

10001



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/00ML/LSC/2014/0028

Property : Flat 4 Cavendish Court
Brighton
BN2 1FU

Applicant : Cavendish Court (Brighton) RTM
Company Limited

Representative : Ms C Chapman, Hobdens Property
Management

Respondent : Housing 21

Representative : Mr R Wheeldon, National Leasehold
Manager

Type of Application : Liability to pay service charges

Tribunal Member(s) : Judge Tildesley OBE
Mr P Turner-Powell FRICS

**Date and Venue of
Hearing** : 13 August 2014
Law Courts Brighton

Date of Decision : 20 August 2014

DECISION

Decisions of the Tribunal

1. The Tribunal determines that the lessees have no obligation under the terms of the lease to contribute to the costs, if they were incurred, for a replacement kitchen, replacement floor coverings, a replacement bathroom suite for flat 4 and for its redecoration.
2. The Tribunal makes no order under section 20C of the 1985 Act.
3. The Tribunal invites the Respondent's representations within 28 days from the date of this decision as to why it should not reimburse the Applicant with the Tribunal fees of £315, which it has paid in connection with these proceedings.

The Application

4. The Applicant seeks a determination under Section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable for the costs of refurbishment of flat 4 (the former flat for the Resident Manager).
5. The Applicant also seeks an order for the limitation of the landlord's costs in the proceedings under Section 20C of the Landlord and Tenant Act 1985.
6. An oral case management hearing took place on 29 April 2014 at which the Respondent failed to attend. The Tribunal directed the parties to exchange their cases by prescribed dates. The Applicant had filed its statement of case by the required date despite the Respondent's failure to meet the directions for disclosure.
7. The Respondent's excuse for not complying with directions was that it had not received the relevant correspondence from the Tribunal. The truth of the matter was that the Tribunal had sent the correspondence to the correct address. The problem rested with the Respondent's internal arrangements for directing mail to the correct person, which was the Respondent's responsibility to put right and was not a valid reason for non-compliance.
8. In view of the Respondent's non-compliance the Tribunal made an unless direction which required the Respondent to file its statement of case by 10 July 2014. The Respondent acted promptly and provided its statement of case by 25 June 2014.
9. The hearing of the application was held on 13 August 2014. Ms C Chapman and Ms S White, the Chair of the Right to Manage Company attended for the Applicant. Mr R Wheeldon attended for the Respondent. The Tribunal admitted in evidence an agreed bundle of documents. Within the bundle was a copy of a specimen lease for a term of 99 years, which the parties adopted for the purpose of these proceedings. Prior to the hearing the Tribunal inspected the property.

The Background

10. Cavendish Court was a purpose built block of retirement flats constructed in the 1980's with occupation restricted to persons aged 55 or over. Cavendish Court housed 31 one and two bedroom flats located on four floors. The property offered various communal facilities to the residents, which included a residents' lounge, laundry room, and guest room. The site had limited parking and a small communal garden. The property was situated in Kemp Town Village, about one mile from Brighton City Centre and in short walking distance of the sea front.
11. The freehold of the property was held by Housing and Care 21, a national non-profit care provider and leader in providing homes for older people. In 2013 the Applicant took over the management of the property from Housing and Care 21.
12. The dispute between the parties centred upon Flat 4 which was a one bedroom ground floor flat allocated to the resident manager for the property. The lease required the landlord to employ a manager for general supervision of the estate, and make arrangements for the answering of emergency calls. The decision about whether the manager was resident or not rested solely with the landlord.
13. The Tribunal understands the property had a resident manager until about 18 months prior to the acquisition of the right to manage by the Applicant. In 29 May 2013 the Respondent wrote to the Applicant about the arrangements for the provision of accommodation for the manager stating that

“Now that residents in Cavendish Court have exercised the RTM you have all collectively taken on the contractual responsibilities of the landlord under the terms of the lease. This means that you need to decide how you will fulfil the requirement to accommodate the Court Manager, for which we suspect you wish to continue with the use of Housing 21's former Court Manager's flat.

This flat is the property of Housing 21 and the transfer of management under the RTM does not transfer the right to use and occupation of this property. However, Housing 21 is willing to make this property available for this purpose for which we intend to charge a rent that you can subsequently recover through the service charge under the terms of the lease...”
14. The Applicant decided not to employ a resident manager, and, therefore, had no use of the flat.
15. The Respondent then arranged for an inspection of Flat 4 in December 2013 by Mr Ling, technical surveyor, who identified various works to the flat in order to enhance its condition for the purpose of sale.

16. The Applicant undertook to repair the water damage in the bathroom of flat 4 and to replace the manager's call equipment with a resident's 24 hour emergency handset. The Applicant was, however, not prepared to pay for a replacement kitchen, bathroom, new floor coverings and redecoration of the flat. In the Applicant's view, the Respondent was requiring the lessees to pay for a complete refurbishment of the flat prior to its sale.
17. The Respondent took a different stance, stating the flat was first provided for the benefit of the leaseholders, and originally made available in new condition. As the flat was now being handed back it was the Respondent's expectation that the flat would be returned in the same new condition. The Respondent insisted that the Applicant was liable to pay the difference in value between the flat in a new condition and the flat in the condition handed back. The Respondent was of the view that the leaseholders were liable to pay the difference in value under the service charge provision in the lease.
18. The Respondent stated that it would refurbish the flat, and invoice the Applicant for the cost of works. Further the Respondent was prepared to litigate if the Applicant did not pay. The Respondent suggested to the Applicant that it may wish to take legal advice.
19. The former manager's flat has now been advertised for sale through a local estate agent at an asking price of £135,000.

Reasons for the Tribunal's decision

20. The nature of the dispute is that the Respondent was requiring the Applicant to pay for the refurbishment of the former managers' flat, and to recover the costs incurred on the refurbishment from the lessees through the service charge.
21. The Respondent stated that following the surrender of the flat the Applicant had a contractual responsibility to return the flat in new condition. The Tribunal questions the factual accuracy of the Respondent's statement about surrender of the flat. In its letter of 29 May 2013 the Respondent pointed out that the flat was its property and further it retained control of the use of the flat after the acquisition of the right to manage. The Applicant did not surrender the flat but merely declined the Respondent's offer to pay a rent for the use of the flat for the manager. Under the lease there was no requirement for the Applicant to provide a resident manager. It was a matter solely for the landlord to decide whether the manager was resident or not.
22. The Respondent justified its position by citing the landlord's covenants in the lease to repair and renew the communal areas and to employ a manager together with the landlord's right to recover the costs incurred in providing these services from the lessees.
23. Clause 5.1 of the specimen lease states that

“the landlord will maintain, repair, decorate and renew the main structure of any building on the Estate (including the Property) and the roof(s), foundations and exterior of any building on the Estate (including the Property) all (if any) main entrances, passages, landings, lifts, staircases, corridors and other parts of any buildings used by or available to the lessee in common with the owners and occupiers of other dwellings on the Estate, and the fixtures, fittings and furnishings in the communal areas”.

24. Under clause 5.6 the landlord covenanted to employ a manager for the general supervision of the Estate. Clause 5.11 stated that the landlord shall decide if the manager is to be resident on the Estate or not.
25. Clause 3.1 required the lessee to pay the landlord the service charge as a contribution towards the costs and expenses of running and maintaining the estate and other matters set out in Appendix 111
26. Appendix 111 defined the services for which the landlord can recover the costs incurred through the service charge. Paragraph 1 referred to the costs and expenses incurred by the landlord in carrying out its obligations in clause 5. Paragraph 2 referred the cost of providing any office and residential accommodation and staff facilities for the manager and staff of the landlord.
27. Paragraph 6 referred to all other expenses (if any) incurred by the landlord in and about the maintenance, repair, renewal and replacement and proper and convenient management and running of the Estate (including fixtures fittings plant furniture and equipment), and the gardens and grounds of the Estate, and of the roads and footpaths drains and services serving the Estate.
28. The Respondent contended that the Applicant was required to refurbish the flat under clause 5(1) of the lease which included the decoration and renewal of the parts of any buildings used in common and of the fixtures fittings and furnishings in the communal areas. The Respondent argued the flat fell within the definition of communal areas which, according to the Respondent, was reinforced by the wording of paragraph 2 of Appendix 111 permitting the recovery of the costs of residential accommodation for the manager.
29. The Respondent also referred to the decision of Court of Appeal in *Earl of Cadogan v Panagopoulos* [2010] EWCA 1259 which ruled that a caretaker's flat was part of the common parts which would be included in the demised premises conveyed under collective enfranchisement.
30. The Applicant challenged the Respondent's depiction of the flat as a communal area. The Applicant said that the lease distinguished between communal areas and residential accommodation. The Applicant referred to clause 1.1 which it said separately identified the resident manager's dwelling (if any) from the common parts. The

Applicant acknowledged that paragraph 2 of Appendix 3 allowed for the recovery of the costs for providing residential accommodation for the manager. The Applicant, however, stated that paragraph 2 had no application because the flat was no longer used as residential accommodation for the manager.

31. The Tribunal finds the Respondent's position is undermined by the facts. At the time the Respondent made its claim, flat 4 had ceased to be used as residential accommodation for the manager. The purpose of the refurbishment was to enable the Respondent to market the flat for sale, not to support the manager in the fulfilment of his duties. The Applicant had no need of the flat because of its decision to employ a day manager rather than a resident one.
32. The facts did not support the Respondent's description of the flat as a communal area, which depended upon the flat continuing to be used as residential accommodation for the manager. Equally the Applicant had no authority under paragraph 2 of Appendix 111 to recover the costs of the refurbishment because the flat was no longer reserved for the manager.
33. The Tribunal also disagrees with the Respondent's analysis of the residential manager's flat as a communal area. Under clause 5.1 the obligation of the landlord to repair and renew fixtures, fittings and furnishings only applied to the communal areas. The majority of the disputed refurbishment costs were associated with fixtures, fittings and furnishings, namely the replacement of the kitchen, bathroom and floor coverings.
34. The Respondent relied on the decision in *Panagopoulos* for its assertion that the manager's flat was a communal area. The Tribunal questions the relevance of the decision to the facts of this application. First, the Court of Appeal was considering the meaning of common parts in the statutory context for collective enfranchisement. Second, at least one of the participating tenants had an entitlement under the lease to the services of a resident caretaker.
35. Under clause 1.1 of the specimen lease for Cavendish House, the meaning of dwelling separately identified the resident manager's dwelling from the common parts. Appendix 1 gave no right to the lessees to use and enjoy the resident manager's dwelling. Clause 5.1 made no mention of dwelling and introduced the term *communal area* which was a further sub-division of the common parts. The Tribunal is satisfied that on a proper interpretation of the lease the term *communal area* did not include the resident manager's dwelling.
36. The Tribunal had wider concerns about this application. In the Tribunal's view, the nature of the dispute did not fit the characterisation of a service charge dispute. The application was a contest between the landlord and the right to manage company. The application did not involve a lessee challenging the reasonableness of

the service charge or a landlord arguing that a charge was payable. Instead the application was about the Respondent's claim to recover the refurbishment costs of the former manager's flat from the Applicant. The success of the Respondent's claim depended upon the Respondent demonstrating that the Applicant had a contractual or legal responsibility to pay the Respondent for those costs. If that is so, the dispute concerned an alleged breach of contract, the determination of which would be outside the Tribunal's jurisdiction.

37. The Tribunal also questions the legitimacy of the Respondent's stance in this matter. It appeared to the Tribunal that the Respondent was telling the Applicant what it should collect in service charges. Following the acquisition of the right to manage, the Respondent has no responsibility for the management of the property, and no authority to determine the level of charges for services. These are the responsibilities of the Applicant. The definition of management functions under section 95 of the Common and Leasehold Reform Act 2002 may even extend to the decision about the future use of the resident manager's flat, which brings into question the accuracy of the Respondent's statement on the flat in its letter of 29 May 2013.
38. Arguably the Respondent as an interested person has a right under section 107 of the 2002 Act to apply for an order requiring the Applicant to make good its statutory responsibilities. The Respondent, however, did not articulate its argument on this basis, and in any event, the application would have to be made to the County Court and not to the Tribunal.
39. The Applicant took steps to resolve this dispute. It repaired the water damage in the flat and installed a 24 hours emergency line, which in all probability, was the extent of its responsibilities to the flat under the lease. The Applicant offered to do additional works as a goodwill gesture which did not satisfy the Respondent. The Applicant considered it had no choice but to bring these proceedings.

Decision

40. The Applicant requested the Tribunal to decide the liability of the service charges to pay for the costs of refurbishment of the flat. For the reasons given above the Tribunal is satisfied that flat 4 was not a communal area. Further flat 4 had ceased to be used as a residential accommodation for the manager. The Tribunal, therefore, holds that the lessees have no obligation under the terms of the lease to contribute to the costs, if they were incurred, for a replacement kitchen, replacement floor coverings, a replacement bathroom suite for flat 4 and for its redecoration.

Application under S20C and refund of fees

41. In the application form the Applicant applied for an order under Section 20C of the 1985 Act. The Tribunal considers the making of an

order would not benefit the Applicant as it would prevent the Applicant from recovering the costs through the service charge it has incurred in the proceedings. The Tribunal determines not to make an order.

42. The Applicant may apply for an order for costs against the Respondent under rule 13 of the Tribunal Procedure Rules 2013. The Tribunal as a rule operates a no costs regime. The Tribunal can only order a party to pay the costs of the other, if it is satisfied the other party has acted unreasonably. If the Applicant wishes to make an application under rule 13 it must do so within 28 days from the date of this decision and to serve a copy on the Respondent.
43. The Tribunal has a wide discretion to order the Respondent to reimburse the Applicant with the Tribunal fees that it had paid in respect of the application and hearing¹. The Tribunal is minded to make an order for reimbursement of the Applicant's fees, and invites the Respondent to make representations within 28 days from date of this decision.

¹ The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

- (1) In the following provisions of this Act "service charge" 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.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) 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 provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (1) An application may be made to the appropriate 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.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
 - (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20C

- (1) 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 court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, 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.
- (2) The application shall be made—
 - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

