



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

**IN THE COUNTY COURT at
Edmonton, sitting at 10 Alfred
Place, London WC1E 7LR**

Tribunal reference : **LON/00AH/LSC/2018/0333**

Court claim number : **E70YJ220**

Property : **55d Penge Road, London SE25 4EJ**

Applicant/Claimant : **Assethold Limited**

Representative : **Mr James Sandham of Counsel
instructed by Scott Cohen Solicitors**

Respondent/Defendant : **Kingswood Property Developments
Limited**

Representative : **Mr Julian Peak (Director) and Ms
Lorna Morgan**

Tribunal members : **Judge N Hawkes
Mr H Geddes RIBA MRTPI
Mr L G Packer**

In the county court : **Judge N Hawkes, with Mr H Geddes
as assessor**

Date of decision : **15 February 2019**

DECISION

Summary of the decisions made

- (1) The Tribunal finds that the service charge claimed by the applicant in the sum of £634.17, which has been paid by the respondent, is reasonable and that it became payable on 25 December 2017.
- (2) Of the administration charges claimed by the applicant, the Tribunal finds that the sum of £2,305.54 is reasonable and (subject to any points which may arise on the determination of the respondent's application

pursuant to paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002) payable.

- (3) The Court finds that the sum of £2,741.25 is payable to the respondent in respect of the Counterclaim.
- (4) Any application pursuant to section 20C of the Landlord and Tenant Act 1985, paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 and any applications for costs shall be made in writing and shall be filed and served within 14 days following the date of this decision. Any written submissions in response, shall be filed and served within 14 days thereafter.

The application

1. The applicant freeholder seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) and schedule 11 to the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) as to the amount of service charges and administration charges payable by the respondent leaseholder, in respect of flat 55d Penge Road, London SE25 4EJ (“the property”).
2. Proceedings were originally issued against the respondent on a date which is not specified on the copy of the claim form which has been provided in the County Court Money Claims Centre under claim number E70YJ220. The Tribunal was informed at the hearing that the claim was issued on or about 26 April 2018.
3. The respondent filed a Defence and Counterclaim dated 7 June 2018 and the proceedings were then transferred to the County Court at Edmonton and then to this Tribunal by the order of District Judge Dias dated 28 August 2018.
4. The Tribunal issued directions and the matter eventually came to hearing on 17 January 2019.

The hearing

5. The applicant freeholder, Assethold Limited, was represented by Mr Sandham of Counsel, instructed by Scott Cohen solicitors, at the hearing. The respondent leaseholder, Kingswood Property Developments Limited, was represented at the hearing by Mr Peak, a Director, assisted by Ms Lorna Morgan.
6. The Tribunal heard oral evidence, on oath, from Mr Gurvits, of the applicant’s managing agents, Eagerstates Limited, on behalf of the applicant. The Tribunal heard oral evidence, on oath, from Mr Peak on behalf of the respondent. The respondent had not filed and served any witness statement prepared by Mr Peak but it was agreed that the

respondent's statements of case in these proceedings would stand as Mr Peak's written evidence.

The background

7. The subject property is a ground floor flat in a building containing five flats. A helpful diagram of the building which has been prepared by Mr Peak appears at page 146 of the hearing bundle.
8. The respondent has sub-let the property to tenants who complained of water ingress and, following these complaints, the respondent carried out the repairs to the roof of the building which are referred to below.
9. Neither party requested an inspection of the property; nor did the Tribunal consider that one was necessary, the repair work which forms the subject of this dispute having been completed and it being common ground that there is no current water ingress.
10. The respondent holds a long lease of the subject property, which requires the landlord to carry out works and to provide services and for the lessee to contribute towards their costs by way a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

The issues

11. The applicant has brought a Claim against the respondent in respect of:
 - (i) service charges in the sum of £634.17; and
 - (ii) administration charges in the sum of £2,555.54 (comprising the applicant's pre-issue legal costs).
12. The respondent has brought a Counterclaim against the applicant in the total sum of £2,741.25 comprising:
 - (i) sums incurred by the respondent in carrying out repairs to the roof of the building which are said to fall within the applicant's repairing covenants under the terms of the respondent's lease; and
 - (ii) loss of rent said to have resulted from the alleged breach of covenant on the part of the applicant.
13. The Tribunal expressed a preliminary view that a court fee in the sum of £115 which appears in a breakdown of the Counterclaim at page 14 of the hearing bundle amounts to a cost of the litigation and does not form part of the respondent's damages claim. All parties agreed with this preliminary view and the court fee has therefore not been included in the Tribunal's consideration of the Counterclaim.

14. As regards the claim, the applicant paid the service charge in the sum of £634.17 following the issue of these proceedings. Whilst this does not prevent the applicant from challenging the reasonableness and/or payability of this service charge, the grounds for such a challenge and the evidence relied upon have not been clearly set out.
15. Mr Peak informed the Tribunal that he had started to investigate the reasonableness of cleaning costs but that this avenue had not been pursued. He indicated that he would not seek to challenge the reasonableness or payability of the service charge save that he contended that, on a true construction of the lease, at the date of issue of the proceedings the service charges claimed had not fallen due.
16. The order transferring issues to the Tribunal is in very wide terms: "Matter be transferred to HM Courts & First-tier Tribunal (Property Chamber), residential property, 1st floor, 10 Alfred Place, London WC1E 7LR".
17. As regards the Counterclaim (the value of which potentially exceeds the value of the Claim), at the commencement of the hearing, both parties agreed that Judge Hawkes would sit as a County Court judge in order to determine the Counterclaim and to deal with any other issues not normally dealt with by the Tribunal. It was noted that this would result in the saving of both time and expense.
18. Following amendments to the County Courts Act 1984, made by schedule 9 of the Crime and Courts Act 2013, all First-tier Tribunal ("FTT") judges are now judges of the County Court. Accordingly, where FTT judges sit in the capacity as judges of the County Court, they have jurisdiction to determine issues that would normally not be dealt with by the Tribunal.
19. Accordingly, Judge Hawkes heard the Counterclaim as a County Court judge sitting alone and (also with the agreement of the parties) the Tribunal wing member, Mr Geddes RIBA, was appointed as assessor for the County Court trial of the Counterclaim.
20. These reasons will act as both the reasons for the Tribunal decision and the reasoned judgment of the County Court, in respect of which a separate order will be made following the determination of the applications pursuant to section 20C of the Landlord and Tenant Act 1985, paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 and any applications for costs.

Determinations and reasons

The determinations of the Tribunal

The service charges

21. The sole issue between the parties concerning the service charge is whether, on a true construction of the lease, the service charge in sum of £634.17 was payable on the date when the Claim was issued.
22. By clause 4(c) of the lease, the respondent is required to contribute and pay one eighth of the costs incurred by the applicant in performing its obligations in accordance with clause 5(b)(c) and (e) of the lease.
23. Clauses 4(c)(ii) and (iii) provide (emphasis supplied):

*(ii) The contribution under paragraph (i) of this clause **for each year shall be estimated by the managing agents for the time being of the Lessor (hereinafter referred to as "the Managing Agents") ... as soon as practicable after the beginning of the year and the Lessee shall pay the estimated contribution by two equal instalments on 24th day of June and 25th day of December in each year.***

*(iii) As soon as reasonable may be after the end of **the year ending 24 December Two Thousand and Seven and each succeeding year** when the actual amount of the said costs for **the period ending on 24th December Two Thousand and Seven or such succeeding year** as the case may be has been ascertained forthwith pay the balance due to the Lessor or be credited in the books of the Managing Agent or if none the Lessor with any amount underpaid by the Lessee.*
24. The respondent contends that the first instalment of estimated service charge falls due on 25 June and the second on 25 December and submits that the words "for each year" should be interpreted as meaning each calendar year rather than each service charge year. Accordingly, on the respondent's case, the first instalment of the 2018 interim service charge did not fall due until 24 June 2018 and it was not outstanding when the applicant issued these proceedings in April 2018.
25. In response, the applicant submits that, given that the service charge year end is 24 December, it is clear that the first instalment of estimated service charge falls due on 25 December and the second on 24 June; if it were the other way around the second instalment would be due outside the service charge year. The lease does not state that the first instalment is due in June, it simply specifies the dates.

26. The applicant notes that it is common for the service charge machinery in leases to require tenants to pay, in advance, an amount on account of their service charge liability for each relevant accounting year. The contractual purpose of such a provision is obvious, namely to put the landlord in funds to discharge its obligations under the lease. After the service charge year has ended, the landlord knows how much has actually been incurred. This amount can be compared with the amount demanded on account and paid by the tenants, and a balancing exercise carried out to ascertain whether the tenants have underpaid or overpaid for that year.

27. The Tribunal was referred to Arnold v Britton and others [2015] UKSC 36 at paragraph 15:

15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

28. The Tribunal accepts the applicant's submissions concerning the true construction of the lease and finds that the service charge claimed by the applicant in the sum of £634.17, which has been paid by the respondent, is reasonable and became payable on 25 December 2017.

The administration charges

29. The respondent challenges the reasonableness of the administration charges. The Tribunal was presented with evidence, which it accepts that:

a. The applicant wrote to Mr Peak between January 2018 and 19 April 2018 requesting payment of the outstanding service charges by the respondent.

b. Mr Peak stated that he would respond by 13 April 2018 but he had not done so when proceedings were issued on or about 26 April 2018.

30. As regards the quantum of the legal costs, the entirety of the work was carried out by a grade A solicitor and, whilst the applicant has agreed fixed fees with its solicitor, the applicant sought to justify the legal costs with reference to the solicitor's charge out rate of £250 per hour.
31. The Tribunal has carefully considered the nature and complexity of the work undertaken, and the issue of proportionality. The Tribunal is of the view that the use of a grade A solicitor with a charge out rate of £250 per hour for the entirety of the work undertaken would not be justified. However, the Tribunal also accepts that the time spent is largely reasonable. **[I have not said anything about complexity, mindful of the fact that in Avon Ground rents v Child the UT said of a similar case that the legal principles for assessing the reasonableness of service charges are well-established and clear. In many cases there will be no issue about the relevant principles to be applied and their application will not be so difficult as to make legal representation essential or even necessary]**
32. Taking into account all of these factors and adopting a broad-brush approach having regard to the value of the dispute, the limited information available, and the absence of a detailed breakdown, the Tribunal finds that the sum of £250 should be deducted from the pre-action costs and that, of the administration charges claimed, the sum of £2,305.54 is reasonable and (subject to any points which may arise on the determination of respondent's application paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002) payable.
33. It was agreed at the conclusion of the hearing that the respondent's application pursuant to paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 would be determined by way of written submissions following the hearing.

The determinations of the County Court

34. Mr Peak gave evidence, which the Court accepts, that:
- a. Prior to the completion of work which Mr Peak arranged to be carried out on behalf of the respondent, there was significant water ingress into the property over a period of approximately 5 months.
 - b. The matter was reported to the applicant on 3 April 2017.
 - c. Mr Peak personally went up onto the roof on at least four occasions and saw that it was "in an appalling state". Mr Peak is not an expert but he was able to give evidence of fact concerning the state of the roof including evidence that there was "a gaping hole",

ponding of water, defective guttering and an open asbestos pipe passing through the roof.

- d. At the respondent's expense, Mr Peak arranged for work to be carried out to remedy defects to areas of sloping roof, flat roof, guttering and an asbestos pipe passing through the roof.
 - e. Following the completion of this repair work, the water ingress ceased.
 - f. The sums claimed by the respondent represent only part of the respondent's expenditure on repairs to the roof; Mr Peak on behalf of the respondent wished to ensure that the level of the Counterclaim was under £3,000 and he therefore did not include all the sums spent.
35. By clause 1(a) of the Fourth Schedule to the lease, the applicant covenants to maintain, repair, decorate and renew:
- "the main structure and in particular the main walls main timbers and floors joists foundations roof chimney stacks gutters and rainwater pipes of the Building."*
36. By clause 7(iv):
- "the word 'repair' includes rectification or making good of any defect in the foundations roof or structure of the Building notwithstanding that it is inherent or due to the original design of the Building."*
37. The applicant initially sought to persuade the Court that the applicant is not obliged to repair areas of the roof of the building which are demised to lessees other than the respondent. However, this point was ultimately not pursued and, in any event, the Court is satisfied that the provisions of the lease which were relied upon by the applicant contain no such limitation.
38. It is common ground that, in respect of areas retained by the applicant, a breach of covenant occurs when a defect arises without the need for the respondent to establish that the applicant has been put on notice. Insofar as any relevant areas have not been retained by the applicant, the Court accepts the respondent's case that the applicant was, in any event, put on notice on 3 April 2017 and that no steps were taken by the applicant to rectify the defects to the roof and guttering within a reasonable period of time following receipt of notice.
39. The applicant contends that because there are various competing causes of the water ingress into the property (the respondent having

carried out repairs to areas of sloping roof, flat roof, guttering and an asbestos pipe passing through the roof) the respondent's claim must fail. There is no expert evidence before the Court as to which of the defects caused the water ingress.

40. The Court is satisfied that if the structure of the Building and, in particular, the roof had been maintained and was in repair, water would not have passed through the roof into the premises (whether through the flat roof, the sloping roof, the pipe passing through the roof or via all of the potential areas of the roof which the respondent repaired).
41. The Court accepts Mr Peak's oral evidence and finds as a fact that water was passing through the roof until Mr Peak arranged for repairs which he described to be carried out. The Court is satisfied on the evidence which it heard that the presence of an open pipe passing through the roof amounts to a defect to the roof and finds that it is likely on the balance of probabilities that all of the areas of the roof and guttering which the respondent repaired were, at the material time, out of repair.
42. Accordingly, the Court is satisfied that the respondent has made out its case that the applicant is in breach of covenant. The applicant does not take issue with the amount claimed in respect of repair work. It does, however, challenge the element of the Counterclaim relating to loss of rent. This is on the grounds that Mr Peak accepted in cross examination that the respondent's tenants had not served or threatened to serve a notice to quit on the respondent.
43. The rent is £700 per month and the tenants were given a two month rent free period, resulting in a loss to the respondent of £1,400, and a three month rent reduction of £100 per month, resulting in a loss to the respondent of £300 ("the rent discounts"). The applicant contends that it was unnecessary for the respondent to have agreed to the rent discounts.
44. The respondent asserts that Mr Peak, on behalf of the respondent, acted reasonably in agreeing rent discounts in order to persuade the tenants to stay and that, if he had not done so, the tenants would have moved out at a time when the property would have been particularly difficult to re-let and the respondent's losses would have been considerably greater.
45. The Court accepts the respondent's submissions. There is a strongly worded letter from the tenants at page 164 of the trial bundle from the tenants stating they "have had 3 months of severe leaks of water about two buckets of water each time it rains since we moved in and we have had no peace or been able to settle properly". They also state "we have a new born baby we will not continue like this anymore." It is apparent

from this correspondence that the respondent sought to negotiate with the tenants before agreeing the rent discounts.

46. In all the circumstances, the Court finds that it is likely on the balance of probabilities that, if the rent discounts had not been granted, it is likely that the tenants would have left at a time when (given its condition) the property would have been difficult to re-let.
47. Accordingly, the Court finds that the respondent to the sum of £2,741.25 respect of the Counterclaim.

Further steps

48. At the conclusion of the hearing, it was agreed that the determination of the applications pursuant to section 20C of the Landlord and Tenant Act 1985, paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 and any applications for costs would be made by way of written representations after this decision had been issued. This was because there was insufficient time available to hear submissions concerning these matters at the hearing.
49. Following the determination of any paragraph 5A application, the Court proposes to give judgment in respect of the balance when any outstanding administration charges have been set off against the sum found to be due to the respondent in respect of the Counterclaim.
50. Any such applications shall be made in writing and shall be filed and served within 14 days following the date of this decision. Any written submissions in response, shall be filed and served within 14 days thereafter.

Name: Judge Hawkes

Date: 15 February 2019

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).