



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

Case reference : LON/00AW/LAC/2016/0017 & 0024

Property : Flat 14, 63 Bramley Road,
London W10 6SY

Applicant : Alexander Davey

Respondent : Notting Hill Housing Group

Representative : Glazer Delmar

Type of application : For the determination of the
reasonableness of and the liability to
pay administration charges

Tribunal members : Judge Nicol
Mr SF Mason BSc FRICS

Date of decision : 21st June 2016

DECISION

- (1) The Tribunal determines that the Respondent's legal costs of £672 in relation to an alleged breach of covenant as to access are not payable by the Applicant.
- (2) The Tribunal further determines that the Respondent's legal costs of £1,645.80 incurred in defending the Applicant's application are not payable by the Applicant.
- (3) The Tribunal has made directions at paragraph 41 below for a further determination in respect of the Applicant's costs in dealing with both his and the Respondent's applications.

The applications

1. By an application received by the Tribunal on 11th April 2016, the Applicant seeks a determination pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) as to the payability and reasonableness of an administration charge of £672 in respect of solicitors’ costs. The Tribunal issued directions culminating in this determination being made on the papers without a hearing.
2. The Respondent made a cross-application on 8th June 2016 for a similar determination in respect of their legal costs in responding to the Applicant’s application, said to amount to £1,645.80. No directions have been made for this application but, by their covering letter and in the application, Glazer Delmar requested that it be considered at the same time as the Tribunal considers the Applicant’s application. The Applicant has not objected to this procedure but, rather, made submissions about the Respondent’s application by letter dated 16th June 2016 – in the event, the Tribunal did not rely on those submissions as the basis for its determination (see further below).
3. By letter dated 1st June 2016 Glazer Delmar complained that the Applicant’s statement in reply had been received one week after the date ordered in the Tribunal’s directions and asked for it to be disallowed. The Tribunal is satisfied that any delay has been trivial. The Applicant said he sent his documents on the correct day so that they should have arrived no more than one working day late. However, even if this is not correct, there is no suggestion that the Respondent has been in any way prejudiced. The overriding objective to do justice between the parties requires the Tribunal not to exclude the Applicant’s reply and accompanying documents.
4. The relevant legal provisions are set out in the Appendix to this decision.

The Facts

5. The Respondent alleges that the Applicant breached his lease in failing to provide access for repair works and should pay the legal costs incurred by them in addressing that breach. Throughout the case, namely in correspondence from both the Respondent’s officers and their solicitors, Glazer Delmar, and in the submissions and witness statements they rely on in these proceedings, the Respondent has sought to rely on the following clauses in the lease and no others:
 3. THE Leaseholder HEREBY COVENANTS with the Landlord:
 - (9) (a) To pay all costs charges and expenses (including Solicitors’ costs and Surveyors’ fees) incurred by the Landlord for the purpose of or incidental to the

preparation and service of a Notice under Section 146 or Section 147 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief by the Court or otherwise incurred by the Landlord in respect of any breach of covenant by the Leaseholder hereunder

- (13) At all reasonable times during the term on notice to permit the Landlord and the lessees of other premises in the Buildings with workmen and others to enter the Premises for the purpose of repairing any adjoining or neighbouring premises and for the purpose of repairing maintaining and replacing all sewers drains pipes cables gutters wires party structures or other conveniences belonging to or serving the same the party so entering making good any damage thereby caused to the Premises
6. By e-mail dated 13th April 2015 Martina Kelly, a Property Management Officer with the Respondent, informed the Applicant that it had recently come to her attention that there was a leak on the soil stack pipe serving the Applicant's third-floor flat, number 14, and the three flats on each of the floors below, namely numbers 2, 6 and 10. She warned that it would be necessary to arrange access to trace the leak and carry out repairs but did not seek to make access arrangements at that time. She asked if there were any signs of the leak in his flat, to which he answered that there were not.
7. Three weeks later, by e-mail dated 5th May 2015, Ms Kelly asked the Applicant for his availability to provide access to his flat. He replied within half an hour with his dates. Access was arranged for 14th May 2015 but Ms Kelly phoned later to cancel. No reason was given.
8. Some 2½ months later, Terry Yapp, a Leasehold Team Co-ordinator with the Respondent, informed the Applicant by e-mail dated 28th July 2015 that a search and trace for the leak would take place on 6th August 2015 and asked if he would be available. The Applicant replied within 5 minutes that he was unavailable on 6th August but was free on 7th August. By e-mail dated 4th August 2015 Ms Yapp informed the Applicant that 6th August had been cancelled as she could not get everyone to be home that day – there was no suggestion that the Applicant was solely to blame. She also said no-one else could do 7th August.
9. Ms Yapp tried again and, by e-mail dated 4th August 2015 asked if either 12th or 19th August were possible. The Applicant replied the same afternoon that he was available on both afternoons. By e-mail dated 18th August 2015 Ms Kelly cancelled the appointment for 19th August on the basis that not all flats had confirmed access.

10. By e-mail dated 20th August 2015 Ms Kelly asked for the availability of all the lessees for 16th September. The Applicant replied on 23rd August 2015 that he was unfortunately unavailable. Ms Kelly phoned the following day to ask if the Applicant would be free on 14th October 2015 but he said he did not know yet.
11. Over one month later, by e-mail timed at 1:26pm on 29th October 2015 Rachel Clifford, another Property Management Officer with the Respondent, asked for the lessees' availability on 11th November. The Applicant replied 3 minutes later saying he was unavailable but asking for other dates.
12. A further 10 minutes later, Ms Clifford asked if anyone else could provide access to the Applicant's flat on 11th November, failing which she asked the Applicant to provide alternative dates. The Applicant replied 3 minutes later with some alternative dates. Ms Clifford did not respond to this but, half an hour later, informed all the lessees that she had "a final repair date" of 18th November 2015 and failure to provide access may result in legal action.
13. The Applicant replied within 25 minutes that he could not do 18th November 2015 but could do 19th or 20th. Ms Clifford replied a few minutes later that 18th November was the last date and repeated the threat of legal action. The Applicant phoned her to discuss this. She said the reason for her position was that the contract, presumably with the Respondent's repairs contractor, was about to expire. No other reason was given in this phone conversation or in any contemporaneous correspondence for the urgency with which the Respondent was now trying to arrange access or the fixing of the date.
14. The difficulty throughout for the Applicant is that he works for an airline and, for the most part, has to accept the times he is rostered for work. He also undertakes training from time to time. He says, and the Tribunal believes him, that he lost opportunities for work, and therefore lost out financially, when the two previous appointments had been made and then cancelled. The Respondent had previously been able to accommodate him while he had done his best to accommodate them. He naturally felt it was unfair now to tie him to a date, again to his financial prejudice, simply because their contract was about to expire. There had been no indication of real urgency, let alone any threat of legal action, before Ms Clifford's involvement from the end of October 2015.
15. Ms Clifford telephoned the Applicant on 2nd November 2015. The Applicant recounts that he protested about the short notice and that he was on duty on 18th November so that he may be out of the country. Ms Clifford maintained her position, referring to the terms of the lease. The Applicant asked to see them. Ms Clifford sent an e-mail later that day quoting the clauses set out in paragraph 5 above. The only alternative

she offered was to collect the keys from the Applicant so that she herself could provide access – the Applicant says in his witness statement dated 20th May 2016 that he would not have been available the day before to give her the keys.

16. Ms Clifford telephoned the Applicant again on 3rd November 2015. She repeated the threat of legal action. The Applicant protested that she was bullying him. Ms Clifford said she would pass this to her manager, which she confirmed by e-mail the same day. In her witness statement dated 29th April 2016, Ms Clifford asserts that, during this phone call, “Access on 18 November was again refused.” The Applicant denies this. Ms Clifford has not explained what words the Applicant used which led her to think he was refusing access as opposed to protesting what was happening or seeking an alternative.
17. The Applicant e-mailed Ms Clifford on 4th November 2015, reiterating his position and, in particular, setting out his understanding that the reason for her inflexibility was that the contract was about to expire. Ms Clifford acknowledged receipt of the e-mail but the Respondent has never denied this reasoning. It is noteworthy that, as in all his e-mails, this e-mail does not state that the Applicant was refusing access.
18. By e-mail on 5th November 2015 the Applicant asked to speak to Peter Albert, Ms Clifford’s manager. Mr Albert replied that he had received the Applicant’s complaint but, somewhat perversely, then stated that he was in full agreement with Ms Clifford. As the Tribunal understands it, Mr Albert was supposed to be looking into the complaint but it is entirely understandable that the Applicant thought he had pre-judged the issue.
19. In any event, the Applicant and Mr Albert spoke by phone later the same day, 5th November 2015. During the phone call, the Applicant raised the possibility that, if the Respondent continued to insist on 18th November as the date for access, he would see if he could get his father to provide it on his behalf. Mr Albert acknowledged that this had been raised in a further e-mail on 6th November 2015.
20. Mr Albert’s e-mail also attached a letter from the Respondent’s solicitors, Glazer Delmar, headed “URGENT LETTER BEFORE ACTION” threatening the Applicant with injunction proceedings unless he now provided access. This was the first the Applicant knew of their involvement but the Respondent had apparently first sought their advice on 29th October 2015 and then again on 3rd November 2015.
21. Glazer Delmar’s letter asserted that access to all four flats was required at the same time and that “four separate contractors” had to attend “in order to ensure full investigations take place.” It turns out from Ms Clifford’s witness statement that, in fact, the Respondent wanted three individual operatives from their one contractor, G4 Contracts Ltd, to

attend so any work could be completed within one day. It is noteworthy that the Respondent has not provided any evidence to support any of these assertions.

22. Glazer Delmar's letter also asserted, "You have refused to give access on 18 November." The Tribunal is satisfied that this is not true. While Glazer Delmar's letter contains at least one inaccuracy (as described in the preceding paragraph), the Applicant's correspondence and later evidence have consistently set out his position that he objected to the Respondent's behaviour but, as of 6th November 2015, he was not refusing access but, quite the opposite, was looking into alternative arrangements, albeit under protest. The Applicant's evidence to the Tribunal has been well set-out and is more comprehensive than that of the Respondent which omitted several e-mails or indeed any acknowledgement of their own role in delaying action and cancelling previous appointments. The Applicant's evidence on this point is clearly preferable to that of the Respondent.
23. By e-mail dated 8th November 2015 the Applicant refuted that he had denied access and said he was still planning for his father to provide access on 18th November 2015. Mr Albert acknowledged this by e-mail dated 9th November 2015. In the event, his father was unavailable and the Applicant arranged to take the day off without pay.
24. According to the Applicant, one operative visited his flat early on 18th November 2015. The only work he carried out was to flush the toilet. The Applicant says the operative told him that it was obvious from what had been seen in the lower flats that the problem was coming from the flat two floors below.
25. Ms Clifford's description of what happened is not inconsistent with the Applicant's. She says in her aforementioned witness statement that repairs were carried out within the ground floor flat on 18th November and then in the flat above on 24th November because access had not been provided to the latter flat on 18th November.

The legal costs of £672

26. On 24th November 2015 Glazer Delmar rendered an invoice to the Respondent "For work undertaken between 4 November 2015 and 24 November 2015" in respect of the Applicant in the sum of £560 plus VAT, for a total of £672. The Respondent purported to demand payment from the Applicant of this sum by e-mails sent on 29th January 2016 and in March 2016. None of these demands were accompanied by the summary of the lessee's rights and obligations required under paragraph 4 of Schedule 11 to the 2002 Act. The Respondent has attempted to remedy this omission by serving the requisite summary by letter dated 27th April 2016.

27. In the Tribunal's opinion, the Applicant's application is, and always has been, bound to succeed for a number of reasons. Firstly, and most fundamentally, there has been no breach of covenant.
28. The clause relied on by the Respondent, namely clause 3(13) requires access to be provided. It was. Ms Clifford asserted in her witness statement, on which the Respondent relies as their statement of case, at paragraph 38 that, "The breach of clause 3(13) ... took place before the 18 November." This is palpable nonsense. The obligation is to provide access, not advance permission for access. Access was provided so there cannot have been any breach. In any event, the Tribunal has already determined that, as a matter of fact, the Applicant did not refuse access.
29. Further, clause 3(13) obliges the lessee to provide access for works to be carried out. It is clear that the Respondent never thought that they needed access for works, but, at most, in order to inspect so that they could trace the leak. In the event, no works were needed or carried out in the Applicant's flat. Clause 3(11) requires access for inspection purposes but the Respondent has never sought to rely on that provision. Even if the Applicant had refused access, he would not have been in breach of clause 3(13) in doing so.
30. Moreover, the obligation to provide access under clause 3(13) is limited to "reasonable times". Of course, the time required for access on 18th November, namely between 8am and 5pm would, in the absence of any other considerations, be thought of as reasonable. However, the Applicant gave more than two weeks' notice that it would not be convenient for him. The Respondent could have maintained that the time remained reasonable if they could have backed up their assertions that they had no choice but to stick to 18th November.
31. However, there is simply no evidence that the flats all had to be inspected or the works carried out at the same time – quite the opposite, the evidence of the works themselves is that they could have been and were done at different times.
32. There is also no evidence of urgency. The Respondent has asserted that they spent 6 months trying to arrange access but more than half of that delay resulted from the Respondent's own inaction. The photos the Respondent relies on as demonstrating the dire state of the flat affected by the leak were taken after the event. Ms Clifford's assertion in her witness statement that she feared for the building's structural integrity was never made prior to gaining access – instead, the only reason given was the expiry of a contract, a matter which is entirely the Respondent's responsibility, not the Applicant's.

33. Even if the Respondent had been able to demonstrate a breach of clause 3(13) giving rise to legal costs, they cannot be payable by the Applicant under clause 3(9)(a). The costs were not incurred preparatory to forfeiture or a section 146 notice. Quite the opposite, they were incurred in threatening legal proceedings to enforce the provisions of the lease which amounts to an affirmation of the existence of the lease, not an indication of any intention to forfeit.
34. Even if the Respondent had been able to establish that their administration charges of £672 were payable in principle, the Tribunal is satisfied that they are not reasonable. Glazer Delmar prepared for, advised on and wrote one letter in relation to a failure to provide access on one occasion. Ms Tara Cornish from Glazer Delmar has provided a witness statement and a table of her costs, although not any of the documents on which that table was based, to try to justify them. However, the Tribunal cannot see how, with the most generous interpretation, it could have taken more than, at most, two hours to conduct this work.
35. This does not even take into account that Glazer Delmar's analysis of the situation was faulty both in fact and in law, as discussed above, or that their work was apparently conducted until 24th November 2015 despite the Applicant making it clear by 8th November 2015 at the very latest that he was not refusing access.
36. For these reasons, the Tribunal is satisfied that the Respondent's costs of £672 are not payable.

The legal costs of £1,645.80

37. The Respondent employed Glazer Delmar to defend the Applicant's application. They have rendered a further invoice dated 29th April 2016 for £1,645.80. The Respondent demanded this amount from the Applicant by letter dated 10th May 2016, this time apparently accompanied by the requisite summary of rights and obligations.
38. The Respondent relies again on clause 3(9)(a) as the basis for liability. Again, the Tribunal is satisfied that this is erroneous. The costs were incurred in defending the Applicant's application, not in preparation of a section 146 notice. There has been no threat of forfeiture at any time, let alone that the Respondent is even contemplating forfeiture, including in their letter of 10th May 2016.
39. The Applicant has asserted that such costs could only be recoverable under paragraph 10 of Schedule 12 to the 2002 Act. In fact, that provision has been superseded by rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013:
 - (1) The Tribunal may make an order in respect of costs only—

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—

(iii) a leasehold case; ...

40. The Respondent has not sought to claim their costs under this provision but, even if they had, the Tribunal would be bound to dismiss such a claim because the Applicant cannot have been said to have acted unreasonably in bringing his application. Rather, the Tribunal is minded to find that it is the Respondent which has acted unreasonably (see further below).

Applicant's costs

41. The Applicant has not applied for an order that the Respondent pay any of his costs. This appears to be at least partly because he was relying on an out-of-date provision. In the light of the Tribunal's view of the Respondent's case, as set out above, the Tribunal is minded to decide that the Respondent should reimburse the Applicant his fee for his application and to pay his reasonable costs. In order to determine this issue, the Tribunal makes the following directions with which both parties must comply:

- a) The Applicant shall confirm to the Tribunal and to the Respondent by 4pm on **27th June 2016** whether he wishes to seek reimbursement of his Tribunal fee and for an order that the Respondent pay his costs. If the Applicant does not do so, the Tribunal shall make no further determination on the issue of costs.
- b) If the Applicant does wish to seek his costs then he shall, by 4pm on **4th July 2016**, file with the Tribunal and send to the Respondent a statement of his costs, accompanied by any supporting documentation.
- c) The Respondent shall, by 4pm on **18th July 2016**, file with the Tribunal and send to the Applicant any written representations, together with any supporting documentation, as to why the Applicant should not be awarded his costs, in the amount claimed or at all.
- d) The Tribunal shall reach a determination on the issue of costs on the filed papers, without a hearing, during the week commencing **25th July 2016**.

Conclusion

42. Subject to the remaining issue of the Applicant's costs, the Tribunal has determined that neither amount claimed in legal costs by the Respondent is payable by the Applicant.

Name: NK Nicol

Date: 21st June 2016

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
 - (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
 - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.
- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
 - (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 4

- (1) A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.
- (2) The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.
- (3) A tenant may withhold payment of an administration charge which has been demanded from him if sub-paragraph (1) is not complied with in relation to the demand.
- (4) Where a tenant withholds an administration charge under this paragraph, any provisions of the lease relating to non-payment or late payment of

administration charges do not have effect in relation to the period for which he so withholds it.

Schedule 11, paragraph 5

- (1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on the appropriate tribunal in respect of any application under sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) An application under sub-paragraph (1) may be made in respect of a matter which—
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
 - (a) in a particular manner, or
 - (b) on particular evidence,of any question which may be the subject matter of an application under sub-paragraph (1).