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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/OOAE/LSC/2017/0383**
Property	**:**	**Belvedere Court Willesden Lane London NW2 5RL**
Applicant	**:**	**Belvedere Court 2009 Limited & Ors.**
Representatives	**:**	**Mr G. Craig; Company Director**
Respondent	**:**	**Ms Barbara Davidovici**
Representative	**:**	**Ms Rachel Coyle of Counsel**
Type of Application	**:**	**For the determination of the liability to pay and reasonableness of service charges (s.27A Landlord and Tenant Act 1985)**
Tribunal Members	**:**	**Prof Robert M. Abbey (Solicitor) Mr Michael Mathews (FRICS) Mr Leslie Packer (Lay Member)**
Date and venue of Hearing	**:**	**5 February 2018 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**12 February 2018**

DECISION

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Decisions of the tribunal

(1) The tribunal determines that:-

(2) The demise of the 18 flats in the property excludes the windows, window frames and surrounding wood frames and sills to the intent that these parts of the property are retained by the lessor as part of the main structure of the property such as the main load bearing walls external walls and roof. Consequently the works are within the lessor's obligations under the terms of the leases of the property. This being so the costs of works to these parts are payable by the lessees under the terms of the leases of the property.

(3) The disrepair to the windows and the wood frames and sills justifies their replacement and replacement by double glazed units is permitted under the terms of the leases. (The tribunal noted that because the respondent at the hearing conceded the following two further points, the parties were in agreement that it was reasonable to replace the windows with metal framed units, (aluminium), rather than UPVC and that the leases permits on account payments for service charges). The respondent had also accepted that the wooden frames and sills were the responsibility of the lessor and as such did not form part of the demise of the several flats. Finally it was accepted by all parties that each lessee was bound to a service charge contribution of one eighteenth part under clause 4(c) of the leases.

The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charge payable by the respondent in respect of service charges payable for services provided for **Belvedere Court Willesden Lane London NW2 5RL**, ("the property") and the liability to pay such service charge.

2. The relevant legal provisions are set out in the Appendix to this decision. Additionally, rights of appeal are set out below in an annex to this decision

The hearing

3. The applicant was represented by Mr Craig, a Director of the applicant company and the respondent was represented by Ms Coyle of Counsel.

4. The tribunal had before it a trial bundle of documents prepared by the one of the parties, the applicant, in accordance with previous directions. At the hearing a respondent's trial bundle was also submitted and by agreement was also used by the tribunal in coming to

this decision. Additional copy paperwork was made available to the tribunal on the day of the hearing that was seen and approved by all parties and therefore added to the trial bundle. Legal precedents were also made available to the tribunal.

The background and the issues

5. The property which is the subject of this application comprises a six storey "T" shaped block constructed of red brick and cast reinforced concrete. It was built around 1950 and contains 18 purpose built flats of which 12 are three bedrooms units and 6 are two bedroom units. There are 179 windows and doors of varying sizes. All windows are steel framed Crittall single glazed units which have been painted white. The full extent of the demise of each flat in the property is an important issue that came before the tribunal and discussed at length below.

6. Neither party requested an inspection and the tribunal did not consider that an inspection was necessary in the light of the detailed and extensive paperwork in the trial bundle; nor would it have been proportionate to the issues in dispute.

7. The lessees of the flats in the property hold long leases and which requires the lessor to provide services and the lessees to contribute towards their cost by way of a service charge. The lessees must pay a fraction stipulated in their lease for the services provided. The actual fraction is expressed to be one eighteenth per flat. It was accepted by all parties to the dispute that this was the amount payable by each and every flat and the tribunal was able to determine that was indeed so. The issues the applicant raised covered the cost of replacing the windows in the property which the applicant says are in a poor state of repair and are in some cases in danger of falling out. (One window was recently replaced to ensure the safety of the structure). The applicant considers that the windows are for the lessor to repair. The respondent disagrees and says that the windows (as distinct from the wooden surrounds) are the responsibility of the eighteen lessees.

The Demise

8. The preliminary and main issue that came before the tribunal was on the extent of the demised premises as defined in the leases of the property, ("the lease"). The tribunal needed to be sure of the extent of the demise to then be able to make decisions about the nature and extent and cost of the service charges. The applicant wanted the tribunal to consider the lease terms to decide on who was responsible for the care of the windows as it was accepted by all the parties that the lease was not clear on this responsibility.

9. The demise in the lease is set out in the first page of the lease in clause two and it provides:-

> *The landlord hereby demises unto the lessee FIRST ALL THOSE several rooms and entrance hall part of the land comprised in the title above referred to and known as flat number 5 and situate on the south side of the first floor of the mansion known as and being "Belvedere Court" Willesden Lane Willesden in the London Borough of Brent the site of which mansion is delineated and coloured pink on the plan attached hereto...."*

At clause three of the lease there is a list of definitions but none really help to clarify the ownership of the windows, so the definition of the Mansion is "*the said mansion known as and being "Belvedere Court"....*". However one other definition is of "the landlord's premises". This is defined as being "*all the property edged red on the said plan and the Mansion and the garages or other buildings erected thereon or on a part or parts thereof respectively*". Accordingly, there is no explicit statement in the lease as to the precise ownership of the windows.

<u>Other relevant lease terms</u>

10. Clause 4(g) describes the lessees' repairing responsibility. This requires the lessee to keep the inside of the flat well and substantially repaired and maintained and thoroughly clean all windows in the lessee's flat so that it is kept in "good order and condition". The tribunal found this to be a significant description as it would seem to support the wording in the demise namely that the main structure of the whole building is maintained by the lessor while the interior only is the responsibility of the lessee such responsibility to include the cleaning of the windows..

11. Clause 4 (i) requires the lessee to paint all the inside wood and ironwork and does lease clause 4(j). Importantly clause 4(n) states that the lessee must not "*....make any alteration in the plan or elevation of the said buildings....or alter or change any of the materials or architectural decorations of the said building....*". Thus the replacement of windows by a tenant would in the opinion of the tribunal be in breach of this lease provision.

12. Clause 6(b) sets out what the lessor must do as its repairing covenant of the property. It states that

> *"The landlord will at all times during the said term keep the main walls (which expression shall include the external walls and all internal load bearing walls) and the reinforced concrete floors the roof drains and exterior of the Mansion....in good and*

substantial repair and decoration and in clean and proper order and condition and properly lighted".

13. Clearly this clause gives the main structure to the landlord for repairing purposes but does not explicitly refer to the windows.

Summary of the applicant's argument

14. The applicant says that the windows of the property are included within the demised premises and he relies upon the provisions of lease outlined above to substantiate this position. The applicant is of the view that, as the lessor is responsible for the repair of the "exterior" of the property, this must therefore include the windows. Because the demises do not include the main walls. This must mean that the lessor also retains the windows in the main walls.

15. The applicant also says that the disrepair of the Crittall windows justifies their replacement. They are now 60 years old, are single glazed, let in rainwater and due to the deterioration of the wooden frames and sills are in some cases potentially dangerous as they could fall out of the window apertures. The applicant relies upon a Defect and Condition Report from July 2014 issued by a Chartered Surveyor from Regents Property Consultants in which it is stated that the windows are beyond economic repair and should be replaced.

16. The applicant further says that the lease allows for the replacement of the single glazed units with double glazing as either a repair or by putting the property into "proper order and condition".

Summary of the respondent's argument

17. The respondent says that the lease must be read as a whole and that when one does so it is clear that the windows are not retained by the freeholder, but are in fact part of the demise to the respondent. To support this view the respondent initially relies upon clauses 4(g) window cleaning, 4(k) the yielding up provision, clause 4(n) the alterations clause where there is no mention of windows. The respondent asserts that the single paned windows are inside the lessees flats so that, whilst the wooden frame is part of the structure of the property, the windows are demised to the lessees.

18. The respondent also asserts that the disrepair of the windows does not justify their replacement. The respondent says that the panes themselves pose few problems and if there are dampness problems in the flats this is not from the single glazed windows but emanate from other issues such as the poor use of vents and fans. The respondent also says that the lease does not permit double glazing replacements as they would be improvements and not repairs.

Decision

19. The tribunal is required to consider which argument they prefer in their interpretation of this poorly constructed lease. The tribunal therefore sought precedent guidance to support their decision making process. The recent Supreme Court case of *Arnold v Britton and Others* [2015] UKSC 36 is extremely helpful in this regard. This case was about judicial interpretation of contractual provisions analogous to the dispute before the tribunal. The court held

> *"that the interpretation of a contractual provision, including one as to service charges, involved identifying what the parties had meant through the eyes of a reasonable reader, and ,save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision; that, 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 departure from the natural meaning; that commercial common sense was 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 was made....it was not the function of a court to relieve a party from the consequences of imprudence or poor advice".*

20. Accordingly the tribunal turned to the lease to try to identify what the parties had meant through the eyes of a reasonable reader. Starting at the demise it is clear that the original intention was to demise just the interior of the flats and this was done explicitly by only referring to the rooms and entrance hall. Then by turning to the repairing covenants for the parties, the tribunal noted that the lessees' covenant to repair just "the inside of the lessee's flat" and specifically is only required to "clean all windows" not keep them repaired or renewed. Furthermore the lessee is explicitly prohibited from making any alterations to the plan or elevation of the property. Then at covenant 6(b) the lessor must repair the main walls including specifically the external walls and all internal load bearing walls and concrete floors roof drains and the "exterior of the Mansion". The tribunal was satisfied that a reasonable reader when seeing these provisions would accept that the windows must be part of the lessor's responsibility particularly when having to repair "the exterior of the mansion". Therefore the tribunal determines that the windows are not demised to the lessees but remains with the lessor to maintain under the lessor's covenants.

21. As to the installation of double glazed units, the tribunal is mindful of the lessor's repairing covenant that required it to keep the main structure including the windows *"in good and substantial repair and decoration and in clean and proper order and condition"*. The tribunal

was of the view that this obligation is sufficient to enable the lessor to install double glazed units. The tribunal took the view that, when all parties agree that the wooden surrounds need to be replaced, the re-instatement of single-glazed windows would not be regarded as keeping the property 'in good order and condition', given both today's building technology, and single glazed windows' poor insulation characteristics.

22. In concluding this, the tribunal rejects the respondent's further suggestion that such works would be an improvement not permitted under the terms of the lease as they would amount to more than repairs. Whilst the obligation to repair is different from an obligation to "improve" or "renew", repairs often, inevitably, involve an element of renewal and improvement (*Ravenseft Properties Ltd v Davstone Holdings Ltd* (1980) QB 12). Thus the appropriate remedy for disrepair is often a question of fact and degree, industry norms, and expense. So in this High Court case from 1980 it was a question of degree whether the work carried out on a building was a repair or work that so changed the character of the building as to involve giving back to the landlord a wholly different building to that demised.

23. With regard to Belvedere Court the changing of windows from single to double glazed units could not be seen by the tribunal to be creating a new building or indeed making such changes as to alter the nature of the property. The windows were merely being replaced and nothing else. In summary, repair can amount to restoration by renewal or replacement of subsidiary parts of a whole such as we have in this dispute regarding the replacement of the windows.

24. For all the reasons set out above the tribunal is of the view that the windows are part of the main structure and for the lessor to maintain and for the lessees to pay for by way of the lease service charge provision. The tribunal were also of the view that the Crittall windows were in a state of disrepair that meant that they should be replaced and the tribunal were also of the view that the replacement windows could be by way of double glazed units. However what kind of double glazed units is for the lessor to reasonably decide in consultation with the lessees and to seek quotations in the usual way and for those quotations to be seen and approved by the lessees according to the statutory requirements of Section 20 of the Landlord and Tenant Act 1985.

Name:	Judge Professor Robert M. Abbey	**Date:**	12 February 2018

Appendix of relevant legislation and rules

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  (a) only to the extent that they are reasonably incurred, and
  (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

  and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination 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 and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.