FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/00KF/LSC/2019/0013**
Property	**:**	1 Capel Terrace, Southend-on-Sea SS1 1EX
Applicant	**:**	Peter Wislocki
Respondent	**:**	Elizabeth Barrick
Representative	**:**	Miss England (counsel)
Type of Application	**:**	to determine reasonableness and payability of service charges for the year 2019 [LTA 1985, s.27A]
Tribunal Members	**:**	G K Sinclair, R Thomas MRICS & O N Miller BSc
Date and venue of Hearing	**:**	Monday 10th June 2019 at Southend-on-Sea Magistrates Court
Date of decision	**:**	22nd July 2019

DECISION

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1. This is an unusual application, as counsel for the respondent was keen to stress that the parties had not fallen out, remained friends, but that they disagreed on

the precise interpretation of certain provisions in the standard-form lease and therefore on their respective liabilities to pay under the service charge provisions.

2. The application seeks answers to five questions :
   a. Is "decoration" equivalent to "maintenance" including repairs and replacement of elements which cannot simply be decorated due to disrepair?
   b. Is the balcony demised to the tenant?
   c. Regardless of whether it is demised to the tenant, is the balcony and its balustrade an element of the building's exterior which should therefore be maintained and decorated at the landlord's expense?
   d. Are external doors, including those giving access to the balcony, elements of the building's exterior which should therefore be maintained and decorated at the landlord's expense?
   e. Are windows elements of the building's exterior which should therefore be maintained and decorated at the landlord's expense?

3. For the reasons which follow the tribunal determines that :
   a. No, decoration is not equivalent to maintenance. It is limited to painting or papering, with appropriate preparation work
   b. Yes, the balcony is used exclusively by and accessed through the upper maisonette. Although the lease plan is inadequate and fails to include the balcony it is part of or appurtenant to the demised premises
   c. The balcony and balustrade are not only part of the exterior of the building, the decoration of which are service charge costs, but they are also an integral part of the design of the building and – as part of its main structure – the cost of maintenance and repair are also recoverable under the service charge
   d. The external doors, including those giving access to the balcony, form part of the exterior of the building and the decoration costs are recoverable as service charge costs. They are not part of the main structure
   e. Windows are part of the exterior and, in the case of the two projecting windows at the side and rear of the building, they are also essential and significant structural elements of each projecting box and therefore form part of the main structure of the building.

Background

4. The subject premises comprise an end-terrace house at the junction of Capel Terrace and Alexandra Road, in a conservation area one block back from the Cliff Gardens and seafront just to the west of the town centre. It has been sub-divided into a ground floor flat and a first and second floor maisonette, with the two lessees also being joint freeholders. Recently, after leaks from the ceiling above the first floor bay window at the front of the maisonette, significant repairs were required to the balcony which partly rested upon top of it.

5. The work involved repairing the roof above the bay window and rebuilding and reconfiguring the balcony decking, plus repairing or replacing individual sections of ornate cast iron balustrade before repainting the whole. The balcony serves only the applicant's maisonette, and the parties disagree about who is responsible for the cost of repair. Is it the responsibility of the applicant alone or of both lessees, through the service charge provisions in their respective leases?

Disputed lease provisions

6. The tribunal was initially surprised that the lease of the applicant's maisonette which was included in the main bundle was dated 8th May 1975, granting a term of 99 years from that date. By the time of the hearing the unexpired term would therefore be just under 55 years, making it by then unmortgageable. Fortunately, however, the respondent also produced a bundle which not only included a lease of her flat dated 19th September 1990, also for a term of 99 years from 8th May 1975, but two more recent leases. These were :
   a. A surrender and lease of the maisonette dated 26th February 2010 between Elizabeth Margaret Barrick & Hannah McCulloch Watkins (landlord) and Hannah McCulloch Watkins (tenant), for a term of 99 years from that date at a stepped ground rent and various indemnities, but otherwise subject to the same terms and covenants as contained in the original lease
   b. A deed of variation dated 22nd June 2016 between Peter Michael Wislocki & Elizabeth Margaret Ann Barrick (landlord) and Elizabeth Margaret Ann Barrick & Joanne Sara Dron (tenant), varying the lease of the flat by extending the term of the lease to 99 years from that date, at a peppercorn rent. Save for those amendments the terms of the 1990 lease continued in full force for the duration of the extended term.

7. Ms Watkins was Mr Wislocki's predecessor in title as tenant. The terms of the two new or extended leases have therefore diverged, and in neither case was the statutory method of obtaining a lease extension employed.

8. On the provisions material to this application, however, the obligations remain similar – save that by clause 4(2) of the respective leases the maisonette shall contribute and pay two thirds of the costs expenses outgoings and matters mentioned in the Third Schedule while the liability of the flat is one third.

9. Beyond a recital that "the flat" means "the interior faces of such exterior walls which bound the flat the floor structure and ceiling and includes all systems tanks drains pipes wires ducts and conduits within the same limitations" and a brief demise of "the first floor and second floor maisonette" (or "the ground floor and lower ground floor flat") "as shown for the purposes of identification only on the plan annexed hereto and there edged red" the lease is unhelpful. In each case the red outline on the lease plan is exactly the same. Neither shows the balcony. The demise of the maisonette does however also include the garden coloured green on the plan. Each demise includes the easements rights and privileges mentioned in the First Schedule.

10. The first covenant imposed on the tenant, by clause 4(1), is to :

    Keep the demised premises (other than the parts thereof comprised and referred to in sub-clauses (4) and (5) of clause 6 hereof) and all walls party walls sewers drains pipes cables wires and appurtenances thereto belonging in good and tenantable repair and condition and in particular (but without prejudice to the generality of the foregoing) so as to support shelter and protect the part of the building other than the demised premises.

11. Clause 6 contains the landlord's covenants, and sub-clause (4) and (5) provide :

    (4) That the landlord will maintain repair decorate and renew (a) the main

structure the foundations and in particular the roof chimney stacks and rainwater pipes of the building and (b) the gas and water pipes drains and electric cables and wires in under and upon the building and enjoyed or used by the tenant in common with the owners and lessees of the other flat (c) the boundary walls and fences of the building (d) the main entrances passages landings and staircases of the building so enjoyed or used by the tenant in common as aforesaid

(5) That the landlord will so often as reasonably required decorate the exterior of the building in such manner as shall be agreed by a majority of the owners or lessees of the flats comprised in the building or failing agreement in the manner in which the same was previously decorated or as near thereto as circumstances permit and in particular will paint the exterior parts of the building usually painted with two coats of good paint at least once every three years.

12. The above provisions, clearly lifted from a template lease for a building with more than two lessees and shared landings and staircases, therefore limit the extent of the tenant's repairing obligations in clause 4(1).

13. The costs to which the tenants must contribute in two thirds / one third shares appear in the Third Schedule. These include at paragraph 1 the expense of maintaining repairing and redecorating and renewing the main structure of the building, its boundary walls and fences, and the main entrance. Paragraph 2 adds the cost of decorating the exterior of the building and paragraph 5 the cost of building insurance.

Relevant statutory material

14. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :

> 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...

15. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
    a. only to the extent that they are reasonably incurred, and
    b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

    Section 19 is not relevant to this enquiry.

16. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

17. Please also note sub-sections (5) & (6), which provide that a tenant is not to be

taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement)[1] is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the Tribunal under section 27A.

Inspection and hearing

18. The tribunal inspected the premises at 10:00 on the morning of the hearing. At the time of the inspection it was raining and sunken parts of the exterior near the front door (which is accessed not from Capel Terrace but from Alexandra Road) had substantial puddles. From a shared entrance door the applicant's front door to the right of a small lobby leads up a winding set of internal stone steps to the first floor. A second staircase leads up to the top floor, from whence one can access the balcony to the front of the building through one room and out via an external doorway. This door is a recent replacement; the previous one having badly decayed.

19. The building is probably Edwardian, and of a very similar style as the others in the terrace. The building at each end has a long top floor balcony, with most of the houses in between having a smaller balcony just over the two-story bay. The buildings at the northern end are rendered and painted, like the subject property at the opposite end. The rest have a plain brick finish, save for some stucco around front entrance arches and some bay windows.

20. At the front of the building (i.e. facing Capel Terrace and the small park on the other side of the road) a bay projects at ground and first floor levels. On the second floor a balcony with ornate cast iron balustrade extends almost but not quite the full width of the building. It is supported for the main part by iron brackets anchored into the front wall, and to the left end (when looking from the street) by the top of the bay. Photographs show that the balcony originally lay directly over the roof of the bay, surfaced with square floor tiles. Now, rebuilt, a gap has been left and the timber balcony decking is slatted to facilitate drainage. Extensive work has been done to refurbish, repair or replace entire cast iron sections of the balustrade before repainting it.

21. On the top floor a room facing on to Alexandra Road (see the photograph on page 38) and one at the rear, overlooking the yard, have projecting box sections, like oriel windows supported on more cast iron brackets, and in which the timber windows comprise approximately 75% of each box and the entire structure apart from a small panelled section below and a flat roof above.

22. The kitchen is on the first floor, to the rear. An external doorway leads from here to a large external timber deck with table and chairs above the ground floor rear extension of the downstairs flat. Behind the door is a timber shed built against the rear wall, for the exclusive use of the maisonette. An external timber staircase leads down to the rear yard, also within the demised premises of the maisonette.

23. The tribunal saw no need to inspect the interior of the ground floor flat, as the

[1] Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

issues all relate to work undertaken to the applicant's maisonette.

24. The hearing lasted an hour and a half. Mr Wislocki, an architect, represented himself while the respondent instructed counsel. The facts were not in dispute; merely the interpretation of the lease provisions, and whether the past conduct of the respondent and the applicant's predecessor in title regarding repairs and redecoration might alter their obligations under the leases.

25. Each party submitted a written statement of case, with the respondent making more lengthy written submissions as well.

26. Having consulted the Leasehold Advisory Service, the applicant referred to and submitted short summaries of the following legal authorities (case law) : *Hallisey v Petmoor Developments Ltd*,[2] *Sheffield City Council v Oliver*,[3] and *Irvine v Moran*.[4]

27. The respondent in turn relied upon *Methuen-Campbell v Walters,*[5] *Rendlesham Estates plc v Barr*[6] and, in oral argument, the definition of "appurtenant property" in section 112 of the Commonhold and Leasehold Reform Act 2002.[7]

28. In the respondent's statement of case and in oral argument certain other questions were raised, such as whether the rear external staircase and the shed on the rear deck were appurtenant to the applicant's demise, and so his exclusive responsibility.

Discussion and findings

29. In considering the definition of such words as "structure", "main structure" and "decorate" the tribunal found various passages in the current edition of *Dowding & Reynolds*[8] to be of great assistance.

30. In determining the extent of a covenant to repair one must look first to the lease and definition of the demised premises. One may also consider the plan, if any, although in the instant case that is not very helpful when considering the finer detail. One must also consider to what extent an item is properly appurtenant to

2 [2000] 11 WLUK 17; [2000] EG 124 (CS)– The whole of a roof terrace forming the roof of another flat was part of the exterior fabric and included within the landlord's repairing covenant.

3 [2008] 8 WLUK 192; LRX/146/2007 – External windows on a dwelling-house or building could be part of its structure or exterior for the purposes of the Housing Act 1985 Sch.6 para.14(2)(a)

4 [1991] 1 EGLR 261; (1992) 24 HLR 1 – The "structure" of a dwelling-house consisted of those elements of the overall dwelling-house which gave it its essential appearance, stability and shape.

5 [1979] QB 525, CA – The word "appurtenance" will not be understood to extend to any land which would not pass under a conveyance of the principal subject matter without being specifically mentioned; that is to say, to extend only to land or buildings within the curtilage of the principal subject matter

6 [2014] EWHC 3968 (TCC) (Edwards-Stuart J) – A dwelling, as well as the individual apartment described in the lease, may possibly extend to other parts of the building which the occupiers of the apartment have in practice exclusive access of living – such as their balcony

7 ...any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the building or part or flat

8 *Dowding & Reynolds : Dilapidations : Law and Practice* (6th ed – 2018, Sweet & Maxwell)

the demised property, is a projection form it, or a fixture that was present at the commencement of the lease, and thus to be enjoyed with the premises demised. However, the tribunal must first consider what constitutes the "main structure" and then whether that includes anything attached to it.

31. In *Irvine v Moran* Mr Recorder Thayne Forbes QC provided what the Court of Appeal in *Grand v Gill*[9] later described as a "good working definition" of the word "structure" by observing :

> I have come to the view that the structure of the dwellinghouse consists of those elements of the overall dwelling house 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.

32. The authors of *Dowding & Reynolds* argue, at 7–38, that despite this "good working definition" :

> ...the question of what constitutes the structure in any particular case will ultimately depend upon the proper construction of the lease in question. In many cases, the lease will itself provide some guidance as to what is meant. Where that is not the case, the correct approach will be to seek to identify those parts of the uilding that, having regard to the language and scheme of the lease as a whole, the objective background facts known to both parties at the date of the lease and the guidance given by the above cases, the parties must be taken to have regarded as comprising the structure. In the case of a separate, self-contained building, these will include, at the very least, all those parts of it which have to do with its stability and protection from the elements. On this basis, the structure of a traditionally built building will extend on any view to the roof, foundations and load-bearing walls. Depending upon the circumstances, it is likely to include other items as well.

33. At 7–39, they suggest that the expression "main structure" will generally indicate a more restrictive meaning than "structure" alone. As always, however, the question is one of construction in every case.

34. Finally, it is worth noting *Blundell v Obsdale Ltd*,[10] in which a house was let containing a tenant's repairing covenant which expressly excluded liability for "structural repairs to the foundations roof main walls and drains." Harman J did not attempt any definition of "structural repairs", but held that repairs to a balustrade forming the boundary of a balcony at first-floor level were not within the exception. His reasoning was that it was not a wall at all, still less a main wall, and in any event, the repairs were not structural because the balustrade was not part of the structure but was simply a "piece of decoration."

35. Applying the facts of this case the tribunal respectfully disagrees. The covenant in *Blundell* excluded liability for structural repairs to "main walls". The covenant in this case refers merely to the "main structure". Further, while Harman J did not regard a balustrade as a wall, and that it was simply "a piece of decoration",

9 [2011] 27 EG 78

10 (1958) 171 EG 491

those seeking to apply Part 1 of the Housing Act 2004 and the provisions of the Housing Health and Safety Rating System would take a very different view. The balustrade is both an essential safety feature and, by tying back into the wall at each end, creates a box structure that provides the balcony with some structural integrity.

36. At 7–41 the authors turn to the meaning of the term "exterior" :

> Prima facie, the "exterior" will include all external parts of the building or unit, i.e. the roof and the structure supporting it, chimneys, external cladding, all outside gutters and pipes, outside walls and external doors. It will generally also include windows and window frames. Thus, in *Ball v Plummer*[11] the landlord of a public house covenanted to do "outside repairs". It was held that this included windows, "the windows being part of the skin of the house".

37. In *Holding & Barnes v Hill House Hammond Ltd*,[12] however, Neuberger J disagreed with the submission that the expressions "structure and exterior" were to be read as covering much the same thing. He said that it was arguable, for instance, that the outside of the windows or doors are not part of the "structure", but they are undoubtedly part of the "exterior."

38. The Cambridge English Dictionary definition of "decorate" is "to paint the inside or outside of a house or put paper on the inside wall." According to *Dowding & Reynolds*, at Chapter 15, an obligation to decorate usually arises in one of two ways: as part of the work required under a covenant to repair, or by virtue of an express covenant to decorate. Even if the covenant to repair makes no express reference to redecorating previously painted parts, the covenant will ordinarily apply both to the painted surface and the underlying fabric – but to what extent?

> In considering the extent to which the obligation requires the covenantor to repaint, two aspects of the law relating to the general covenant must be borne in mind: first, no work is required until the subject matter of the covenant is in a damaged or deteriorated condition; and second, no remedial work is required until the nature of the relevant damage or deterioration is such as to bring the subject-matter below the contemplated standard. It follows that a covenant to repair does not oblige the covenantor to do any painting until the condition of the existing paintwork is defective to such an extent as to fall below the appropriate standard.[13]

39. An express covenant to decorate does not relieve a tenant of its obligation to do so under its repairing covenant, but the covenant to decorate is additional to it. In the Australian case of *Gemmell v Goldsworthy*[14] Cleland J said that :

> The term to paint every two years is absolute and unconditional. It had to be done whether it was apparently necessary or not, whereas the duty under the term to repair was to 'keep up' the condition of the painting

[11] (1879) 23 SJ 656

[12] [2000] L&TR 428

[13] *Dowding & Reynolds*, at 15–03

[14] [1942] SASR 55

during the intervening period of two years only if and when it was necessary and proper to do so.

40. It follows that “decorate” cannot be equated with “maintain”, as argued for by Mr Wislocki. It is a more limited covenant in scope, but if required to be done with a specified frequency then it must be done, whether objectively necessary or not.

41. The tribunal therefore determines that :
    a. “Decorate” cannot be equated with “maintain”. It is an entirely separate covenant
    b. The balcony is property only accessible to and enjoyable with the upper maisonette, and is thus at least appurtenant property, even if not formally demised
    c. The balcony is part of the main structure, for maintenance purposes, and is also part of the exterior, to be decorated as a service charge expense
    d. External doors are part of the exterior, for decoration purposes, but are not part of the main structure for purposes of maintenance and repair
    e. The outside of the windows also form part of the exterior. However, in the case of the two projecting windows at the side and rear of the building, they also comprise essential and significant structural elements of each projecting box and thus are part of the main structure of the building : see the photographs at pages 38 and 48 of the main bundle.

42. Some additional points were raised by the respondent. The tribunal considers that the rear decking outside the appellant’s first floor kitchen is appurtenant to the maisonette, as are the external steps leading down to the rear yard which is expressly demised with the maisonette. While the shed has been built against the rear wall, the tribunal does not regard it, unlike the balcony, as an integral part of the structure or main structure of the building. Responsibility for the repair of all these items therefore lies with the lessee of the maisonette. As part of the exterior, however, their decoration is a legitimate service charge expense.

Dated 22nd July 2019

Graham Sinclair
First-tier Tribunal Judge