FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	CHI/23UE/LSC/2023/0067
Property	**:**	Wallbank House, 22a Denmark Road, Gloucester, GL1 3HZ
Applicant	**:**	Wallbank House (Manager) Limited
Representative	**:**	Colmore Gaskell
Respondents	**:**	The Leaseholders of Wallbank House
Type of application	**:**	For the determination of the payability and reasonableness of service charges under section 27A of the Landlord and Tenant Act 1985
Tribunal member	**:**	Judge H. Lumby
Venue	**:**	Paper determination
Date of decision	**:**	22 May 2024

DECISION

Decision of the tribunal

The tribunal determines that the sum for window replacement in the 2024 service charge budget for the Property amounting to £4,200 is not payable by the Respondents.

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the payability of a charge of £4,200 in respect of the installation of windows in the 2024 service charge year. The Applicant is not seeking a declaration as to the reasonableness of that cost, just whether it is payable pursuant to the Respondents' leases.

2. The total amount in dispute is £4,200.

3. The Applicant has not sought costs orders pursuant to section 20C of the 1985 Act or pursuant to paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002 and this has not been considered by the tribunal.

The background

4. The Property is a purpose block of flats containing one and two bedroom apartments.

5. The Applicant is the freeholder of the Property and the Respondents are the leaseholders.

6. The application relates to Flat 11 where there have been issues with the windows which the Applicant believed were a health and safety risk. New windows have been installed by the Respondent. Both parties seek determination as to who is liable to pay for the windows pursuant to the Respondent's lease on the basis that the lease is silent on the responsibility for maintenance and replacement of flat windows.

7. The application was submitted on 10 May 2023 with just Mr William Crane as leaseholder of the Flat 11 identified as the respondent. Directions were issued by the tribunal on 24 October 2023 for a case management hearing to be held on 8 November 2023. At this hearing, various issues with the original application were identified including the tribunal's jurisdiction to determine the dispute and the identity of the respondents. The Applicant was directed to submit a revised application addressing the various issued raised by 24 November 2023.

8. The revised application was submitted on 1 December 2023 and accepted by the tribunal. The revised application identifies a sum for window replacement in the 2024 service charge budget amounting to £4,200 and seeks a determination as to whether this is payable by the leaseholders of the Property. All leaseholders are now a party to the case and together comprise the Respondents.

9. Further directions were issued by the tribunal on 22 December 2023. This required, amongst various actions, that the Applicant submit the bundle for the tribunal's determination by 5 March 2024. No bundle was received by that date and so on 19 March 2024 the application was struck out by the tribunal for non-compliance with directions but subsequently reinstated on 29 April 2024 following submissions to the tribunal.

10. This has been a determination on the papers. The documents that the tribunal was referred to are in a bundle of 81 pages, the contents of which the tribunal have noted. The bundle contained the original application, a revised application, a specimen lease of an unidentified unit, title and budget information, the tribunal's directions in the case, a statement of case from the Applicant, a response to that statement by Mr Crane, a payment agreement, a further statement of Mr Crane, a photograph and various emails.

The lease

11. The bundle contains a lease dated 24 May 1983 for a term of 120 years from 1 January 1983. The number of the flat demised by this lease is not apparent from the copy provided, although from looking at the office copy entries provided for the Applicant's title, it would appear to be a copy of the lease of Flat 6 on the ground floor as that is the only lease listed with that date and for that term and with that term commencement date. No confirmation has been provided that all the leases of the Property are in similar form, although the lease contains a recital that all leases will be on substantially the same form and a covenant by the landlord not to dispose of other residential units other than in the same or similar form to this lease. The tribunal has therefore worked on the assumption that this form of lease will be applicable to all the Respondents, including the leaseholder of Flat 11.

12. The lease defines the demised premises as

> "the property and premises described in the First Schedule hereto together with all additions and improvements at any time and from time to time made thereto and all fixtures of every kind which shall from time to time be in or upon the said property (whether originally affixed or fastened to or upon the same or otherwise) except such tenant's fixtures as can be removed from the said property without defacing the same and where the context so admits shall include any part thereof and the easements rights and privileges appurtenant thereto granted or arising hereby"

13. The First Schedule describes the demised premises as including:

> "ALL THAT self-contained flat or residential unit comprising and being numbered on the floor of the premises forming the Entire Property known as Wallbank House Denmark Road Gloucester and lying between a horizontal plane following the line of the lower edge of the floor structure forming the floor of the said flat or residential unit and another plane following the lower edge of the floor structure of the floor of the flat above or as the case may be of the roof immediately above the said flat as the same is shown on the plan annexed hereto and thereon edged in blue"

The demise also includes a car parking space which is not relevant for these purposes.

14. Clause 5(2) of the lease contains a covenant by the landlord:

> "To keep in repair the structure including the foundations and roof and the exterior of the demised premises including drains gutters and external pipes and keep in repair and proper working order the installations contained within the amenity land or the common parts for the supply of water gas and electricity and for sanitation provided that this covenant shall not be construed as requiring the Landlord to carry out any works for which the Tenant is liable by virtue of his duty to use the demised premises in a tenant like manner or would be liable apart from any express covenant on his behalf nor shall it be construed as requiring the Landlord to re-build or re-instate the demised premises (other than the main structure) in a case of damage or destruction by fire or by tempest flood or other inevitable accident or to keep in repair or maintain anything which the Tenant is entitled to remove from the demised premises"

15. Paragraph 5 of the Fourth Schedule to the lease contains the tenant's repair and decoration covenants as follows:

> "(1) At all times during the said term when and as often as need shall require well and substantially to cleanse repair support and uphold the demised premises save and except the condition and decoration fo [sic] the surfaces of the external parts thereof as respects general condition decoration cleanliness and tidiness and it is hereby declared that the generality of these provisions shall in no way be restricted by any of the sub-paragraphs of this paragraph
>
> (2) Once in every five years of the said term and in the last year thereof (whether determined by effluxion of time or in any other way) to paint in a proper and workmanlike manner all the inside wood and ironwork usually painted of the demised premises with two coats of good paint and so that the internal painting in the last year of the said term shall be of a tint or colour to be approved by the Landlord and also with every such internal painting to whitewash colourwash distemper grain varnish paper and otherwise decorate in a proper and workmanlike manner all such internal parts of the demised premises as have been or ought properly to be so treated
>
> (3) To execute all such works as are or may under or in pursuance of any Act or Acts of Parliament already or hereafter to be passed or as may be directed or

required by any District Council Local or Public Authority to be executed at any time during the said term upon or in respect of the demised premises or any part thereof whether by the Landlord or the Tenant thereof"

16. The lease only contains obligations to pay maintenance charges to the "Management Company". This is defined as Wallbank House (Managers) Limited. The lease refers to an agreement to transfer what the amounts to the freehold reversion of the Property to that company; Wallbank House (Managers) Limited is the registered proprietor of the freehold and the Applicant in this case. There are no obligations to pay maintenance charges to the landlord.

17. Clause 2 of the lease contains the grant of the lease to the tenant and includes a requirement to pay:

"to the Management Company such sum as the Management Company may by Annual General Meeting resolve from time to time as the sum to be paid by each and every residential unit for the upkeep cleaning and lighting of the amenity or common areas of the entire property"

18. This is supplemented by a covenant by the tenant in the Fourth Schedule to the lease to:

"pay to the Management Company such sum as shall from time to time be required for the maintenance and upkeep of the amenity area or common parts of the Entire Property"

"Amenity land" is defined as:

"all that land and garden in common usage by each and every one of the said residential units or provided by the Landlords for the benefit or better enjoyment of each and every one of the said residential units"

"Common parts" are defined as:

"all the foundations and the roof of each and every one of the residential units together with the landings and stairs drying room and storage accommodation provided within the said premises for the use and enjoyment of every one of the said residential units and further the entrance drive footpaths and the area of tarmacadam to be provided for visitors or communal car parking"

The "Entire Property" is defined as:

"the property of the Landlord shown edged red on the said Plan"

The plan provided is unclear but the tribunal is satisfied that it at least encompasses the whole building in which the flats are located.

Submissions by the parties

19. The Applicant's case is that the lease does not include windows within the demise and the lease does not specifically state that their repair is the responsibility of the landlord. It therefore argues that the leaseholders are responsible for their own windows which it states has been the custom in the past.

20. Mr Crane argues that section 5-2 of the lease makes it clear that the landlord is responsible for window maintenance. He contends that the landlord is obliged under that clause to maintain the structure of the building which would include the windows. He further submits that the Applicant had agreed to pay for the windows to be replaced then retracted that agreement, leaving the windows open and causing higher electricity bills to be incurred through an additional need to heat the flat. He is therefore seeking damages from the Applicant because of its treatment of him.

Tribunal determination

21. The issue to be determined is whether the budget cost of £4,200 for the replacement of the windows in Flat 11 of the Property is payable by the Respondents.

22. As a preliminary point, the tribunal only has jurisdiction to determine whether the costs of installation of the windows if charged by the landlord is payable by the leaseholders and if so whether the amount demanded is reasonable. It does not have powers to award damages of the nature sought by Mr Crane.

23. Having considered all of the documents provided, the tribunal has made determinations on the issue in question as follows.

24. In deciding whether the cost of the replacement of the Flat 11 windows was recoverable as a common maintenance charge, the tribunal began by considering whether the windows were in the demise. The Applicant's position is that they are not within the demise. As they are not expressly included or excluded, it is a question for the tribunal of interpreting relevant definitions.

25. The plan provided with the lease shows the demise line drawn around the interior of the flat, suggesting an internal demise. The definition in the First Schedule specifies the extent of the demise as "a horizontal plane following the line of the lower edge of the floor structure forming the floor of the said flat or residential unit and another plane following the lower edge of the floor structure of the floor of the flat above or as the case may be of the roof immediately above the said flat". The tribunal determines that this means the demise lies between the lower edge of its

floor and the lower edge of the floor or roof above. The reference to floor structure suggests it also includes the beams beneath the floor. More importantly, the demise extends as far as the floor extends but no further. This means that it is an internal demise which does not extend into the external walls and by extension any windows within it.

26. The definition of demised premises states that the demise includes all fixtures in it (with non-relevant exceptions) so the next question is whether a window is a fixture or part of the structure. This was considered in the case of *Irvine v Moran [1991] 1 EGLR 261* where the court held that the "structure of the dwelling-house" extended beyond the load-bearing parts of the property in question. The court held that a material part of the structure of a building included the windows and therefore found that windows were part of the structure. It also found that the windows formed part of the exterior of the property.

27. This approach was applied by the Lands Tribunal in the case of *Sheffield City Council v Oliver [2008] EWLands LRX/146/2007* where the tribunal found that the external windows of a property were both part of its structure and part of its exterior. In that case, the tribunal allowed costs of doing works to the windows to be recoverable through the service charge.

28. These cases are consistent with the external windows in this case not being fixtures but instead being part of the structure of the Property as a whole. Accordingly, the tribunal determines that the external windows do not form part of the demise and instead form part of the building's structure.

29. The tribunal next considered whether external windows fall within the landlord's or the tenant's repairing obligation, irrespective of whether it was part of the demise.

30. The tenant's repair obligations are set out in paragraph 5 of the Fourth Schedule to the lease. These only relate to the demised premises and contain an additional carve out of "the condition and decoration fo [sic] the surfaces of the external parts thereof as respects general condition decoration cleanliness and tidiness". This somewhat torturously worded exception is a carve out from the tenant's obligations of the cleaning and decorating external parts of the demise which the tribunal concludes relates to the demised car parking space. The tenant's repair obligations are not extended to include the windows. Accordingly, the tribunal determines that the tenant is not responsible for the repair of the windows.

31. Turning to the landlord's repair obligation, there is again no express reference to the windows. However, it is obliged by clause 5(2) of the lease to "keep in repair the structure including the foundations and roof and the exterior of the demised premises". Applying the *Irvine v Moran*

case referred to above and the tribunal's determination on this issue, the windows form part of the structure and are therefore caught by clause 5(2). In addition, as it has been determined that the windows form part of the exterior of the demised premises, this emphasises that it is the landlord who is responsible for repairing the windows. The landlord's covenant extending to the exterior of the demised premises also means that the repair of the windows will be the landlord's responsibility even if the windows were included within the demise.

32. As a matter of interpretation of the law, an obligation to keep in repair extends to obligation to replace an item where beyond repair.

33. Accordingly, the tribunal determines that the landlord is responsible for replacing external windows within the Property.

34. The final issue is whether the landlord or the management company can recover the cost of windows repairs from the leaseholders.

35. As referred to above, only the management company has a right to recover the cost of repairs through the maintenance charge. Clause 2 requires contributions by tenants towards "the upkeep cleaning and lighting of the amenity or common areas of the entire property", echoed by a tenant covenant in the Fourth Schedule to pay "such sum as shall from time to time be required for the maintenance and upkeep of the amenity area or common parts of the Entire Property". Amenity areas refer to external common parts whilst the common parts include "the foundations and the roof" of each flat and communal areas within the building.

36. Accordingly, neither the amenity areas nor the common parts include the walls of the building. This will include the flat windows within it. As a result, neither the landlord nor the management company can claim service charges contributions towards the repair or replacement of windows by the landlord. As a result, the tribunal determines that the Applicant cannot recover the cost of repairing or replacing the windows in Flat 11 from the Respondents.

37. Accordingly, the tribunal determines that the sum for window replacement in the 2024 service charge budget for the Property amounting to £4,200 is not payable by the Respondents.

Rights of appeal

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.