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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2016/0088**
Property	:	**13A Bournemouth Park Road, Southend-on-Sea, SS2 5JQ**
Applicant	:	**Westleigh Properties Ltd.**
Represented by		**Ms. Heidi Slassor (from the managing agents, Gateway Property Management Ltd.)**
Respondents	:	**Vincent Fahey and Sacha Taylor**
Represented by		**Tim Coombs (lay representative)**
Date of Transfer from Southend County Court	:	**9th November 2016**
Type of Application	:	**to determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair)** **Gerard Smith MRICS FAAV REV** **Nat Miller BSc**
Date and place of Hearing	:	**6th March 2017 at Southend Magistrates' Court, Victoria Avenue, Southend-on-Sea SS2 6EU**

DECISION

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1. The Tribunal determines that of the claim of £2,844.05 plus court fee of £205.00, the following determinations are made which means that £1,811.36 plus the court fee of £205.00 is now payable:-

Item	Date	Claim(£)	Decision
Ground rent	24.06.14	25.00	paid
Insurance	29.06.14	443.13	agreed
Balancing service charge	30.06.14	510.01	agreed
Ground rent	25.12.14	25.00	paid
Insurance	29.06.15	378.22	agreed
Balancing service charge	30.06.15	480.00	agreed
Ground rent	24.06.15	25.00	paid
Ground rent	25.12.15	25.00	paid

Interest on ground rent	21.01.16	6.20	not payable
Interest - on a/c service ch.	21.01.16	138.79	not payable
Pre-action legal exs.	21.01.16	300.00	not payable
Surveyor's fee	06.04.16	270.00	not payable
Interest on ground rent	20.04.16	1.97	not payable
Interest – on a/c service ch.	20.04.16	35.73	not payable
Pre-action expenses	20.04.16	180.00	not payable
Court fee	20.04.16	205.00	payable
		3,049.05	

2. With regard to the Respondents' counterclaim, the determination of the Tribunal is that:-

   (a) as the cost of the works referred to in the counterclaim will be payable by the Respondents and the other long leaseholder at the property in any event, an award of damages for breach of contract is inappropriate particularly as the Respondents say that they cannot afford to pay for the work, and
   (b) the only appropriate means of enforcement of the lease in terms of curing the water ingress is a mandatory injunction which will not be recommended to the court immediately in the hope that agreement can be reached and
   (c) there will be no award for general damages as no evidence, such as medical evidence, was produced to substantiate such an award

3. The claim is transferred back to the Southend County Court under claim no. C00YM356 for determination of any outstanding issues. The parties should note that it will be up to them to make any application to the court in relation to those matters as and when the attempts to settle the case as set out below have been attempted. Until those attempts have been made, there should be no judgment registered against the Respondents.

Reasons

Introduction

4. Court proceedings were issued by the Applicant for the sum stated above plus statutory interest on the 12th May 2016. It is not the first set of litigation between the parties which has made the Tribunal's task more difficult than it could have been. In the first defence filed by the Respondents, they did not challenge the claim for service charges and concentrated only on their counterclaim which did not actually claim anything. It simply alleged that the Applicant was in breach of the terms of the lease for not keeping the roof in repair.

5. An amended defence and counterclaim dated 1st November 2016 was then filed. This seeks to challenge the claim by saying that certain parts of it are 'statute barred' but does not say what is actually admitted, if anything. However it is said that the claim will be reduced by set off in respect of the counterclaim. The counterclaim is then said to be the estimated cost of repairs to the roof which is said to be £10,021.39 "*reduced to £10,000.00. It is not cost effective under*

the present rules on calculation of the Lease". How this sum is calculated is not clear. Costs, interest and "*any other remedy deemed suitable*" are then claimed.

6. Thus the Respondents seem to be claiming for the whole cost of repairs when half of that cost is the responsibility of the ground floor leaseholder and the other half is their responsibility.

7. District Judge Ashworth at Southend county court allocated the claim to the Small Claims Track and transferred the case to this Tribunal by order dated 9th November 2016. On the 7th December 2016, the Tribunal made directions timetabling matters to this hearing. The Applicant has supplied a bundle for the Tribunal.

The Lease

8. The bundle produced for the hearing included a copy of an Office Copy of the lease which is dated for the 28th February 1986 and is for a term of 99 years from 24th June 1985 with an increasing ground rent. There is also a copy of the lease to the ground floor which may or may not be relevant. The Land Registry says that the Office Copy of the lease to the property is, in effect, a copy of what was lodged with them. However, at pages 219 and 221 of the bundle it is clear that on each occasion, one page does not follow on to the next as the clause numbers do not follow on. There are pages missing.

9. In the papers, the Respondents' representative argues that the pages seen must be the complete lease and if there is anything else it should be ignored – page 58. However the subject leases, in the preambles, say "*It is intended to demise the flat not hereby demised on terms similar in all respects to those contained herein*". The lease to the ground floor is in the same terms save for the particulars such as price, demise etc. and those clauses on the missing pages.

10. Clearly there are missing pages but no explanation as to when they were omitted or who omitted them. It is this Tribunal's view that, on the balance of probabilities, the intention of the parties of both leases was to have them in the same terms which means that the actual agreement reached between the parties in respect of the property included the extra pages. Further, the Tribunal concludes that when the leases were executed, there were no missing pages. Thus, and save for clear and obvious differences such as the price and description of the demise, the lease of the subject property is in the same terms as the ground floor.

11. Of relevance to this case, the roof is part of the demise although it is the landlord's responsibility to maintain it and recover half the cost from the leaseholder. The landlord also covenants to maintain the foundations, chimney stacks, gutters, rainwater pipes, common entrance ways, halls, paths and gas and water pipes drains and electric cables and wires used in common with the other flat. On the other hand, it is for the leaseholder to decorate all outside ironwork and wood every 3rd year.

12. There is no provision permitting the landlord to claim the cost of managing agents. Interest can be claimed on moneys expended by the landlord because of the leaseholders' breach of a repairing covenant in the lease as a result of which the landlord has undertaken the repairs. This would not apply to a situation where the landlord was in breach of a covenant to repair and maintain or where the landlord had not actually undertaken repairs.

13. As to administration fees, there is no provision in the lease for them to be recovered in any situation other than in contemplation of the service of a section 146 Notice (there has been no mention of a decision to attempt forfeiture) or the registration of an assignment etc. and there is no provision for the landlord to recover service charges in advance by way of a sinking fund or by any other means.

The Law

14. Section 18 of the **Landlord and Tenant Act 1985** ("the 1985 Act") defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

15. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

16. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") ("the Schedule") defines an administration charge as being:-

> *"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable... directly or indirectly in respect of a failure by the tenant to make a payment by the due date to the landlord."*

17. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

> *"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"*

The Inspection

18. The members of the Tribunal inspected the property in the presence of the Respondents. Ms. Slassor was in attendance at the property but did not come inside. The property is a mid-terraced house close to Southend town centre. It is of brick construction under an interlocking concrete tiled pitch roof with a decorative gable end over the front bay windows.

19. From the roadway at the front, the members of the Tribunal could not see any lead flashing in or around the roof. Whether there is any in the valleys between the sections of the roof was difficult to make out as the

gaps were so small but there must clearly have been some protection against water penetration in the valleys.

20. A matter of some concerned was the right hand corner of the roof when looking at it from the road. This is where the majority of the water penetration appears to have occurred. At this point is the original lead guttering which, of itself is not a bad thing as it appeared to be in reasonable condition. Beneath this location, the brickwork had been renovated and re-pointed. At the hearing, it was said that the original brickwork had been badly affected by water. A big problem is that the downpipe is on the other side of the bay, it has to serve this property and 11 Bournemouth Park Road and is of a smaller size than the said guttering.

21. The Tribunal came to the view that in all probability, water pouring into the gutter during heavy rain would not be able to escape and would cascade out onto the brickwork and possibly would have caused or contributed to the damage on the inside of the 1st floor front room seen by the Tribunal.

22. The inside damage was to the front room and the bathroom. The Respondents said at the hearing that they had done some work to the guttering which had stopped the bathroom damage. Half the plaster to the front wall of the lounge had been removed and the exposed brickwork had now evidently dried out, despite some heavy rainfall in the week prior to the inspection.

The Hearing

23. The hearing was attended by the Respondents, Ms. Slassor and Mr. Coombs. The Tribunal chair then questioned the parties about various aspects of the case. As to the claim being statute barred, this was withdrawn. It was said on behalf of the Respondents (a) that they now accepted the claim save for decisions about whether interest and administration charges were payable and (b) that if the work was done and they were asked to pay for it, they would not be able to do so as there was no equity in the property against which they could borrow.

24. Ms. Slassor then said that in those circumstances, the RICS code of practice made it clear that the landlord would not be able to do the work as it was clear from the code that the money had to be available before contractors were instructed. It was pointed out to her that she had misunderstood the code. The requirement to have the money available was to avoid the managing agent instructing a contractor when there was no means of paying for the work. Applying the code to this case where the landlord had to maintain the roof and was unable to collect moneys in advance from the leaseholders, simply meant that Ms. Slassor's agency would have to make sure that their client had the money to pay.

25. The remainder of the hearing was conducted with commendable civility bearing in mind the circumstances. The Respondents were honest and realistic about their financial situation, although they were obviously very upset by the fact that there had been water penetration for many

years and no proper inspection had been made on behalf of the landlord until 2015.

26. As to the work to be done, it was agreed that an additional downpipe on the right hand side of the bay window would be a good idea with a larger diameter that the other down pipe. Whilst this was being done, there should be work to the wooden board and the concrete etc. behind the guttering reported in sections 4.2.7, 4.2.8 and 4.2.9 of the Respondent's surveyor's report. Finally an apparent roof leak above the bay in the roof void as reported by Mr. Fahey at the hearing should be investigated and resolved.

27. Once these works have been undertaken, there should be a gap to see whether they were effective. If not, then the additional work in the quote from Stringer Roofing Services Ltd. would need to be done with the addition of a full investigation of the roof lining. Code 5 lead would be needed rather than code 4. It was the Tribunal's opinion that this estimate would be insufficient to cover the actual cost of the work.

Discussion

28. As far as the defence is concerned, the earliest claim in this case dates back to 24th June 2014 and the Respondents accepted that none of the claim could be statute barred.

29. It is clear from the evidence that there has been a problem with water penetration for some time. The Respondents say that this has been for many years. The Applicant says that it only knew about a problem in September 2012 – which is still some years ago. It was reminded in September 2013 but refused to do anything about it because, it says, the Respondents were in arrears with their service charges.

30. On 7th February 2015, Trevor Brown FRICS, a surveyor appointed by the Respondents, inspected the property with the assistance of a temporary tower and platform to "*report upon the apparent cause and consequence of water penetration into the building*". His report has been provided for this Tribunal at page 71 and contains none of the usual requirements of an experts report i.e. a commitment to be independent and observe an overriding duty to the Tribunal.

31. The report is quite short and attaches several photographs. However, the most unfortunate thing about this report is that Mr. Brown does not do what he was instructed to do. He points out several areas where maintenance is required and areas where further investigation is needed. However, he does not state categorically what the cause of the water penetration is.

32. As a result of a further complaint from the Respondents on 12th October 2015, the Applicant appointed a surveyor to inspect, namely Ann Johnson BSc (Hons) FCIH AssocRICS. Her report dated 30th October 2015 is at page 46 in the bundle. Again, neither her report nor her statement dated 2nd February 2017 at page 398 contain the appropriate surveyor's certificate to the Tribunal. The Applicant says that the conclusion reached was that it was not a roof problem but "*it was*

repairs to flashing and trusses". The schedule of works at page 165 in the bundle suggests more than that.

33. As far as the cost of any remedial works is concerned, the Tribunal saw 2 quotes obtained by the Applicant as part of the section 20 (of the 1985 Act) consultation process. There is a a quote from Starlight Plumbing Ltd. T/as Starlight Builders dated 7th December 2015 at page 161 in the sum of £720.00 including VAT plus £330 if flashing was needed to the party walls. This was somewhat difficult to follow as the PC sums alone in the specification amounted to £1,600. There is another estimate dated 4th November 2015 at page 48 from Stringer Roofing Services Ltd. in the sum of £2,875.00 plus VAT.

34. As far as the Respondents are concerned, there is an estimate from Highview Roofing and Externals Ltd. at page 158. It is dated 2nd December 2016 and at the end of the 2nd page is a list of works and a total at the top of page 3 in the sum of £8,100.00 including provisional sums of £1,800.00. It then says "*upon arrival we were asked to determine the difference in costs between the works required now against the cost should the leak have been resolved when original leak occurred in 2006*".

35. There is then a global figure of £3,700 which includes the provisional cost sums and scaffolding costs referred to in the quote of £8,100.00. There is no mention of VAT in the estimate although the notepaper indicates that the company is registered for VAT purposes. The Applicant's agent says that requests for information about insurance etc. in respect of that company have been ignored.

Conclusions

36. Certain parts of this case could be said to be within the jurisdiction of the county court e.g. ground rent, assessment of damages in respect of the counterclaim and payment of the court fee. The Tribunal chair is a judge of the county court pursuant to a fairly recent change to the **County Courts Act 1984**. Sub-sections 5(2)(t) and (u) were amended by the **Crime and Courts Act 2013** so that First-tier Tribunal judges became County Court judges. District Judge Ashworth transferred 'the claim' to this tribunal.

37. The Tribunal chair has therefore determined any county court matters in his capacity as a county court judge.

38. The hearing finished with the parties more or less agreed that efforts would be made to agree remedial work along the lines of that suggested by the Tribunal and Ms. Slassor would take instructions from the Applicant about whether the amount outstanding as claimed plus the cost of the remedial work could be repaid over a period of, say, 10 years. This would clearly benefit the Respondents and it would also benefit the Applicant in that at least its freehold title value would not be jeopardised.

39. At the hearing and in the papers are suggestions that compensation should be paid. The problem is that it was accepted by the

Respondents that they had not fulfilled their obligations to paint the exterior wood and ironwork. Unprotected and rotting woodwork is a frequent cause of water penetration. It was also accepted that they had not paid service charges. The Respondents were clearly – and genuinely, in the Tribunal's opinion – worried about how the damp was affecting their health and that of their child. However, there was no actual evidence by way of medical reports etc. of any damage or potential damage.

40. The Tribunal was unable to undertake a full survey in the 15 minutes or so they had to look over the property but they did their best, with the additional evidence provided, to assist the parties in a situation which threatens to be a complete vicious circle with both parties being in breach of the terms of the lease. As both the Applicant and the Respondents have had a hand in creating this vicious circle, the Tribunal chair decided that ordering the Respondents to pay statutory interest on the amounts outstanding or damages for internal rectification would be inappropriate.

41. The Tribunal wondered whether it should transfer the case back to the county court now or wait until after stage 1 in the process. It was decided that the Tribunal in its expert capacity has done as much as it can to assist the court. If the suggested scheme does not work, the outcomes are likely to be a mandatory injunction to get the repair work done followed by possible forfeiture when the Respondents can't pay for the work. Both those issues are best resolved by the court itself.

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Bruce Edgington
Regional Judge
8th March 2017

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.