



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

Case Reference : CAM/33UG/LSC/2017/0014

Property : Cairns Court, Belvedere Place, Newmarket Road,
Norwich NR4 7PT

Applicant : The Cairns Court Company (Norwich) Ltd

Representative : Sebastian Kokelaar, counsel, instructed by Howes
Percival LLP
Guy Hudson, Managing Agent (NRM)

Respondents : The long leaseholders listed in the application

Representative : Gill Knox & Liz McDonald

Type of Application : for determination of liability to pay service charges
[LTA 1985, s.27A]

Tribunal Members : G K Sinclair, G F Smith MRICS FAAV REV
& C Gowman BSc MCIEH MCMi

**Date and venue of
Hearing** : Thursday 4th May 2017 at Norwich Magistrates Ct

Date of Decision : 22nd May 2017

DECISION

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- Relevant lease provisions paras 5–14
- Material statutory provisions para 15
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Summary

1. By an application received at the tribunal office on 8th February 2017 the lessor company sought a determination of the lessees’ liability to pay service charges in respect of repairs to or replacement of the balustrades surrounding the balconies of eighteen of the twenty-one flats in the building. Unusually, no amount was specified, nor any past or future accounting periods mentioned. For the applicant Mr Kokelaar stated that the application was one seeking a decision in principle, under section 27A(3), on the question 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.
2. This application appears to have been prompted by a change in managing agent to Norwich Residential Management (a director of which was bizarrely - in view of potential conflicts of interest – formally appointed as the applicant’s company secretary), an assumption by NRM that external maintenance and repair is the responsibility of the lessor, and the lessees’ reaction to some very substantial quotations obtained following a section 20 consultation exercise in 2015.
3. It appears that the lessees (and directors) are split on what outcome they want, with some pointing to the fact that responsibility for maintenance of the balconies has been left to themselves ever since the leases were granted in the early 1980s and others preferring that the lessor take charge. Ultimately it is a question of the proper construction of the lease, as it seems doubtful if a sufficient majority could be obtained to seek an acceptable variation of all the leases under Part IV of the 1987 Act.
4. For the following reasons the tribunal determines that on a proper construction of the sample lease for those flats in the main block both the reinforced concrete balcony and the balustrade bolted into its face form part of the demised premises and, while the lessor is responsible for the periodic redecoration of the painted concrete face of each balcony and the balustrade, responsibility for maintenance and repair or replacement falls upon the individual lessee.

Relevant lease provisions

5. The sample lease is dated 30th September 1983. It has three parties and is made between Bloomsbury Housing Society (Norwich) Ltd as lessor (1), the applicant company (2), and Michael Charter Cole as lessee (3).
6. Paragraph 3 of the preamble records that by an agreement dated 31st August 1983 the lessor has agreed to transfer all the property contained in its freehold title, namely the land on the northeast side of Leopold Road, Norwich shown hatched black on the lease plan to the applicant company and that company has agreed to enter into the lease and undertake the obligations therein contained.
7. Clause 1 contains basic definitions, including that “the Reserved premises” means

the site (including the estate buildings and the reserved services) but except the premises demised by the lease.

8. Clause 2 demises to the lessee the flat and car parking space identified in the First Schedule, together with the rights and subject to the exceptions and reservations mentioned in that Schedule.
9. By clause 4 the lessee covenants to comply with the covenants in the Second Schedule and by clause 5 the lessor covenants (inter alia) that if the lessee of any other flat fails in this regard then at the written request of and agreement by the lessee to provide an indemnity it will enforce such covenants on that other's part.
10. The applicant's insurance and service charge responsibilities are set out in clause 6, by reference to the Fourth Schedule.
11. The demised premises as described in the First Schedule are flat 39 on the second floor, the site of which is shown edged red on the lease plan, and the parking space shown edged blue. It is unfortunate that the sample lease concerns flat 39 because that is one of the three flats in the separate block which do not have any balconies at all. This application concerns only the area edged red, and only in those flats in the long block, each of which includes a projecting or recessed balcony. The demise is subject to:
 - (4) The right for the [applicant] or the lessor to decorate or redecorate (to the exclusion of the lessee whose obligations shall not extend thereto) the outside faces of the external walls and the entrance doors of the flat and the demised premises
12. A point taken on the plans (see for example that at page 2/80) is that the red line is shown running along inside the black line forming the outer edge of the balcony. There is no question whether the balcony itself is part of the demise; the question is whether the surround or balustrade is. The plan, it was argued on behalf of the applicant, is not expressed to be for identification purposes only. However, upon being asked at the hearing to examine the lease plan at page 1/35 the words "For identification purposes only" appear on the bottom line, just to the right of the words "Cairns Court, Belvedere Place, Norwich."
13. Amongst the lessee's covenants in the Second Schedule the tribunal was referred in particular to those at paragraph (d) [requiring the lessee from time to time and at all times during the term to keep in good and substantial repair and condition including all windows and glass the demised premises and the fixtures and fittings therein], (e) [to paint the interior of the demised premises every fifth year], and (h) [not at any time during the term to make any structural additions or alterations to the demised premises without the previous written consent of the lessor]. At paragraph (o) there was also what was described as a "*Jarvis v Harris* clause" allowing the lessor to carry out and later reclaim the cost of any works should the lessee default in complying with his or her covenants.
14. In the Fourth Schedule, at page 1/30, the applicant covenants at paragraph 1 to insure the estate buildings and keep them insured against the usual perils, such insurance to be affected in the joint names of the lessor, the applicant and the lessee with regard to the demised premises. At paragraph 3, at 1/31, the applicant

covenants to redecorate the communal parts and to paint the exterior wood and iron and cement work of the estate buildings at least once in every five years, and at paragraph 5 to maintain the reserved premises in good order and condition and the gardens free from weeds, etc.

Material statutory provisions

15. The tribunal's powers to determine whether an amount by way of service charge is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The material part of section 27A(3) is quoted in paragraph 1 above. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

Inspection and hearing

16. The tribunal inspected the block and the balconies of two of the flats— one each of the twelve projecting and six recessed balconies – at 09:45 on the morning of the hearing. At the time of the inspection the weather was dry and sunny.
17. The building is in two parts, with a main block comprising three floors each with a row of six flats overlooking a shared garden above a basement car parking area. These are the flats with balconies : those at each end having balconies recessed within the main outline of the building and the twelve flats in the middle with projecting balconies. On the opposite side of the block, facing Belvedere Place, there are two projecting staircases connecting the flats with the exit doors and with the basement car park. The southern staircase, closest to Leopold Road, is also connected to a small square block comprising three flats, one on each floor. None of these three flats overlooks the garden or has a balcony.
18. With the exception of one all-metal balustrade on the top floor, all of the others have a structure comprising metal uprights to which are attached thin wooden strips, tightly arranged at the lower part (providing a modesty screen) and a top rail. The metal uprights are bolted into the face of the concrete balconies rather than into the top of them, a type of construction which the tribunal believes is no longer permitted under current Building Regulations.
19. At the hearing the applicant was represented by Mr Kokelaar, who was assisted by Mr Guy Hudson of Norwich Residential Management. Those respondents who opposed the application were represented by Ms Gill Knox and Ms Liz McDonald, both of whom are chartered surveyors.
20. No evidence was heard but in the first of two bundles before the tribunal there are various statements of case, witness statements, copy leases and exchanges of emails. The second bundle essentially comprised copies of every material lease, which the tribunal considered an unnecessary burden and expense.
21. Mr Kokelaar agreed with the tribunal that the dispute was essentially a short point of construction. Who bears responsibility for maintaining the balcony surrounds turns on whether the surrounds are part of the demise or not. The

chairman put to him that only if there was ambiguity would the tribunal need to consider the principles most recently explained by the Supreme Court in *Arnold v Britton*¹ and, when considering whether the parties' conduct over the 30 plus years to date was probative of their original understanding, the Court of Appeal's decision in *Ali v Lane*.²

22. Whilst noting what the chairman had said earlier about how frequent it was for responsibility for the repair and repainting of external windows to be divided between the lessee and the lessor Mr Kokelaar argued that paragraph 3 in the Fourth Schedule must impose an obligation on the lessor to paint the balcony surrounds and that it would be difficult to see why the parties would agree to the obligations being split between the applicant and individual lessees. As a matter of common sense, the intention must be to leave the obligation with the lessee or the lessor.
23. As a wider point of estate management, the lessor and the lessees as a whole have an interest in ensuring that all exterior aspects of the property are kept well maintained. That is significantly more difficult to achieve if certain aspects are left to individual tenants, who may carry out their obligations at different times and to different standards, if done at all – thus perhaps requiring the lessor to take enforcement action.
24. When referred by the tribunal to the fact that clause 7 provided for every internal wall separating flats from adjoining flats to be regarded as a party wall, and that the same applied to the floors and ceilings between the flats on different levels, Mr Kokelaar said that it was true that the external walls were not mentioned, but a normal lease would impose responsibility for structural repair on the lessor – to ensure that the work is done and to simplify insurance responsibilities.
25. On behalf of the respondents who were not in agreement with the applicant (and quite a few of the lessees were) Ms Knox submitted that under the lease she had to accept the lessor's responsibility for decoration of the balcony surrounds, but not for their repair. She noted that the concrete face of each balcony has been painted white but not the metal upstands. This split in responsibility was, she said, common in leases.
26. Ms McDonald said that the answer to the dispute depends on the definition of the demise. The lease is very clear. It refers to the property edged red on the plan. The balcony is part of the demise and the structure. If part were to be retained by the lessor then that would have to be specifically excluded. The plans are shown as being for identification purposes only, and the red line does not indicate that there is a millimetre or so retained by the lessor.
27. She drew attention to the practice of the parties over the years. The lessor has never maintained or charged for maintenance of the balconies. She submitted that the balustrade does not form part of the external wall but is a fixture bolted to the balcony – and thus the responsibility of the lessee.

¹ [2015] UKSC 36; [2015] AC 1619

² [2006] EWCA Civ 1532; [2007] 1 P&CR 26

28. She also noted the extent of the demise concerning walls, floors and ceilings. The intention of the lessor appeared to be to divest itself of as many responsibilities as possible, which is unusual. It would be odd therefore if it demised all those structural parts but not the balcony surrounds. She did not find it conceivable that the balcony surrounds are a retained part, rechargeable under the service charge, as they are not mentioned in the lease.

Discussion and findings

29. The tribunal considers that, while the red lines on the various plans on page 1/13 are shown as being on the inside of the black lines, the wording of the lease is clear. One can't put a red line on top of a black line and for it to be visible. The lease specifically deals with windows, and walls and ceilings, but is silent on the balcony. The lessee's liability for maintenance of the demised premises also extends to the more important part – where that balustrade bolts into. The plan is quite clear.
30. If there were any doubt, the tribunal would also use, as an aid to interpretation, the behaviour of the parties ever since the mid-1980s. Never before has the lessor sought to maintain, repair or replace the balcony balustrades, or claimed entitlement or obligation to do so. Maintenance has been left to the individual lessees, and one lessee with a flat towards the middle of the top floor has in fact replaced his or her balustrade with one of all-metal construction that does not conform with the rest.
31. While the provisions of the lease concerning liability for the main structure are of potential concern both to insurers and mortgagors the demise of the balcony, properly interpreted, does include the balcony balustrade. The lessor's only responsibility is to decorate, as the balustrades and faces of the balconies form part of the exterior of the building.

Dated 22nd May 2017

Graham Sinclair

Graham Sinclair
Tribunal Judge