



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : BIR/00CN/LAM/2021/0002

Property : 58-60 Albion Street, Birmingham B1 3EA

Applicants : Ben Clark & Amy Clark; Ben Holmshaw
& Rachel Holmshaw; Kevin O’Keeffe

Representative : In person

Respondent : MTH Properties Limited

Representative : Mr Ian Williamson, solicitor

Type of Application : Application for a direction under section
24 (4) of the of the Landlord and Tenant
Act 1987 (“1987 Act”)

Tribunal members : Judge Anthony Verduyn
Mr V Ward BSc Hons FRICS

Date : 18th January 2021

DECISION

The external window frames to the Property form part of the demise to their respective apartments, and only the decorative state of the external surface of the external frames is the responsibility of the manager under the service charge provisions of each lease.

REASONS

1. By Order of this Tribunal, on 17th September 2020 Mr Joe Jobson MRICS of Principle Estate Management, Cornwall House, 31 Lionel Street, Birmingham B3 1AP was appointed as Manager of the Property pursuant to Section 24 of the Landlord and Tenant Act 1987 (“1987 Act”).

2. By email of 27th October 2020, Mr Jobson asked the Tribunal the following:

“We would like some guidance on the interpretation of a lease clause on the repair of the external window frames –

- Definitions of retained parts: "c. All external decorative services [misquoting “surfaces” in the original] of 1) the building, 2) external doors 3) external door frames and 4) external window frames" (page 5)
- Schedule 1.2 - Under the definition of the property it states the property shall not include any retained parts.
- Schedule 7 - In 1.1.10.1 states that the services include "repairing and, whenever the landlord, acting reasonably, regards it as necessary in order to repair, replacing, or renewing the retained parts".

The residents believe the frames are covered within the remit of service charge – however we believe it could be a demised cost.”

3. The Tribunal decided to treat this question as an application for a direction by the appointed manager under section 24 (4) of the 1987 Act:

(4) An order under this section may make provision with respect to—

(a) such matters relating to the exercise by the manager of his functions under the order, and

(b) such incidental or ancillary matters,

as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters.

4. Directions dated 4th November 2020 were then given that the leaseholders had until 14th December 2020 to respond to the question. The period of time given was sufficient for the direction that the Tribunal would then determine the issue on the basis of the written submissions (if any) after 14th December 2020, pursuant to Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, unless any party in receipt

of this Direction requests a hearing within 28 days of receipt of these Directions. No party requested a hearing.

5. On 2nd December 2020 Mr and Mrs Clark, leaseholders at the Property responded by email in the following terms:

“1) We believe the lease clearly defines external window frames as 'Retained Parts' under the lease definitions:

Definitions of retained parts: "c. All external decorative services [misquoting “surfaces” in the original] of 1) the building, 2) external doors 3) external door frames and 4) external window frames" (page 5)

We understand this definition is designed to differentiate between external surfaces and internal surfaces (with internal surfaces being the responsibility of the leaseholder).

2) It is clearly confirmed in schedule 1.2 of the lease that anything defined as a Retained Part does not constitute part of 'The Property' that the leaseholder is responsible for:

Schedule 1.2 - Under the definition of the property it states the property shall not include any retained parts.

3) As per Schedule 7 of the lease, repairs and maintenance of the Retained parts are part of the services and so covered by the service charge:

Schedule 7 - In 1.1.10.1 states that the services include "repairing and, whenever the landlord, acting reasonably, regards it as necessary in order to repair, replacing, or renewing the retained parts".

We highlight that for anything identified as a retained part, this goes above the requirement to decorate only but also to repair and replace.

4) It is further implied that the intention of the freeholder is for all maintenance of external window frames to be covered in the lease, by the nature of repair work that was carried out in November 2019 which was included in the services and service charge. The Respondent has indicated to us many times that the responsibility for window frames is part of the services under the lease, and there is no differentiation between decoration and maintenance/repair. For example, when we queried this with the Respondent, he replied in an email on the 4th of January 2019 saying "To put your mind at rest, the external window decorations are my responsibility as will be the costs involved". (This email can be provided if necessary.)

5) If there is any doubt over whether this service should be provided as part of the service charge, we suggest that as the property is grade 2 listed and the sash windows are at the front of the property, it is in all leaseholders interests to make sure these are maintained and as such should be part of the collective cost of maintaining the building.

6) We believe the issue raised may be specifically relating to whether the lease covers decoration only. Whilst we do not agree with this interpretation (as set out in points 1-3), we also wish to raise the question around where decoration ends and maintenance/repair begins, as we believe these to be fundamentally linked and unable to be separated. Despite attempted repairs in November 2019, the current state of the wooden sash windows is in need of repair which is primarily due to failure to paint and maintain the frames by the Freeholder up to now. Should it be deemed that repairs are a demised cost, we would be seeking further guidance on how to proceed and how to seek compensation for costs incurred to ourselves due to negligence by the Respondent in keeping up sufficient maintenance whilst they were managing the building. This is something we have pursued many times and forms part of the evidence to the Tribunal for the appointment of a manager.”

6. On 7th December 2020 Mr Kevin O’Keeffe a leaseholder at the Property responded by email in the following terms:

“Having read through the lease for my dwelling it states on page 4 and 5 that part C states that retained parts all external (i) the building, (ii) external doors, (iii) external doors frames and (iv) external window frames. My view is that the freeholder is responsible for all the external 'skin' of the buildings less for window glass.”

7. Finally, by letter of 13th December 2020, from Mr Ian Williamson of the Wilkes Partnership, solicitor to the freeholder, wrote in response as follows:

“we comment as follows having referred to the original Lease dated 16th November 2017 relating to Apartment 3, 60 Albion Street and granted to Benjamin Calton Clark and Amy Elizabeth Clark.

The Lease is based on a standard form supplied by Practical Law precedents and commonly in use by many firms of Solicitors, and is the basis for the Leases of all 8 Apartments at Albion Street.

The property included in the Lease or demise is defined in Schedule 1. In particular at 1(f) the Property known as Apartment 3, 60 Albion Street is defined as including “the doors and windows and their frames, fittings and glass.”

On the face of it therefore we regard the window frames as being included in the Lease and the Lessee’s responsibility for maintenance except that part of the Property which is described as “Retained Parts”. The definition of Retained Parts includes the wording at (c) “all external decorative surfaces of (i) the Building (ii) external doors (iii) external door frames and (iv) external window frames.”

The cost of maintaining the Retained Parts and in particular cleaning, maintaining, decorating, repairing and replacing them is of course recoverable through the service charge and it appears clear to us that the definition of Retained Parts insofar as it relates to external window frames relates only to what are described as the external decorative surfaces. That is to say the window frames themselves are not Retained Parts but the exterior decoration of them is.”

8. The Tribunal has considered all the submissions in the context of the terms of the lease as a whole and in the context of its grant.
9. The conduct of the parties subsequent to the execution of the lease is not an aid to interpreting it, since it goes to the subjective understanding of the party concerned and not to the objective meaning of the lease. Further, the Grade 2 status of the exterior of the building can be relevant, but appears immaterial to responsibility for the window frames: the status of the building merely determines the regulation of the frames’ repair or replacement, and not responsibility for maintaining them. It is of no assistance that the lease is in a standard form, in circumstances where the Tribunal has not been directed to, or found, any relevant case law interpreting such leases.
10. The Tribunal finds, though, that the construction of the lease is quite straight-forward. The window frames are demised under the definition of “the Property” (i.e. the apartment the subject of the given lease) under paragraph 1(f) of Schedule 1, which refers to doors and windows “and their frames” being part of the Property. The reference in the definition of “Retained Parts” to the decorative surface of the external window frames, does not extend to the frame structure accordingly. The rationale would be that external decoration should be consistent in appearance, rather than dependent upon the whim of the lessee.
11. The relevant part of Schedule 7 is not the repair obligation under paragraph 1.1.10.1, but the “decorating of the Retained Parts where appropriate or necessary” under paragraph 1.1.10.2.
12. If, as Mr and Mrs Clarke allege, want of redecoration has led to disrepair in the window frame, then that is a matter for them to seek independent legal advice upon. The jurisdiction of this Tribunal is not to advise lessees on issues of liability for allowing the paintwork to fail, since the relevant statutory provision (as set out above) does not extend that far.

FURTHER MATTERS

13. By email of 11th January 2021, Mr and Mrs Clark contacted the Tribunal seeking advice and raising a concern regarding completion of the directions of the Management Order made on 17th September 2020. They assert that the Respondent landlord is in breach of Part 12 of the Order which stated:

"12. That no later than two weeks after the date of this Order the Landlord shall provide all necessary information to and arrange with

the Manager an orderly transfer of responsibilities. No later than this date, the Landlord shall transfer to the Manager all the accounts, books, records and funds relating to the Service Charge and Insurance of the Property. "

14. They state that Mr Jobson has informed them that the Respondent has provided some information of spending and income, but not completed accounts with any supporting evidence. It is stated that this is consistent with previous conduct of the Respondent:

“we have significant concerns with the previous spending summary the landlord provided, which does not reconcile with our understanding of the amount of work that has been carried out. Hence, we have previously requested evidence to support this which has still not been provided.”
15. The Respondent has apparently stated that there is nothing to be handed over, by reason of service charge arrears (although, the Tribunal notes, that this would not be relevant to the handing over of accounts, books and records, as ordered).
16. Mr Jobson has apparently stated that he cannot seek to recover service charge arrears from either tenants, or the Respondent insofar as he is personally liable to pay them, due to the incomplete evidence provided by the Respondent.
17. This causes Mr and Mrs Clark to seek advice of the Tribunal on the steps available to ensure the Respondent provides accurate accounts and determines any arrears owed, and responsibility for collecting arrears of service charges.
18. The Tribunal is not an advisory body. Its appointed manager may raise questions of the Tribunal, but lessees have to take their own legal advice and make their own decisions on what (if any) applications can be made to the Tribunal to invokes its statutory powers, such as they are.
19. Further, Mr Jobson is the appointed manager and it is his decision how to proceed with management of the Property within the terms of his appointment. He has the necessary power to collect arrears under Part 6 of the Management Order, even if they arose before his appointment. The exercise of that power is primarily a matter for him, subject to any formal applications that can be made to the Tribunal. Similarly, any steps to enforce the provisions of the Management Order are primarily a matter for him. He has to consider what is likely to be productive and what is not. Further, it should be borne in mind that the expenses of management (insofar as they are not recoverable from others) are ultimately a component part of the Service Charge.

Tribunal Judge Dr Anthony Verduyn

Dated 18th January 2021

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.