FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LSC/2021/0352**
HMCTS code	**:**	**V: CVPREMOTE**
Property	**:**	**17 Papermill Wharf, 50 Narrow Street, London E16 8BZ**
Applicant	**:**	**Babul Basu**
Representative	**:**	**Matthew Withers (Counsel)**
Respondent	**:**	**Papermill Wharf (Narrow Street) Freehold Limited**
Representative	**:**	**Nicholas Jackson (Counsel)**
Type of application	**:**	**Determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985 and administration charges under schedule 11 of the Commonhold and Leasehold Reform Act 2002**
Tribunal members	**:**	**Judge Robert Latham** **Fiona Macleod MCIEH**
Date and venue of hearing	**:**	**11 April 2022 at** **10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**27 May 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and no-one requested the same, or it was not practicable and all issues could be determined in a remote hearing. The parties have provided a Bundle of Documents (611 pages) to which reference is made in this decision.

Decisions of the Tribunal

(1) Upon the Respondent confirming that there is no current breach of covenant by the Applicant as at the date of the hearing, the parties have compromised the Respondent's claim for administration charges on the terms set out in the Respondent's letter, dated 8 March 2022.

(2) The Tribunal determines that the external windows and balcony doors fall within the tenant's covenant to keep in good and substantial repair and decoration condition (including the renewal and replacement of all worn or damaged parts) pursuant to Schedule 1, paragraph 3 of the lease. This covenant excludes the decoration of the external surfaces of such external windows and balcony doors which fall within the landlord's covenant pursuant to Schedule 6, paragraph 5(a) of the said lease.

(3) The parties have agreed that the Tribunal should make an order under section 20C of the Landlord and Tenant Act 1985 so that none of the Respondent's costs incidental to, or in connection with, the two applications before the tribunal, save for those incidental to, or in connection with, the issue relating to the party responsible for the repair of the windows and French doors.

(4) The Tribunal does not make an order for the reimbursement of the tribunal fees paid by the Applicant.

The Applications

1. On 4 October 2021, the Applicant issued two applications seeking determinations (i) under Schedule 11 to the Commonhold and Leasehold Reform Act 2002 as to whether administration charges are payable (at p.1-11); and (ii) under section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable (at p.12-23). The Applicant also seeks an order for the limitation of the landlord's costs in the proceedings under section 20C of the Landlord and Tenant Act 1985 and an order to reduce or extinguish the tenant's liability to pay an administration charge in respect of litigation costs, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. The Applicant provided a Statement of Case (at p.24-30).

2. On 17 November 2021, the Tribunal gave Directions which were amended on 25 January 2022 (at p.72-77). Pursuant to the Directions, the parties have filed their Statements of Case, witness statements and expert evidence all of which are included in the Bundle of Documents (611 pages) to which reference is made in the decision.

The Hearing

3. The Applicant was represented by Mr Matthew Withers (Counsel) who was instructed by Herrington LLP. The Applicant attended the hearing together with Ms Nikki Coward (Solicitor) and Mr Lee Galley (her expert). The Respondent was represented by Mr Nicholas Jackson (Counsel) instructed by Radar Limited Solicitors. He was accompanied by Ms Julie Roberts (a director of the respondent company), and Mr Mark Egner (Solicitor). Both Counsel provided Skeleton Arguments and referred to a number of authorities.

4. On 8 March 2022 (at p.535) the Respondent made an Open Offer of Settlement. The offer was open for acceptance until 16.00 on 22 March. At the beginning of the hearing, Mr Jackson confirmed that the Respondent was still willing to hold open the offer. He also confirmed that as a result of the works which have been executed, the Respondent accepted that there was no current breach of covenant.

5. The Tribunal granted a short adjournment for the parties to review their positions. When the hearing resumed, the Applicant confirmed that she accepted the Open Offer of Settlement. As a result of this, the only issue which the Tribunal is required to determine is whether it is the landlord or the tenant who is responsible for the maintenance and repair of the windows and doors in the Applicant's flat. The Tribunal heard submissions on this issue from both Counsel.

The Background

6. Papermill Wharf is a development built 1992 in the traditional wharf style overlooking the River Thames. There are commercial and retail units on the ground floor, above which there are 51 residential flats.

7. On 11 November 1994, the Respondent acquired the freehold interest. All the tenants are members of the Respondent Company. On 28 March 2018, the Applicant acquired the leasehold interest in Flat 17 ("the Flat"). The Applicant lives in a nearby block at Medland House. She has sublet the Flat. Her tenants have complained of disrepair to the windows and doors and the cost of heating the Flat. It is accepted that any disrepair has now been remedied.

8. Papermill Wharf has PVC coated aluminium framed double glazed windows and balcony doors. The windows are all side hung casement windows, except for the rear bedroom which is bottom hung. The balcony doors are side hung and formed of the same construction with fixed light panes. All the windows and doors are fitted with a butterfly rubber seal around the perimeter of the opening casements.

9. The windows are now 30 years old. A number have become ill fitting and draughty. Some 26 lessees have replaced the windows. A further 6 lessees have partially replaced their windows. This Tribunal is required to determine whether that obligation to repair and replace the windows is that of the landlord or the tenant.

The Lease

10. The Applicant's lease is dated 29 June 1993 (at p.88-186). Counsel referred the Tribunal to the following provisions (emphasis added):

(i) "The Block" is defined as "the block of flats to be known as "Papermill Wharf (formerly Papermill Court) Narrow Street London E14 and shall include all additions amendments and alterations thereto during the Term".

(ii) "The Flat" is defined as "the flat numbered 17 on the first floor of the Block and for purposes of identification shown so numbered and edged red on the Plan including for the purpose of obligation as well as grant those parts described in the First Schedule hereto as included but excluding those parts therein described as excluded".

(iii) The Flat includes a balcony. The lease plan includes the balcony in the demise.

(iv) The First Schedule describes the Flat as including "(a)…the doors and door frames and window frames fitted in such walls (other than the external surfaces of such walls doors frames and window frames) and the glass fitted in such window frames". Paragraph (h) provides that the demise excludes "any of the main timbers of the Block or any of the structural walls or structural partitions thereof (whether internal or external) and such plastered surfaces thereof and the doors and frames fitted therein as are not expressly included in the demise".

(v) By Clause 3, the tenant covenants to observe the obligations set out in the Fourth Schedule. By paragraph 3 of the Fourth Schedule, the tenant covenants to "keep the Flat and all parts thereof and all fixtures and fittings therein and all additions thereto in good and substantial repair and decorative condition throughout the Term (including the renewal and replacement of all worn or damaged parts) and so to yield up at the expiration or sooner determination of the said Term".

(vi) By Clause 5, the landlord covenants to observe the obligations set out in the Sixth Schedule. By paragraph 5(a) of the Sixth Schedule, the

landlord covenants to "use all reasonable endeavours to keep the structure and the exterior of the Block ….in good and tenantable repair and decorative condition (including any renewal and replacement of all worn or damaged parts) …. PROVIDED that for the sake of clarity and the avoidance of doubt the obligations of the landlord under this clause shall include (but not by way of limitation) an obligation to keep in good and tenantable repair and condition the structure of the balconies forming part of the Block) and to keep such parts thereof as are or should be decorated in good decorative condition".

The Submissions of the Parties

11. Both Counsel agreed that the starting point for interpreting any lease is the decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619. Lord Neuberger considered the relevant principles at [17] – [23]. The interpretation of any contractual provision, involves identifying what the parties had meant through the eyes of a reasonable reader. Save in the exceptional case, that meaning was to be gleaned from the language of the provision. Although the less clear the relevant words were, the more the court could properly depart from their natural meaning, it was not to embark on an exercise of searching for drafting infelicities in order to facilitate a departure from the natural meaning. Commercial common sense is relevant only to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date on which the contract had been made. The purpose of contractual interpretation is to identify what the parties agreed, not what the court thought that they should have agreed.

12. Mr Withers, on behalf of the Applicant, argues that the landlord is liable to repair the external windows and balcony doors. These are part of the structure and exterior of the Block and within the landlord's covenants under paragraph 5(a) of the Sixth Schedule. The mere fact that the door frames and window frames (excluding their external surfaces) are demised to the tenant is not critical. By analogy, Mr Withers refers to the balconies which are included in the demise to the tenant. Despite this, the landlord is responsible for keeping the structures of all the balconies forming part of the Block in good and tenantable repair and in good decorative condition.

13. Mr Withers submits that landlord's repairing covenant requires them to maintain the structure and exterior of the block. The exterior of the windows are demised to the landlord. The windows and doors fall within the definition of structure and exterior and as such the obligation to repair them falls onto the landlord. He argues that it would be invidious to separate a responsibility to maintain the exterior of the window and doors, but not the entire window or door. If replacement is in fact required, it is not possible to replace an exterior of a window, the whole unit must be replaced.

14. Mr Jackson responds that the meaning of the lease is plain. Both the frames and the glass are expressly included in the demise. There is no basis for declaring otherwise. The Applicant is rather seeking to reverse the whole rationale underpinning the foregoing principle. Her case is that because it may be invidious to differentiate between the window frames and their 'external surfaces', the whole composite component ought to be excised from her repairing obligation. He suggests that her argument should rather be to the contrary. Because everything except the very external powder coated surface of the window and door frames comes within the demise, the landlord should not be permitted to invoke some minor proprietary right in the same so as to obfuscate any desire on her part to replace the whole. That is not, and never has been, at all germane.

15. Ms Richard, in her witness statement, explains how the division of responsibilities under the lease are both rational and sensible. The doors and windows of a flat, together with their frames, fittings and glass, are included in each leased flat. There is good sense in excluding the external decorative surface and imposing responsibility for this on the landlord. This ensures that the exterior of the Building retains a uniform appearance. The Block is in a conservation area, so the appearance could only be changed if there is both a consensus among tenants to do so and if the local authority approves.

16. Mr Wither's starting point is the decision of Mr Recorder Thayne Forbes QC (as he was then) in *Irvine v Moran* [1990] 24 HLR 1. The judge was required to construe the obligation imposed on the landlord of a short lease (under 7 years) "to keep in repair the structure and exterior of the dwelling-house (including drains, gutters, and external pipes;". This provision imposed by section 32 of the Housing Act 1961 is now replaced by section 11 of the Landlord and Tenant Act 1985. The section further provides that any covenant which the tenancy imposes on the tenant which relates to these matters shall be of no effect. The lease in question imposed extensive repairing and decorating obligations.

17. The Judge considered that the word "structure" should be construed in the context of the legislation. In this context, he concluded (emphaisis added, at p.5):

> "The structure of the dwellinghouse is something less than the overall dwellinghouse itself. Of course, the difficulty that is posed is deciding to what more limited aspects of the overall dwellinghouse the word "structure" is addressed. I have come to the view that the structure of the dwellinghouse consists of those elements of the overall dwellinghouse which give it its essential appearance, stability and shape. The expression does not extend to the many and various ways in which the dwellinghouse will be fitted out, equipped, decorated and generally made to be habitable. I am not persuaded by Mr. Brock that one should limit

> the expression "the structure of the dwellinghouse" to those aspects of the dwellinghouse 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 dwellinghouse", that in order to be part of the structure of the dwellinghouse 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 or not something is or is not part of the structure of the dwellinghouse. It is not easy to think of an overall explanation of the meaning of those words which will be applicable in every case and I deliberately decline to attempt such a definition."

18. The Judge made findings that the internal wall plaster and the door furniture do not form part of the structure of a dwelling-house before considering the position of windows which he found "a difficult matter to decide":

> "Windows pose a slightly different problem. I have some hesitation about this, but bearing in mind that one is talking about a dwellinghouse, 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 dwellinghouse in its essential material elements, I have come to the conclusion that windows do form part of the structure of the dwellinghouse. 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 dwellinghouse, it seems to me that an essential and material element in a dwellinghouse, using ordinary common sense and an application of the words "structure of the dwellinghouse" 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 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 dwellinghouse.
>
> Again, there is room for factual differences. For example, though it has not been suggested that such is the case here, there could be furniture which is added to a window which is not essential for the operation of that particular window. In such circumstances I think that it would be doubtful if such non-essential furniture were to be regarded as part of the structure. However, I do not have to consider such nice questions as that and so I do not make any specific ruling on it. In this case, it not having been suggested that there is any circumstance which does not justify the particular

> furniture being placed on the particular windows, I am satisfied that the windows together with their various accoutrements are part of the structure.
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> Windows, which form 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 s.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 dwellinghouse it would follow, on 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. Mr Jackson argues that this decision is not relevant to the issue which this Tribunal is required to determine. We are not construing a statute. Neither are we considering the structure and exterior of a "dwelling-house". We are rather considering the respective obligations of landlord and tenant in respect of the repair and maintenance of the "Flat" and the "Block" in a context where the parties are not restricted by statute as to how the respective obligations should be apportioned. In the current case, there is a clear division of responsibilities between landlord and tenant.

20. Mr Withers then turned to *Marlborough Park Services Ltd v Rowe* [2006] HLR 30, a decision in which the Court of Appeal approved of the judgement in *Irvine v Moran*. The issue before the Court of Appel the timber ceiling was part of "the main structure" of the block. The Court was construing the terms of a long lease. At [16], Neuberger LJ (as he was then) identified the "central question" in the appeal:

> "namely whether, in the context of this lease, and in the relevant circumstances, the floor joists of the ground floor ceiling and first-floor floor of the maisonette are part of the "main structures of the Property" within cl.5(a)(i)(a) [of the lease"].

21. In referring to the passage quoted at [17] above, Neuberger LJ stated at [17]):

> "While I accept, as I have emphasised, that words such as "structure" or "main structures" must take their meaning from the particular document, lease or statute in which they are found,

> and from the surrounding circumstances, and while 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."

22. Sedley LJ added a cautionary warning (at [22]:

> "Although that case, like this one, concerned liability for what the lease called the "main structure" of the building, reading across from one lease to another is a risky business and the exercise has not been found useful here."

23. Mr Withers relied on the decision of Judge Tildersley OBE on 25 January 2019 in *High View Lodge* (CHI/23UF/LIS/2018/0050). He referred the Tribunal to [26], [28], [41] and [42] of his decision. Mr Jackson referred to the terms of the lease at [18]. This was a paper determination. The leaseholder had withdrawn his objection. Despite this, the landlord sought a ruling as to who was responsible for the cost of replacing wooden windows and doors with modern UPVC frames. The Judge was required to construe the terms of the lease. It had been suggested that there was a serious conflict between the respective obligations of the landlord and the tenant. The Tribunal does not find it useful to read across from one lease to another.

24. Mr Withers relied on the decision of the President of the Upper Tribunal, George Bartlett QC 12 August 2008, in *Sheffield City Council v Oliver*. (LRX/146/2007). He referred the Tribunal to [9]. [22] – [22] and [24] of the decision. The President was satisfied that the external windows were part of the structure and exterior of both the demised premises and the building. The fact that the habendum had included external windows and doors as part of the demise was not critical. The President noted that there was no reason why some limitation on the scope of the repairing covenant should be derived from the demise. Mr Jackson highlighted that this was a lease that had been acquired under the statutory Right to Buy scheme. The Housing Act 1985 required a covenant by the landlord to keep in repair the structure and exterior of the dwelling-house.

25. Mr Withers finally referred the Tribunal to the First-tier Tribunal decision, dated 2 September 2020 in Maygood House (LON/00AM/LSC/2020/0072). Relying on *Sheffield City Council v Oliver*, the tribunal held that the landlord was liable for the repair of the windows. However, this is another case which turned on the particular terms of the lease. Mr Jackson highlighted [9] of the decision.

The Tribunal's Determination

26. The Tribunal is satisfied that the external windows and balcony doors fall within the tenant's covenant to keep in good and substantial repair

and decoration condition (including the renewal and replacement of all worn or damaged parts) pursuant to Schedule 1, paragraph 3 of the lease. This covenant excludes the decoration of the external surfaces of such external windows and balcony doors which fall within the landlord's covenant pursuant to Schedule 6, paragraph 5(a) of the said lease.

27. The Tribunal must construe the lease as a whole. Mr Withers suggests that there are inconsistencies in the lease, as a result of which it should be construed in the manner for which he contends. We do not accept that there are any such inconsistences.

28. The lease provides a rational and comprehensive code for the repair and maintenance of both the Flat and the Block. The Flat is demised to the tenant. This includes the door frames and the window frames. The lease expressly excludes the external surfaces of such windows and doors. The tenant is obliged to keep the Flat in good and substantial repair and decorative condition. That expressly excludes the decoration of the external surfaces of those windows and doors.

29. The landlord is required to keep the structure and exterior of the Block in good and tenantable repair and decorative condition. The meaning to be given to that phrase "structure and exterior" must be construed in the context of the whole lease. It extends to the "exterior" of the Flat's windows and doors. The fact that the coated aluminium units require minimal decorative attention is irrelevant. The word "structure" is not a word of art. As Neuberger LJ decided in *Marlborough Park Services Ltd v Rowe*, the word "structure" must take its meaning from the particular lease. Its meaning must be considered in the context of the lease. The issue for this tribunal is whether in the context of this lease, the word "structure" should extend to the windows and doors of this Flat. It is quite apparent to us that the drafters of this lease concluded that it should not.

30. The Tribunal is further satisfied that this lease makes a sensible and thoroughly practical division of responsibilities between landlord and tenant. There is good sense in imposing the responsibility for decorating the external surfaces of any flat of the landlord. This ensures that the exterior of the Building retains a uniform appearance. This is important for any Block which is situated in a conservation area.

Application under s.20C and refund of fees

31. The parties have agreed that the Tribunal should make an order under section 20C of the Landlord and Tenant Act 1985 so that none of the Respondent's costs incidental to, or in connection with, the two applications before the tribunal, save for those incidental to, or in connection with, the issue relating to the party responsible for the repair of the windows and French doors.

32. The Tribunal have found in favour of the landlord on the manner in which the lease should construed. We are therefore satisfied that it would be inappropriate to make any additional order under section 20C or to make any order for the refund of the tribunal fees which the Applicant has paid.

Judge Robert Latham
27 May 2022

Rights of appeal

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

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

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

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

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

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