FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AM/LSC/2020/0072** **LON/00AU/LSC/2020/0093**
Property	**:**	**Maygood House, Maygood Street, London N1 9QR**
Leaseholder	**:**	**Mr John Bryan (1); Simon Ralph (2) and 20 other lessees whose names are appended to the Landlord's applications**
Representative	**:**	**In person**
Landlord	**:**	**R Trading Company 1 Ltd**
Representative	**:**	**Mr Justin Bates of Counsel**
Type of application	**:**	**Liability to pay service charges and dispensation application**
Tribunal member	**:**	**Judge W Hansen** **Andrew Lewicki FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Hearing	**:**	**24-25 August 2020**

DECISION

Determination

(1) The Tribunal determines that the windows within each flat at Maygood House, Maygood Street, London N1 (including the glass within them) fall within the landlord's repairing obligation contained in Clause 5(3) of the Leases dated 27 June 1984 and 16 March 1988 respectively.

(2) Save as aforesaid, the Tribunal makes no determination in relation to the Landlord's application (LON/00AU/LSC/2020/0093), the Landlord having abandoned that application (insofar as it related to the reasonableness of a proposed scheme to replace the windows at Maygood House) and agreed to re-tender the proposed window works having first commissioned a fresh window survey and engaged in a further statutory consultation process.

(3) The Tribunal rejects Mr Bryan's challenge (LON/00AM/LSC/2020/0072) in relation to the service charge years 2018 and 2019 and determines that each of the charges which were the subject of challenge were payable and reasonable. The Tribunal makes no determination in relation to advance service charges demanded in 2020 in respect of costs to be incurred, Mr Bryan having abandoned such challenge (without prejudice to his right to challenge the actual costs if and when they are incurred).

(4) The Tribunal makes an Order under section 20C of the Landlord and Tenant Act 1985 that the Landlord shall not be entitled to add the costs incurred in connection with these proceedings (LON/00AM/LSC/2020/0072 & LON/00AU/LSC/2020/0093) to the service charge.

Reasons

1. Maygood House, Maygood Street, London N1 is a 1930s purpose-built block of 30 flats on 5 floors. The Landlord owns 8 of the flats. The remaining 22 are individually owned on long leases. Mr Bryan, the tenant of Flat 24, seeks a determination under section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable or would be payable. The issues relate to the 2018, 2019 and 2020 service charge years. In relation to 2020, the issue

relates to the Landlord's proposal to replace all the windows in the block (see below). Mr Bryan 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 his 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.

2. Separately, the Landlord has made two applications itself (under case reference LON/00AU/LSC/2020/0093). One application is a section 27A service charge application for the 2020 year relating to its proposal to remove and replace all single-glazed windows and linings and timber repairs and to replace them with double-glazed units. The other application is a section 20ZA application for dispensation with compliance with the statutory consultation requirements insofar as they required the Landlord to give leaseholders slightly longer in which to make Stage 2 observations. All leaseholders of the block (including Mr Bryan) have been named as respondents to these applications.

3. In the event, the proceedings have taken a very unusual course. The Landlord's proposal was that a contractor called Rope Works London Ltd ("Rope Works") would carry out the window replacement scheme at a total cost of £442,870.22 including VAT and professional fees. The total number of windows replaced was to be 224, involving a mixture of flat windows and communal windows, in varying states of repair. In anticipation of this proposal proceeding, we were told that the Landlord's managing agent has collected, by way of service charge, approximately £340,000. However, by the time of the hearing Rope Works had ceased to exist and was on the point of being struck off the register of companies. We were told that the business of the company had been split between two new companies owned and controlled by the same people that owned and controlled Rope Works and that one of these new companies would now carry out the work at the same tender price as previously offered by Rope Works

4. The general body of tenants, as represented before us by Mr Ralph, the tenant of Flat 13 and a member of the recognised residents association, want their flat windows replaced but have no confidence in Rope Works and maintained that the communal windows were not in need of replacement or repair. Mr Bryan contended that the relevant leases did not, on their true construction, permit what he said would be an improvement and that in any event, the proposal was

unreasonable, in particular because no proper consideration had been given to viable alternative proposals, including proposals to repair, rather than replace, at much less cost. The evidence, he submitted, suggested that only about 25% of the windows actually needed replacement, and that the rest could be repaired. The Landlord favoured uniformity for aesthetic and other reasons and appeared intent on proceeding with replacement of all the windows in the block, both flat and communal windows. Mr Bryan also submitted that the glass within the windows was demised to the tenant and it was therefore the tenant's responsibility to repair the glass.

5. As the hearing progressed, it became clear to the Tribunal that there were numerous difficulties with the scheme as proposed. Rope Works had, on 2 March 2020, applied to the Registrar of Companies to be struck off and dissolved. Little was known about the new company that was proposed to undertake the work. Mr Rubens appeared to accept in his evidence that the communal windows did not need replacement. The alternative option of repair had not been as fully explored as it should have been. The evidence about the condition of the windows was now somewhat out of date, dating as it did from 2018.

6. As a result of the above, Mr Bates took instructions overnight and on the morning of day 2 indicated that his instructions were as follows:

> *My instructions are that the freeholder considers that, in light of the indication, the best way forward is to re-tender the proposed works. It therefore proposes to:*
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> *(a) commission a fresh window survey (the previous survey dating from mid-2018) to review the present condition of all the windows; and*
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> *(b) engage in a further statutory consultation in which quotations will be obtained for both 'repair' and 'replacement' of the windows.*
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> *That being so, the Freeholder will not be pursuing the present application insofar as it relates to the reasonableness of the proposed replacement works (i.e. the s.19, Landlord and Tenant Act 1985 issues). The dispensation application also falls away as the consultation process to which it related will not now be taken forward.*
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> *It does, however, still seek a determination as to the "in principle" issues concerning who has responsibility for the windows (i.e. the clause 5(3) issue) which arises both in the application issued by Mr Bryan and in the application issued by the freeholder.*
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> *The remaining issues on the "day to day" service charges which form part of the application issued by Mr Bryan also remain live and will require a determination.*

7. In the light of that indication, we have considered the best way forward and decided that we should deal with the issue relating to responsibility for the windows by reference to the terms of the relevant leases. However, we are not dealing with the repair/improvement issue raised by Mr Bryan as this is entirely or largely fact sensitive and can only properly be dealt with when there is up-to-date evidence about the condition of the windows and a concrete proposal as how any disrepair should be remedied. Nor, for obvious reasons, will the Tribunal now be dealing with the reasonableness of the proposed replacement works or the dispensation application which simply falls away. The parties appeared content that the money collected thus far in anticipation of a window repair/replacement scheme should remain with the managing agent in anticipation of a new proposal and none of the parties invited us to make any determination as to the reasonableness of the sums collected in advance.

8. We propose therefore only to deal with (i) the issue of who has responsibility for repairing the flat windows (including in particular whether the landlord's responsibility extends only to the frames and does not include the glass); (ii) the issues relating to the day-to-day service charges for 2018, 2019 and 2020 as raised by Mr Bryan but excluding his complaints that certain costs had come in under budget and his complaint in relation to the demand for £19,000 to pay for internal decorations, these points having been formally abandoned by him in the course of argument.

9. *Issue (i): Lease Interpretation*. Mr Bryan is the original lessee. He holds under a lease dated 27 June 1984 for a term of 99 years from 25 December 1983. The Demised Premises are described as a "*self-contained suite of rooms … on the third floor*". They are further identified in the First Schedule as "*including the internal plastered coverings and plaster work of the walls bounding the demised premises but not the doors and door frames and window frames in such walls but including the glass fitted in such window frames…*" Under Clause 5(3)(a) the landlord covenants "*To maintain and keep in good and substantial repair and condition (i) the main structure of the Building including the principal internal timbers and the exterior walls and the foundations and the roof thereof with its main water tanks main drains gutters and rain water pipes (other than those included in this demise or in the demise of any other flat in the Building*".

10. Under Clause 4(5) the tenant covenants "*To repair maintain renew uphold and keep the Demised Premises and all parts thereof including so far as the same form part of or are within the Demised Premises all windows glass and doors locks fastenings and hinges … in good and substantial repair and condition*".

11. Mr Bates submits that the windows form part of the main structure and that the whole of the window, including the glass, is within the scope of the landlord's repairing covenant at Clause 5(3). He relies principally on *Sheffield City Council v Oliver* (LRX/146/2007) and the following underlined passages within that decision:

> *15. The covenant in paragraph 14(2) of Schedule 6 to the 1985 Act applies by force of the statute. It is implied in every lease to which the paragraph applies, whatever covenants may be expressly included in the lease. The requirement under (a) is "to keep in repair the structure and exterior of the dwelling-house and the building in which it is situated." The principal question that arises is whether the external windows are part of the structure and/or the exterior of the maisonette and/or the building. Authority on the question is to be found in Irvine v Morgan [1991] 1 EGLR 261, a decision of Mr Thayne Forbes QC sitting as a Deputy Judge of the Queen's Bench Division. The provision under consideration in that case was section 32(1)(a) of the Housing Act 1961, which implied in any lease of a dwelling-house to which the section applied a covenant "to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes)", effectively, therefore, the same covenant as that to be implied under paragraph 14(2)(a). The issue was whether certain items, including external sash windows, were within the scope of the covenant. The judge held that they were both part of the structure and part of the exterior of the dwelling-house.*
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> *16. At 262 F-G the judge said:*
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> > *"I have come to the view that the structure of the dwelling-house consists of those elements of the overall dwelling-house which give it its essential appearances, stability and shape. The expression does not extend to the many and various ways in which the dwelling-house will be fitted out, equipped, decorated and generally made to be habitable.*
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> > *I am not persuaded … that one should limit the expression 'the structure of the dwelling-house' to those aspects of the dwelling-house 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 dwelling-house', that in order to be part of the structure of the dwelling-house 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 something is or is not part of the structure of the dwelling-house."*
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> *17. Having considered some of the other items that were in dispute, the judge referred at 262M-263B to the windows:*
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> > *"Windows pose a slightly different problem. I have some hesitation about this, but bearing in mind that one is talking about a dwelling-house, 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 dwelling-house in its essential material elements, I have come to the conclusion that windows do form part of the structure of the dwelling-house. 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 dwelling-house, it seems to me that an essential and material element in a dwelling-house, using ordinary common sense and an application of the words 'structure of the dwelling-house' 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 the 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 dwelling-house."

18. The judge further held that the windows were part of the exterior of the premises. At 263 C-D he said:

"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 section 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 dwelling-house it would follow one 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. The passage I have set out in paragraph 16 above was cited with apparent approval in Ibrahim v Dovecorn Reversions Ltd [2001] 2 EGLR 46 by Rimer J in construing the meaning of "main structure" in a repairing covenant. And in Marlborough Park Services Ltd v Rowe [2006] 2 EGLR 27 in the Court of Appeal, in which the issue was whether certain parts of a building were within the term "main structures" in a covenant to repair, Neuberger LJ, having quoted this passage, said (at 29 C-D):

"[17] Although I accept, as I have emphasised, that words such as 'structure' or 'main structures' must take their meaning from the particular document, lease or stature in which they are found, and from the surrounding circumstances, and although 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."

20. The decision in Irvine v Morgan in relation to the windows was consistent with an earlier decision of the Court of Appeal in Quick v Taff Ely Borough Council [1986] 1 QB 809, which also concerned the application of section 32(1)(a) of the 1961 Act. The house in that case suffered from severe condensation and the question was whether the council were required under the implied covenant to carry out works, including the replacement of windows, in order to alleviate the condensation. The council accepted the findings of the judge at first instance that the windows formed part of the exterior and probably part of the structure of the house (see at 811 F), and it is clear that each of the lords justices also had no difficulty in accepting those findings (see Dillon LJ at 819G, Lawton LJ at 823B and Neill LJ at 823D).

> *21. Other earlier authority, such as it is, seems to me to support the judge's conclusions in Irvine v Morgan. In Ball v Plummer, The Times 17 June 1879, noted in 23 SJ 656 and referred to by Bankes LJ in Boswell v Crucible Steel Co [1925] 1KB 119 at 121, the Court of Appeal held that a lessor was bound under a covenant to do external repairs to mend broken windows, which, Bramwell LJ said, were "part of the skin of the house". In Pearlman v Harrow School [1979] QB 56 the issue was whether certain works constituted structural alterations to a building. At 79D Eveleigh LJ noted the suggested definition of "structural" by the judge at first instance as "Appertaining to the basic fabric and parts of the house as distinguished from its decorations and fittings" and said that in his opinion the judge had the right conception of what Parliament meant by structural.*
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> *22. Each of these cases, Ball v Plummer and Pearlman, concerned different provisions from those in the present case, in one instance external repairs and in the other structural alterations (and in Irvine v Morgan the judge said at 262J that he did not find Pearlman particularly helpful), but it seems to me that the concept of windows as part of the skin of the house and the concept of the structure as the fabric of the building are illuminating and, I think, supportive of the conclusions in Irvine v Morgan. In principle, therefore, in my judgment, for the purposes of paragraph 14(2)(a) external windows will constitute both part of the structure and part of the exterior of the building or the dwelling-house to which they belong. It would be wrong to say that they will do so in every case, since facts are infinitely variable, but there is nothing to suggest that the metal-framed windows in the present case are exceptional.*

12. Mr Bates relies in particular on the passage from *Irvine v Moran* in which the learned Judge held that the "*windows themselves, the window frames and the sashes do form part of the structure"* and that *"it would be invidious to separate the cords from the sashes and the essential furniture from the frames".*

13. Mr Ralph agrees with Mr Bates. Mr Bryan did not ultimately press the alternative view that strongly. His concern appeared to be that there should be certainty going forward as to who was responsible for repairing the windows, including the glass within them. This landlord positively avers that it is responsible for repairing the entirety of the windows but Mr Bryan was concerned that a new landlord might contend that the windows or the glass within them were the tenant's responsibility. That is a possibility that we cannot preclude but any finding by this Tribunal on the proper construction of the lease would, absent a successful appeal, bind these parties and would constitute a significant obstacle in the way of any later attempt by, for example, a new freeholder, to re-open the subject.

14. Before resolving the issue of interpretation, we should also record the fact that Mr Bryan's lease appears to be atypical to this extent: only one other lessee appears to hold under a lease in identical terms, namely Flat 2, although it is

possible that the leases for flats 4, 16 and 29 are also in these terms. However, the vast majority hold under a lease in which Clause 4(5) is worded slightly differently (see underlining) as follows: "*To repair maintain renew uphold and keep the Demised Premises and all parts thereof <u>including all parts for which the lessors are responsible under Clause 5(3) hereof but</u> including so far as the same form part of or are within the Demised Premises all windows glass and doors locks fastenings and hinges … in good and substantial repair and condition*".

15. We raised with the parties whether where the word "*including*" first appears in this clause, it should in fact be "*excluding*". There was substantial agreement that this would make more sense. We are satisfied that this is an obvious error which we can legitimately correct as part of the process of interpretation. It clearly makes no sense otherwise for obvious reasons. The principal repairing obligations were clearly not intended to overlap in this way. In any event, we have concluded that any difference in wording between the two forms of lease makes no difference to the outcome. We conclude, for the reasons that follow, that the landlord is responsible for repairing and maintaining the flat windows, including the glass within them.

16. We agree, following the *Sheffield City Council* case and the body of law contained therein, that in these leases, the main structure includes the windows. It clearly includes the window frames which are expressly excluded from the definition of the Demised Premises. It is right that the glass within the windows is demised to the tenant. If Mr Bryan or another tenant wants the glass within the window frames, he would in principle be entitled to it. But the repairing obligation in Clause 4(5) clearly does not extend to the window frames as they are not part of the demised premises (we agree with Mr Bates that the words "*including so far as the same form part of or are within the Demised Premises"* are important in this regard) and it would be "*invidious*", to use the language of Thayne Forbes QC, to separate the window glass from the window frames when considering the parties' repairing obligations in relation to the flat windows. Whilst the leases are not well drafted, we are satisfied that the contractual language does not compel what we regard as an invidious and impractical solution. Having regard to the language of the leases and construing the relevant language in the appropriate documentary, factual and commercial context, we are satisfied that on the true construction of these leases the landlord is responsible for repairing and maintaining the flat windows,

including the glass within them. The parties explored whether there might be an overlapping but more limited responsibility on the tenant in relation purely to the window glass. We express no view on this, as it does not ultimately affect our view on the principal issue of interpretation.

17. *Issue (ii): Day-to-day service charge items*. Most of these issues either fell away entirely or were the subject of very brief submissions. We propose to deal with the issues that remain equally briefly. Mr Bryan's complaints are set out under paragraph 9 of his Statement of Case (pp.185-186). As previously indicated, Mr Bryan has abandoned his complaint across all three years in question that actual costs were routinely and repeatedly coming in *under* budget, thereby suggesting that the managing agents were making unreasonable demands for advance service charge. For the avoidance of doubt, we find that the budgets set were reasonable and not demonstrative of mismanagement. Any overpayment is adjusted via the service charge in the following year in accordance with the terms of the lease (para 4, Fifth Schedule). We accept Mr Rubens' evidence contained at paragraphs 6-7 of his statement dated 10 July 2020.

18. *2018*. In terms of specific challenges to actual costs incurred, for 2018 Mr Bryan complains firstly about the cost of communal lighting suggesting that the lights were on for longer than they should have been thereby wasting money. We reject this complaint and accept Mr Rubens' evidence contained at paragraph 11 of his statement dated 10 July 2020. We find that the provision of communal lighting and the manner of its provision was entirely reasonable. Mr Bryan then complains about the operation of the reserve fund. We reject any criticism of this and are satisfied that it is being operated properly in accordance with the terms of the lease (Clause 5(3)(k)). Finally, he challenges the management fees of £11,000 and contends for a reduction of 10%. We make no reduction and consider the sum claimed reasonable. This appears to be a Building that requires fairly intensive management and when the total is pro-rated over the number of flats it is reasonable.

19. *2019*. In terms of the budgetary issues, we repeat what we said above and reject any complaint in relation to the budgeted costs. In relation to the reserve fund, management fees and communal lighting costs, we repeat our previous observations and reject any challenge to these items. Mr Bryan complains about the gardening costs on the basis that there is no garden but we accept Mr

Rubens' evidence that these modest charges are incurred when contractors are brought in to deal with encroaching overgrowth from plants, bushes and trees belonging to neighbours. Mr Bryan did not pursue his point about the cost of repairing a window and patio door.

20. *2020*. The principal item under challenge for this year was the window replacement proposal and associated costs but this has now been withdrawn and we have dealt above with the only issue that was still live following the withdrawal of that proposal, namely the issue of lease interpretation. In relation to the other challenges raised by Mr Bryan for this year, they have either been abandoned by Mr Bryan or can be rejected on the basis of our observations above.

21. *Section 20C*. The tenants seek an order under section 20C of the Landlord and Tenant Act 1985.

22. The Tribunal has a discretion in the matter which must be exercised having regard to what is just and equitable in all the circumstances: *Tenants of Langford Court v. Doren Ltd* (LRX/37/2000).

23. In relation to every lessee other than Mr Bryan, whilst making no concession, Mr Bates realistically acknowledged that the Tribunal was likely to make a section 20C order in relation to the costs of these proceedings and we do so, having no doubt that it is just and equitable in all the circumstances, the Landlord having abandoned the window replacement scheme that was the main subject of these proceedings.

24. In relation to Mr Bryan, Mr Bates submitted that a percentage order was appropriate to reflect the fact that he, unlike the other tenants, contended that the leases did not permit the Landlord to replace the glass in the windows and to reflect his failure on the day-to-day service charge items.

25. However, these two cases were, in substance, about the window replacement scheme. Yes, an issue of construction had to be determined, but Mr Bryan, along with the other lessees had legitimate concerns about many other aspects of the scheme which ultimately led the Landlord to abandon that scheme.

26. Apart from the lease construction issue, in respect of which the Landlord required a determination, and the issues around the window replacement scheme, the other issues took up a matter of minutes.

27. In all the circumstances, we have concluded that it is just and equitable to make the same section 20C order in respect of all the tenants specified in the Landlord's application.

Name: Judge W Hansen **Date:** 2 September 2020