



**Residential
Property**
TRIBUNAL SERVICE

**LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**

**DECISION ON AN APPLICATION UNDER SECTION 27A LANDLORD AND
TENANT ACT 1985**

Ref : LON/00AR/LSC/2011/0401

Premises: 3 Mildenhall House, Redcar Road, Romford, Essex RM3 9QB
Applicant: Mrs H Goldsmith
Respondent: London Borough of Havering
Application date: 15th June 2011
Decision date: 15th August 2011
Tribunal: Mr P Korn (Chairman)
Mr S Mason FRICS FCI Arb

BACKGROUND

1. This is an application for a determination of liability to pay and reasonableness of certain service charges, namely the Applicant's share of the cost of replacing the windows and window-frames of other flats within the building, the work having been carried out in 2010 and invoiced in 2011. The amount charged to the Applicant – being the amount in dispute – is £1,893.82.
2. The Applicant is the leaseholder of the Premises pursuant to a lease (“**the Lease**”) dated 9th November 1987 and originally made between the Respondent (1) and Mr T Lawrence (2). The Lease was granted

pursuant to the 'Right to Buy' provisions in Part V of the Housing Act 1985.

3. The Premises comprise a one bedroom first floor flat in a purpose-built block of flats.
4. For the reasons set out in Directions the Tribunal has decided (having first afforded to the parties the opportunity to request a hearing) to deal with this case on the papers alone and without a hearing.

THE APPLICANT'S CASE

5. The Applicant states that the Lease requires her to "*keep the Demised Premises ... including windows and window-frames ... in good tenable repair and condition ...*". She argues that she has done this at her own cost but that now the Respondent wishes to charge her through the service charge for the cost of replacing the windows of other flats in the block.
6. She submits that she should not have to contribute towards the cost of replacing other windows. Her argument seems to be based on the assumption that other leases contain similar provisions and that therefore the cost in each case is the direct responsibility of each individual leaseholder and/or that if she has an express obligation to keep her own windows in good condition it must follow that the service charge does not cover the cost of maintaining the windows in each individual flat.
7. In support of the Applicant's position her husband has provided a copy of a written opinion from Shoosmiths Solicitors dated 9th February 2010 in response to a request from him for advice on this issue. In particular Shoosmiths state that the tenant – not the landlord – is responsible for repairing and renewing, particularly in view of the express nature of the tenant's obligation in the Lease. Shoosmiths concede that the landlord's obligation to repair etc the main structure and exterior could include the windows in an appropriate case, that was not so in a case (as here) where the tenant had an express obligation to be responsible for the windows.
8. In their opinion Shoosmiths cite the cases of *Patrick v Marley Estate Management (2007) EWCA Civ 166* and *McDougall v Easington District Council (1989) 25 EG 104* but suggests that the latter case is probably not of much assistance in the present case.

THE RESPONDENT'S CASE

9. The Respondent's position relies on the written Opinion of its Counsel, Andrew Lane of Hardwicke Building.

15. Even if the windows are part of the demised premises, Mr Lane argues that the landlord is still responsible for their upkeep by virtue of Schedule 6 to the Housing Act 1985. This is on the basis that the Lease was granted pursuant to the 'Right to Buy' provisions in Part V of the Housing Act 1985 and that Schedule 6 applies to 'Right to Buy' leases. The relevant parts of paragraph 14 of Schedule 6 reads as follows:-

"(1) This paragraph applies where the dwelling-house is a flat.

(2) There are implied covenants by the landlord –

(a) to keep in repair the structure and exterior of the dwelling-house and of the building in which it is situated (including drains, gutters and external pipes) and to make good any defect affecting that structure;

(b) to keep in repair any other property over or in respect of which the tenant has rights by virtue of this Schedule;

(c) ...

(4) The County Court may, by order made with the consent of the parties, authorise the inclusion in the lease or in an agreement collateral to it of provisions excluding or modifying the obligations of the landlord under the covenants implied by this paragraph, if it appears to the court that it is reasonable to do so."

16. Mr Lane argues that by virtue of paragraph 14(4) of Schedule 6 all of the above implied covenants are incapable of being overridden otherwise than with the authority of the County Court.
17. Mr Lane goes on to state that in the light of the provisions of Schedule 6 of the Housing Act 1985 the real question is whether windows can properly be said to be part of the structure and exterior. On this point, in relation to the *Patrick* case cited by Shoosmiths Mr Lane notes that it did not concern a 'right to buy' lease and submits that the case only concerns the proper construction of the lease in that case itself.

THE 1985 ACT

18. Under Section 27A(1) of the 1985 Act "*an application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable ...*".
19. Under Section 18 of the 1985 Act 'service charge' is defined as "*an amount payable by a tenant ... as part of or in addition to the rent ... payable for services repairs, maintenance, improvements or insurance or the landlord's costs of management, and the whole or part of which varies or may vary according to the relevant costs*". 'Relevant costs' are defined as "*the costs or estimated costs incurred or to be incurred by or on behalf of the landlord ... in connection with the matters for which the service charge is payable*".

20. Under Section 19(1) of the 1985 Act "*relevant costs shall be taken into account in determining the amount of a service charge payable for a period ... only to the extent that they are reasonably incurred ...*".
21. On the basis of the above provisions, the Tribunal considers that it has jurisdiction to make a determination in respect of the charges in dispute.

APPLICATION OF LAW TO FACTS

22. The definition of demised premises in the Lease could be more clearly expressed and the Tribunal considers that it does contain certain ambiguities. However, the first issue would seem to be whether the Lease and the other leases place (or appear to place) responsibility for repair/renewal of windows and window-frames on the landlord or the tenant.
23. In the 'old' leases and the 'new' leases the tenant is expressly obliged to "*keep the demised premises ... including the windows and window frames of the demised premises ... in good ... condition*". Whilst it could be argued that the windows and window frames do not form part of the definition of the demised premises and that therefore the demised premises does not **have** any windows or window frames on which this obligation could bite this does not seem to the Tribunal to be a reasonable interpretation of the repairing clause. It seems reasonable to assume that the intention was for the windows and window frames to form part of the tenant's direct repairing obligation and therefore not part of the landlord's responsibility in the absence of a reference to the windows and window frames being expressly part of the landlord's repairing obligation and therefore not recoverable as part of the service charge.
24. In relation to 'new' leases, the position is slightly different, in that the windows and window frames are only expressed to be the tenant's responsibility "*where such units have been provided by the Lessee at his expense and with the Council's prior written approval*" and it will be a matter of factual analysis to establish how many leaseholders with 'new' leases provided the units at their own expense with the Council's prior written approval.
25. However, as Mr Lane submits, the statutory backdrop cannot be ignored. The Lease was granted pursuant to the 'Right to Buy' provisions in Part V of the Housing Act 1985 and is therefore affected by those provisions and by Schedule 6 to the same Act. Under paragraph 14(2)(a) of that Schedule there are implied covenants by the landlord to keep in repair the structure and exterior. Under paragraph 14(4) those implied covenants can be excluded or modified by order of the County Court with the consent of both parties, and the Tribunal agrees with Mr Lane that it follows that they cannot be excluded or modified **without** an order of the County Court. There is no evidence that such an order has been obtained, and therefore the issue is whether

– **regardless** of the express wording of the Lease or any of the other ‘right to buy’ leases the windows and window frames form part of the structure and/or exterior.

26. Having considered the cases cited by Mr Lane and by Shoosmiths, the Tribunal prefers the interpretation of Mr Lane. Whilst the Tribunal is not technically bound by decisions of the Upper Tribunal such decisions are highly persuasive and it is considered that the Tribunal should follow them in the absence of compelling reasons not to do so. The decision of George Bartlett QC in *Sheffield City Council* is clear and whilst he leaves the door open for a different decision in an exceptional case the Applicant has offered no evidence to persuade the Tribunal that this case is exceptional in that sense.
27. Shoosmiths have cited the *Patrick* case but have not explained it in detail nor have they indicated that they were necessarily aware that this was a case to which Part V of the Housing Act 1985 applies. In any event, from the limited information that the Tribunal has been given to support the Applicant’s position it does not seem clear that the Court was expressing a general principle and it would seem that the case turned on its own particular facts.
28. Therefore the Tribunal is of the view, on the basis of the evidence submitted, that the Lease and the other leases contain an implied covenant on the part of the landlord to keep the structure and exterior in good repair, that the windows and window frames form part of the structure and/or of the exterior, that the express wording of the tenant’s repairing covenant does not affect this analysis by virtue of paragraph 14(4) of Schedule 6 to the Housing Act 1985 and that therefore the renewal of the windows and window frames in other flats are the landlord’s responsibility. The cost of such works of renewal properly form part of the service charge.
29. The Applicant has not challenged the **amount** of the cost of renewing the windows and window frames.

DECISION

30. It is hereby determined that the Applicant’s contribution of £1,893.82 towards the cost of renewing windows and window frames in the block is payable in full.
31. The Applicant has applied for an order under Section 20C of the 1985 Act that none of the costs incurred (or to be incurred) by the Respondent in connection with these proceedings can be added to the service charge. As the Tribunal has found in the Respondent’s favour and the Respondent has dealt with the matter perfectly properly the Tribunal does not consider it appropriate to make any such order.