12004

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

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| **Case Reference** | : | **LON/00AG/LSC/2015/0351 & 0377** |
| **Property** | : | **68 Compayne Gardens, London NW6 3RY** |
| **Applicant** | : | **The 68 Compayne Gardens Management Company Limited** |
| **Respondent** | : | **Sanya Dragacevic** |
| **Type of Application** | : | **For the determination of the reasonableness of and the liability to pay service charges and administration charges** |
| **Tribunal Member(s)** | : | **Judge Dickie**<br>**Mr J Barlow, FRICS** |

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**DECISION**

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## Decisions of the tribunal

1. The tribunal reaches the following decisions on the issues in these applications:

(i) The Respondent's claim for damages for breach of covenant is determined in the sum of £3956.47.

(ii) The tribunal having determined the Applicant's claim for service charges in the sum of £5512, Ms Dragacevic has a net service charge liability to the Applicant in the sum of £1555.53. The tribunal finds that she is liable to pay costs in the s.20ZA proceedings of £1200 including VAT to the Applicant pursuant to Clause 3.14 of the lease.

(iii) The Respondent shall refund to the Applicant the sum of £125 in tribunal fees in respect of the current application, in addition to the £190 in fees she has been ordered to pay in respect of the s.20ZA application.

## The application

2. In its written decision dated 25 August 2016 (corrected 20 October 2016) the tribunal determined the service charges payable by the Respondent for the year 2015 in respect of disputed demands for major works expenditure. It also dismissed the Respondent's counterclaim for damages in respect of an infestation of mice and adjourned on directions its determination of her counterclaim for the landlord's alleged failure to:

(i) Redecorate the exterior of the window frames to her flat;

(ii) Maintain and keep the roof and gutters to the property in good and substantial repair and condition.

3. As a result of that decision, the Respondent's service charge liability for that year is agreed to be £5512, subject to determination of her set off for damages for these alleged breaches of the landlord's covenants in the lease. It is not necessary to set out the history of this matter further, which has been adequately summarised in the previous tribunal decisions. However, it is emphasised that in his decision dated 19 February 2016 on preliminary issues before him, Judge Andrew recorded that the tribunal accepted jurisdiction to determine Ms Dragacevic's counterclaim on the basis of her agreement to limit it to the amount of the disputed service charges. According to the decision in *Continental Property Ventures Inc. v White [2006] 1 EGLR 85* the tribunal would otherwise have had no jurisdiction in respect of damages exceeding the service charges claimed.

4. The Applicant was again represented by Mr Akshay Kaul, assisted by Ms M Grzyb and the Respondent appeared in person. The relevant lease terms are set out in the tribunal's previous decision and are not repeated herein.

## Roof Leaks

5. The part of the building above the subject flat has an apex roof and pitched roof to the front, and a flat roof to part of the rear extending above the bathroom and part of the master bedroom. It was the Respondent's case that the roof above her flat had been leaking for a long period of time. She said there were many leaks in many locations over many years, including into the master bedroom through the apex roof owing to missing tiles, from the flat roof into the bathroom and from the pitched roof above the second bedroom.

6. Mr Kaul challenged her account since records only showed roof leaks on one occasion in 2012 (which affected flat 5 also, and in respect of which Ms Grzyb had said she would claim on the building insurance). The Respondent said she had not wished to claim on the insurance as it was landlord's neglect which was not an insured event.

7. There was corroborative evidence of roof leaks on a few occasions, but the evidence that this was a persistent problem was not strong. Ms Dragacevic showed the earliest complaint of her tenant was on 29 December 2009 concerning:

*"a box above the bigger toilets which has started to leak too. (probably water accumulating on the roof)".*

8. In an email of 25 April 2010 Ms Dragacevic indicated there had been no leaks from the pitched roof to date:

*"If anything was to happen to the roof – the cost would be twice that much. There are already tiles missing from the roof (visible from outside) and it is only a matter of time when the first leak will show."*

9. In a December 2013 email the Respondent reported leaking windows but not a leaking roof.

10. Ms Dragacevic had few receipts and invoices to evidence her financial losses. She said he had not kept them as she did not expect to end up in litigation. The tribunal understands the evidenced claim to be for £1896.22 including VAT, comprising:

(i) 21 January 2010 - Waterford invoice for £128.08 for investigating leak and siliconing around 4" duct work.

(ii) 1 September 2015 - Waterford statement of account for £660 including VAT (including invoice 19 July 2015 for £576 including VAT, annotated as decorating ceilings in two bathrooms damaged by roof leaks, plus invoice 6 August 2015 for £84).

(iii) 3 July 2014 - Waterford estimate for £660 (£550 plus VAT) for concealing stains in two bedrooms caused by roof leaks and painting ceilings.

(iv) 17 July 2015 – Statement of Account and estimate recording £132 including VAT for replacing bathroom fans damaged by roof leaks.

(v) 25 March 2015 - Nuaire invoice for purchase of 2 extractor fans for £316.14 including VAT.

11. Ms Dragacevic also produced an invoice dated 13 August 2012 from Kroll to the Applicant company for £600 including VAT for investigating leak in roof to flat 5 (with an email from Ms Grzyb indicating that repairs were to be paid from the service charge), with reference also to penetration into flat 4.

12. This evidence demonstrates roof leaks in January 2010 (bathroom from pitched roof), in 2012, in or before 2014 in both bedrooms, and in or before 2015 to both bathrooms.

13. Clearly, there was a series of leaks in a series of locations. The absence of documentary evidence of complaints or additional expenditure is not suggestive of the leaks being much more frequent and does not indicate particularly serious loss or inconvenience. There was no documentary evidence demonstrating when Ms Dragacevic had herself attended the property and witnessed roof leaks.

14. Mr Kaul gave evidence and confirmed that the landlord paid compensation to Ms Grzyb for the 2012 roof leak and agreed that this was because it had been in breach of covenant to repair. He agreed that from 2008 until 2012 there was no evidence that the landlord had checked the condition of the flat roof. He conceded that pursuant to the judgment in *British Telecommunications Plc v Sun Life Assurance Society Plc [1996] Ch 69* a landlord can be in breach of covenant to repair even without notice of the defect. The tribunal is satisfied that the landlord has failed to comply with its obligation in Clause 5.5.1 of the lease to keep the main structure of the building in good and substantial repair and that the Respondent has an a right to compensation in respect of her losses occasioned by the leaks. It must consider their frequency and the appropriate damages.

15. Ms Dragacevic does not present as a person likely to withhold from complaining when she has grounds, and the tribunal considers it likely

she would have recorded her complaints in writing in respect of a matter which was serious and unaddressed by the landlord. The positions taken by these warring neighbours have become personal and increasingly entrenched. Those are conditions in which exaggeration or understatement can take place. Both parties have been prone to making numerous assertions without corroborative evidence. Having considered the evidence the tribunal is persuaded that there have been roof leaks on the occasions supported by documentary evidence, caused by the landlord's failure to inspect and maintain the roof, but does not accept that there were significant other leaks on the various, unspecified, uncorroborated and unreported occasions vaguely asserted by Ms Dragacevic. Ms Dragacevic's claim was for her financial losses caused by the roof leaks. Her claim for loss of rent is dealt with below.

16. In respect of the leaks that occurred in 2010, 2012, 2014 and 2015, the landlord has been in breach of covenant to repair under the lease and the tribunal finds that all of the Respondent's expenditure set out above is payable by way of damages. The tribunal rejects Mr Kaul's assertion that Ms Dragacevic could have mitigated her losses by claiming on the building's insurance. The insurance policy does not cover landlord's neglect.

17. Ms Dragacevic also claimed surveyor's fees of £975, but the tribunal considers that she instructed Mr Hyman in contemplation of taking proceedings in respect of the landlord's breach of covenant (even though she did not expressly communicate this in her instructions) and it has no power to make an order in respect of them other than as provided in Rule 13.

**Windows**

18. On the second floor of the subject property there are two sash windows (in the kitchen diner) and a French window onto a balcony in the living room. On the third floor there is a window in the apex of the roof (in the master bedroom) as well as two skylights in the pitched roof (in the second bedroom). It was the Respondent's case that the window in the main bedroom, under the apex roof, had been damaged by water penetration owing to the landlord's failure to carry out exterior redecoration over many years.

19. Some exterior repairs and redecoration were carried out in 2004, though the Respondent considered these were to a low standard and had just masked the problem with the window. In an April 2004 email Mr Empson of Flat 1 reported the findings of the builder that Ms Dragacevic's "top floor big windows need new wooden frames".

20. However, the tribunal observed that her express position was that the apex window was already affected by rot in 2003 when she purchased the flat, and the tribunal is satisfied that this is likely. The tribunal has

difficulty in determining the condition of the window on the date of purchase, and no survey report obtained prior buying the flat has been produced. Ms Grzyb purchased in 2007 and Mr Kaul in 2008, and their survey reports were not produced in evidence either.

21. Ms Dragacevic is of the view that the window was capable of repair when she purchased, and when the works were carried out in 2004, and there is some support for this view given that the Applicant in 2004 specified works of repair and redecoration.

22. The Respondent asked the Applicant to replace this window in 2006, and the company meeting minute records her agreeing it was not urgent and could wait. She denied that was an accurate record of the meeting, when according to her an agreement was reached that the landlord would replace the window. There is no other evidence to indicate in 2006 that it was in fact beyond repair.

23. Ms Grzyb, who purchased her flat in 2007, gave oral evidence that in 2008 she had explained to the other leaseholders her proposed works to create a roof terrace. She said that all agreed to carry out the exterior redecoration at the same time as her work.

24. Emails from November 2009 show that the Respondent's tenants reported the apex window was not properly sealed. Ms Dragacevic told the other leaseholders "the frame is totally rotten and a neighbour told me before I bought the flat the same window fell out".

25. Mr Empson gave oral evidence that he had inspected the apex window in 2009 at the Respondent's request, as her tenants had been complaining about it. He found the frames to be sound and not letting in rainwater, and that the problem was that the window was poorly fitted and allowed a slight draft through a gap between the window and the sill. He also found two small cracks in two adjacent small panes that could have let in some moisture. He recommended a simple adjustment to the fitting but was not aware that Ms Dragacevic had ever acted on his suggestion.

26. An email from the Respondent dated 20 May 2012 reports the rotten condition of the apex window.

27. Mr Ian Hyman FRICS gave oral expert evidence for the Respondent. He is a chartered surveyor with 30 years experience in the residential field primarily in West Hampstead. He had been instructed to report as to the condition of the windows, and confirmed he was not instructed in relation to the roof leaks.

28. Mr Hyman carried out an inspection on 24 February 2015 from ground level and from inside the subject property. He observed a rotten sill in the French doors, decay to sills and missing putties in the kitchen windows and a rotten casement in the apex window, which could not be opened due to its poor state. He did not have a photograph of the rot to the apex window (which he had seen though it had been covered with a blind and had furniture placed next to it) but described the timber as having decayed to the point of almost disappearing. He concluded that the apex window required replacement and that the windows were in an "appalling state" due to total neglect for a very considerable period. with evidence of wet rot to varying degrees, especially to the base of windows. In his view this sort of rot was common where there had been neglect. The flat was in an exposed position owing to its elevation and orientation. He said that the normal recommendation is that external redecorations and repairs should be carried out at roughly 4-5 yearly intervals, to include as normal the replacement of putties.

29. Various photographs were attached to Mr Hyman's report. However, it was revealed at the hearing that only one of these (the only photo which bore a date and time stamp) was in fact taken by him as he had experienced problems with his camera at the inspection. He said that Ms Dragacevic had thereafter sent him undated photographs by email which he had recognised as contemporaneous and included in his report. As Mr Hyman had not himself anticipated litigation when preparing his report, it had not included the usual confirmations expected of expert witnesses, but he confirmed his overriding duty to the tribunal orally.

30. Mr Hyman's expected that, if the cracked pane observed in 2009 was left unattended for some time, it would cause internal damage to the apex window. However he said this would not be a major factor in causing the rot, which was particularly bad externally. He acknowledged that there were missing putties in the apex window, though he had not stated this in his report. However, he did not think most of the rot he saw, towards the base, sills and frame, would be likely to be due to loose putties (which would affect the bottom rail). When pressed, he said that no more than 10% of the rot to the apex window could be attributable to cracked glazing, and up to 20% to reflect also the missing putties. Mr Hyman advised that, with the paintwork in the very poor condition he has seen, it would take a couple of years to cause extensive wet rot, and less time with missing putties also.

31. Whilst the external part of the sill to the French window appeared from the photo to be sound, Mr Hyman suspected that this part was a newer replacement than the remainder and that owing to neglect water had entered into a gap between the two and caused decay.

32. In making submissions to the Applicant, Mr Kaul made it clear that he did not argue that the landlord had any defence to a claim for breach of Clause 5.2.2 if it unreasonably deemed that exterior redecoration was not necessary. In the present case, however, he denied that the exterior painting was overdue until probably 2013. Exterior redecoration having taken place in 2004, he argued that the failure to paint on a 5 year cycle could not have caused rot to the apex window as by 2006 it was already rotten.

*Determination - Windows*

33. The tribunal is in no doubt that the Applicant has breached Clause 5.2.2 of the lease. The exterior woodwork was not painted for approximately 11 years. In that time there is no evidence that the landlord considered its duty under the lease to carry out cyclical redecorations, or made itself aware by seeking expert advice as to the condition of the exterior paintwork and the recommended interval between painting. The decision in 2008 to postpone this work until Ms Grzyb was ready to carry out works to create a roof terrace, to save on costs, led to the works finally being postponed for approximately seven years. In this way the landlord company, as the tribunal has commented in its previous decision, has placed economy to the leaseholders before the to discharge its covenants under the lease.

34. Mr Kaul's suggestion that painting was not necessary until about 2013 was unsupported by any evidence and is firmly rejected. The tribunal ts the view of Mr Hyman that the appropriate cycle for exterior tenance should have been 4/5 years. The landlord was in breach since at least 2009.

35. There is conflicting evidence as to the condition of the apex window from 2004 to 2009, all of it inexpert or hearsay. However, the tribunal has taken into account the evidence that there is, and in particular that the condition of the window when observed by Mr Hyman would have been reached after a period of deterioration owing to lack of redecoration. The tribunal forms the view that though the window was affected by rot on purchase in 2004, it was painted in that year, which would have offered it protection, and thereafter that the primary cause of its further deterioration to the point where complete replacement was necessary, rather than repair, was the landlord's breach of covenant in failing to implement cyclical maintenance from around 2009 until 2015. The tribunal is satisfied on balance that repair rather than replacement would have been possible but for the landlord failure to redecorate.

36. A number of factors fall for consideration in determining the level of compensation to be awarded. Firstly, it is necessary to identify the

Respondent's loss arising. As a set off against her service charge liability, she seeks damages of £72.85 including VAT for the 2010 planing of a kitchen window swollen owing to rain penetration, and the sum of £4708.22 for the replacement in 2015 of the apex window (for which a receipt was produced). Her additional claim for loss of rent owing to the condition of the window and the roof leaks is dealt with below.

37. The cost of planing the kitchen window as shown in the invoice produced is the likely result of the landlord's failure to redecorate externally. With regard to the cost of replacement of the apex window, the Respondent can have no loss in relation to damage already existing on the date of her purchase. She negotiated the price and bought the property based on in the condition that it was in. It is clear that the window was affected by rot in 2003, and a prudent purchaser would not have assumed (at least on the material now before the tribunal) that all necessary window repairs were the liability of the landlord.

38. It is difficult on the evidence to determine a figure for the damage caused by the deterioration of the window from about 2009, not least because the condition of the window is not clear. The Respondent has failed to produce evidence of the condition of the window on purchase and the tribunal therefore assumes the rot to the window at that time, though reparable, was significant. A prudent purchaser would be likely to negotiate the price of the property in round figures. There was no expert valuation evidence from either party, and it would have been disproportionate to obtain it. The tribunal considers that a reasonable purchaser would expect a discount in the region of £1,000 from the purchase price in respect of the apex window rot, and that the market value of the property would reflect the condition on the date of completion. That sum is therefore not a loss to the Respondent and must be deducted from the replacement cost of the window.

39. Compensation should not place the Respondent in a better position than she would have been had the landlord complied with its maintenance obligations under the lease. The Respondent's loss should also be offset by the assumed cost of any external redecorations which she would have paid had there been no breach of covenant by the landlord and had a programme of cyclical exterior redecoration been maintained. There was no evidence of this cost, other than that for the 2014 programme of works, which included internal and external redecorations as well as "electricals" and "plumber" for a cost of £17,035.48 plus VAT. Doing the best it can with regard to the evidence heard in the first hearing (not repeated in this decision), the tribunal determines that the Respondent would have paid £1,500 including the prevailing rate of VAT of 15% for external redecoration had this been

carried out in 2009. This too must be deducted from the cost of the window replacement to reach her net loss, being £2208.22.

40. The tribunal considers that the Respondent's compensation must then be adjusted to reflect her contributory fault. Ms Dragacevic failed to carry out her own window repairs after purchase. Furthermore she has at all material times been a part of the collective that is the landlord, and the tribunal acknowledges Mr Kaul's position that she cannot disclaim her responsibility for the performance of the landlord's repairing covenants in those circumstances.

41. The directors of the company, of which the Respondent was one, had a duty to ensure compliance with the landlord's covenants under the lease. There is no evidence of her having tried unsuccessfully to persuade the other directors to carry out exterior redecoration, or that until 2014 she complained that it had not been done. The evidence does not demonstrate that Ms Dragacevic took significant steps in this regard, and the tribunal does not accept her oral evidence that she did. It appears likely to the tribunal that she acquiesced, even if reluctantly, in the decision to postpone redecorations in 2008 until Ms Grzyb was ready to start her works to create a roof terrace. The likelihood that Ms Dragacevic would have avoided the replacement of the window by carrying out her own repairs, and/or succeeded in persuading the other leaseholders to agree to repaint the property in compliance with the lease terms does not seem to the tribunal to be high, given the expert evidence and the consistent position of the landlord. Putting it at about 10% in the view of the tribunal, a proportionate deduction to her damages must be made.

**42.** The tribunal therefore determines damages by way of set-off in the sum of £1987.40, plus £72.85 for the sash window repair.

**Loss of Rent**

43. The Respondent claimed for void periods and for loss of full rent. Her evidence was that the rotten windows, roof leaks from April 2007 onwards, and the infestation prevented her from renting the premises at a market rent from April 2009 to date. She assessed her claim at £65,240.00 (but limited it as set out above), though asserted her real losses were actually a much higher figure.

44. In summary Mr Kaul argued in submissions for the landlord that there was no evidence of a connection between any breach of covenant and any loss of rent, and the tribunal agrees. It was striking that there was no contemporaneous mention by Ms Dragacevic in any of the documents that she was having to reduce the rent owing to the condition of the windows and leaks from the roof. Given the very

substantial sums she claimed to be losing, the absence of any expression of dissatisfaction is notable. Furthermore, there is no record from the landlord or tenant of any rent agreement referring to a discount for the condition of the property. The Respondent said that the tenant did not complain much as he was getting a reduced rent, but the tribunal did not find it credible that there would be no documentary evidence at all of this nature if Ms Dragacevic was indeed losing such vast sums of money and the tenant was indeed experiencing serious inconvenience and discomfort.

45. Ms Dragacevic produced copy tenancy agreements and sought to rely on evidence that the rent she charged had gone down from 2008, and that the property had been unlet for a good part of 2009 and 2011. However, there are many reasons why a landlord might reduce or not increase rent, or have void periods (not least local market conditions). The Respondent did not discharge the burden of proving causation.

46. Furthermore, the evidence that the condition of the flat would cause loss of rent was not strong. The tribunal has determined that the roof leaks were intermittent and infrequent. Ms Dragacevic would not be entitled to damages for loss of rent for the rot to the apex window in the condition when the flat was purchased. It is not clear on the evidence what if any difference the window's deterioration would have made to the rent she could charge.

47. The valuation evidence produced by the Respondent was unimpressive and the tribunal rejects it. Ms Dragacevic produced a letter of advice from Foxtons letting agents dated 11 December 2015 to the effect that *"the rental income would have gone up by £15-£25pw/pa depending on the year and assuming that the property remained in good condition."* She produced a written report from Jacqueline Alpert MRICS of BMCS dated 23 December 2015. Ms Alpert set out her opinion as to the rental value for the subject flat for the years 2009 to 2014 both in good and poor condition – the latter explained to mean the flat affected by water ingress from the roof and by infestation of mice. The rotten condition of the apex window was not specified to be a factor in the valuation (though there was reference to poor window condition in relation to the replacement and its cost).

48. In estimating rental value in good condition Ms Alpert said she had made enquiries with three firms of local letting agents, and compared this with the rent actually received. She concluded that the difference between the rental value of the flat in good and poor condition was £100 per week in 2009/10, £135 in 2010/11, rising to £160 for 20011 – 2015. However, her opinion was therefore derivative and entirely unsupported. She produced no evidence at all of the rent paid for comparable properties in the area, and such evidence is something the tribunal would have expected in a professional valuation report. The

Applicant, on the other hand, produced written evidence of the rent for a neighbouring flat which suggested that the Respondent's rent was not low.

49. An addendum to her report dated 24 November 2016 (which the Respondent claimed but could not prove had actually first been prepared in January 2016) contained a "Summary of Findings" which appeared to be no more than a list of unsupported assertions which read as if they had been dictated by the Respondent:

> *"The cause of the rent loss over the period was the Landlord's neglect of the building, not anything which you had done or had failed to do. More specifically, the loss of rent was caused by window disrepair and roof leaks. You mitigated your rent loss as much as you could, attempting to reduce the effects of the window disrepair and roof leaks wherever possible."*

211. Thus, the expert's opinion as to the cause of the loss of rent had materially changed. The mouse infestation was now not referred to as a cause of the loss of rent, but the condition of the windows was. The tribunal considered this substantially to undermine the reliability of the valuation evidence. There had been no adjustment to the valuation to reflect the dismissal of the claim in respect of a mouse infestation, and there was no expert opinion as to the relative impact on valuation of each of the three cited causes (mice, roof leaks and windows).

212. Ms Alpert also went on to list in similar fashion the "*Condition of premises and steps you took to mitigate your rental losses*", which again appeared to be nothing more than a repetition of assertions made by Ms Dragacevic, Ms Alpert acting as her mouthpiece, for example:

213. *"You tried to mitigate your losses by repeatedly repainting the ceilings and the inside surfaces of the window frames to hire their true poor condition. You tried many times to ease the kitchen windows until their deterioration prevented this. You attempted to replace the window blind in the bedroom but could not do so due to the window frame being too brittle."*

215. Ms Alpert indicated that she had inspected the property over the years in question and had seen its condition, but did not explain upon what instructions or in what capacity. All in all, the tribunal found the Respondent's valuation evidence to be unsatisfactory and unpersuasive and was unable to rely on it.

## Costs and fees

216. Mr Kaul made an oral application for costs against Ms Dragacevic under Rule 13. There was no time for the parties to make

representations upon that application. The tribunal would indicate however that, subject to representations from the parties which it will consider, its preliminary view is that an order for costs payable by either party is not justified in the present case. If the application for costs is pursued, the Applicant must file and serve written representations within 14 days, and the Respondent within 14 days thereafter. Any submissions on the tenant's application under s.20C of the Act must be made at the same time.

217. Having considered all of the circumstances, the tribunal determines that the Respondent should within 28 days to refund to the Applicant £125 in respect of half of the tribunal fees paid in the present proceedings.

**Name:** F. Dickie **Date:** 14 March 2017