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

Residential Property TRIBUNAL SERVICE

S.27A & S20C Landlord & Tenant Act 1985(as amended)("the Act")

Case Number:	**CH1/45UH/LSC/2009/0003**
Property:	**Flat 2 Penhurst Court 2 Grove Road Worthing West Sussex BN14 9DG**
Applicant/Leaseholders:	**Mr M Hall Mrs V West**
Respondent/Landlord:	**Watson Property Investment Limited**
Appearances for the Applicants:	**Michael Hall in person**
Appearances for the Respondent:	**Timothy Mullen - Director of the Respondent Freehold Company**
Date of Inspection /Hearing	**17th March 2009**
Tribunal:	**Mr R T A Wilson LLB (Lawyer Chairman) Mr J S McAllister FRICS (Valuer Member) Mr R Potter FRICS (Valuer Member)**
Date of the Tribunal's Decision:	**8th April 2009**

DECISION IN SUMMARY

1. The balustrades of the property form part of the leaseholders' demise and the responsibility for painting them lies exclusively with the leaseholder. Therefore the costs of painting them are not recoverable as a service charge item.

2. An order is made under section 20C of the Act that all costs incurred by the Respondent in connection with these 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 Applicant in future years.

3. No order is made in relation to the repayment of fees incurred by the Applicants in these proceedings.

THE APPLICATIONS

4. This was an application originally made by Mr Hall to which Mrs West was later joined in as an Applicant, under section 27A (3) of the Act for a determination whether, if costs were incurred by the Respondent in the painting of the balustrades to the property, a service charge would be payable for those costs.

5. The Applicants also sought an order pursuant to Section 20C of the Act that the Respondents' costs incurred in these proceedings are not relevant costs to be included in the service charge for the building in future years.

6. The Tribunal is also required to consider, pursuant to regulation 9 of the Leasehold Valuation Tribunal (England) Regulations 2003 whether the Respondents should be required to reimburse the fees incurred by the Applicants in these proceedings.

PRELIMINARYS / ISSUES IN DISPUTE

7. The hearing took place on the 17th March 2009 at the Residential Property Tribunal office, 1 Market Avenue, Chichester. Mr Hall appeared in person accompanied by his son. Mrs. West did not attend and was not represented .The Respondent was represented by Timothy Mullen a Director of the company.

8. Both parties had set out their respective positions in their statement of case and both parties had prepared and submitted a bundle of evidence.

9. At the hearing the Tribunal established that there was one narrow issue to determine namely whether the costs incurred by the Respondent in re-painting the balustrades to the property were recoverable as a service charge item.

JURISDICTION

10. 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 wherever 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 insofar 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.

THE LEASES

11. The Tribunal had copies of the leases relating to flats 2 and flat 5 of Penhurst Court, 2 Grove Road, Worthing. Flat 2 is on the ground floor of the property and flat 5 is on the first floor. The Tribunal established that both leases where in similar form as regards the covenants relating to the repair and redecoration of the structure of the building and the flats contained therein.

12. The Tribunal was shown the original counterpart lease relating to flat 5 and found that the lease plan relating to the first floor flat did not accord with the narrative definition of the flat. The lease plan clearly excluded from the demise the whole of the balcony including the balustrades. However, the narrative contained a definition of the flat, which expressly included the balustrading.

INSPECTION

13. The Tribunal members inspected the property before the hearing in the presence of the parties. Penhurst Court is a three storey block built circa 1990 rendered and whitened to the ground floor with natural brick above under a pitched tile roof. Only the first floor flats have balconies. The building is situated on a corner plot with limited landscape grounds laid mainly to grass. There is a low brick and stone boundary wall with parking to one side. The property appeared to be generally well maintained with the exterior having been recently re-painted.

COMMON GROUND

14. The parties agreed that the balustrades as defined below were included in the demise of the first floor flats and that the lessees of these flats were responsible for the repairs/maintenance. The only issue was whether this obligation included painting.

15. The penguin "Dictionary of Building Terms" 1964 edition defines balustrades as, "*the collective name to the whole infilling from handrail down to floor level at the edge of a stair/bridge etc.*" A baluster is defined "*as a post in a balustrade of a bridge or flight of stairs.*"

16. The parties agreed that the supporting posts at first floor level were not part of the balustrades which consisted of the timber work between the vertical supporting posts i.e. the handrail, the bottom rail and the vertical balusters between them. In layman's terms the

area in dispute amounted to a horizontal ladder shape of wooden posts between the wooden supporting posts.

APPLICANTS' CASE

17. Mr Hall commenced his evidence by stating that the issue for the Tribunal to decide was to determine the liability for payment of the cost of work in respect of painting the timber balustrades of the first floor balconies. It was his contention that these balustrades belonged entirely to the leaseholders of the first floor flats and therefore no part of the costs of painting them could form part of the service charge.

18. In support of this contention Mr Hall referred the Tribunal to two sections of his lease. The extent of the individual flats was defined in detail in the first schedule to the leases and at clause 1(f) of the first schedule the following words were included.

> *"the paving to the balcony area (applicable to first floor flats only) and the timber balustrading fixed thereto but not including the construction thereunder or the construction supporting the canopy roof thereover".*

In his opinion this clause meant that the whole of the balustrading was included with the flat. As to the tenants liabilities, the tenant, in accordance with clause 4.1 of the tenants covenant of the lease was obliged to, *"repair maintain renew uphold and keep the demise premises.....balustrading.....in good and substantial repair and condition"*. In his view the tenant was clearly required to undertake all necessary work to the balustrades including painting. This was because the primary purpose of painting timber is to apply a coating of paint of sufficient thickness and quality to resist the detrimental effects of weather and thus maintain the balustrade in a good and substantial repair and condition as required by the terms of the lease. In summary therefore painting was an act of maintenance.

19. In summary Mr Hall considered that the Respondent was not permitted under the terms of the lease to undertake painting work to the balustrades and if it had done so then it could not expect to recover the costs by way of service charge.

RESPONDENT'S CASE

20. Mr Mullen confirmed that work had recently been completed to the building, which had included a painting contract for the exterior that included painting the balustrading. It was his intention that the painting work would be funded from the service charge account if the Tribunal allowed. He confirmed that the balustrades had been repainted as part of this contract and there were a number of reasons why this had happened.

21. Firstly from a management point of view it made sense to carry out the painting of the balustrades whilst carrying out painting to the rest of the building. In his opinion it made no sense to exclude the balustrades. He had a number of properties in his portfolio where the repair of balconies rested with the tenant whereas re-decoration thereof was left to the landlord with the ability to recover the costs via the service charge. In this way the exterior of the property could be maintained in good order in the same colour and otherwise in conformity.

22. Secondly, there were numerous clauses in the leases, which directly affected the apportionment of costs. In particular the leases provided for a defined and fixed percentage of the service charge to each flat. Flats 1 to 12 with the exception of apartments 2, 6 and 10 paid a fixed 8.61%. Apartment numbers 2, 6 and 10 paid a fixed percentage of 7.5%. There was no provision to vary this figure nor did the leases allow for the landlord to recalculate the apportionment. Furthermore there was no mechanism to enable the landlord to attribute specific costs to individual leaseholders.

23. Mr Mullen contended that the cost of redecorating the balustrades was a legitimate cost under the service charge on the basis that the external decoration of the building was a responsibility that fell to the landlord in its entirety. In support of this contention he referred to clause 5 (5) (b) (i) of the lease which contained the lessors obligation to paint the outside of the building. Whilst he accepted that this clause appeared to exclude any areas demised to other lessees, he felt that this exclusion in his words "was a sweeper clause intended to pick up anything in between." He did not believe that the words were intended to exclude the painting of the balustrades.

24. Mr Mullen also made reference to paragraph 19 of the Fourth Schedule which set out the regulations. Paragraph 19 contained a regulation in the following terms:-

    "*Not at any time to interfere with the external decoration or painting of the demised premises or of any other part of the building*".

    In his opinion this clause was in direct conflict with clause 5(5)(b) and the intention was to place an obligation on the landlord to paint the exterior of the balustrades and not the tenant.

25. Whilst Mr Cullen accepted that the demise of the flats included the balustrades in respect of maintenance, he did not accept the Applicant's view that maintenance included decoration. The leases specifically obliged the leaseholders to redecorate the inside of their demised premises but did not explicitly convey any obligation to redecorate externally. Conversely the lease expressly stated that the landlord should paint the outside of the building. Furthermore Regulation 19 put the matter beyond doubt insofar as it prevented the leaseholder from interfering with the external redecoration of either the demised premises or indeed any part of the exterior. In his opinion this clause must therefore suggest that the landlord had the sole responsibility for the external redecoration of the whole of the building and all of its parts.

DELIBERATIONS

26. We have concluded that the costs of repainting the balustrades cannot form part of the service charge. We have formed this view because although the leases are poorly drafted, it is clear from them that the balustrades form part of the demise of the individual flats. Clause 4(1) of the leases places an obligation on the leaseholders to repair their flats. There is a covenant that the tenants will, "repair maintain renew uphold and keep the demised premises including the balustrading in good and substantial repair and condition". We accept Mr Hall's contention that the act of painting can be regarded as a repair. Indeed this was held to be the case in the old case of *Monk and Noyes (1824) 1C & P265* where a covenant to, "*substantially repair uphold and maintain*" a house was held to oblige a tenant to paint the interior. This covenant is similar in all material respects to the covenant

contained in the leases and bearing in mind the context and location of this building we believe that painting the balustrades can properly be regarded as part of the leaseholders covenant to repair maintain renew and uphold.

27. In coming to this conclusion we have had regard to all the points made by the Respondent and in particular we have considered the combined effect of clauses 5(5)(b)(i) and paragraph 19 of the Fourth Schedule of the leases.

28. We accept Mr Mullen's points concerning the fixed ratios of service charge and how this might adversely affect the funding / apportionment of the exterior painting. We also accept that from a management point of view there is much to be said for the landlord painting the balustrades at the same time that the rest of the exterior is painted. However, we are not persuaded that the lease places any obligation on the landlord to paint the balustrades, which are accepted by all parties as forming part of the first floor flats.

29. Clause 5(5)(b)(i) which contains the landlords painting covenant specifically excludes the obligation to paint those parts which are not included in the demise of any other flat in the building. These words seem clear to us and we do not accept the interpretation of Mr Mullen that the words are merely a sweeper clause intended to pick up anything in between.

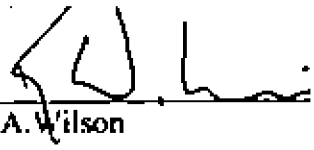
30. The Tribunal acknowledges regulation 19 of the Fourth Schedule which states, *"not at any time to interfere with the external decoration or painting of the demised premises or of any other part of the building"*, does not sit comfortably with the tenants obligation clause 4.1 to repair and by inference to paint the balustrading. However in context the Tribunal agrees with Mr Hall's contention that in undertaking painting to the balustrade a leaseholder would not be interfering with the external decoration rather the leaseholder would be complying with his contractual obligation to paint the balustrades.

31. Having regard to the findings that we have made, it follows that if the landlord has painted the balustrades then it is not able under the terms of the leases to recover the cost of painting of them as a service charge item.

SECTION 20C AND REIMBURSEMENT OF FEES

32. 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.

33. In the Tribunals opinion the Applicants were right to make this application because the terms of the leases relating to painting the balustrades are not clear. Both parties have put to the Tribunal well reasoned argued cases. In the event we have accepted the arguments put forward by the Applicants and therefore the Applicants have been successful. In these circumstances we are of the opinion that it would be unjust, unreasonable and unfair if each party were not to bear their own costs. In these circumstances we make an order under section 20C that any costs incurred by the Respondent in respect of these proceedings are not to be regarded as relevant costs to be taken into account in determining future service charges. For the same reasons we make no order in relation to the reimbursement of fees.

Chairman 
R.T.A. Wilson

Dated 8th April 2009