LRX/100/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – whether condition precedent (namely a certificate from lessor's surveyor) satisfied so as to enable service charges to be claimed – whether overpayments of service charge properly dealt with – whether renewal of carpets on communal landings within matters which could be charged for.

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE NORTHERN RENT ASSESSMENT PANEL

BETWEEN	**JOHN CRAMPTON** **PETER BENTLEY** **JOHN SANPHER** **MRS CRAMPTON**	**Appellants**
	and	
	PARK PLACE 96 LIMITED	**Respondent**

Re: Park Place,
Park Parade,
Harrogate
HG1 5NH

Before: His Honour Judge Huskinson

Sitting at Harrogate County Court, 2 Victoria Avenue, Harrogate,
North Yorkshire HG1 1 EL
on 7 April 2009

John Crampton (ie the first named Appellant) represented himself and the other Appellants
C H Renton (Company Secretary of the Respondent) represented the Respondent with permission of the Tribunal

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The following cases are referred to in this decision:

Barrington v Sloane Properties [2007] 3 EGLR 91

DECISION

Introduction

1. This is an appeal from a decision of the Leasehold Valuation Tribunal for the Northern Rent Assessment Panel (the LVT) dated 21 May 2007. The LVT's decision was given upon an application made to it by the present Appellants for a decision under section 27A of the Landlord and Tenant Act 1985 as amended as to the amount of service charge payable by each of the Appellants in respect of that Appellant's flat for the service charge years in question, namely the calendar years 2001 to 2006.

2. The Appellants are lessees of flats in Park Place, Park Parade, Harrogate, which is a substantial block of flats comprising 49 flats and a separate caretaker's flat and extending to a ground floor and 12 upper floors. More precisely, Mr Bentley and Mr Sanpher have at all material times been the lessee of their respective flats (flat 99 and flat 21), Mr Crampton was at all material times the lessee of flat 69, but in the course of 2007 he sold that flat. Mr Crampton and his wife Mrs Crampton purchased flat 78 on 12 September 2006. Mrs Crampton was added as an applicant by the LVT in respect of flat No.78.

3. It appears that the leases of the various flats are not all in identical terms. However the LVT was invited to proceed upon the basis that all the Appellants' leases were in the same terms as that of flat 69, which was held by Mr Crampton, being a lease dated 1 July 1963. I proceed upon the same basis.

4. The Respondent is a company in which each of the 49 tenants own one share. The purpose of the company is to hold the freehold of the building and to run the building for the benefit of all the lessees, who are the members of the company. Effectively all the income of the Respondent is derived from the lessees of the building.

5. The lease of the flats is not well drafted. There are proposals (which I understand are well advanced) that the lessees of flats in the building will surrender their existing leases to the Respondent and will be regranted a new lease for a longer term on properly drafted terms including in particular more satisfactory service charge provisions. While this is of interest it does not of course affect what I have to decide in this appeal. I must proceed upon the basis of the lease as it exists.

6. The lease of 1 July 1963 demised flat 69 for a term of 99 years from 25 March 1963 at a rent of £5 per annum payable by equal half yearly payment in advance on 29 September and 25 March in every year. Clause 4(22) is in the following terms:

> "(22) To reimburse to the Lessor a sum (hereinafter referred to as "the service charge") equal to 1.9 per centum of the costs expenses outgoings and matters mentioned in the First Schedule hereto the service charge to be due and payable on

demand and the amount of the service charge to be ascertained and certified by the Lessor's Surveyor acting as an expert and not as an arbitrator once a year on the Thirty first day of December in each year (or if such ascertainment shall not take place on the Thirty first day of December then the said sum shall be ascertained as soon thereafter as may be possible as if such sum had been ascertained on the Thirty first day of December aforesaid) commencing on the Thirty first day of December next (but not more frequently than once in every yearly period computed from the First day of January to the thirty first day of December next following) PROVIDED THEREFORE and it is hereby agreed that the Lessee shall (if required by the Lessor) with every half yearly payment of rent pay to the Lessor such sum on account of the service charge payable by the Lessee under this clause as the Lessor's Surveyor shall certify as being a reasonable interim sum to be paid on account of the service charge and that the service charge payable by the Lessee hereunder (or such balance as shall remain after giving credit for any half yearly payments as aforesaid) shall be paid by the Lessee or any proper balance found to be repayable to the Lessee shall be so repaid to him on the Thirtieth day of June next following the year ending on the Thirty first day of December to which such contributions shall relate or so soon thereafter as may be possible PROVIDED LASTLY that the Lessor shall not be entitled to re-enter under the provision in that behalf hereinafter contained in respect of non-payment only of any such interim sum as is hereinbefore mentioned."

The First Schedule set out a list of the costs expenses outgoings and matters in respect of which the lessee is to make a contribution. So far as presently relevant paragraphs 4, 7 and 11 should be noted which are in the following terms:

> "4. The cost of keeping in repair maintaining cleaning decorating and renewing when necessary the Retained Parts and the outside of the Building and all conduits pipes wires ducts carrying or conveying gas water electricity television ventilation and sewage and surface water (both inside and out) or any similar service.
>
> 7. The cost of lighting heating and keeping swept the Retained Parts and covering (if any) the floors thereof.
>
> 11. Such sum or sums from time to time as the Lessor's Surveyor shall consider desirable to be retained by the Lessor by way of a reserve fund as reasonable provisions for prospective costs expenses outgoings and other matters mentioned or referred to in this Schedule Provided that the amounts standing to the credit of such Reserve Fund and being not then appropriated to meet liabilities actually incurred shall be brought into account by way of deduction in accumulating the amount of the service charge provided for in Clause 4 (22) of this Lease at the end of each successive fifth yearly period (as defined in the said clause) computed from the Thirty-first day of December next following the date hereof."

The expression "the Retained Parts" is defined in the third recital to the lease in the following terms:

> "The Lessor intends to retain all the parts of the Building not intended to be demised as flats as aforesaid (which parts are hereinafter referred to as the 'Retained parts').

7. The Appellants raised numerous points before the LVT by way of objection to the service charges demanded by the Respondent. Some of these points were decided by the LVT in favour of the Appellants. There is no cross-appeal by the Respondent against these findings. The Appellants sought permission to appeal against various points which the LVT had decided against them. The LVT refused permission to appeal but the Lands Tribunal granted a limited permission to appeal, in that it refused permission to appeal upon certain points and granted permission to appeal on other points, but these were subject to limitations as contained in the directions there given, which were in the following terms:

> "a. The Lands Tribunal will conduct a hearing at which it will determine
>
> (i) Whether the sums certified in the years 2001, 2002, 2003, 2004, 2005 and 2006 (in the case of No 69, 2005 and 2006 only) were certified in accordance with the procedures specified in the lease;
>
> (ii) Whether the procedure adopted by the Respondents for the retention of balances at the year end was in accordance with the lease, and whether any failings would have altered the sums properly certified, if any;
>
> 1. Whether it was reasonable to certify the costs of carpeting when tenders had not been obtained in accordance with RICS practice, and when the role of the expert had arguably been misinterpreted by the LVT.
> 2. Whether the replacement of carpets put down by the tenants could form part of the works for which a service charge could be made
> 3. In the case of No 69, leave is granted in respect of years 2005 and 2006 only.
>
> b. Upon issuing its decision on those issues, The Tribunal will then give directions on the determination of any consequential issues of valuation or assessment of costs."

8. At the hearing before me neither the Appellants nor the Respondent were professionally represented. All four Appellants attended the hearing and Mr Crampton presented their case on behalf of himself and the other three Appellants, who were asked whether they had anything to add to the submissions made by Mr Crampton but who indicated that they relied upon all that he had said. So far as concerned the Respondent, Mr Renton (with permission given by the Tribunal) represented the Respondent, he being the company secretary.

9. Substantial written material had been submitted to the Tribunal by both parties and was contained in a paginated bundle provided by the Appellants which extended to 439 pages. Mr Renton provided certain further pages (440 to 450) which had been omitted.

10. It appeared provisionally to me that the material submitted by the Appellants covered issues which were wider than those for which permission to appeal had been granted. At the outset of the hearing I indicated this preliminary view and invited submissions insofar as this

view was not accepted. My preliminary view was that the matters in issue before the Lands Tribunal were:

(1) The question of whether nothing at all was payable by the Appellants for one or more of the service charge years by reason of there never having been issued any surveyor's certificate (or any valid surveyor's certificate) such as to satisfy a condition precedent to payment within the terms of Clause 4(22) (I call this "the no certificate/defective certificate issue").

(2) The question of whether cash balances which had been received by the Respondent by way of service charge in respect of a particular calendar year but which had not been fully spent within that year could be held by the Respondent as some form of reserve fund or whether such money must be paid back to the respective lessees on the following 30 June in accordance with Clause 4(22) and whether, in consequence, each of the Appellants is entitled to a credit against the service charge which would be otherwise be payable for the calendar year 2006 (I call this "the reserve fund issue").

(3) The question of whether the costs of recarpeting three of the landings at the building was properly included within the service charges or whether such costs should have been excluded on the basis either that the terms of the lease did not entitle the Respondent to recarpet the landings and to recover the costs through the service charge provisions or that there had been some other irregularity in respect of the certifying of the costs of the carpeting (I will call this "the carpeting issue").

Neither the Appellants nor the Respondent advanced any reasoned submissions by way of disagreement with my preliminary views as to the ambit of the present appeal. Accordingly the appeal proceeded upon this basis. For the avoidance of doubt I state that in my judgment the foregoing three points are the only points open to the Appellants having regard to the terms in which permission to appeal was refused as regards various matters and was granted upon terms as regards other limited matters.

11. I enquired whether either the Appellants or the Respondent proposed to call any evidence before me. They indicated that they did not intend to do so and wished to advance arguments based upon documents which were before me.

12. After the conclusion of the hearing I undertook an accompanied view of the building. I ascended by the communal lift to the twelfth floor and then viewed various of the landings in the building.

13. It is convenient to consider the parties' submissions on each of the three above mentioned issues in turn and to give my decision upon each such issue before passing on to the next.

No certificate/defective certificate issue

14. Mr Crampton submitted that the recoverability of service charge payments rests upon the terms of the lease and not upon the content of resolutions passed by the Respondent company at general meetings (whether annual or extraordinary). There was a concern on behalf of the Appellants that the Respondent was minded to seek to recover monies otherwise than strictly in accordance of the lease and that the Respondent took the view that if a resolution was passed at a general meeting then all of the tenants should be taken to be bound thereby so far as recoverability of service charge is concerned. Mr Renton made clear on behalf of the Respondent that the Respondent accepted that the recoverability of service charge must rest upon the terms of the lease. This is plainly correct.

15. Before turning to Mr Crampton's submissions on this first issue the following may be noted. It is central to this first issue and also to the reserve fund issue (and to a lesser extent to the carpet issue) as to what if any certificates were prepared by the "Lessor Surveyor" as provided for in the lease. Bearing this in mind it is remarkable that neither the Appellants nor the Respondent included within the extensive bundle any certificate at all in respect of any service charge year. I drew attention to this fact at the outset of the hearing, but neither party was able to produce any such certificates. The circumstances regarding the existence or non-existence of certificates must therefore be deduced from the papers before me and from the submissions of the parties to which I now turn.

16. Mr Crampton advanced the following submissions:

1. There were no certificates at all issued for the service charge years 2001 and 2002 with the result that no service charge whatever is payable in respect of either of those years. Mr Crampton drew attention to an order of the Harrogate County Court in proceedings to which he was a party dated 2 April 2004 which ordered (inter alia):

   > "The Claimant shall .... repay to the Defendants £2823.00 being the sums paid on an interim basis in respect of service charges for 2001, 2002, no certificate having been produced in relation to those years in accordance with Clause 4(22) of the lease".

2. Mr Crampton accepted that perhaps some certificates were issued by the Lessor's Surveyor, Mr Peter Campkin, for the years 2003 and following and Mr Crampton also thinks that Mr Campkin produced some backdated certificates for several years.

3. However Mr Crampton submitted that these certificates were not proper certificates because they were not the product of Mr Campkin applying his expert mind not merely to question of whether as a matter of fact certain sums of money had been spent but also to the question of whether the amounts spent were reasonable and in accordance with the provisions of the lease. Mr Crampton submitted that Mr Campkin had effectively merely rubber stamped the Respondent's expenditure without himself thinking properly about

it. Accordingly Mr Crampton submitted that, once again, nothing was payable by the Appellants in respect of any of the service charge years because there was no proper Lessor's Surveyor's certificate, which was a condition precedent to anything being payable under the service charge provisions.

4. Mr Crampton relied upon Mr Campkin's letter to him dated 2 July 2004 (page 197 of the bundle) as indicating that Mr Campkin had not properly applied his own mind to the contents of any certificate but had instead effectively rubber stamped the landlord's document.

5. Mr Crampton also relied upon the fact that, as noted by the LVT in paragraph 18 of its decision, Mr Campkin appears not to have raised any fee for work of certification under the provisions of the lease. He submitted that it must therefore be inferred that no such certification had ever been done.

17. In answer Mr Renton advanced the following points:

1. He referred to a letter written by Mr Crampton himself dated 9 February 2003 which on the second page (page 151 of the bundle) made reference to the question of a certificate relating to the 2001 account having been raised at the 18th July Board meeting and going on to observe that at the 2nd September Board meeting service charge certification was an Agenda item and

> "A Service Charge certificate for every flat was received from the Surveyor, each individually signed."

Mr Renton submitted that this showed there must have been certificates for the calendar year 2001.

2. As regards the year 2002 Mr Renton drew attention to a court order dated 28 April 2003 which included the following words:

> "Mr Campkin shall be invited to supply a new certificate in accordance with the draft annexed and payment of the revised service charge shall be dependant upon the issue of a new certificate."

Mr Renton submitted that this indicated that there must have been a certificate for the 2002 year, as is further confirmed at page 153 of the bundle being the minutes of and AGM held on 25 March 2003 stating that the budget for 2002 was certified by the surveyor (but the certification was not distributed to shareholders).

3. Mr Renton also relied upon Mr Crampton's acceptance that for the years 2003 and following certificates were issued (albeit certificates which Mr Crampton criticises) and to Mr Crampton's further acceptance that retrospective certificates were issued for earlier years.

18. In the foregoing circumstances Mr Renton submitted that the Tribunal must conclude that certificates were issued by the Lessor's Surveyor. As regards the further criticism advanced by Mr Crampton that these certificates were inadequate in that they omitted to bring an independent expert mind to the contents of the certificate, Mr Renton drew attention to the fact that Mr Campkin is a building surveyor and holds the qualification MRICS. As regards Mr Campkin's letter at page 197 Mr Renton submitted that Mr Campkin justifiably said that he could comment regarding bricks and mortar and that he was entitled to indicate that it was necessary for him to make enquiries and obtain information from others regarding other aspects of the matter. Mr Renton submitted that this letter in fact showed a professional approach on behalf of Mr Campkin. Mr Renton drew attention to certain bills issued by Mr Campkin at pages 349 to 361 of the bundle.

19. It is remarkable that neither side has placed before the Tribunal such certificates as were issued by the Lessor's Surveyor Mr Campkin. The question of whether certificates had been issued and, if so, the adequacy of such certificates was clearly a central issue having regard to the terms in which permission to appeal was granted. It is however necessary for me to decide this appeal upon the material which has been placed before the Lands Tribunal and upon the submissions (which were not in the form of sworn evidence) from the parties.

20. I note that it was not expressly raised as a point for consideration by the LVT that there had been a total omission to issue any certificates at all for any particular service charge year. Certainly the LVT has not made any finding that no certificates at all were issued for any such year. Having regard to the documents before me and to the submissions of the parties I reach the following conclusions:

(1) I accept Mr Renton's argument that there must have been certificates issued by the Lessor's Surveyor for the service charge years 2001 and 2002, see the clear implication regarding the existence of such certificates from the documents at pages 151, 153 and 158 of the bundle.

(2) Bearing in mind Mr Crampton's acceptance that certificates were issued for the years 2003 and following and bearing also in mind that nothing has been drawn to my attention in the bundle indicating that there was an omission to issue any such certificates I conclude that certificates were issued by the Lessor's Surveyor for the service charge years 2003, 2004, 2005 and 2006.

(3) As regards the judgment dated 2 April 2004 obtained by Mr Crampton for the repayment of £2,823, I notice that the Court Order refers to this sum as being paid "on an interim basis in respect of service charge for 2001-2002" and the reason given for the Court Order was "no certificate having been produced in relation to those years in accordance with Clause 4(22) of the lease". Accordingly this Court Order may only be directly relevant to the question of whether certificates were provided by the Lessor's Surveyor in respect of the amount claimed by way of interim service charge, rather than being relevant to the question of whether any final certificate was prepared by the Lessor's Surveyor after end of the relevant service charge year. Also this court order was made in proceedings which concerned only Mr Crampton and flat 69 and was

only relevant to Mr Crampton's service charge for the years 2001 and 2002 (which are not before me for decision so far as concerns flat 69). Accordingly the conclusion which I reach regarding the existence of certificates (ie certificates issued after the end of the relevant service charge year) is not inconsistent with the terms of this Court Order.

(4) I note the comparatively small amount charged by Mr Campkin for the work performed and the brief description of that work, including little reference to the preparation of certificates. However the manner in which Mr Campkin chose to charge for his work and the way he described the work done in his fee notes is insufficient to justify a conclusion that, despite the matters noted above, no certificates at all were issued by Mr Campkin.

21. Accordingly I reject the argument that nothing whatever is payable by way of service charges for any of the service charge years by reason of there being a total absence of any certificate having been issued by the Lessor's Surveyor – I find that certificates were issued by the Lessor's Surveyor for each such year.

22. The next question is whether such certificates as were issued by Mr Campkin (which I have not seen) were adequate to satisfy the requirement in Clause 4(22) of the lease that a Lessor's Surveyor's certificate should be issued, or whether on the other hand the certificates were sufficiently defective to require them to be treated as effectively no certificates at all, with the result that the condition precedent in Clause 4(22) for payment of service charge has not been satisfied. I conclude that the certificates must be treated as having been adequate to satisfy the condition precedent:

(1) Mr Crampton has not produced the certificates which he criticises. In my judgment it was for him to do so.

(2) Apart from the foregoing, I consider that the contents of Mr Campkin's letter dated 2 July 2007 (page 197) are wholly insufficient to show some unprofessional approach. The letter was not written regarding the subject of certification of service charge accounts. I see nothing in the letter to show some inappropriate approach by Mr Campkin, who was fully entitled to observe:

> "I am not involved in the decision making process in respect of whether various projects go ahead or not, this is obviously the role of the Management Committee as it is for all issues relating to Park Place Apartments."

(3) I also note the decision of the Lands Tribunal (His Honour Judge Gilbart QC) in *Barrington v Sloane Properties* [2007] 3 EGLR 91 where it was held that if a surveyor's certificate is in fact issued then, provided such a certificate was not defective on its face, it could be treated as a valid certificate (rather than a nullity) even though it had been arrived at in a manner inconsistent with the lease. Thus such a certificate would satisfy the condition precedent that a certificate be issued, but it would be open to the tenants to challenge such a certificate. In fact in the present case there has indeed been such a challenge by

the present Appellants to the various service charge accounts and the LVT has given its rulings (in many cases in favour of the Appellants) on the contents of such occurrence.

23. Accordingly I reject the Appellants' argument that nothing is payable by way of service charge for the relevant service charge years by reason of some alleged absence of adequate certificates from the Lessor's Surveyor.

Reserve Fund issue

24. Mr Crampton submitted that the terms of the lease are clear. Unless the Respondent operates the reserve fund as specifically provided for in paragraph 11 of the First Schedule to the lease, then the Respondent must return any overpayment of service charge (ie any overpayment made in respect of a particular service charge year ending on 31 December) on 30 June of the following year. Mr Crampton accepted that this would give rise to practical problems for the Respondent, but he pointed out that practicability does not oust the clear terms of the lease. What Mr Crampton on behalf of the Appellants seeks is a finding that £21,019, which was the total amount of the overpaid service charge for the year ended 31 December 2005, should be treated as held to the credit of the tenants as from 30 June 2006, with the result that each of the present Appellants should be entitled to a credit against the total service charge bill for the calendar year 2006 in a sum equal to their relevant percentage (ie the percentage set out for that lessee in Clause 4(22) of that lessee's lease) of this sum of £21,019.

25. On behalf of the Respondent Mr Renton did not seek to justify the retention of the overpaid service charge by reference to paragraph 11 of the First Schedule – he accepted that the Respondent had not sought to operate the reserve fund as provided for in paragraph 11 because the drafting of that provision made it effectively impossible sensibly to operate the reserve fund in accordance therewith. He submitted however that there was a mismatch between the dates upon which interim payments of service charge for any particular service charge year could be demanded (25 March and 29 September) and the date from which the service charge year ran (1 January). He submitted that if the Respondent operated strictly in accordance with the terms of the lease it could run out of cash during the first quarter of any year and that it therefore should be entitled to retain the overpaid service charge in accordance with the procedure it had adopted.

26. I reach the following conclusions upon the reserve fund issue. The difficulties for the Respondent arising from the poor drafting to the service charge provisions are unfortunate, but they do not entitle the Respondent to disregard the terms of the lease. It is accepted as a matter of fact that for the service charge year ended 31 December 2005 there was a total overpayment by the lessees of £21,019. Leaving aside for the moment the position of Mr and Mrs Crampton, each of the other Appellants was entitled on 30 June 2006 to be repaid his respective percentage of this sum. They were not paid this sum. Accordingly they are entitled to set off against the demand of service charge for the calendar year ended 31 December 2006 their respective percentage of this £21,019.

27. So far as concerns flat No.78 and the position of Mr and Mrs Crampton, Mrs Crampton was joined as a party to the proceedings before the LVT because Mr and Mrs Crampton purchased flat 78 on 12 September 2006. On 21 August 2007 Mr and Mrs Crampton sold their original flat, namely flat 69. It follows that Mr and Mrs Crampton were the lessees of flat 69 on 30 June 2006 and were entitled to their percentage of £21,019. However as regards flat 78 they were not the lessee on 30 June 2006 and accordingly did not become entitled to repayment of the relevant percentage of £21,019. In the result therefore I conclude that in respect of the service charge year ended 31 December 2006:

(1) Mr Crampton is entitled to a reduction in the service charges for that year in the sum of his relevant percentage of £21,019 in respect of flat 69.

(2) Mr Bentley and Mr Sanpher are each respectively entitled to a reduction in the service charges for that year in respect of (respectively) flats 99 and 21 in the sum of their relevant percentages of £21,019.

(3) However Mr and Mrs Crampton are not entitled to any reduction in the service charge for the year ended 31 December 2006 in respect of flat 78.

The carpets issue

28. On this point Mr Crampton said that he relied upon and adopted the advice given to the Respondent by the Respondent's own legal advisers as recorded in the major works notice dated 23 May 2003 at page 161 of the bundle:

"1. As the carpets on the landing were added after the leases were drawn up they do not come under the terms of the lease, in addition it is not clear who paid for which carpets, except the carpeting in the hall which was paid for by the Company. Under the terms of the Lease the lessor is only responsible for the good repair of the original vinyl/plastic flooring. This is further confirmed under the First Schedule in the Lease – Costs Expenses Outgoings and Matters in respect of which the Lessee is to Make a contribution clause 7 refers to "The reasonable cost of keeping swept the Retained Parts and coverings (if any) the floors there of"

2. It is therefore considered that the carpets on each landing are the responsibility of the lessees on that landing. However, the lessor is still responsible for keeping the Common Areas properly swept and cleansed, which would includes the regular vacuuming and when deemed appropriate steam cleaning the carpets – this was done some two and a half years ago.

3. If and when the lessees on a landing decide that they wish to replace the carpet on their landing at their own expense this may only be done with the agreement of the lessor – which will not be unreasonably with held."

29. Mr Crampton informed me that there had originally been linoleum on the relevant flooring on the landings but that this had long since disappeared and had been replaced by the carpets. Mr Crampton informed me that the Appellants did not argue that the cost of the carpets was too high, but the Appellants did not accept that the carpets which were replaced on three of the landings were sufficiently worn to justify such replacement.

30. Mr Crampton also expressed concern at the level of the cost of the redecoration on the landing (ie leaving aside the question of the carpets) but I pointed out that this was not an argument open to him having regard to the terms in which permission to appeal was granted.

31. On behalf of the Respondent Mr Renton submitted that the terms of the lease regarding the ability to replace the carpets and charge the costs through the service charge were vague. He accepted that originally the Respondent had been advised by its solicitors as set out in passage relied upon by Mr Crampton, but that the Respondent had then taken a different view as to what was permitted under the terms of the lease. He submitted that the carpet should be treated as part of the building. He informed me that the carpets had been there for a long time and that the carpets on the floors which were recarpeted had been in very poor condition.

32. My conclusions upon this issue regarding the carpets are as follows. The First Schedule provides at paragraph 7 that the costs which can be charged through the service charge to the lessees include

> “the costs of lighting, heating and keeping swept the Retained Parts and covering (if any) the floors thereof

This is not a happily worded provision. If it had been intended to make clear that the Retained Parts and the covering of the floors were both the objects of the words “lighting, heating and keeping swept”, then the appropriate wording for the clause would have been as follow:

> “The cost of lighting, heating and keeping swept the Retained Parts and **the** covering (if any) **of** the floors thereof”

In other words the two words in heavy type need adding. However these words are not there. In my judgment the provision can and should be read on the basis that the word “covering” has the same grammatical status and is the same part of speech as the words “lighting, heating and keeping swept”, such that what can be charged is the cost of lighting, heating and keeping swept the Retained Parts and also the cost of “covering (if any) the floors thereof.” I realised the words “if any” are somewhat inelegant in this construction, but they make perfectly good sense, namely there is no obligation on the lessor to cover the floors but if any such covering is provided it can be charged for through the service charge provisions.

33. I also note that the Respondent is the occupier of the common parts of the Building and could be liable under the Occupiers Liability Act 1957 for injury to persons caused by any relevant defect in the state of the landings, eg by reason of a hole in the carpets. It would be contrary to the business efficacy of the lease for the Respondent to be saddled with this liability but to have no power to replace, if necessary, the carpets on the landings. Bearing in mind that

the provisions of paragraph 7 of the First Schedule can be construed in a manner to give efficacy and commonsense to the agreement, I conclude they should be so construed.

34. I viewed the building and several of the landings. I was shown some landings which still had the old carpet (floors 4, 6, 11 and 12) and some landings where the carpet had been renewed (floors 1, 2, 3, 5 and 7). So far as concerns the landings where the old carpets still remained, I saw nothing there to indicate any obvious need for replacement. However as regards the carpets which were replaced I heard no sworn evidence regarding the state of these carpets nor was any written or photographic material placed before me so as to demonstrate the state of these carpets. Mr Renton merely informed me in the course of his submissions that the carpet on his floor (the 5th floor where the carpet was replaced) had been in a very poor condition. Upon the material before me I cannot disagree with the LVT which appears (see paragraph 22 of its decision) to have accepted that in 2004 certain carpets needed to be replaced. The LVT also found that the costs of replacement were reasonable, which implies the LVT was satisfied that it was reasonable to replace the carpets. There is nothing before me to indicate the LVT was wrong in these conclusions.

35. Accordingly upon the carpets issue I conclude that the terms of the lease did entitle the Respondent to replace such carpets as it replaced during the relevant service charge years and to charge the costs thereof through the service charge provisions.

Overall conclusions

36. For the reasons given above I conclude:

(1) Adequate certificates from the Lessor's Surveyor were provided for each of the relevant service charge years, such that the Appellants fail upon their argument that no service charges whatever should be payable for the relevant years.

(2) The Appellants are entitled to credit against their respective service charges for flats 69, 99 and 21 (but not in respect of flat 78) for the service charge year ended 31 December 2006, the amount of such credit being that Appellant's relevant percentage (as set forth in Clause 4(22) of that Appellant's lease) of the sum of £20,019.

(3) The Respondent was entitled to charge the cost of the renewal of the carpets through the service charge provisions.

Accordingly save as is recorded in subparagraph (2) above I dismiss the Appellants' appeal.

Costs

37. Mr Renton made clear that the Respondent did not seek any order for costs against any of the Appellants. Mr Crampton however asked on behalf of the Appellants that the Tribunal

should make an award of costs against the Respondent. Mr Crampton recognised that the Tribunal only has jurisdiction to award costs against the Respondent if the Respondent has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with this appeal to the Lands Tribunal, but he argued that the Respondent had so acted in that the Appellants had only been able to achieve some movement from the Respondent when court proceedings or Tribunal proceedings were launched. The Appellants had set out more detailed submissions regarding costs on pages 56 and following of the bundle. I intend no disrespect to Mr Crampton by dealing with this question of costs briefly. This was an appeal by the Appellants in which the Respondent did not seek to cross appeal. The Appellants have achieved only limited success in this present appeal. There was nothing unreasonable in the Respondent seeking to uphold the decision of the LVT or in the manner in which the Respondent has conducted itself in relation to this appeal to the Lands Tribunal. I refuse to make any order for costs against the Respondent.

Dated 1 May 2009

His Honour Judge Huskinson