FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AU/LSC/2020/0122**
HMCTS Code	**:**	**P:PAPERREMOTE**
Property	**:**	**Imperial Towers, 15-17 Netherhall Gardens, London, NW3 5RT**
Applicant	**:**	**Imperial Towers (Freeholders) Ltd**
Representative	**:**	**JPC Law, Solicitors**
Respondents	**:**	**The Leaseholders**
Representative	**:**	**In person**
Type of Application	**:**	**For the determination of the liability to pay a service charge**
Tribunal Members	**:**	**Tribunal Judge I Mohabir** **Mrs Anthea Rawlence MRICS**
Date of Decision	**:**	**23 September 2020**

DECISION

Covid-19 pandemic: description of hearing:

This has been a remote hearing on the papers which has been not objected to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because it was not practicable, and all issues could be determined on paper.

Background

1. This is an application made by the Applicant under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of the Respondents' liability to pay a service charge contribution for the repair and/or replacement of the windows in the property in the current service charge year.

2. Imperial Towers ("the property") collectively is comprised of a residential block containing 20 two-bedroom flats and a penthouse and another smaller block containing 6 one and two bedroom flats.

3. The Applicant is the freeholder of the property. The Respondent leaseholders all hold long residential leases and are also members of the Applicant company.

4. Apparently, urgent repairs are required for some of the windows in the building. The Applicant's position is that each of the Respondents, since 1972, has repaired and maintained their own windows. That position is challenged by the leaseholder of Flat 17, Mr Rosenblatt, who is the only Respondent that has responded to the application.

5. Much correspondence has passed between the Applicant and Mr Rosenblatt's solicitors regarding the construction of the repairing obligations set out in the residential leases, which the Tribunal understands were granted on the same terms. It seems that some of the residential leases have been extended with minor variations, but not the repairing obligations.

6. Neither the Applicant nor Mr Rosenblatt have were able to reach an agreed position. By an application dated 24 March 2020, the Applicant applied to the Tribunal that raised two issues, namely:

(a) whether the repair and maintenance of the windows in each of the flats is the freeholder's or the tenant's responsibility;
(b) if so, whether the costs are recoverable by the Applicant as service charge expenditure.

7. To answer these issues it is, firstly, necessary to set out the relevant lease terms.

Lease Terms

8. The Tribunal was provided with a copy of the original lease of Flat 17 dated 19 April 1972 ("the lease"), which was surrendered and a new lease granted dated 12 December 2005 on the same terms subject to minor variations. However, as stated earlier, the repairing obligations remained the same as the original lease.

9. Clause 1 of the l lease demised (for the purpose of obligation as well as grant) *inter alia*:

> *"(i) The internal plastered coverings and plaster works of the walls bounding the flat and garage and the doors and door frames and windows fitted in such walls".*

10. It is of note that clause 1 goes on to define the extent of the demise in relation to the external walls as being *"a party wall severed medially and shall be included in the premises hereby demised as far only as the medial plane thereof".* It is common ground that the windows in question are located in the external walls of the flats.

11. By clauses 3 and 4 of the lease, the tenant and the lessor covenanted to perform the obligations set out in the Fourth and Fifth Schedules to the lease respectively.

12. Paragraph 4 in the Fourth Schedule obliges the tenant to *"maintain and keep the whole of the interior of the demised premises and all glass in the windows and doors…"*.

13. Paragraph 4(a) in the Fifth Schedule obliges the lessor to repair and maintain:

> *"the main structure of the said block including the foundations and the roof thereof with its gutters and rain water and soil pipes the external and internal walls (but not the said party walls or internal walls completely within the demised premises or the interior faces including the plaster and glass in the windows of such parts of the external walls as bound the demised premises or the rooms therein)…"*.

13. Paragraph 1 in the Sixth Schedule provides, *inter alia*, that the lessor can recover as service charge expenditure the costs incurred pursuant to its repairing obligations set out above calculated in accordance with paragraph 26 in the Fourth Schedule.

14. So it can, therefore, be seen how the ambiguity concerning the repairing and maintenance of the windows in each flat has arisen. On the face of it, clause 1(i) of the lease expressly demises "the windows". However, the landlord and tenants' repairing obligations only speak of "the glass in the windows".

Decision

15. The Tribunal's determination took place on 22 September 2020 and was based primarily on the statements of case filed by the Applicant and Mr Rosenblatt together with the additional documentary evidence. There was no oral hearing or inspection of the property.

16. Given the ambiguity that has occurred, it was necessary for the Tribunal to construe the lease and, more importantly, what was intended by the contracting parties at the time it was granted in relation to the respective repairing obligations.

17. The issues raised in this application have given rise to much previous judicial determination. The general principle that has emerged is that, when construing lease terms as to the intention of the parties, each case is fact specific and context is highly important.

Were the Windows Demised to the Tenant?

18. In short, the answer to this question is that the windows in each flat in the property are expressly demised in clause 1(i) of the lease.

Who is Responsible for the External Maintenance and Repair of the Windows?

19. This is the substantive issue in the application. Although, the Tribunal was satisfied that the windows are demised, the repairing obligations on the landlord and the tenant in the lease only expressly mention the glass in the windows and not the frames themselves.

20. The strong inference to be drawn from this is that the contracting parties only intended the tenant to be responsible for the repair and maintenance of the glass in the windows. This is consistent with the internal repairing obligation of the tenant in the lease, which would include the internal surfaces of the windows.

21. At paragraph 31 in the judgement in ***Pattrick v Marley Estates Management Limited*** [2007] EWCA Civ 1176, the Chancellor in the Court of Appeal held that:

> " I accept that by force of the words used in Part II of the First Schedule the windows were comprised in the demised premises. But, equally, they are an important element in the exterior of the building and its visual appearance. Such appearance is of concern to the lessees and occupants of all 17 dwellings so that it would be normal to find some standardised decoration obligation. To my mind the fact that they are so obviously part of the exterior of the buildings and in need of consistent redecoration is sufficient to recognise them as being "comprised and referred" to in clause 6(f)…."

22. The Tribunal applied the same reasoning to the facts in the present case and concluded that it must have been intended by the contracting parties that the external parts of the windows would have formed part of the external structure of the property.

23. Support for this conclusion can be found in ***Irvine v Moran*** [1991] EGLR 261 where it was held that "structure" is not just limited to load bearing elements, but consists of " those elements of the overall dwelling that give it its essential appearance, stability and shape" including windows.

What About the Absence of Any Express Repairing Obligation on the Part of the Landlord in the Fifth Schedule?

24. In the Upper Tribunal judgement in ***Tay v Holding & Management (Solitaire) Limited*** [2019] UKUT 373 (LC), a similar issue arose where the lease in that instance was also silent as to the landlord's repairing obligation for windows. The landlord's repairing obligation was very similar to that of the landlord in the present case.

25. At paragraph 37 of the judgement, Judge Cooke said that it was highly unlikely that the contracting parties intended in the course of a long residential lease no one would be obliged to repair the windows. This is the relevant point to bear in mind when construing the landlord's repairing obligation. She went on to conclude *"in the absence of any express covenant to keep the windows in repair, they must be regarded as part of the structure of the block and must fall within the* (landlord's repairing) *obligation"*.

26. The landlord's repairing covenant here is directly analogous to that in ***Tay***. Therefore, the Tribunal adopted the same reasoning when construing paragraph 4(a) in the Fifth Schedule and concluded that the landlord's repairing obligation included the external parts of the windows of each flat, as they were part of the external structure of the property.

Can the Landlord Recover the Expenditure as a Service Charge?

27. The short answer to this question is that the landlord may do so as set out in paragraph 13 above.

Position Since 1972

28. It seems that the leaseholders have, perhaps understandably, individually maintained the windows in their respective flats at their own cost on the mistaken assumption that their leases obliged them to do so. Arguably, on this basis, an estoppel by convention may have arisen in relation to the position now taken by Mr Rosenblatt as to where the obligation and cost may now lay to do so. However, this point was not before the Tribunal (or argued) and we do not have jurisdiction to decide it in any event.

Costs & Fees

29. No application had been made under section 20C of the Act. As to the fees paid by the Applicant, it has not succeeded on any of the issues raised in this application. Furthermore, it is not clear if the Applicant was seeking the reimbursement of the fees paid, but for the avoidance of doubt, the Tribunal makes no order that they are reimbursed by the Respondents on the basis that it is not just or equitable to do so.

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber)

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" 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 the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) 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 provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to 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.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination 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 and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).