THE RESIDENTIAL PROPERTY TRIBUNALSERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property
TRIBUNAL SERVICE

S.27A and S.20ZA of the Landlord & Tenant Act 1985(as amended)("the 1985Act")

Case Numbers:	**CHI/OOML/LIS/2009/0105 (Case 1)** **CHI/OOML/LSC/2009/0071 (Case 2)**
Property:	**53 Marine Parade** **Brighton** **East Sussex.** **BN2 1PH**
Case 1 **Applicants:**	**W Chalmers, J Chalmers and J Selby**
Respondent:	**53 Marine Parade Limited (The Company)**
Case 2 **Applicants:**	**53 Marine Parade Limited (The Company)**
Respondent:	**W Chalmers, J Chalmers and J Selby**
Date of Inspection /Hearing	**9th December 2009**
Tribunal:	**Mr R T A Wilson LLB (Lawyer Chairman)** **Mr R Wilkey FRICS (Valuer Member)** **Ms J Morris (Lay Member)**
Date of the Tribunal's Decision:	**7th January 2010**

THE APPLICATIONS.

Case 1 and Case 2 were applications made pursuant to Section 27A of the 1985 Act and sought a declaration from the tribunal in respect of service charge arising out of replacement works carried out to a beam to the rear of the property in 2008/2009. In respect of both applications the parties agreed the following: -

a. The beam, ("the Beam") referred to in both applications is that which supports the bay window to the rear of the first-floor flat at the property.

b. The only question for the decision of the tribunal is whether or not the cost of replacing the Beam falls to be recovered as service charge so that both service charge applications may be treated as amounting to exactly the same thing.

c. The applications made by the parties for the limitation of costs pursuant to section 20C of the 1985 Act would not be pursued at the hearing by agreement.

d. A third application, which was made by the Company for dispensation pursuant to section 20ZA of the 1985 Act from the requirement to carry out consultation in respect of the Beam work, was presented to the tribunal unopposed.

THE DECISION.

1. The Beam forms part of the demise of the first-floor flat at the property and thus the costs associated with its repair/replacement are not recoverable as service charge.

2. No determination is made in respect of the application under section 20ZA of the 1985 Act as the costs of the repair/replacement works to the Beam are not recoverable by the Company as service charge.

PRELIMINARY MATTERS.

3. All parties had set out in considerable detail their position on the issues in their written statements and at the hearing all parties expanded upon their written statements.

4. Much of the evidence put forward by the parties centered on who authorised the contractors to carry out the works to the Beam, in what capacity and on whose part the instructions were given and whether those instructing the work had the legal capacity to do so.

5. The tribunal had due regard to the evidence put to it in relation to these matters but ultimately the question to be answered, namely whether the Beam forms part of the demise of the first-floor flat, turns on the proper construction of the lease. Accordingly this decision does not record or summarise all of the evidence presented to it and merely summarises in the briefest terms the submissions put to it on the true construction of the lease.

INSPECTION.

6. 53 Marine Parade, Brighton, East Sussex is a substantial, terraced Victorian building arranged as 4 self-contained flats and facing the main coast road beyond which is the sea front. The front elevations are cement rendered and painted. The internal arrangement of the flats in the building is deceptive and, in the case of at least one flat, the accommodation is on different levels. The tribunal was lead through one of the flats onto a large flat roof area at the rear of the building. The bay window, which gains support from the Beam, could clearly be seen and, although the Beam has been covered, the location was evident by reference to the documents supplied with the bundles. It was particularly noted that the bay window served only the first floor flat. The Tribunal then inspection the bay from within the interior of the relevant flat.

THE PARTY'S SUBMISSIONS.

7. Mr Staples on behalf of the Company argued that the Beam works should be viewed as a service charge item. He contended that the lease contains a number of generic clauses that only provide an outline of how responsibility for repairs should be addressed. In the absence of specific guidance as to the responsibility of the works carried out, a number of assumptions are required. The lease terms, which are relevant to the question, are clause 1 which defines the building, clause 5.1.3 which contains the landlord's covenant to maintain and keep in good and substantial repair and condition the building and clause 4.1.5 which prohibits the lessee from making any structural alterations or structural addition to the demised premises. Based upon the clauses highlighted above Mr. Staples contended that the repairs carried out to the beam should be covered by the service charge. The repairs amounted to a structural alteration. This was required because a section of the Beam beyond the area included within the demise of the first-floor flat was failing. The work by its very nature was also something that the lease, by way of an absolute covenant, prohibits the tenant from carrying out.

8. Ms Fleckney, the lessee of the first floor flat, and Mr Brazier also supported Mr Staples in his view and agreed with his interpretation of the lease.

9. In contrast, Mr and Mrs Chalmers argued that the Beam belonged entirely to the first-floor flat. They pointed in their evidence to two solicitors' letters and also a letter from the Leasehold Advisory Service all of which concluded in these terms. Two surveyors had also arrived at the same conclusion that the Beam was within the demise of the first floor flat. The tribunal was informed that Ms Sebry, another leaseholder in the building, also supported this interpretation.

THE TRIBUNAL'S CONCLUSIONS.

10. The tribunal began by noting the description of the flat contained in the lease which reads - *all that flat being on the first floor of the building and shown edged red on the plan annexed hereto and including the floors of the flat and the joists and beams there under and the ceilings of the flat and subject to clause 8 the internal walls of the flat and the plaster on the walls and the internal surfaces the window frames and glass in the windows of the flat.*

11. Next, the tribunal referred to the lease plan and noted that the location of the Beam fell predominantly within the area edged red on the plan. From its inspection the tribunal had been able to observe that the Beam gains support from the party walls either side of the building and two small sections either end of the Beam extend beyond the main footprint of the flat. To this small extent only does the Beam extend beyond the red edging of the lease plan.

12. The tribunal noted that in clause 4.1.3 of the lease the tenant covenants- *to maintain uphold and keep the demised premises and subject to clause 8 all walls sewers drain pipes cables wires and appurtenances thereto belonging in good and tenantable repair and condition.*

13. By clause 4.1.5 the tenant agrees- *not to make any structural alterations or structural addition to the demised premises or any part thereof or remove any of the landlord's fixtures and fittings.*

14. The tribunal took note of two further clauses in the lease, namely clause 1 and clause 5.1.3. Clause 1 contains a definition of the building, which is stated to mean - *the whole of the property of which the premises hereby demised form part known as 53 Marine Parade Brighton together with the forecourts basement areas gardens and boundary walls adjacent thereto all of which is registered at HM land Registry under the above-mentioned title number.*

15. By clause 5.1.3 the landlord covenants - *to maintain and keep in good and substantial repair and condition the main structure of the building other than the demised premises and all other flats therein already or intended to be demised upon terms similar to these presents including the foundations the roof thereof with its gutters and rainwater pipes.*

16. During its inspection the tribunal was afforded an unimpeded view of the Beam and was able to see that the purpose of the Beam is firstly to provide support to the small outside area of the first-floor flat and secondly to provide support to the bay window serving the rear bedroom of the first-floor flat.

17. There is no structure either above or below the Beam other than the bay window, which as we have said is used solely by the first-floor flat.

18. Apart from the two end sections of the Beam, which gain support from the party walls either side of the building, the location of the Beam is entirely within the red edging on the plan annexed to the lease.

19. Taking all these factors into account we are satisfied that the Beam can properly be regarded as a beam belonging exclusively to the first floor flat. It supports the floor of the flat and is therefore part of the flat demise, the repair of which is the responsibility of the lessee pursuant to clause 4.1.3 of the lease. This interpretation is consistent with the repairing covenants of the lease as a whole. The repairing structure of the lease is designed so that all lessees share the costs of maintaining the structural and common parts of the building on the basis that they all directly or indirectly derive benefit from these items, whilst the costs of maintaining the individual flats are borne by the individual lessees where the benefit is not shared. The Beam is for the exclusive use of the leaseholder of the first floor flat and is not shared and no other flat derives any benefit from it.

20. We reject Mr Staple's contention that the replacement of the Beam can properly be regarded as either a structural alteration or structural addition. There have been no alterations. The configuration of the Beam before and after the work is essentially the same. In any event the existence of the covenant at clause 4.1.5 of the lease does not change the tribunal's view that the responsibility for the Beam rests entirely with the lessee of the first-floor flat. Clause 4.1.5 is a standard prohibition on making structural alterations or structural additions to the demised premises and as stated above the view of the tribunal is that the Beam works did not amount to a structural alteration or a structural addition, they were simply repairs to an existing structure.

21. The tribunal also considered the impact of clause 5.1.3 of the lease. The tribunal is satisfied that the wording of clause 5.1.3.1 specifically excludes the landlord's obligation to repair the demised premises. The lease is clear that the floors of the flat and the joists and beams there under form part of the demised premises and do not fall to be repaired by the landlord under clause 5.1.3.

22. Taking all these factors into account, the tribunal is satisfied that on a true construction of the lease, the Beam forms part of the demise of the first-floor flat and therefore the cost of repairs/replacement cannot form part of the service charge account.

23. Having regard to the conclusions reached in paragraph 22 above the tribunal has no jurisdiction to make a determination in respect of the application made by the Company for dispensation from the requirement to consult under section 20ZA of the 1985 Act .

THE CONSEQUENCES OF THE TRIBUNAL'S DECISION.

24. The tribunal was presented with conflicting and irreconcilable submissions as to who had instructed the Beam work and on whose behalf the contract was placed. However no evidence was presented to the tribunal that Ms Fleckney, the owner of the flat to which the Beam related by virtue of this decision had instructed the contractors to proceed with the Beam work and as the managing agents were not her agents they could not contract on her behalf.

25. By contrast the tribunal can see an argument that the Company has legally assumed liability for the work by the actions and communications of its board of directors and the managing agents. The tribunal noted that the Company has a share capital of four pounds divided into four ordinary one-pound shares of one pound each, one allotted to each lessee. The Company is therefore collectively owned by the lessees themselves and it is clearly not in their interests that the Company is left with a debt which it is unable to recover. The tribunal was handed a copy of the memorandum and articles of association of the Company and noted paragraph 16 of the articles of association which states that - *the members shall from time to time and whenever called upon by the company so to do contribute equally or in such proportions as the directors may determine to all expenses and losses which the company shall properly incur on their behalf and in respect of which they are not otherwise bound to contribute in their capacity as members.*

26. The tribunal can see a situation where this article is invoked so as to apportion the cost of the Beam works to the lessees of the building in an equitable way as part of a compromise solution, which recognizes the errors made. The compromise might recognise that whilst it is Ms Fleckney who has benefited from the works, she was not given a choice as to when and in what manner and to what specification the work was commissioned.

27. The tribunal stresses that these comments do not form part of its decision and indeed fall outside of its jurisdiction and accordingly no legal weight can be placed upon them. Nonetheless the tribunal expresses the hope that the parties will have regard to these observations and find an equitable solution, which involves sharing the costs of the Beam work, without the recourse to further legal proceedings, which are likely to be protracted, uncertain and expensive for all concerned.

Signed

Chairman _____
RTA Wilson LLB

Dated 7th January 2010