

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



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

Case Number:	CHI/21UD/LSC/2010/0130
Property:	Flat 1 Quebec Mansions 102 Filsham Road St Leonard's on Sea TN38 0PG
Applicants:	Mr Robert and Mrs Joanna Tillyer
Respondent:	Mr. Richard Bryant
Appearances for the Applicant:	Mr. Bob Tillyer
Appearances for the Respondents:	Tim Polli Barrister and Mr. N Standen Chartered Building Surveyor
Date of Inspection/Hearing	9th November 2010
Tribunal:	Mr. R T A Wilson LLB (Lawyer Chairman) Mr. B Simms FRICS (Surveyor Member)
Date of the Tribunal's Decision:	3rd December 2010

Application

1. This was an application by Mr. and Mrs. Tillyer (leaseholders) 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 to rebuild the balconies of the property in the year 2010 or possibly 2011, then service charges would be payable by them as a result.

Decision

2. The Tribunal has determined that if the Respondent freeholder was to incur costs for the repair of the balconies then a service charge would be payable by Mr. and Mrs. Tillyer to reimburse the reasonable cost of those works. The leases of the flats place an obligation upon the Respondent as landlord to undertake such works and an obligation upon the lessees, including the Applicants, to make payments to the landlord by way of service charge in reimbursement.

Inspection

3. The Tribunal inspected the Property prior to the hearing in the presence of the parties and their representatives. The property comprises a large late Victorian house, which has been extended, altered and converted to provide several self-contained flats. Access to the flats is mainly by way of open staircases and landings, but flat one is approached from the original front door at the front of the property. The original building is constructed of brick with a pitched tile covered roof. At some time in the past a substantial balcony has been constructed on the south side. This structure covers three floors and is built of a steel frame with rendered surfaces and asphalt roofs or balcony floors. It appears that as constructed the balconies were open but at some time in the past some have subsequently been enclosed.

The Law

4. 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 a service charge is 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

5. The Tribunal was supplied with a copy completion extract of the lease relating to the subject property. This extract did not include a coloured copy of the plan. Counterpart leases of flats 1 and 6 were available at the hearing. For the purposes of the matters before the Tribunal, all the leases seen by the Tribunal were in similar form save for the demise section. The leases were granted in or about 1954 for a term of 999 years commencing on 24th June 1950 at rents of £10 per year. The lease of the subject property was amended by a deed of variation dated the 17th May 1996.

6. The relevant provisions of the leases appear to be those set out below namely:
- Clause 1- the habendum section of flat 1. *-the lessor hereby demises unto the lessee ALL THAT ground floor flat known as flat number one with garden and ground appertaining thereto as the same is more particularly delineated in the plan hereunto annexed and thereon edged red all of which premises form part of the building and premises known as Quebec Mansion's, Filsham Road, St Leonard's on Sea, in the county of Sussex.*
 - Clause 1 -the reddendum section of flat 1 (a tenants covenant) *and also paying by way of additional rent (b) such a sum of money as shall be equal to such proportion of any sum or sums properly expended from time to time by the lessor pursuant to the covenant in that behalf contained in the maintenance or repair of the roof main walls timbers pipes wires cables and drains and exterior of the said building including the foundations thereof or of the said road and boundary or other walls and fences as the rateable value of the said flat hereby demised shall bear to the rateable value of the said building.*
 - Clause 2 (iii) - (a tenants covenant) *to keep the interior of the said flat hereby demised and the glass in the windows and doors thereof in good and substantial repair and so to yield up the said premises at the expiration or sooner determination of the said term.*
 - Clause 3 (ii) - (a landlords covenant) *to keep the roof and main walls and main timbers drains and exterior of the building of which the flat hereby demised forms part including the foundations thereof and the said balcony and steps and the said boundary or other walls and fences at all times during the said term in good and substantial repair and the outside wood and ironwork properly painted and will keep the said road in good condition for use as a private roadway.*
 - Clause 1- the reddendum section of flat 6 *All THAT upper floor flat known as flat number six as the same is more particularly delineated in the plan hereunto affixed and thereon edged red all of which premises form part of the building and premises known as Quebec Mansions, Filsham Road St. Leonard's on Sea in the County of Sussex TOGETHER ALSO in common with the lessor and all others entitled to use the same with the use for the purpose of access to an egress from the said flat of the balcony and steps leading up thereto and coloured yellow on the said plan and of the roadway coloured brown on the said plan.*
7. It is appropriate here to say that the copy lease in the hearing bundle did not include the colour plan referred to in the narrative. However at the hearing the Tribunal was shown the original counterpart leases of flats 1 and 6 and the counterpart leases do include plans. The red edging on the plan for flat 6, which has a balcony, clearly includes in the tenants demise the entire balcony, which exclusively serves this flat including the outside face thereof. The plan for this flat also indicates that the pillars and the enclosing walls of the balcony also form part of the demise. Flat 1, the subject property does not have a balcony but the red edging attached to the counterpart lease for this flat includes as part of the demise the patio area, which is directly beneath the balcony of flat 6. The plan of flat 1 clearly shows that the balcony supports at ground floor level fall also within the demise of flat 1.
8. The Tribunal noted that apart from the lease plan to flat 6 there is only one reference to a balcony in the narrative section and the Tribunal is satisfied that this reference is to the balcony to the front north elevation of the property, which is not in dispute. Accordingly apart from the lease plan, the lease of flat 6 is silent as to the repairing obligations that relate to the balcony. This is unfortunate and is the reason why this application has been brought.

The Hearing

The Applicants' Case

9. Mr. B. Tillyer, the Applicant's father, told the Tribunal that his son and daughter-in-laws' case was as set out in the written statement of case. The flat was purchased in January 2008. In March 2010 the Respondent served his son and daughter-in-law with a stage one consultation notice. This notice indicated that the landlord proposed to carry out a substantial rebuilding program, which would involve the demolition of the balconies to the south side of the property and the rebuilding of these balconies using modern materials and to a modern specification. The notice indicated that this rebuilding program was necessary to prevent continued water ingress to the building.
10. It is his son's case that the lease of flat one indicated that the repair or rebuilding of the balconies was not the responsibility of the leaseholder of flat one. In other words the balconies formed part of the demise of the flats, which they served, and they were not the landlords responsibility to repair. The Applicant sought a ruling and direction from the Tribunal in this respect.
11. If the Tribunal did not agree with this construction then it was his son's case that the landlord had not properly investigated cheaper remedial options for the repair and support of the balconies. It was his case that cheaper remedial options were available and that it was perfectly possible to carry out patch repair work which would be a far cheaper and less disruptive option than demolition and rebuilding even though further remedial action may be needed in later years.
12. Mr Tillyer contended that a full rebuild to the latest building standards, would increase the comfort and value of flat 6 and 6A at the expense of other leaseholders. It was his case that as such, those enjoying these enhancements should pay for them or at least pay a higher percentage of the total rebuild costs. He sought the Tribunal's ruling on this point.
13. At the hearing Mr. Tillyer confirmed that he did not wish to develop or expand upon the arguments set out in his son's written statement of case and he was content to rely upon the expertise and impartiality of the Tribunal to arrive at a fair and just result based on the documents supplied.

The Respondents' Case.

14. Mr Polli commenced the Respondent's case by setting out the factual background against which he said the leases needed to be construed. Quebec Mansion was a block of 13 flats. The Respondent landlord believed that the main part of the building was originally built in Victorian times as a single house. For a while it was a private school but, shortly before World War II, a two story extension was added along the full length of the back of the building and it was converted into flats.
15. In February 2010 Mr. Bryant was advised that the steel beams supporting the first and second floors south facing balconies had corroded. He received advice that the structural integrity of the second floor balcony was compromised and that corrosion to the first-floor balcony was causing on going damage. There was in the hearing bundle a report from consulting civil and structural engineers confirming these matters.
16. Since commissioning the report Mr. Bryant, himself a resident leaseholder in the block, had been consulting with the residents of the building about the need for the works. Bearing in mind the contents of the report and also relying upon advice obtained from Mr. Standen; a chartered building surveyor of some 20 years standing, Mr. Bryant had concluded that the only way forward was to demolish the entire balcony structure and

rebuild the same using modern materials and design. Mr. Bryant had instigated the consultation procedure to enable him to collect the full cost of these works which had been provisionally estimated at between £60-£70,000. In the interim the Applicants had issued this application to the LVT, which in his submission raised three issues as follows:-

- (i) Whether the lease of a flat 1 obliges the Applicants to contribute towards the cost of works to the balconies.
 - (ii) Whether a rebuild is necessary or appropriate or whether some lesser works such as patch repairs should be carried out.
 - (iii) Whether a section 20C order should be made in respect of this application.
17. Mr. Polli accepted that the only issues that could be properly determined by the Tribunal at this stage, bearing in mind the evidence available to it, was whether service charges in respect of the costs of balcony works would in principal be recoverable as a matter of contract under the terms of the lease of the subject property and the issue of costs. In other words only issues (i) and (iii) above.
18. Mr. Polli contended that the lease terms of the subject property were sufficiently wide to enable the Respondent to recover the costs of rebuilding the balconies as a service charge item. The relevant service charge covenants were contained in clause 1 which required the lessee to contribute to the costs incurred by the landlord in complying with his obligations set out in clause 3(ii). In clause 3(ii) the landlord covenants to keep the roof and main walls and main timbers drains and exterior of the building in good and substantial repair.
19. As a matter of construction Mr. Polli contended that the balcony structure fell within the ordinary meaning of *the main walls and exterior of the building*. The lease needed to be read as a whole and it could not sensibly be suggested that the landlord would repair and maintain the roof main walls and exterior foundations and balconies of the building but only be able to recover the cost of repairing and maintaining the roof main walls exterior and foundations but not the balconies. Mr. Polli relied upon the Respondent's repairing covenants set out in clause 3(ii) of the leases, which he maintained extended to the whole balcony structure as being part of the exterior of the building. The issue was confused by the mention in the lessor's obligation to repair "...the said balcony and steps..." whereas there had been no mention earlier in the lease of a balcony or steps. From the wording of other leases it was clear that this was a reference to the access balcony and steps on the North side of the building and not the balcony under consideration here.
20. Mr. Polli further contended that it is for the party who is subject to the repairing covenants to choose how to comply with its obligations. In such circumstances the leaseholders could not insist that the landlord carried out only a minimum level of repair. As such he invited the Tribunal to hold as a matter of contract that the cost of work to the balconies could be recovered as service charge.
21. As for the section 20C Application, Mr. Polli contended that Mr. Bryant was not a faceless, distant and uncommunicative landlord. Indeed he was one of the residents himself who would be responsible for contributing towards the cost of the balcony work. Mr. Bryant had not invited this application by behaving shadily or disreputably, nor had he proceeded in haste regardless of the tenants concerns. Mr. Polli contended that Mr. Bryant had sought to engage properly and proportionately with the Tribunal in relation to the application and indeed all he had been doing was taking and following independent professional advice. Having regard to all these matters Mr. Polli maintained that it would not be just and equitable for Mr. Bryant to bear any greater proportion of the legal costs associated with the application than he would have to

bear in any event as one of the tenants contributing to the annual service charge. In these circumstances he invited the Tribunal to make no order under section 20C.

Decision

22. 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 because, other than on the lease plans, the balconies to the south elevation of the property are not expressly mentioned anywhere else in the leases whereas the balcony and steps on the North side are expressly mentioned. In particular the leases do not set out with any clarity who is responsible for maintaining the balconies. The Respondents repairing covenants are set out exclusively at clause 3(ii) and they make no mention of the subject balconies at all. The central question to be answered therefore is can all or any part of the balcony structure be considered a landlords repairing obligation?
23. It is clear that the balcony structures form the most outer part of the building and in the lease plan of flat 6 the whole of the balcony is included as part of the flat. The Tribunal is satisfied that in this case the plan controls the description of the flat. We have so concluded because the narrative, which introduces the plan, does not contain limiting words such as "by way of identification only." Instead it contains the words "more particularly delineated" which we take to mean that the draughtsman intended the lease plan to control the description. This was established with identical wording in *Eastwood v Ashton* [1915] AC 900 where it was held that the plan should prevail over the verbal description.
24. The problem in this case comes about because the tenants repairing obligations, which are contained in clause 2(iii), are limited to the interior of the flat. But, the lease does not contain any precise wording defining what is meant by the interior. It was held in the case of *A-G v Lonsdale* (1868) LR 7 Eq377 that where a lease comprises only part of a building, as in this case, then the demise will include both sides of any external wall unless there is an exception or reservation or something else in the context of the lease to exclude them.
25. In this case the landlords repairing obligations, which are at clause 3(ii), are stated to extend to the exterior of the building. Clearly these two clauses, 2(iii) and 3(ii), do not sit comfortably with each other.
26. It is argued by Mr Polli that the word 'exterior' in the landlords repairing covenant can and does properly apply to the whole of the balconies even if they have been enclosed since the beginning of the lease by the tenants themselves. In summary he maintains that all of the balconies are repairable by the landlord even though they form part of the flat demise.
27. On the other hand the Applicants argue that the balcony structures are part of the tenant's demise, which are repairable by the tenants and not the landlord.
28. Notwithstanding these inconsistencies and omissions we have concluded that the leases do place an obligation on the landlord to repair all structural sections of the balconies even though part of the balcony structures do fall within the flat demise. In short we broadly accept the submissions of the Respondent as to the true construction of the leases in this respect.
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 balconies, which form part of the structure and exterior of the block, 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 structure of their 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 repair and, if necessary (but only if necessary) to renew, as part of that repair, the whole or parts of the balcony structures falls on the landlord.
31. We do not consider that the tenants' covenant in clause 2 (iii) to keep all interior parts of the demised premises has the effect of rendering individual tenants liable to maintain the structures of their balconies, an obligation which would be inconsistent with clause 3 (ii). Looking at the factual matrix we find that the balcony structures were in place when the leases were granted and it is established law that repairing covenants must be construed by reference to the physical state of the building at the time that the lease was entered into. The overall repairing structure of the leases is that it is the leaseholders duty to repair the interior of their flats whilst the landlord maintains and repairs the exterior subject to recovering a proportion of the cost from the leaseholders. This is what the parties expected and in the absence of clear words to the contrary, which do not appear in this case, the Tribunal should not disturb this arrangement. The Tribunal considers that the plain meaning of exterior does in the particular circumstances of this case include the balconies, which are substantial external structures and which could not easily be repaired by individual leaseholders and certainly not in isolation.
32. Furthermore we are in no doubt that renewal of the balcony structures with similar balconies, albeit of a modern specification, are capable of constituting a repair and not an improvement. Provided the original balconies are in a substantial state of disrepair and the costs and standard of repair/renewal work are reasonable, the costs will be recoverable as a service charge under the leases.
33. That said, in the Tribunal's judgment the lease does not enable the landlord to carry out improvements, which go beyond repair/renewal and recover the cost of those improvements via the service charge. There is a fine line to be drawn and the Tribunal considers that a prudent landlord would properly investigate the possibility and cost of carrying out limited repair work to the balconies as opposed to the wholesale rebuilding of the balconies and compare and contrast the cost and benefits of each scheme before deciding on which scheme to implement.
34. The Tribunal heard evidence that as originally constructed, the balconies were not enclosed and that they were enclosed at a later date by the leaseholders themselves. No permission was sought from the landlord, as the leases do not contain any restrictions on the leaseholders carrying out this work. This oral evidence was not substantiated by documentary or photographic evidence and it was not entirely clear if enclosure took place before or after the leases were granted. The inference given by Mr. Bryant at the hearing was that enclosure had taken place after the leases had been granted. It appears to the Tribunal that if the landlord elects to proceed with the rebuilding option as opposed to the more limited option of repairs, which might not involve work to the enclosures, then the cost of rebuilding the enclosures and the conservatory on the second floor may not be capable of forming part of a valid service charge demand. This is likely to be the case if it is established that it was the lessees themselves who carried out the additional enclosure and construction work. The Respondent will therefore have to proceed with caution in this respect.

Section 20C Application.

35. 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.

36. 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 it is understandable that the Applicants should have applied to the Tribunal for a determination. It is also entirely understandable that the Respondent should have fully engaged with the application. 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 whether or not the lease allows recovery of such costs via the service charge.

Signed _____
Robert T A Wilson Solicitor LLB.

Dated 3rd December 2010