

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**



**Residential
Property**
TRIBUNAL SERVICE

S.27A Landlord & Tenant Act 1985 (as amended) ("the 1985 Act")

Case Number:	CHI/00ML/LSC/2010/0045
Property:	One Grand Avenue Hove East Sussex BN3 2LA
Applicant:	Poethurst Limited
Respondents:	Dorothy Benwell and Daniels Limited
Appearances for the Applicant:	Marcus Staples of Messrs Deacon & Co. Bruce Coppard Surveyor Alan Bennett of BEP Consulting Engineers
Appearances for the Respondents:	Jeremy Donegan Solicitor
Date of Inspection/Hearing	12th July 2010
Tribunal:	Mr R T A Wilson LLB (Lawyer Chairman) Nigel Robinson FRICS (Surveyor Member) Ms Jan Morris (Lay Member)
Date of the Tribunal's Decision:	28th July 2010

Application

1. This was an application by Poethurst Limited ("the Company") made to the tribunal pursuant to section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") in order to determine whether, if costs were incurred for concrete works to the structure of the property and also works to the balconies of the property in the year 2010 or possibly 2011, then service charges would be payable by the lessees of the flats at the Property, or some of them as a result.

Decision

2. The tribunal has determined that if the Company were to incur costs for concrete repairs to the Property and for the replacement of elements of the balconies then a service charge would be payable by all the lessees of the flats of the Property to reimburse the reasonable cost of those works. The leases of the flats place an obligation upon the Company to undertake such works and an obligation upon the lessees to make payments to the landlord by way of service charge in reimbursement.

Inspection

3. The tribunal inspected the exterior of the Property prior to the hearing and also viewed the ground floor flat 32 which has no balcony, together with flat 15 on the fifth floor and flat 30 on the tenth floor both of which have balconies. It saw that 30 of the 32 flats at the Property are provided with a balcony which projects beyond the walls of the exterior of the building. The balconies appear to be of cantilevered construction. They have metal balustrades and handrails fixed to the balcony structure and to reinforced concrete upstands as well as to brick infill panels and are finished with a timber handrail capping.
4. The railings have variously rusted to a greater or lesser degree. The rust has caused some staining to the concrete beneath the frames and there is some evidence of corrosion and warping. The tribunal was advised that in some places the brick infill panels are beginning to come loose due to the wire ties between the concrete upstands of the balcony structure and the panels corroding. There is therefore a risk that these panels will fall outwards. It was noted that the brick panel on the balcony serving Flat 30 had been removed and that a temporary timber infill had been provided.
5. The tribunal noted that the building itself is an eleven-storey tower block constructed in the 1960s with a concrete frame. Whilst the elevations are predominantly of brick, the brickwork on each floor level is designed to be independent from that below and is built off a horizontal concrete nib projecting from the concrete frame.
6. The tribunal was shown areas of the building where the nibs had failed and broken away from the structure. As the nibs deteriorate and fail, the load of the brickwork will be transferred to the brick panels below and there is a risk of these panels then failing and themselves breaking away from the building causing a serious hazard to the occupiers and visitors to the building.

The Law

7. The tribunal prefaces its observations by pointing out that the law relevant to the determination of service charges is to be found primarily in sections 18, 19 and 27A of the Act. In brief summary, section 18 defines what is a service charge in terms that present no difficulty here and section 19 provides in the context of this case that a service charge must be reasonably incurred. Section 27 (3) allows the tribunal to determine in this context 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. It is this latter provision that is particularly relevant to the present application.

The Leases

8. The tribunal was supplied with sample copies of the leases of the various types of flat at the property. Neither the original leases nor the counterpart leases were available at the hearing. For the purposes of the matters before the tribunal, all the leases were in very similar form. The leases were granted in or about 1968 for a term of 99 years commencing on 29 September 1966 at rents of £40. The tribunal was told that the leases were in identical form save for the description of the two ground floor flats which omit the words "*and balcony*" on page one in clause 1.
9. The relevant provisions of the leases appear to be those set out below namely;
 - The Retained Parts are defined as all parts of the Building not intended to be demised as flats.
 - The Building is defined as *One Grand Avenue Hove in the County of Sussex comprising in all 32 residential flats, which together with the yard garages parking spaces and grounds thereof is hereinafter collectively called the Building.*
 - The two flats without balconies are defined in clause 1 as *all that flat on the ground floor of the building and the garage numbered including (a) all walls enclosing the same (but in the case of any external wall of the building only the interior face of such wall) and in the case of any dividing wall between the said flat and any other flat in the building only one half of such wall severed vertically (b) the ceilings and floors (including floor structures of the said flat) (c) the glass in the windows (d) all conduits pipes and wires carrying or conveying gas water (hot and cold) electricity television aerial telephone ventilation and such like carried in the floors screeds ceilings and walls or ducts incorporated within the flat and not used by any other flat whether in common with the flat hereby demised or otherwise (all of which premises are together hereinafter called the demised premises and are for the purpose of identification showed edged red on the plan annex hereto*
 - clause 4(3) of the lease contains an obligation on the part of the lessees *from time to time as often as occasion shall require during the said term at his own expense well and substantially to renew repair uphold support maintain and cleanse amend and keep in good and substantial repair and condition the demised premises including keeping in repair and replacing where necessary all doors all glass and also all cisterns pipes wires and ducts and any other thing installed for the purpose of supplying gas water and electricity telephone and television..... or other things that are installed or used only for the demised premises and also any other part of the building.*
 - clause 4 (11) states *not without the previous licence or consent in writing of the lessor to make or allow to be made any structural alterations in the plan elevation or appearance of the demised premises or make any addition thereto or cut or injure any of the walls or timbers thereof or erect or remove any internal partition for dividing rooms.*

The applicant's covenants are set out at clause 6 of the leases.

- By clause 6(3) *they are obliged to keep the roof and external walls of the building in a thorough condition of repair and in good weatherproof condition and also to keep the Retained Parts in good repair.*
- By clause 6 (4) *they are obliged as often as in the opinion of the lessor shall be proper and necessary to paint all the outside wood and iron work of the building.*
- The service charge provisions are set out in clause 4 (22) of the lease and the lessees are required to reimburse to the lessor a sum equal to 3 ¼ % of the lessors expenses and outgoings and matters mentioned in the first schedule the service charge to be due and payable on demand and the amount of the service charge to be ascertained and certified by the lessors surveyor acting as an expert and not as an arbitrator once a year up to 30th June in each year. The service charge provisions provide for interim service charge payments to be made by the lessees twice yearly and for a balancing charge to be made at the end of the year following production and certification of the annual accounts.
- The first schedule to the leases sets out the categories of costs and expenses outgoings and matters in respect of which the lessee is to make a contribution. Paragraph 4 of the first schedule contains the following words *the cost of keeping in repair maintaining cleaning and decorating and renewing where 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.*

10. It is appropriate here to say that the copy leases shown to the tribunal did not include the colour plans referred to in the narrative. The Tribunal was therefore unable to ascertain whether the plans assist in construing the various obligations to repair as set out in the lease.

11. The tribunal noted that the word balcony appears in the demise section of the lease but it appears nowhere else at all in the leases.

The Hearing

The Applicant's Case

12. Mr Staples for the applicant commenced his client's case by giving some background to the application. Following discussions with the residents association in 2008 it was agreed to embark upon a program of works to the exterior of the building and a schedule of works and a specification was put out to tender in March 2009. These works principally involved amongst other things the replacement of balcony handrails and balustrades and works to the brick panels and concrete frame of the building.

13. Before the consultation period of the proposed work ended there were two incidents of masonry falling from the seventh floor of the building. The applicant arranged for scaffold to be placed around the base of the building to protect residents and others from further incidents and investigations were carried out to find what had caused the problem. Following advice given by consulting engineers it was decided to amend the program of works so that repairs to the concrete frame on the south and west elevations of the building could be implemented and investigations carried out to the condition of the frame on the north and east elevations.
14. A revised program of works was drawn up to incorporate these works. However, as a number of residents had by this point questioned the design and cost of the proposed balcony works the specification was revised further so that these should be replaced on a like-for-like basis, which would save costs.
15. Whilst discussions were taking place it became apparent that some leaseholders were unclear as to whether such works should form part of the service charge. A resident of one of the ground floor flats expressed the view that as she did not have a balcony she should not be responsible for contributing towards the cost of any works in relation to other balconies serving the building. As a result of this uncertainty the applicants had decided that the issue of repairing the balconies should be referred to the tribunal for review. In addition, as some of the leaseholders were also questioning whether the concrete works were also their responsibility it was decided that this issue should also be referred to the tribunal for review.
16. The applicant had compared the ground floor flat lease against the lease for flat 25, which does have a balcony and had drawn the following conclusions from this comparison:-
 - i) The lease of the building sets out a description of the demised premises on the first page at clause 1. The wording of the ground floor flat is identical to the wording contained within the other leases except that no mention of the balcony is made because that flat does not have one.
 - ii) The leaseholders repairing obligations set out in the ground floor flat are identical to those contained within the other leases of the building with the exception of the final section that covers work to the floor and the necessity of advising the occupier of the flat below. The lease stipulates that the leaseholder shall renew repair uphold support maintain cleanse amend and keep in good and substantial repair and condition the demised premises.
 - iii) Clause 4 (22) in the ground floor flat lease is identical to the clause contained within the other leases of the building and stipulates that the leaseholder shall contribute towards the costs expenses and outgoings and other matters mentioned in the first schedule.
 - iv) Under clause 6 (3) the applicant covenants to keep the roof and external walls of the building in a thorough condition of repair and in good weather proof condition and also to keep the Retained Parts in good repair. The Retained Parts are defined on the first page of all the leases as all the parts of the Building not intended to be demised as flats.
 - v) The first schedule to the ground floor lease is identical to those contained within the other leases of the building and is headed costs expenses outgoings and matters in respect of which the lessee is to make a contribution. Paragraph 4 refers to the cost of keeping in

repair maintaining cleaning and decorating and renewing when necessary the Retained Parts and the outside of the building.....

17. Having regard to the above, Mr Staples said that the applicant drew the following conclusions with regard to the balconies: The leaseholder is responsible for a contribution towards the cost of maintaining the outside of the building and the lessor is responsible for maintaining the external walls. The balconies are open to the elements and only partially enclosed and are therefore part of the outside of the building. The definition of the demise in all the leases of the Building makes no specific reference to the maintenance of the balcony whether a flat has a balcony or not and the only section that assists is the reference to external walls where only the interior face is included. The reference to the maintenance of floors within the demise is qualified by reference to the said flat, which is listed separately to the balcony. The applicant therefore concludes that all works to the balconies are to be dealt with by the applicant and the cost recovered via the service charge. The applicant could find nothing within the lease of the ground floor flat that supported an alternative approach. He invited the tribunal to rule in this way.

18. As far as the concrete repairs were concerned Mr Staples contended that the position was simple. All of the concrete repairs were repairs to the structure of the building and accordingly the applicant was obliged to maintain the same, subject to a contribution by the lessees. Mr Staples called Mr Bruce Coppard to give evidence in relation to the state of the building. Mr Coppard told the tribunal that he was a chartered building surveyor with 25 years experience in the survey and remedial works to buildings. He had been told of the two falls of masonry which had happened in a single week affecting the south and west elevations of the building. As a consequence he had carried out an investigation and had ascertained that the worst failures were above the window openings. His investigation also revealed that a significant part of the concrete nibs serving the building were defective. As the purpose of the nibs was to support the bricks, the failure of them would have catastrophic consequences for the building. He was in no doubt that the building was in disrepair and had to be attended to. He had drawn up the specification of works and he was satisfied that the scope of work was appropriate to bring the building back into a state of repair. He was also satisfied that the most cost-effective solution was to replace the whole of the nib system and the component and ancillary parts. Bearing in mind the state of disrepair it was no longer feasible to carry out only patch repairs.

19. He was also satisfied that the balconies including the hand rails, balustrades and panels were in a state of disrepair. In some cases the brick infill panels and cement/concrete above were coming loose and some handrails were corroding with the timber handrail capping also deteriorating and becoming loose. This deterioration had led to warping in parts and it was conceivable that the fixings could come loose with the result that the balustrades would rotate outwards which could result in a fatality. In addition to this the asphalt covering under the floor of the balconies had failed in parts and in his opinion it was this failure which was leading to dampness in some of the flats. There was also a defect with the detailing between the balcony asphalt and the main wall of the building and it was necessary to provide a cavity tray to the wall appropriately weatherproofed to the asphalt. In his opinion nearly all elements of the balcony had structural parts to them and that the repairs set out in the schedule were required to keep the damp at bay. The revised specification now involved replacing the components of the balconies on a like-for-like basis and the overall cost was less than that previously proposed. In summary he was satisfied that the concrete repairs and the repairs to the balconies were all necessary.

The Respondents' Case.

20. Mr Donegan confirmed that he acted for the respondents who both held long leases of the two ground floor flats, which did not have balconies. The respondents disputed their liability to contribute towards the proposed balcony works at the building. They accepted their liability to contribute to the other proposed works and in particular accepted their liability to contribute towards the concrete works.
21. Mr Donegan referred the tribunal to the lease relating to flat 25, which was on the ninth floor of the building and which did have a balcony. The balcony was stated to be part of the demised premises as defined in clause 1 of the lease. It was the respondents' case that all parts of the balcony were within the demised premises including the balustrades, panels and handrails and as such fell to be repaired by the lessees by virtue of clause 4 (3) of the lease. Having regard to this covenant it followed that the lessee of flat 25 and indeed all the lessees of other flats with balconies were responsible for the maintenance and repair of their own balcony which formed part of the demised premises. The respondents contended that the proposed works to the balconies, largely consisting of replacement of the balcony balustrades, panels and handrails with the possibility of additional work to the balcony floors, all fell within the lessees repairing covenants at clause 4 of the lease. Furthermore the works constituted improvements rather than repairs and the applicant had failed to adduce any independent expert evidence establishing that all of the works in question were necessary. Accordingly no part of the works was chargeable to the maintenance account for the building.
22. Mr Donegan referred the tribunal to the applicant's repairing covenants set out in clause 6(3) of the leases. He maintained that this obligation did not extend to the balcony balustrades or handrails which do not form part of the roof or external walls of the building or indeed the Retained Parts.
23. Mr Donegan also referred the tribunal to clause 6(4) of the lease, which dealt with the painting of outside wood and ironwork of the Building. He confirmed that the respondents accepted that this covenant extended to the balcony balustrades and handrails and it followed therefore that the applicant was responsible for the redecoration of these. However, he maintained that they had no obligation to maintain, repair or renew these items.
24. Having regard to the above he invited the tribunal to determine that the respondents had no liability to contribute towards the proposed works on the balconies. He also invited the tribunal to make a declaration pursuant to section 20C of the 1985 Act that none of the costs incurred or to be incurred by the applicant in pursuing this application should be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the lessees of the building.

Decision

25. The tribunal first directed its consideration to the proposed concrete repairs to the building. It noted that the respondents do not challenge their obligation to contribute towards the reasonable costs of these works. The tribunal was satisfied that the leases do contain an obligation on the applicant to repair the structure of the building and an obligation on the

part of the lessees to contribute towards the costs. The tribunal accepts the evidence of Mr Coppard that the repairs to be carried out to the concrete, form part of the structure of the building, which is in disrepair. It is also satisfied that the proposed works are necessary and also accepted the evidence of Mr Coppard that the method of works proposed is the most cost-effective. In these circumstances it has no difficulty in determining that if the Company were to incur costs for the proposed concrete repairs to the property then a service charge would be payable by all the lessees to reimburse the cost of those works.

26. The position with regard to the balconies is not as clear. It is plain to the tribunal that as regards the provisions relating to the maintenance of the balconies is concerned the leases are less than satisfactory not least of all because other than in the demise section the balconies are not mentioned anywhere else. The applicant's repairing covenants are set out at clause 6 (3) of the lease and require the applicant to keep the roof and external walls of the building in a thorough condition of repair and in a weatherproof condition and also to keep the Retained Parts in good repair. One of the questions to be answered therefore is can all or any part of the balcony structure be considered a landlords repairing obligation? It is clear that the balcony structures form the most outer part of the building and in the flat demise it is stated that in the case of an external wall of a flat only the interior face is included. However it is argued by Mr Donegan that the word 'interior' can only properly apply to an enclosed structure whereas the balconies are not enclosed at all. He maintains that no part of the balcony is repairable by the landlord and that they form part of the flat demise repairable by the lessees. However he does accept that the obligation to paint the balconies does rest with the landlord under clause 6(4).
27. Furthermore in the first schedule which sets out the categories of work, costs and expenses in respect of which the lessees are to make contribution, there is further uncertainty. In paragraph 4 it is envisaged that the cost of keeping "the outside of the building in repair" is something, which the lessees have to contribute to by way of service charge. Unfortunately this wording is inconsistent with the applicant's repairing covenants set out in clause 6(3) which does not include an express covenant on the part of the applicant to repair "the outside of the building."
28. Notwithstanding these inconsistencies and omissions we have concluded that the leases do place an obligation on the landlord to both decorate and also to repair all sections of the balconies.
29. In the first place we consider it appropriate, unless driven by the plain words of the lease to a contrary conclusion, to give a commonsense construction to the leases. Commonsense strongly suggests that each and all parts of the balcony form part of the structure and exterior of the block which ought to be maintained by the landlord in a planned and coherent way. To require individual leaseholders to repair and replace any part of the balcony, which would certainly require scaffolding, would be to our minds almost unworkable and therefore is a construction of the lease to be avoided if at all possible.
30. In this case we do not consider that such an unfortunate conclusion is inevitable. Indeed we are satisfied that the plain meaning of each lease, taken as a whole, is that the obligation to decorate, repair and, if necessary renew the whole or parts of the balconies falls on the landlord.

31. We are satisfied that the tenants covenant in clause 4 (11) not to carry out structural alterations in the plan elevation or appearance of the demised premises or to make any addition thereto or cut injure any of the walls or timbers thereof prevents the tenant from lawfully repairing or renewing any part of the balcony attaching to his/her flat and strongly suggests that to do so is the landlord's obligation. We do not consider that the tenants' covenant in clause 4 (3) to keep all interior parts of the demised premises, has the effect of rendering individual tenants liable to maintain their balconies, an obligation which would be inconsistent with clause 4 (11) as well as the landlord's obligation in clause 6(3) & 6(4).
32. Furthermore we are in no doubt that replacement of the balcony rails and balustrades with similar rails and balustrades, albeit of a modern specification, will be a repair and not an improvement. Provided the original balconies are in disrepair, the costs are reasonable and the standard of work reasonable and as a consequence will be recoverable as a service charge under the leases. This is the case regardless of whether or not leases make reference to balconies.
33. In arriving at this decision the Tribunal considered the constituent parts of the balcony works as follows:-
 - i) The balcony floor repairs.
 - ii) The balcony brick panel repairs.
 - iii) The balcony balustrades and handrail repairs.
 - iv) The balcony glazing panel repairs.

Balcony Floor Repairs.

These repairs include replacement of the asphalt and cavity trays. The purpose of the asphalt is to keep the building dry. If for example it were to be removed and replaced with tiles, which are not waterproof, then the whole structure of the building would suffer. Asphalt is a waterproof membrane and it is there to preserve the structure of the building, which under clause 6(3) is the lessor's liability. There has to be a relationship between the asphalt covering and the cavity trays for there to be a successful exclusion of moisture and dampness to the structure of the building. Accordingly, the way that the landlord can keep the building in good repair and condition and free from water penetration is for there to be an adequate weatherproof membrane underneath the balcony floors which is maintained by him. Failure to properly maintain the balconies could result in water penetration to the flat below.

Balcony Brick Panels

The tribunal concludes that repairs to the balcony brick panels are also the applicant's responsibility by virtue of clause 6(3) of the lease and not the lessees' responsibility pursuant to clause 4(3). In arriving at this decision we have had regard to clause 4(11) of the lease which prevents the lessees from carrying out these works. The brick panels can properly be considered as the first line of water defenses preventing water penetration to the building through its relationship with the asphalt, which is the landlord's responsibility under clause 6(3).

Handrails and Balustrades

We consider that these items form an integral part of the balcony design and are in part fixed by, and secure, the balcony brick panels. In these circumstances we do not believe that it was the intention of the draftsman that these items should be repaired separately from the brick panels. For this reason we concluded that they form part of the applicants repairing liability under clause 6(3).


Glazing Panels.

In a similar way to the brick panels, clause 4(11) prevents the lessees from carrying out this work. In these circumstances, adopting a purposeful approach the tribunal determines that it is the landlord's responsibility to maintain and repair these. The tribunal notes the provisions of clause 4(6), which deal with apportioning the expense of walls and fences and appurtenances used or capable of being used in common by the lessees and the lessees of other premises in the building. This clause suggests that the responsibility for the costs of repair of these areas will be for the two lessees whose flats are separated by the glazing panels with each lessee being responsible for one half of the cost.

Section 20C Application.

34. The legislation gives the tribunal discretion to disallow in whole or in part the costs incurred by a landlord in proceedings before it being treated as relevant costs to be taken into account when determining the amount of future service charges. The tribunal has a wide discretion to make such an order that is just and equitable in all the circumstances. Decided cases suggest that in arriving at its decision tribunals should have regard not only to the outcome of the case but also the conduct of the parties.
35. The tribunal declines to make an order in this case. The leases are clearly less than satisfactory in matters relating to the repair of the balconies and bearing in mind the lessees concern, it is understandable that the applicant should have applied to the tribunal for a determination. The tribunal has had some difficulty in arriving at its decision and arguments have been finely balanced. In the circumstances the tribunal considers that no order under section 20C should be made.

Signed _____


Robert T A Wilson Solicitor LLB.

Dated 28th July 2010