees and

disbursements of managing agents, solicitors, counsel, surveyors ... employed or retained by the Landlord for or in connection with the general overall management and administration and supervision of the building.” In *Conway v Jam Factory Freehold Ltd* [2013] UKUT 0592 (LC) the Deputy President (Martin Rodger QC) held that the costs of dealing with a s.24 application were costs incurred “in the management of the building”. At [42] Deputy President said “The management of a complex residential building necessarily and routinely involves dealing with inquiries, complaints and criticism. If leaseholders seek the appointment of a new manager, or seek to persuade a landlord to make changes in the style or approach to management, the landlord's participation in such discussions would, in my view, also be “in the management of the building”.

8. In *Assethold Ltd v Watts* [2014] UKUT 537 (LC) the Upper Tribunal (Martin Rodger QC, Deputy President) held that legal costs incurred by a landlord in bringing proceedings to obtain a party wall award were recoverable under the landlord's general obligation to do whatever acts were necessary to preserve the safety and amenity of the building.
9. *Geyfords Limited v O'Sullivan* [2015] UKUT 683 (LC) is the most recent case in this line of authority. The landlord incurred professional costs in both County Court and LVT proceedings and subsequently sought to recover a contribution towards them through the service charges for the three accounting years from 2011 to 2014. The lessee covenanted to contribute a sum called “the Maintenance Contribution” which was to be one-twelfth of the “costs expenses outgoings and matters” mentioned in the Fourth Schedule. Para 6 of the Fourth Schedule refers to: “All other expenses (if any) incurred by the Lessors or their managing agents in and about the maintenance and proper and convenient management and running of the Development.” As a preliminary issue, the FTT determined that legal costs were not recoverable under para 6 of the Fourth Schedule. The landlord appealed.

10. On appeal, Martin Rodger QC, Deputy President, reviewed a number of authorities on the recovery of legal costs, including *Reston Ltd v Hudson* [1990] 2 EGLR 51 and *Sella House Ltd v Mears* [1989] 1 EGLR 65, in the light of the Supreme Court's recent decision in *Arnold v Britton*. The the Deputy President held that the language of para 6 was "less clear than [was] to be expected if the cost of proceedings against defaulting leaseholders had been intended to be recovered as costs and expenses of "proper and convenient management and running of the Development". Moreover, the President held that "commercial common sense would lead one to expect the employment of clear language to impose onerous and unpredictable burdens." Accordingly, the landlord's appeal was dismissed.
  
11. For many years, the courts and tribunals adopted a restrictive approach to the construction of service charge clauses (e.g. *Sella House*, culminating in Rix LJ's comments in *McHale v Earl Cadogan*). In recent years, it appeared that the courts were adopting a more relaxed approach (see *Assethold v Watts* – also a decision of the Deputy President), making it more likely that a landlord could recover legal costs under a sweeper clause. That trend looked set to continue following the Supreme Court's decision in *Arnold v Britton*. *Geyfords Limited v O'Sullivan*, however, marks a retreat to the old approach that legal costs will not be recoverable through a service charge in the absence of clear words. It will not be welcomed by landlords.

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