LRX/146/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – landlord's covenant to repair structure and exterior of premises – whether external windows part of structure and exterior – held that they were – Landlord and Tenant Act 1985 s27A; Housing Act 1985 Sch 6 para 14(2)

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

BETWEEN **SHEFFIELD CITY COUNCIL** **Appellant**

and

HAZEL ST CLARE OLIVER **Respondent**

Re: 128 Cliff Street
Sheffield
S11 8FA

Before: The President

Sitting at Sheffield Combined Court Centre, The Law Courts,
50 West Bar, Sheffield, S3 8PH
on 12 August 2008

Christopher Baker instructed by Leigh Hall for Sheffield City Council
The respondent in person

The following cases are referred to in this decision:

Irvine v Morgan [1991] 1 EGLR 261
Ibrahim v Dovecorn Reversions Ltd [2001] 2 EGLR 46
Marlborough Park Services Ltd v Rowe [2006] 2 EGLR 27
Quick v Taff Ely Borough Council [1986] 1 QB 809
Ball v Plummer, The Times 17 June 1879; 23 SJ 656
Pearlman v Harrow School [1979] QB 56
Boswell v Crucible Steel Co [1925] 1KB 119

DECISION

1. This is an appeal by the landlord, Sheffield City Council, against a decision of the Leasehold Valuation Tribunal for the Northern Rent Assessment Panel on an application made to it by the tenant, Ms Oliver, under sections 27A and 20C of the Landlord and Tenant Act 1985. Ms Oliver is the tenant of a maisonette, 128 Cliff Street, Sheffield, under a lease for 125 years from 25 September 1989 which was acquired by Ms Oliver and her late mother under the right to buy provisions of the Housing Act 1985. The application under section 27A related to two service charge matters. The first was the proposed installation by the council of double-glazed windows, and the second was the reasonableness of the general service charge for the year to 30 September 2006. It is in relation to the first of these that this appeal arises.

2. On 28 July 2006 Sheffield Homes Ltd, which I take to be the agency through which the council exercises its functions as landlord, wrote to Ms Oliver giving notice of its intention to carry out works to her maisonette. It said:

> "Under the terms of the Lease for your flat or maisonette, the City Council is responsible for repairs and improvements to the structure and exterior of your flat/maisonette, and to the building in which it is situated, together with communal facilities used by the occupants...
>
> The work we are planning to carry out to your block, (78-130), is to:-
>
> - Remove all existing windows and replace new PVC-u double glazed windows including all associated work.
> - Remove existing front door and frames and replace with new PVC-u door and doorframes including all associated work.
>
> Please note that the composite door and UPVc door listed in your estimate are not compulsory. It is down to your own discretion if you want any of these doors replacing. A representative from Lovell's contractors will contact you shortly to discuss your decision.
>
> Please note however, that any existing windows will be replaced as part of this scheme. Details of this can be found within your lease.
>
> The reasons for carrying out the work are as follows:-
>
> See attached Landlords Reasons.
>
> Your estimated proportioned cost in connection with the proposed work is £6,147.59."

3. The attached Landlord's Reasons gave as the reason for considering it necessary to carry out the proposed works to the windows:

> "**Windows** – the existing single glazed metal windows are prone to warping and causing draughts. In addition they are a source of condensation (black mould) and allow heat to escape from the property.

> By replacing the windows with double glazed UPVC units the thermal comfort of the home will be improved and will lower heating costs."

Subsequently the council in a letter to Ms Oliver said that the cost of the works for the windows alone would be £4,532.33.

4. In her application to the LVT Ms Oliver said that she would like the tribunal to find that the council were unreasonable in:

> "1) Not allowing me to have the windows replaced privately, at an affordable cost. Another leaseholder on the estate (Club Garden Rd) had their windows replaced privately – precedent set.
>
> 2) Deciding that we cannot opt out of the scheme to have our windows replaced by council/Sheffield Home Contractors. Some leaseholders at Hawley Street could not afford and did not have their windows replaced. Precedent set. Contrary to what the council claim, Cllr Jillian Creasey informed me that those window frames are wooden and rotten. Our window frames are iron and, though slightly warped, still intact."

5. In its decision, the LVT noted that the lease was "in a usual form" and made provision for a service charge in relation to the council's obligations, which included "keeping in repair and improving the structure and exterior of the demised premises and the building." Having quoted part of the habendum and referred to the lessee's repairing obligations and the definition of "The building", it said:

> "It is clear, therefore that the windows and frames are part of the demised premises. They are the responsibility of the lessee. They are excluded from the definition of the Building. They are separate and distinct from the exterior.
>
> On the face of it, the service charge section of the lease, read in conjunction with the definition provisions, does not include the windows and frames within the obligations or powers of the Lessors to undertake work and charge for the same via the service charge.
>
> The respondents rely upon Clause 3(29), which obliges the Lessee to 'pay .... as part of the Service Charge a reasonable part of the cost .... (of) ... carrying out repairs and improvements to the structure and exterior of the demised premises and the Building ...' (the Tribunals' emphasis).
>
> The windows and frames are not part of the exterior (as defined and set out above). Our inspection confirmed that they could not be said to be part of the structure. The respondents have, accordingly, neither the right nor the obligation to repair or renew or improve them."

6. The LVT went on to conclude that the council had complied with the consultation requirements under section 20 of the Landlord and Tenant Act 1985 in respect of the replacement of the windows, and that a reasonable cost to be paid for the works through the

service charge would be £3000. Under section 20C it ordered that the costs of the hearing were not to be treated as relevant costs.

7. The council sought leave from the LVT to appeal in relation to its construction of the lease, the reasonableness of the cost of the works, an item in the general service charge and the order under section 20C. The LVT granted leave on the first matter and refused it on the other three matters. A further application to the Lands Tribunal in respect of these three matters was refused by Judge Gilbart QC in relation to the reasonableness of the cost of the window works and the item in the general service charge but was granted in relation to the section 20C order since that could have been affected by the decision on the construction of the lease. The Member directed that the appeal would be by way of review.

8. The case for the council is that the LVT was in error in determining that the replacement windows were not work that they had an obligation to perform or the right to undertake. Mr Christopher Baker on their behalf submits that there was such an obligation under the provisions of the lease and also by reason of covenants to be implied in the lease under the Housing Act 1985. The material provisions in the lease and the statute are as follows.

9. Under Clause 1 of the lease the council demised to the lessee:

> "... the demised premises being the maisonette situate on the ground and first floors of the Building ... TOGETHER with the windows and doors including the glass and frames thereof in the exterior walls of the demised premises ... EXCEPTING AND RESERVING from this demise those parts of the structure and exterior of the demised premises which the Council are by virtue of the provisions of paragraph 14(2)(a) of Part III of Schedule 6 of the 1985 Act obliged to keep in repair (but for the avoidance of doubt excluding from this exception and reservation the exterior windows and doors of the demised premises and the glass and frames of such windows and doors the internal walls of the demised premises and the internal surfaces of the wall or walls of the exterior of the demised premises) ..."

Thus the demised premises included the external windows, their frames and glass.

10. Paragraph 14(2) of Part III of Schedule 6 to the 1985 Act, which is referred to in this way in the habendum and is of central importance in this case, is applied by section 139 of the Act which provides that the grant of a lease executed in pursuance of the right to buy must conforms with Parts I and III of Schedule 6 to the Act. Paragraph 14 in Part III of the Schedule deals with covenants by the landlord where the dwelling-house the subject of this lease is a flat (as the maisonette here is), and, so far as material, it provides as follows:

> "(2) There are implied covenants by the landlord –
>
> (a) to keep in repair the structure and exterior of the dwelling-house and of the building in which it is situated (including drains, gutters and external pipes) and to make good any defect affecting that structure;

(b) to keep in repair any other property over or in respect of which the tenant has rights by virtue of this Schedule ...

(4) The county court may, by order made with the consent of the parties, authorise the inclusion in the lease or in an agreement collateral to it of provisions excluding or modifying the obligations of the landlord under the covenants implied by this paragraph, if it appears to the court that it is reasonable to do so."

11. The lessee's repairing covenant in the lease is contained in clause 3(3), which provides:

"(3) To keep the demised premises and every part thereof (except those parts of the demised premises which the Council are by virtue of the covenant implied by paragraph 14(2)(a) of Schedule 6 to the 1985 liable to keep in repair) and all fixtures and fittings therein and all additions thereto and all (if any) sewer drains cables pipes wires ducts radiators tanks cisterns and valves and channels within and serving the demised premises and all doors and windows (including the glass and frames thereof) floors ceilings internal walls and surfaces and skirtings therein in good repair AND where necessary to renew or replace all worn or damaged parts of the demised premises which the lessee is liable as hereinbefore provided to repair".

12. The council's repairing covenant in the lease is contained in clause 4(3), which provides:

"(3) To keep in repair (the definition of repair where appropriate including decorative repair) and (if desirable in the opinion of the Council) to improve (a) the structure and exterior of the demised premises and of the Building (including drains gutters and external pipes) and to make good any defect affecting that structure ..."

It is to be noted that this covenant obliges the council not only to repair but also to improve if in its opinion this is desirable. In this respect it goes further than the purely repairing covenant that is implied by paragraph 14(2)(a). The reference to "the structure and exterior" is the same in each provision.

13. The relevant service charge provisions appear in clause 3(1) and (29) and paragraphs 1 and 2 of Part III of the Schedule. Under Clause 3 the lessee covenants:

"(1) ...

(c) to observe and perform the provisions on the part of the Lessee contained in Part III of the Schedule hereto (the Service Charge) ...

(29) Subject (so far as applicable) to the provisions of paragraphs 16D and 18 of Schedule 6 of the 1985 Act to pay to the Council from time to time as part of the Service Charge a reasonable part of the costs and expenses which the Council may from time to time incur or estimate to be incurred in carrying out repairs and improvements to the structure and exterior of the demised premises and the Building (including drains gutters and external pipes) and making good any defect affecting that structure ..."

14. Under the hearing "The Service Charge" Part III of the Schedule provides:

> "1. The Service Charge payable by the Lessee shall be a fair proportion ... of all costs expenses and outgoings incurred or estimated to be incurred by the Council in respect of or for the benefit of the Building (such fair proportion representing that part of the said costs expenses and outgoings incurred or to be incurred by the Council in complying with their obligations contained or implied herein for the benefit of the Lessee insofar only as such costs expenses and outgoings may lawfully be recovered from the Lessee).
>
> 2. The aforementioned obligations on the part of the Council in respect of which the Service Charge shall be attributable and paid by the Lessee in respect of the demised premises are (but not by way of limitation) as follows:-
>
> (A) Keeping in repair and improving the structure and exterior of the demised premises and the Building (including drains gutters and external pipes) and the making good of any defect affecting that structure ..."

15. The covenant in paragraph 14(2) of Schedule 6 to the 1985 Act applies by force of the statute. It is implied in every lease to which the paragraph applies, whatever covenants may be expressly included in the lease. The requirement under (a) is "to keep in repair the structure and exterior of the dwelling-house and the building in which it is situated." The principal question that arises is whether the external windows are part of the structure and/or the exterior of the maisonette and/or the building. Authority on the question is to be found in *Irvine v Morgan* [1991] 1 EGLR 261, a decision of Mr Thayne Forbes QC sitting as a Deputy Judge of the Queen's Bench Division. The provision under consideration in that case was section 32(1)(a) of the Housing Act 1961, which implied in any lease of a dwelling-house to which the section applied a covenant "to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes)", effectively, therefore, the same covenant as that to be implied under paragraph 14(2)(a). The issue was whether certain items, including external sash windows, were within the scope of the covenant. The judge held that they were both part of the structure and part of the exterior of the dwelling-house.

16. At 262 F-G the judge said:

> "I have come to the view that the structure of the dwelling-house consists of those elements of the overall dwelling-house which give it its essential appearances, stability and shape. The expression does not extend to the many and various ways in which the dwelling-house will be fitted out, equipped, decorated and generally made to be habitable.
>
> I am not persuaded ... that one should limit the expression 'the structure of the dwelling-house' to those aspects of the dwelling-house which are load-bearing in the sense that that sort of expression is used by professional consulting engineers and the like; but what I do feel is, as regards the words 'structure of the dwelling-house', that in order to be part of the structure of the dwelling-house a particular element must be a material or significant element in the overall construction. To some extent, in every

case there will be a degree of fact to be gone into to decide whether something is or is not part of the structure of the dwelling-house."

17. Having considered some of the other items that were in dispute, the judge referred at 262M-263B to the windows:

> "Windows pose a slightly different problem. I have some hesitation about this, but bearing in mind that one is talking about a dwelling-house, and rejecting as I do the suggestion that one should use 'load-bearing' as the only touchstone to determining what is the structure of the dwelling-house in its essential material elements, I have come to the conclusion that windows do form part of the structure of the dwelling-house. My conclusion might be different if one were talking about windows in, let us say, an agricultural building. The essential material elements may change, depending on the nature and use of the building in question. In the case of a dwelling-house, it seems to me that an essential and material element in a dwelling-house, using ordinary common sense and an application of the words 'structure of the dwelling-house' without limiting them to a concept such as 'load-bearing', must include the external windows and doors. Therefore, I hold that windows themselves, the window frames and the sashes do form part of the structure. It follows that, since these are the sash windows, it would be invidious to separate the cords from the sashes and the essential furniture from the frames. So, in my judgment, the windows including the sashes, the cords, the frames and the furniture are part of the structure of the dwelling-house."

18. The judge further held that the windows were part of the exterior of the premises. At 263 C-D he said:

> "The external windows, in my view, do form part of the exterior of the building, at least on their outer face. If I am wrong about regarding the windows as part of the structure, I am satisfied that at least on their outer face the windows are part of the exterior. If I am wrong about the windows being part of the structure, then in that more limited sense the windows still fall within section 32(1)(a). If I am wrong about the windows being part of the structure and I am only right that the window frames and so forth form part of the exterior of the dwelling-house it would follow one that more limited basis, that the cords and furniture, all of which would be internal, would not be part of the exterior. It does happen (and I speak from personal experience) that some part of the window furniture can be on the exterior. If that happens to be the case here, it is part of the exterior of the building as well. I do not know whether there actually are any parts of the window furniture on the outside of the building."

19. The passage I have set out in paragraph 16 above was cited with apparent approval in *Ibrahim v Dovecorn Reversions Ltd* [2001] 2 EGLR 46 by Rimer J in construing the meaning of "main structure" in a repairing covenant. And in *Marlborough Park Services Ltd v Rowe* [2006] 2 EGLR 27 in the Court of Appeal, in which the issue was whether certain parts of a building were within the term "main structures" in a covenant to repair, Neuberger LJ, having quoted this passage, said (at 29 C-D):

> "[17] Although I accept, as I have emphasised, that words such as 'structure' or 'main structures' must take their meaning from the particular document, lease or stature in which they are found, and from the surrounding circumstances, and although it can be said that any attempt to define them will, to an extent, raise as many questions as it answers, it seems to me that that is a good working definition to bear in mind, albeit not one to apply slavishly."

20. The decision in *Irvine v Morgan* in relation to the windows was consistent with an earlier decision of the Court of Appeal in *Quick v Taff Ely Borough Council* [1986] 1 QB 809, which also concerned the application of section 32(1)(a) of the 1961 Act. The house in that case suffered from severe condensation and the question was whether the council were required under the implied covenant to carry out works, including the replacement of windows, in order to alleviate the condensation. The council accepted the findings of the judge at first instance that the windows formed part of the exterior and probably part of the structure of the house (see at 811 F), and it is clear that each of the lords justices also had no difficulty in accepting those findings (see Dillon LJ at 819G, Lawton LJ at 823B and Neill LJ at 823D).

21. Other earlier authority, such as it is, seems to me to support the judge's conclusions in *Irvine v Morgan*. In *Ball v Plummer*, The Times 17 June 1879, noted in 23 SJ 656 and referred to by Bankes LJ in *Boswell v Crucible Steel Co* [1925] 1KB 119 at 121, the Court of Appeal held that a lessor was bound under a covenant to do external repairs to mend broken windows, which, Bramwell LJ said, were "part of the skin of the house". In *Pearlman v Harrow School* [1979] QB 56 the issue was whether certain works constituted structural alterations to a building. At 79D Eveleigh LJ noted the suggested definition of "structural" by the judge at first instance as "Appertaining to the basic fabric and parts of the house as distinguished from its decorations and fittings" and said that in his opinion the judge had the right conception of what Parliament meant by structural.

22. Each of these cases, *Ball v Plummer* and *Pearlman*, concerned different provisions from those in the present case, in one instance external repairs and in the other structural alterations (and in *Irvine v Morgan* the judge said at 262J that he did not find *Pearlman* particularly helpful), but it seems to me that the concept of windows as part of the skin of the house and the concept of the structure as the fabric of the building are illuminating and, I think, supportive of the conclusions in *Irvine v Morgan*. In principle, therefore, in my judgment, for the purposes of paragraph 14(2)(a) external windows will constitute both part of the structure and part of the exterior of the building or the dwelling-house to which they belong. It would be wrong to say that they will do so in every case, since facts are infinitely variable, but there is nothing to suggest that the metal-framed windows in the present case are exceptional.

23. Under paragraph 14(2)(a), therefore, the council is required to keep the external windows in repair, and thus the cost of fulfilling this obligation is attributable to the service charge. The council, however, have not, so far as I am aware, sought to justify the proposed works as works of repair only. Their notice of intention to carry out the works referred to their responsibility "for repairs and improvements to the structure and exterior" of the maisonette, and the reasons for carrying out the works appear to imply that they would be improvements. It is not

sufficient for the council, therefore, to rely on the implied covenant. They need to rely on the covenant at clause 4(3) of the lease, which, somewhat surprisingly it seems to me, enables them (indeed requires them), whether the lessee likes it or not, to undertake works of improvement that they consider desirable to a maisonette held under a 125-year lease and then charge the cost of the works to the lessee.

24. As far as clause 4(3) is concerned, I see no reason to reach any different conclusion on whether the external windows are part of the structure and extension of the demised premises and the building. The LVT thought that the windows and frames were excluded from the definition of "the Building" because they were not expressly mentioned in it, but I can see no reason why this should be so. That the habendum includes the external windows and doors within the demise, excepts the parts of the structure and exterior which the council are obliged to repair under paragraph 14(2)(a) and then for avoidance of doubt excludes the external windows and doors from this exception has no bearing, in my view, on the construction to be placed on clause 4(3). There is no reason why some limitation on the scope of the repairing covenant should be derived from the demise. But in any event the wording of the habendum does not suggest that the parties proceeded on the basis that external windows were not part of "the structure and exterior" within the meaning of those words in paragraph 14(2)(a).

25. Mr Baker advanced as an alternative argument that, if the repair to the windows was not required under (a) of paragraph 14(2) it was in any event required under (b), which requires the landlord to keep in repair "any other property over or in respect of which the tenant has rights by virtue of this Schedule." As I understood his argument, it was that if the windows were not part of the structure or exterior of the maisonette, they were part of the maisonette itself and, since the lessee was entitled to possession of the maisonette, the windows were property in respect of which she had rights. It does not appear to me that the lessee has any rights in the maisonette itself by virtue of the Schedule (in contrast to such things as rights of support and to the passage of water and rights of way, all of which are specifically provided for), and in any event it would be unlikely that the "other property" referred to would include the maisonette, since the provision would then have the effect of requiring the landlord to carry out internal repairs. I cannot accept this alternative argument, therefore.

26. The primary contention does, however, succeed. The LVT should have concluded that the reasonable cost of the works to replace the external windows would be payable to the council as part of the service charge. The appeal on this point is therefore allowed. On the section 20C order I see no justification for interfering with the decision of the LVT. The council was unsuccessful in relation to the reasonableness of the cost of the works and the LVT ordered a reduction in the service charge for the year ending 30 September 2006, and in these circumstances, notwithstanding the partial reversal of the LVT's decision, I think it appropriate that the order should stand.

27. I would only add this. It does seem to me somewhat surprising, as I have said, that, under the terms of this 125-year lease, if the council are of opinion that a particular improvement is desirable, they are able to carry out the works of improvement and to charge the lessee for them even though the lessee does not want them carried out. I was told,

however, that, because of Ms Oliver's objection to the council's proposed works, the windows have not been replaced; and I would hope that, as a matter of practice, the council would not without the lessee's approval carry out improvement works to the demised premises for which the lessee is to be charged unless the works are no more than a limited extension of works of repair.

18 August 2008

George Bartlett QC, President