

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**



**Residential
Property**
TRIBUNAL SERVICE

**S.27A & S.20C Landlord & Tenant Act 1985(as amended)(“the Act”)
And**

Schedule 11 to the Commonhold and Leasehold Reform Act 2002

Case Number:	CHI/00ML/LDC/2009/0018
Property:	Flat 24 Berriedale House 251-255 Kingsway Hove East Sussex
Applicant:	Berriedale House Limited
Respondent:	The Executors of the estate of Mr A Kattell deceased
Appearances for the Applicant:	Mr M Bowles of Classic Property Management
Appearances for the Respondent:	Mr A Newey solicitor
Date of Hearing	23rd July 2009
Tribunal:	Mr R Wilson LLB (Chairman) Mr A Mackay FRICS (Valuer member) Ms J Dalal (Lay member)
Date of the Tribunal’s Decision:	11th August 2009

THE APPLICATIONS

The applications made by the parties are as follows: -

1. For a determination pursuant to section 27A of the Act of the Respondents' liability to pay service charges for the years 2002 to 2008 inclusive and
2. For an order pursuant to section 20C of the Act that the Applicants costs incurred in these proceedings are not relevant costs to be included in the service charge for future years.
3. For a determination pursuant to schedule 11 of the Commonhold and Leasehold Reform Act 2002.
4. The Tribunal is also required to consider, pursuant to regulations 9 of the Leasehold Valuation Tribunals (fees) (England) Regulations 2003 whether the Respondent should be required to reimburse the fees incurred by the Applicant in these proceedings.

DECISION IN SUMMARY

The Tribunal determines for each of the reasons set out below as follows: -

5. The amounts claimed by the Applicants by way of service charge as disclosed by the audited accounts for the property for the years 2002 to 2008 inclusive, were reasonably incurred and are payable by the Respondents.
6. The only administrative charge payable by the Respondents for the years 2002 to 2009 amounts to £64.63 in respect of the invoice for electrical work carried out to flat 16.
7. No order is made under section 20C of the Act.

JURISDICTION

Section 27A of the 1985 Act

8. The Tribunal has power under Section 27A of the Landlord and Tenant Act 1985 to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable in so far as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.
9. By section 19 of the Act service charges are only payable to the extent that they have been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.
10. The Tribunal has the power to determine whether an administration charge is payable in accordance with schedule 11 to the Commonhold and Leasehold Reform Act 2002 which provides that;

a variable administration charge is payable only to the extent that the amount of the charge is reasonable.

11. In paragraph 1d of Schedule 11 an administration charge is defined as an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or in directly in connection with a breach or alleged breach of covenant or condition in his lease.

THE LEASE

12. The Tribunal had a copy of a lease relating to flat 32 at the property dated 14 June 1968 and is for a term expiring on 25 March 2065 paying an initial yearly rent of £25 rising every 25 years.
13. The Tribunal was told that the lease relating to the subject property flat 24, mirrors in all material respects, the copy of the lease relating to number 32.

INSPECTION

14. The Tribunal inspected the property before the hearing in the presence of the parties. Berriedale House is a detached purpose built block of flats, originally built in the 1960's and arranged on ground and seven upper floors, with two electric passenger lifts and comprising 51 flats and an additional caretaker's flat. There are 8 separate garages. The building occupies a corner position at the junction of Kingsway and Berriedale Avenue. The flats on the upper floors and at the front of the building enjoy distant views towards the English Channel. The elevations are formed in load bearing brickwork with a flat roof system. The original window system to the individual flats has been replaced with plastic double glazed windows. Internally, the public ways are in good decorative repair and have been the subject of both modernisation and refurbishment.

PRELIMINARIES / ISSUES IN DISPUTE.

15. This application is connected to and was considered contemporaneously with a second application made by the Applicants pursuant to section 20ZA of the Act under reference number CHI/00ML/LDC/2009/0018. In this second application, the Applicants sought an order from the Tribunal for dispensation from all the consultation requirements in relation to a program of major works carried out between 2002 and 2004. ("the Works")
16. In the event, the Tribunal has granted dispensation in respect of all of the consultation requirements for the Works, which has a material bearing on the outcome of this application under section 27A of the Act.
17. Mr Newey confirmed that his submissions in relation to the section 27A application related solely to the failure on the part of the Applicants to comply with the statutory consultation procedure. His clients were not in a position to challenge the reasonableness of the Works or the standard of work carried out. Accordingly it was not his intention to lead any other evidence in relation to the section 27A Act application. He accepted that if the Tribunal

granted dispensation for the Works then he had no other issues or defence to raise in relation to the section 27A application.

18. In the event, the Tribunal has granted a dispensation order in relation to the Works and as a consequence the Respondents accept that the service charges claimed by the Applicants, as set out in this application, are payable and recoverable in full and it is not necessary for the Tribunal to consider issues of payability or reasonableness.

SCHEDULE 11 (ADMINISTRATION EXPENSES)

19. The Tribunal established the following facts: -

- i) In January 2002 the previous owner of the subject flat, Mr Kattell died and his son Maurice Kattell contested the will, claiming the subject flat as his own.
- ii) Mr Maurice Kattell took up occupation of the flat and throughout his occupancy he neglected the upkeep of the flat, which developed water penetration problems caused by defective windows.
- iii) The water problems caused damage to other flats in the building in particular flat 16, which was directly below the subject property.
- iv) The Applicants were obstructed in their attempts to gain access to the flat and they retained surveyors and lawyers to assist them in rectifying the breaches of covenants relating to flat 24.
- v) The total administration charges claimed by the Applicants are £1,191.42 and with the exception of one invoice relating to the provision of electrical work, all these charges relate to surveyors fees.
- vi) An access order was obtained by the Applicants in the Brighton County Court and the Applicant's legal costs were awarded against Maurice Kattell personally.

THE APPLICANT'S CASE.

20. Mr. Bowles referred the Tribunal to paragraphs 3 and 5 to the Fourth Schedule of the lease which states as follows;

Paragraph 3 - 'the tenant shall keep the interior of the flat and all parts thereof and all fixtures and fittings therein and all additions thereto in good repair and condition and properly cleaned.

Paragraph 5 - 'The tenant shall do all such works as are by law directed or necessary to be done on or in respect of the flat and shall keep the landlord indemnified against all claims demands and liabilities in the respect thereof.

21. Mr. Bowles told the Tribunal that the water ingress problems referred to above constituted a clear breach of these paragraphs and that the administration charges claimed all arose directly out of these breaches. In these circumstances, the administration charges were recoverable to the extent that they had been reasonably incurred. Mr. Bowles referred the Tribunal to each invoice making up the global total and suggested that in each case the amount claimed was a

modest amount. In these circumstances he invited the Tribunal to make an order directing that all the administration charges were recoverable.

22. Mr. Bowles then directed the Tribunal to his claim in respect of interest. This totaled a little over £4000 up to December 2008. Mr Bowles told the Tribunal that interest had been calculated on all late payments at the statutory rate of 8%. Mr. Bowles considered that it was reasonable to make such charges as the Respondents and their predecessors had made no payment towards service charge since 2001. It was therefore the case that the freeholders had been subsidizing the service charges on flat 24 for over five years and this justified the payment of interest. Mr Bowles accepted that there was no provision to charge interest in the lease but he relied on section 69 of the County Court Act 1984 which enabled interest to be charged in respect of over due amounts.
23. Commencing his defence on behalf of the Respondents, Mr. Newey contended that the professional fees that the Applicants sought to recover were not properly within the definition of administration charges as defined by schedule 11 to the 2002 Act. Rather, they amounted to a general claim in damages, which was not a matter that could be dealt with by the Tribunal. Claims for damages were heard in the County Court.
24. Mr. Newey contended that specific and clear wording had to be contained in a lease for schedule 11 to apply and in his opinion neither paragraph 3 or paragraph 5 of the Fourth scheduled to the lease was specific enough.
25. In the alternative, Mr. Newey referred the Tribunal to a letter from the then Applicants solicitors dated 30 May 2008 in which a statement was made to the effect that the Applicants would not seek any part of their costs from the Respondents. Having regard to the contents of this letter it was his contention that the Applicants were now precluded from recovering the invoice of Messes Grommet Wade for £573.40.
26. Mr. Newey's position in relation to the interest claimed was simple, namely that there was no provision in the lease allowing for the application of interest to late payments. It was his case that in the absence of such a clause, no charge could be made.
27. Mr. Newey contended that the County Court Act 1984 also did not assist the Applicants as it related only to Court proceedings and did not attend to Tribunal hearings.

ANALYSIS AND DETERMINATION

28. It is settled law that clear and unambiguous wording must be contained within a lease to allow administration charges, or indeed any other charges to be recoverable from the lessee. The Tribunal considered the wording at paragraphs 3 and 5 relied upon by the Applicants and concluded that the wording in these paragraphs was not specific enough to allow the recovery of professional fees, which make up the bulk of the Applicants claim.
29. Paragraph 3 consists of an obligation to keep the interior of the flat in good repair. The Tribunal accepts that a failure on the part of the lessee to keep the flat in repair, will give rise to an action in damages, but not per se to the payment of an administration charge. Furthermore, the Tribunal also accepts the Respondent's contention that an action for a claim in damages lies not with the Tribunal, but with the County Court.

30. Paragraph 5, constitutes a tenants indemnity in respect of any works, which are by law directed or necessary to be done in respect of the flat. As above, whilst a breach of this clause may entitle a landlord to damages, a breach of this clause in itself does not give rise to the payment of an administration charge.

31. The Tribunal perused all the paragraphs in the Fourth Schedule and in particular paragraph 18. Paragraph 18 states as follows;

“the tenant will repay to the landlord all costs charges and expenses incurred by the landlord in repairing, renewing and reinstating any part of the building not hereby demised so far as such repair, renewal or reinstatement shall have been necessitated or contributed to by any act, negligence or default of the tenant.”

The Tribunal took the view that this clause did enable the payment of administration charges in so far as they related to the recovery of the cost of works to the building carried out because of the negligence of the tenant and that the invoice for £65.63 in respect off electrical work fell within the ambit of this clause because it related to work done as opposed to services rendered.

32. The Tribunal had no difficulty in accepting the Respondent’s case for the claims for interest. There is no clause in the lease providing for the payment of interest for late payments of service charge and in these circumstances the Tribunal holds that no interest is recoverable by the Applicants in respect of late payment of service charge for any of the years under challenge.

33. The Tribunal also accepts the case put forward by the Respondents in relation to the County Court Act 1984. This Act has no application to the Tribunal and therefore cannot be used as authority to claim interest.

SECTION 20C APPLICATION AND REIMBURSEMENT OF FEES.

34. Both of these matters can be taken together as the Tribunals’ considerations in relation to both are largely the same. The section gives the Tribunal discretion to disallow in whole or in part the costs incurred by a landlord in proceedings before it. The Tribunal has a very wide discretion to make an order that is, ‘just and equitable’ in the circumstances.

35. Mr. Newey’s submissions in respect of this application were briefly put. He referred the Tribunal to a copy of a letter dated 9 June 2008 written by his firm to the then solicitors acting for the Applicants. The contents of this letter proved that the issues before the Tribunal were not new but were in fact long-standing. Mr. Newey contended that had the Applicants engage in constructive dialogue following this letter then it was his view that the hearing would not have been necessary. For these reasons he invited the Tribunal to make an order under the Act.

36. Mr Bowles for the Respondents denied that there had been any unwillingness on the part of his clients to engage in dialogue. Quite the reverse was the case. He referred the Tribunal to numerous letters, which have been written to the Respondents solicitors by the applicants, inviting the Respondents to come to the table in respect of the outstanding service charge.

37. Mr. Bowles contended that the Respondents had made no attempts to negotiate and it was clear in any event but they had no money to pay the service charge because the flat was the only asset of the estate.
38. In these circumstances it was hardly surprising that the Applicants had had no option but to start the Tribunal proceedings. Whilst he accepted that prior to the hearing, there had been some negotiation, it was his view that this had only happened because of the Tribunal hearing. In these circumstances, he invited the Tribunal to resist the application and not make an order under section 20C of the Act.
39. Having reviewed all the relevant correspondents, and having heard both parties submissions, the Tribunal has concluded that it would be just and equitable for no order to be made, thus allowing the Applicants to recover their costs of these proceedings, provided there is provision in the lease so to do. We accept the Applicant's submissions that there has been no real attempt by the Respondents to negotiate a settlement or to accommodate the Applicants in relation to the very considerable service charges which have accrued. An accommodation could have been made for example by means of a solicitors undertaking to pay the outstanding service charge from the proceeds of sale of the flat. In these circumstances the Tribunal considers that an order under section 20C of the Act would unfairly penalize the Applicants when their actions in bringing this case have largely been vindicated.
40. The Tribunal makes no order in relation to the repayment of fees, because it considers that the outcome of the case does not warrant a punitive sanction against the Respondent.

Chairman



Dated 11th August 2009