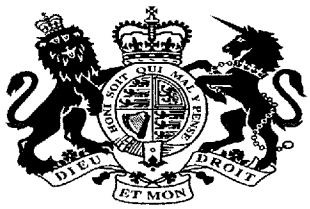
10129



FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UC/LSC/2013/0137**
Property	:	**43 Donnithorne House, Brunswick Square, Herne Bay, Kent, CT6 5QS**
Applicant	:	**Mr B Ayres**
Representative	:	**N/A**
Respondent	:	**Anchor Trust**
Representative	:	**Ms D Matusevicius**
Type of Application	:	**s27A Landlord and Tenant Act 1085**
Tribunal Members	:	**Judge Lal** **Mr C. C Harbridge FRICS**
Date and venue of Hearing	:	**Marine Hotel, Whitstable, Kent CT5 2BE** **4th July 2014**
Date of Decision	:	**6th July 2014**

DECISION

Application

1. This matter originated out of an application received by the Tribunal on 12th November 2013.

2. The matter was the subject of a series of Directions. Judge R Wilson dated the first 27th November 2013, which resulted in a Case Management Conference on 17th February 2014 heard by Judge R Norman.

3. On that occasion it was noted the tenant's application concerned that element of the service charge for heating and hot water and water and the individual charges for heating and hot water. On that occasion the tenant wished to leave open the matter of communal charges but was firmly of the view that he wished to challenge the individual charges.

4. It was explained by Ms Matusevicius, who appeared on that occasion, that the landlord attributes 20% of the charge to communal service charges and the remaining 80% is apportioned as between the tenants and she set out the formula.

5. The matter was the subject of Further Direction issued on 7th April 2014 by Judge Tildesley OBE. The matter was again the subject of Directions by the same Judge on 5th June 2014, which dealt with various applications for disclosure.

The Inspection

6. The Tribunal inspected the subject premises on the morning of the hearing. Donnithorne House comprises a multi-block, multi-storey, purpose designed and built, retirement development located close to the centre of Herne Bay. The buildings are of concrete frame construction with brick outer skins beneath pitched roofs clad with interlocking profiled concrete tiles. We understand the property was built in 1978. The accommodation comprises self-contained residential units of differing size, with communal halls landings and social spaces, which include a communal laundry. The Tribunal inspected the exterior of the complex and appreciated the external characteristics of the different sized flats, and the situation and extent of the terrace that forms part of the former managers accommodation. Internally the Tribunal was able to inspect the communal areas.

The Hearing

7. Mr Ayres attended in person and Ms Matusevicius represented the Respondent. Miss Ellis, also from the Anchor Trust, accompanied her. The Tribunal was satisfied that both sides were in possession of the papers and the Tribunal had regard to the respective statements of case supplied.

The Case for the Applicant

8. In summary and in oral submission, the Applicant submitted that the tenancy agreement for Donnithorne House states that in respect of water, heating and hot water charges, the cost is based on the number of people for who the premises were designed for, not the number of people living there. Mr Ayres submitted that the 39 studio flats were designed for 1 person, the 13 one bedroom flats were designed for 2 people, the one two bedroom flat was designed for 3 people and the 1 three bedroom flat was designed for 5 people. That makes a notional total of 73 persons with each person being liable to pay £260.90 on a sum of £19,046. This would be the amount that the studio flat would pay but the three bedroom flat would pay 5 times that amount because it was designed for 5 people. He submitted that it was unreasonable for the studio flats to be subsidising the other flats and that the agreement itself was defective.

The Case for the Respondent

9. Ms Matusevicius submitted that the Applicant's calculations assumed that a property for 2 people should be charged double and so on and so forth. Her submission was that given the size of the flats it is not considered that a one bedroom flat would cost double to heat as a studio flat. She also dealt with the one 3 bedroomed flat which was a scheme managers flat but was now considered accommodation suitable for 3 people only rather than the notional 5 it was designed for. She queried why anyone occupying this unit should pay 5 times more.

10. She described the apportionment as follows; the studio flat based on occupancy of one person as designed for is allocated 1.656% of the cost (as a fraction of 1). In respect of a one bedroom flat based on 2 people would be estimated to be 40% higher and therefore the amount allocated is 2.318%; a two bedroom flat based on 3 people would be estimated to incur a 60% higher cost than a studio flat and therefore the allocation is 2.649%. This would result in the following charges:

Studio flat x 1.656%=£315.36 for the year

One bedroom flat x2.318% - £441.48 for the year

Two bedroom and ex scheme managers flat x 2.649%= £504.60 for the year.

11. She submitted that this was a much more equitable solution than that advanced by the Applicant. She submitted that her uplift percentages were based on a consideration of the actual occupancy of the subject premises. She submitted for example that whilst families with young children would have a higher water usage in reality this would not happen at Donnithorne House even the notional 3 person units would in practice have only 2 people living there. She highlighted that this formula has been used for 30 years, that the Respondent is a charity and adopting the approach of the Applicant would effectively take the notional 5 person unit out of the equation as a non viable let which would lead to an increase in service charge across the board.

12. She also added that the tenancy agreement had within it the use of the word "based" rather than "divided."

13. Mr Ayres made a brief reply in which he stated that the Tenancy Agreement was defective and had been from the outset and he could not see why a family could not occupy the notional 5-person unit as long as one of them was over the required age limit of 55. He highlighted in his submission his assessment of water usage, citing as an example the watering of plants by the unit that had the patio area.

The Tribunal's Decision

The Law

14. The statutory provisions primarily relevant to applications of this nature are to be found in section 18, 19 and 27A of the Act. The Tribunal has of course had regard in making its decision to the whole of the relevant sections as they are set out in the Act, but here sets out what it intends shall be a sufficient extract form each to assist the parties in reading this decision. Section 18 provides that the expression "service charge" for these purposes 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 relevant costs."

"Relevant costs" are the cost or estimated costs incurred or to be incurred by the landlord in connection with the matters for which the service charge is payable and the expression "costs" includes overheads.

Section 19 provides that :

> "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 provision of services or the carrying out of works only if the services or works are of reasonable standard
>
> and the amount payable shall be limited accordingly."

1. Subsections (1) and (2) of section 27A of the Act provide that:

"(1) An application may be made .....for a determination whether a service charge is payable and, if it is, as to-

a. the person to whom it is payable
b. the person by 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.

15. The notion of something being reasonable has been held to mean that the landlord does not have an unfettered discretion to adopt the highest standard and to charge the tenant that amount; neither does it mean that the tenant can insist on the cheapest amount.

16. The proper approach and practical test were indicated in **Plough Investments Ltds v Manchester City Council [1989] 1 EGLR 244** that as a general rule where there may be more than one method of executing in that case, repairs, the choice of method rests with the party with the obligation under the terms of the lease.

17. Further the tenant cannot insist on the cheapest method and a workable test is whether the landlord himself would have chosen the method if he had to bear the costs himself. Ultimately it is for the court or tribunal to do decide on the basis of the evidence before it and exercising its own expertise. In that regard the First Tier Tribunal is an expert tribunal and is able to bring its own expertise and experience in assessing the evidence before it.

18. The starting point for the Tribunal's analysis is the Tenancy agreement Part B, clause 2 which by reference to the relevant Schedule states "the cost that you pay us is in line with the levels set by the service provider. The cost is based on the number of people the premises was designed for, not the number of people living in the premises." This same phrase is used in respect of water and heating costs.

19. The Tribunal is satisfied that the method can only be based on the number of people that the premises was designed for and not that actual number of people who live there. The question for the Tribunal is which of the each respective methods advanced is consistent with that interpretation and the reasonableness of the same.

20. The Tribunal notes that the agreement uses the words "based" as opposed to "divided by." The latter is the approach advocated by Mr Ayres, namely a literal division of the cost by the notional 73 persons who the flats were designed for. The Tribunal is satisfied that the agreement does not use this division formulation, but the use of the word "based" denotes a starting point.

21. The Tribunal is satisfied that the formula adopted by the Respondent is based on the number of people who the flats were designed for but the percentage division takes into account, in broad terms, the reality of the type of persons that actually live there, namely elderly retired people. The Tribunal notes that Mr Ayres mentioned elderly female residents who may like their baths every evening or the tenants who watered their plants in the one flat with the terrace or indeed the number of windows and potential heat loss for each type of flat as demonstrating a lack of equality. Ultimately the Tribunal is not persuaded by these arguments as leading to an unreasonable service charge for the studio flats being levied. To attempt to adopt such a differentiation maybe unworkable in practice and ultimately the Respondent has adopted a method that in the Tribunal's assessment is a reasonable one by reference to a general view of consumption.

22. The Tribunal is satisfied that the Respondent's calculation is based on notional occupancy but modified in terms of percentage to reflect overall general usage for those who actually live there. The Tribunal can see no basis for a finding that the formulation used is unreasonable across all the flats. The Tribunal cannot see it as being reasonable that the notional 5 person flat pays 5 times more than the studio flats, when the reality is that it is occupied by a couple and in all probability will continue to be occupied at an occupancy level no greater than that of a two bedroomed flat. To find otherwise would have serious implications for the ability of the Respondent, itself a housing charity, to provide this type of provision for all residents.

23. The Tribunal therefore does not find in favour of the Applicant for the reasons above.

24. Having regard to the guidance given by the Lands Tribunal, as it formerly was, in the **Tenants of Langford Court v Doren LRX/37/2000**, the Tribunal does however consider it just and equitable to make an order under s.20C of the Landlord and Tenant Act 1985. The Respondent indicated that they would resist such an order, however the Tribunal is of the view that the tenancy agreement could have been clearer in terms of its overall explanation. Indeed the Respondent did inform the Tribunal that it was reviewed but without change in 2007.

25. The Applicant has not succeeded in his submission and the Tribunal directs that no order be made in respect of the Applicant's application and hearing fee in what essentially is a no costs jurisdiction.

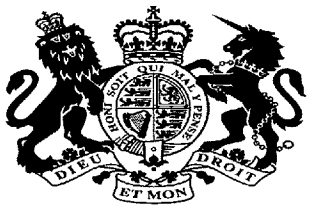
26. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office, which has been dealing with the case. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

27. 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.

28. 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.

Judge S. Lal

Dated 6th July 2014



FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UC/LSC/2013/0137**
Property	:	**43 Donnithorne House, Brunswick Square, Herne Bay, Kent, CT6 5QS**
Applicant	:	**Mr B Ayres**
Representative	:	**N/A**
Respondent	:	**Anchor Trust**
Representative	:	**Ms D Matusevicius**
Type of Application	:	**s27A Landlord and Tenant Act 1085**
Tribunal Members	:	**Judge Lal** **Mr C. C Harbridge FRICS**
Date and venue of Hearing	:	**Marine Hotel, Whitstable, Kent CT5 2BE** **4th July 2014**
Date of Original Decision	:	**6th July 2014**
Date of Decision	:	**17th August 2014**

DECISION ON APPLICATION FOR PERMISSION TO APPEAL

---

1. Following the Decision of the Tribunal in the above matter, the Applicant has applied to the Tribunal for Permission to appeal the Decision to the Upper Tribunal (Lands Chamber).

2. The Tribunal considers the matter in accordance with Rule 53. It first considered in light of the overriding objective whether to review the Decision in accordance with Rule 55. In the light of the issues raised by the Applicant the Tribunal has decided not to do so and therefore the Tribunal went on to consider whether permission to appeal ought to be granted.

3. The Tribunal notes the Permission application seeks to re-argue matters, the substance of which was dealt with fully by the Tribunal both at the hearing and in its substantive Decision. Furthermore the Tribunal had access to and considered all the documentation referred to by the Applicant. The Permission application amounts to no more than a continuing disagreement with the Decision and it does not identify any error or errors of law or any other reason that would justify the grant of permission to appeal.

4. Having considered the matter and in light of the issues raised, the Tribunal has decided not to grant permission to appeal as the application does not raise important points of law and it is not arguable that the Decision may contain an error or errors of law.

5. In accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007 and Rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 the Applicant may make a further application for permission to appeal to the Upper Tribunal (Lands Chamber. Such application must be made in writing and received by the Upper Tribunal (Lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission.

Judge S Lal (Legal Chairman)