



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/00HN/LSC/2014/0015

Property : Flat 8, Eversleigh, 48 West Cliff Road,
Bournemouth, Dorset, BH4 8BB

Applicant : Eversleigh Flats Management
Company Limited

Representative : Coles Miller, Solicitors

Respondent : Mr D G H Gilmour and Mrs H M
Gilmour

Representative : -

Type of Application : Service charges : section 27A of the
Landlord and Tenant Act 1985 ("the
1985 Act")

Tribunal Members : Judge P R Boardman (Chairman),
and Mr A J Mellery-Pratt FRICS

**Date and venue of
Hearing** : Decided on the papers without a
hearing

Date of Decision : 8 April 2014

DECISION

© CROWN COPYRIGHT 2014

Introduction

1. This application concerns balcony repairs to the Property, one of 13 flats in the building known as Eversleigh. The cost of the repairs,

according to a tender from Southstreet (Builders) Limited dated 6 January 2014, will be between £3546.66 and £3848 plus VAT. The Applicant seeks a determination :

- a. whether the works are a landlord's obligation, and, if so :
 - whether the Applicant has the ability to recover the costs by way of service charge, assuming that the leases of all the flats in the building are in the same terms as that for the Property
 - and, if so, whether the costs are reasonable, subject to consultation pursuant to section 20 of the 1985 Act
 - b. or whether the works are a tenant's obligation
2. The parties have both asked the Tribunal to determine this matter on the papers without a hearing
 3. The documents before the Tribunal are contained in a bundle, paginated 1 to 48. At the Tribunal's request, the Applicant's solicitors have sent the Tribunal page (2) of the lease of the Property, which had been missing from the bundle. The Tribunal has paginated that page 41a. References in this decision to page numbers are to page numbers in the bundle, unless otherwise stated

The lease of the Property (pages 39 to 48)

4. The material parts of the lease are as follows :

Particulars (page 40)

5(a) The Flat : *no 8 on the 2nd floor of the Building.....*

6 The Address : *Eversleigh, 48 West Cliff Road, Bournemouth*

7 The Building : *the block of flats of which the Flat forms part including all common parts and appurtenances exclusively serving the Building*

13 The Estate : *the Landlord's development of a block of thirteen residential flats at the Address.....*

Clause 3 : Tenant's covenants with the Landlord (page 41a)

(5)(a) subject to the liability imposed on the Company by virtue of clause 4 hereof to keep the demised premises and every part thereof and all additions thereto in good and substantial repair and condition

(6) not to alter the demised premises either externally or internally or to cut or maim or injure any structural part thereof or erect or suffer to be erected any further building or addition upon the demised premises or make or suffer to be made any external projection from the demised premises

(7) at all times during the said term to keep the interior of the demised premises in a good decorative order and condition.....

Clause 4(1) : Company's covenants with the Landlord and the Tenant (page 43)

(a) that the Company will at all times during the term hereby granted keep the foundations main walls timbers roofs main drains and sewers and the exterior and internal parts including the staircases

halls passages and such other internal parts as shall or may from time to time be used in common (or made available for common use) by the tenants of the Estate of (i) the Building.....in good and substantial repair and in clean and proper order and condition and properly lighted

(c) the Company will.....in every third year of the said term.....prepare as necessary and paint all external surfaces of the Building (including balconies).....

The First Schedule Part I : description of the demised premises (page 46)

(A)the Flat.....

(B) there shall be included in this demise :

(vi) all window frames and the glass therein

(vi) the upper horizontal surface of the balcony or terrace (if any) exclusively serving the Flat and the air space between the said surface and a line in prolongation with the level of the ceiling of the Flat

(vii) the floor and.....the horizontal structure between the floor of the demised premises and the ceiling of any part of the Building immediately below the said floor

(C) there shall be excepted from this demise :

(ii) the outer and load bearing walls of all buildings on the Estate and any walls rails or surrounds of any balcony or terrace

The Second Schedule : restrictions and stipulations (page 47)

4 Not to use the Amenity Area or any outside parts of the Building or the Flat for the purpose of hanging or drying clothes.....

8 Not to affix or exhibit.....to or upon any part of the exterior of the demised premises or within the same so as to be visible from the exterior thereof any placard.....

**Opinion of Michael Norman on behalf of the Respondent 27
January 2014**

5. Mr Norman stated that water had penetrated the Property, in the region of the balcony door. The balcony comprised a concrete slab cantilevered from, and an integral part of, the concrete slab of the second floor of the building. It was protected by an asphalt waterproofing membrane, over which were decorative tiles. It appeared to be common ground that the water penetration was because of a defect in the asphalt covering. The tender from Southstreet (Builders) Limited dated 6 January 2014 spoke of various cracks in the asphalt, the predominant crack being to the perimeter wall between the horizontal asphalt and the vertical face of the perimeter detail. The conclusion was that the balcony surface was defective, probably on the flat surface itself, along the vertical upstand and at the junctions with the balustrading posts. The remedy advised was to strip and re-cover the asphalt surface to the balcony area, and to supply and fix a trim to the perimeter edges and to dress the asphalt into the trim
6. Mr Norman set out what he said were agreed to be the relevant provisions of the lease

7. Since the tenant's repairing obligation was made subject to the management company's repairing liability, the first question was to ascertain the extent of the management company's obligation
8. Clause 4 of the lease imposed a repairing obligation in relation to the exterior parts of the building. The balconies were exterior parts of the building. They were exterior to the main walls and were not enclosed but were open to the elements
9. Therefore, regardless of the definition of the demised premises, the lease imposed on the management company repairing obligations in relation to the whole balcony
10. The separation of demise (defining the space which the tenant was entitled to occupy) from responsibilities (defined by the parties' respective repairing responsibilities) was an approach recognised by an LVT in a case concerning Flat 3, 4 Thirlmere Road, London SW6 1QW (LON/00AY/LSC/2008/02/00)
11. The damage requiring remedial works was to the asphalt waterproof covering of the balcony. That was part of the exterior, which was the responsibility of the management company
12. In any event, the demise included only *the upper horizontal surface of the balcony or terrace (if any) serving the Flat and the airspace between the said surface and a line in prolongation with the level of the ceiling of the Flat*. By including the upper horizontal surface of the balcony within the demise, all that was included was the surface for the tenant to walk on, not the structure of it. That resonated with the LVT's approach already quoted, namely that the demise defined the space which the tenant was entitled to occupy. There was no justification for notionally attaching the asphalt membrane to the tiles so as to characterise it as a component part of the surface. The purpose of the asphalt was to provide water penetration protection, not to provide a walking surface, and was therefore not within the demise

Opinion of Coles Miller Solicitors LLP on behalf of the Applicant 10 February 2014

13. Coles Miller stated that the Applicant had now purchased the freehold of the building, and accordingly now fulfilled the functions of both the landlord and the management company under the lease
14. Coles Miller set out what they said were the relevant terms of the lease
15. It appeared to be agreed that the extent of the works required were set out in the tender from Southstreet (Builders) Limited dated 6 January 2014, that the landlord had an obligation to repair the exterior of the building, and that the tenant had an obligation to repair the demised premises

16. The points in dispute were :
 - a. whether the *exterior of the building* included the balcony and its surface (tiling, waterproofing and asphalt)
 - b. whether the *upper horizontal surface* of the balcony within the definition of the demised premises included the tiling, waterproofing and asphalt
 - c. if so, in each case, whether the words *subject to* before the tenant's covenant in clause 3(5)(a) had a bearing on the responsibility to maintain and repair the surface (tiling, waterproofing and asphalt)
17. The *exterior of the Building* included the balcony (page 19). The definition of *the Building* with the use of the word *appurtenances* within item 7 of the Particulars made that clear
18. The landlord's covenant in clause 4 made no reference to the balcony of the Property. The clause referred to the foundations and main walls of the Building and then went on to refer to the exterior of the Building. The construction of the words following the words *the* and *exterior* appeared to assist. Given the construction of the following words and the second inclusion of the words *internal parts*, the words *the exterior* could be set apart from the words limiting the landlord's obligations. The words *such other internal parts as shall or may from time to time be used in common* therefore amounted to another obligation, not tied to the obligation to maintain the *exterior of the Building*
19. The *upper horizontal surface* of the balcony included the tiling, waterproofing and asphalt. Part I of Schedule 1 defined the demised premises, and specifically set out what was and what was not included within the demise. The word *surface* at B(vi) could be interpreted as the tiling, waterproofing and asphalt placed upon the structure
20. The use of the words *any walls rails or surrounds of any balcony terrace* at (C)(ii) clearly excluded the structure from the demise
21. The use of the word *upper* assisted in detracting the reader from the structure and attracting the reader to the surface. It simply did not follow that the use of the word *upper* could mean less than the surface, tiling and waterproofing, ie potentially nothing at all. A practical example was the breaking of a tile by the tenant, which should result in the tenant being responsible for repairing it. That was further supported by the obligation (by reference to (B)(vii) of part I of the First Schedule) to maintain and repair the floor within the interior of the flat
22. The use of the words *horizontal* and *surface* following the word *upper* further assisted in detracting the reader from the structure, the vertical surfaces (ie the sides) and the "lower" horizontal surface (ie beneath)
23. Leases had to be read and construed as a whole : **Delbale Limited v Amara Perinpanathan** [2005] EWCA Civ 1724 and **Dorrington Belgravia Limited v McGlashan** [2010] L&TR 3. When

interpreting overreaching terms, such as *exterior*, which clearly had a very wide meaning, a more detailed consideration had to be given to the interpretation of the lease as a whole

24. Clause 3(6) contained a covenant by the tenant *not to alter the demised premises either externally or internally.....or suffer to be made any external projection from the demised premises*. That clause demonstrated the tenant's further responsibilities in connection with external aspects of the demised premises
25. Paragraph (B)(iv) of Part I of the First Schedule specifically included in the demise *all window frames and the glass therein*, whereas that could equally be regarded as falling within the definition of the *exterior of the Building*
26. Paragraphs 8 and 14 of the Second Schedule illustrated further responsibility of the tenant in connection with the external aspects of the premises
27. These contrasting provisions had to be considered when forming a wide conclusion about the responsibilities under the lease. The clear specific provisions, such as those set out, had to prevail in illustrating the parties' intentions, over and above a wide-ranging "catch-all" provision such as that contained in clause 4(1)(a)
28. The extent of the works was as set out in the tender from Southstreet (Builders) Limited dated 6 January 2014. The landlord had an obligation to maintain and repair the *exterior of the Building*. The tenant had an obligation to maintain and repair the *demised premises*. The *exterior of the Building* included the balcony and its surface (tiling, waterproofing and asphalt). The *upper horizontal surface* of the balcony, within the definition of the demised premises, included the tiling, waterproofing and asphalt. The words *subject to* before the tenant's covenant in clause 3(5)(a) did not have a bearing on the responsibility to maintain and repair the surface (tiling, waterproofing and asphalt). On balance, the tenant was obliged to repair the balcony tiling, waterproofing and asphalt

The Respondent's schedule of points of agreement and dispute

29. The Respondent summarised the issues and the parties' respective arguments
30. The Respondent also set out the Respondent's response to the opinion of Coles Miller
31. In relation to the question whether the *upper horizontal surface* of the balcony within the definition of the demised premises included the tiling, waterproofing and asphalt, the Respondent's case was that that issue was also and independently decisive. There were two arguments:
 - a. that *surface* meant no more than the "space over" – ie did not even include the tiling

- b. that the asphalt waterproof membrane was functionally part of, or an element of, the structure and not of the surface, if the surface was, or included, the tiling
- 32. Additionally, the word “upper” excluded an interpretation which would include a layer (the asphalt waterproofing membrane) **below** the tile
- 33. The arguments of Coles Miller
 - a. did not explain why the waterproofing membrane was not part of the structure
 - b. were misleading [in their arguments set out in paragraph 21 of this decision] because on either of the Respondent’s arguments it included the surface, albeit on one argument [set out at paragraph 30a of this decision] only a space and on the alternative argument [set out at paragraph 30b of this decision] the tiling but not the waterproofing; thus on neither potential interpretation advanced by the Respondent did the demise in this respect include *potentially nothing at all*
- 34. In relation to the question whether the words *subject to* before the tenant’s covenant in clause 3(5)(a) had a bearing on the responsibility to maintain and repair the surface :
 - a. the arguments by Coles Miller did not explain why the express subordination of the tenant’s covenants of repair to the landlord’s covenants of repair should be overridden or ignored
 - b. neither of the cases relied on by Coles Miller were of any assistance on the questions in this case, as they each addressed the scope of the demise where the words of the sub-leases in question were not explicit; they offered no help to Coles Miller to make good their apparent argument that the tiling and the waterproofing asphalt membrane were together the *upper horizontal surface* or to demonstrate why the words “subject to” in the context of the clear repairing covenants should be ignored even they were correct on the scope of the demise

Inspection

- 35. The Tribunal inspected the Property at 12.00 noon on 8 April 2014. Also present were Mrs J Cain, director and secretary of the Applicant, Mrs Gilmour and Mr Gilmour
- 36. Patio doors led from the lounge to the balcony. Concrete tiles formed the surface of the balcony. An upper layer of tiles had been removed, and stacked in one corner. The perimeter of the balcony had glass panels between stainless steel stanchions which were set into the concrete upstand around the base of the balcony. Separate circular cover plates around the base of the stanchions were not attached to the stanchions or the concrete upstand and could be lifted up the stanchions, revealing a gap round the bases of the stanchions. The Tribunal recommended that the parties might consider asking their advisers whether those gaps could be the entry points for the water penetration

The Tribunal's decision

37. The Tribunal has taken account of all the submissions made on behalf of the Applicant
38. However, the Tribunal finds that :
- a. the premises demised to the tenant specifically includes the upper horizontal surface of the balcony : paragraph (B)(vi) of Part I of the first schedule to the lease
 - b. however, the tenant's obligation to repair the demised premises in clause 3(5)(a) of the lease is specifically made subject to the liability imposed on the company by virtue of clause 4 of the lease
 - c. the company's liability under clause 4 of the lease includes a liability to keep in good and substantial repair the exterior of the Building
 - d. as very fairly and properly conceded on behalf of the Applicant (at page 19) the exterior of the Building includes the balcony
 - e. the balcony is not enclosed, so that the upper horizontal surface of the balcony, although demised to the tenant, is part of the exterior of the Building
 - f. it would have been very easy for the draftsman of the lease to have excluded the horizontal surface of the balcony from the landlord's repairing covenant, if that had been the parties' intention
 - g. there is no reason in principle why the repair of part of the demised premises should not be the liability of the landlord, rather than the liability of the tenant, just as, as the Tribunal finds, the painting of the exterior of the demised premises is the company's liability under clause 4(1)(c); in making that finding, the Tribunal has taken into account the fact that clause 4(1)(c) of the lease specifically includes balconies in the company's liability to paint all external surfaces of the Building; however, the Tribunal finds that those words are merely declaratory for the purposes of the painting liability, and are not intended to draw a contrast between the extent of the company's painting liability in clause 4(1)(c) and the extent of the company's repairing covenant in clause 4(1)(a)
 - h. the Applicant has submitted that the breaking of a tile by the tenant should result in the tenant being responsible for repairing it; however, the Tribunal finds that the responsibility for repairing it is the landlord's *under the lease*, even if the landlord were then able to recover the cost from the tenant, for example, *under the law relating to negligence*
 - i. the liability under the lease for repairing the balcony, including the upper horizontal surface, is therefore a landlord's obligation, not a tenant's obligation

Appeals

39. A person wishing to appeal against this decision must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case
40. 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
41. 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 admit the application for permission to appeal
42. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result which the person is seeking

Dated 8 April 2014

.....
Judge P R Boardman
(Chairman)