FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00ML/LSC/2019/0028
Property	**:**	Basement Flat, 29 Holland Road, Hove BN3 1JE
Applicant	**:**	Leigh Best
Representative	**:**	
Respondent	**:**	Mr T Bitton; Mrs A Davis; Mr Derek Lennard; Mr Daniel Lennard; Mr P Lennard & Ms S J Lennard
Representative	**:**	Ellman Henderson
Type of Application	**:**	Determination of service charges
Tribunal Member	**:**	Mr D Banfield FRICS
Date of Decision	**:**	8 August 2019

DECISION

The Tribunal determines that the sum of £5,419.37 in respect of balcony repairs is reasonable and payable.

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Background

1. The Applicant seeks determination as to whether he is liable under his lease to contribute £5,368.21 through service charges towards the costs of repairing a balcony which exclusively serves a separate first floor flat in the building of which the Property forms a part.

2. The Tribunal made Directions on 22 March 2019 setting out a timetable for the provision of documents by the parties leading to a determination by the Tribunal. The application was to be determined on the papers **without a hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013** unless a party objected in writing to the Tribunal within 28 days of the date of receipt of the directions. No objections have been received and the matter is therefore determined on the papers received.

The Parties' Positions

The Applicant

3. Mr Best says that he considers the balcony forms part of the first floor flat. The only access to the balcony is through the First Floor Flat. It cannot be used as communal space. The freeholder lets the flat out and charges a premium rate due to the sea views from the balcony.

4. The only lease in the building is for the basement flat the other flats being owned by the freeholder.

5. Advice received from the Leaseholders Association stated:
   - Is the balcony part of the main structure? In the absence of other leases there is no definition of what constitutes part of other flats
   - In the majority of leases seen the balcony is defined as part of the main structure with the leaseholder being responsible for the surface only.
   - His lease is not clear
   - Where there is doubt the Contro proferentum (sic) rule applies in that any doubt should be construed against the person who put them forward i.e. the landlord

6. If a more detailed lease had been created along with leases of other flats, in particular the first floor flat we would not be in this position now.

The Respondent

7. In a statement on behalf of the freeholder it is confirmed that the property comprises an end of terrace house converted into five flats one of which (the basement) was sold off on a long lease with the upper parts retained by the freeholder and let to four periodic tenants.

8. Clause 1 of the lease defines "the building" as "the whole of the property of which the flat hereby demised forms part known as 29 Holland Road, Hove foresaid together with the forecourts, basement areas gardens and boundary walls"

9. Clause 4.2.4 defines the annual maintenance cost as "shall be the total of all sums actually spent by the landlord during the period to which the relevant current annual maintenance relates in connection with the management and maintenance of "the building"

10. Clause 5.1.3 describes the main structure of "the building" and they argue that the balcony forms part of the structure.

11. In support a copy of the lease of the adjoining property is provided in which the balcony is part of the structure.

12. That Mr Best cannot access the balcony is not relevant.

The Lease

13. The lease is dated 12 December 1996 and made between Williams & Lennard and Sigma Estates Limited. The clauses relevant to this dispute are as referred to at paragraphs 8 to 10 above.

14. In addition, clause 4.2 specifies the Lessee's proportion of the service costs to be 20% of the "Annual Maintenance Cost" and Clause 5.1.3.1 limits the freeholder's obligation in respect of the building by excluding "the Flat and all other flats therein already or intended to be demised……"

The Law

15. The tribunal has power under section 27A of the Act 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 a service charge is payable.

16. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. Section 19 (2) concerns where a service charge is payable before the relevant costs are incurred no greater amount than is reasonable is payable.

Discussion and Decision

17. This application challenges the construction of the lease as to whether the first-floor balcony should be considered as part of the first floor flat and therefore excluded from the Freeholder's repairing obligations under Clause 5.1.3 of the lease.

18. This dispute would not have arisen if a lease had been granted for the first floor flat indicating clearly whether the balcony was included or excluded from the demise. For whatever reason this did not happen and we are faced with determining the meaning of the words contained in the only lease we have.

19. Clearly the balcony is part of "the building" and the only exclusion from the landlord's obligation would be if it formed part of "the Flat and all other flats therein already or intended to be demised……"

20. It is not part of "the flat" and no other flat has been demised. Therefore, I have to consider whether it was" intended to be demised"

21. There is no evidence as to the intention of the parties at the time and I therefore have to consider the balance of probabilities. Evidence provided is that;

    - The first floor flat in the adjoining building excludes the balcony

    - The Leaseholders Association says that "In the majority of leases seen the balcony is defined as part of the main structure with the leaseholder being responsible for the surface only".

22. Whilst the above does not provide a definitive answer it does indicate that to exclude the balcony from the demise of the adjacent flat would not have been an unusual course to have taken.

23. As such I am not satisfied that the balcony should form part of a flat that "was intended to be demised" which consequentially means that it remains part of the landlord's repairing obligations the cost of which is recovered by way of the service charge.

24. The only challenge made was to the construction of the lease and I therefore determine that 20% of the cost of the repairs to the balcony are payable by way of service charge by the Applicant.

25. The Applicant refers to the charge being £5,368.21 whereas the cost of Balcony repairs in the Application for Payment dated 22 May 2019 total £5,419.37 and, in the absence of any challenge, it is this higher sum that the Tribunal determines as both reasonable and payable.

26. Neither party has made submissions in respect of the Applications under Section 20C Landlord and Tenant Act 1985 or Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

27. Any submissions that the parties may wish the Tribunal to consider should be received by the Tribunal by 29 August 2019 following which a supplementary determination will be made.

D Banfield FRICS
8 August 2019

Appeals

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.