FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/LIS/2019/0002**
Property	**:**	**3 Collection Place, 96 Boundary Road, London NW8 0RH**
Applicant	**:**	**The Collection (Management) Limited**
Representative	**:**	**Miss Georgia Whiting (Counsel) Monro Wright & Wasbrough LLP**
Respondent	**:**	**Alex Andrew**
Representative	**:**	**Mr Charles Auld (Counsel) Berry Smith LLP**
Type of application	**:**	**Reasonableness and liability to pay service charges - s.27A Landlord and Tenant Act 1985**
Tribunal member(s)	**:**	**Judge N Rushton QC Mr P M J Casey MRICS Mr L G Packer**
Date and venue of hearing	**:**	**14 October 2019 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**22 October 2019**

DECISION

Decisions of the tribunal

(1) The Tribunal determines that no service charges are payable by the Respondent under the terms of the lease for any of the years 2016, 2017, 2018 and 2019 in respect of which a determination is sought.

(2) The Tribunal makes an order under section 20C the Landlord and Tenant Act 1985 ("**the 1985 Act**") that the costs incurred by the

Applicant in connection with these proceedings are not to be regarded as relevant costs in determining the amount of any service charge to be paid by the Respondent.

The Application

1. By an application dated 8 July 2019 the Applicant landlord seeks a determination under Section 27A of the 1985 Act of the reasonableness and of the Respondent tenant's liability to pay service charges for the years 2016, 2017, 2018 and 2019.

2. The Applicant has produced a schedule of its costs, and also seeks an order for payment of its costs by the Respondent pursuant to paragraph 2 of Part II of the Fourth Schedule to the lease.

3. The Respondent has applied for an order under s.20C of the 1985 Act.

4. Directions were issued on 11 July 2019. The Respondent was directed to provide a statement in reply to the application by 1 August 2019 and the Applicant to provide a statement in reply by 12 August 2019, to stand as each party's case. On the application of the Respondent, those deadlines were extended on 31 July 2019 to 2 September 2019 and 23 September 2019 respectively.

5. A statement has been filed by the Respondent, Alex Andrew dated 2 September 2019. A statement has been filed on behalf of the Applicant from David Pow, one of its directors, dated 23 September 2019.

Introduction

6. This is a service charge dispute in respect of the property at 3 Collection Place, 96 Boundary Road, London NW8 0RH ("**the Property**"). The freeholder and landlord of the Property is The Collection (Management) Limited ("**the Company**"), the Applicant. The long leasehold interest in the Property is owned by Ms Alex Andrew, the Respondent.

7. The Company alleges that service charges in respect of the Property for the period from July 2016 to date have been demanded and are due and payable but remain unpaid. There is no dispute that those service charges have not been paid by Ms Andrew.

8. The key issue in this case is whether or not service charges have ceased to be payable under the terms of the lease, on the grounds that the Property has been damaged by a risk against which the Company has insured it, so as to be uninhabitable.

The Property

9. The Property is a substantial five-bedroom, four-bathroom new build contemporary-style house in St John's Wood. The lease premium paid by Ms Andrew in 2008 was £2.48m. The Tribunal had the benefit of sight of marketing pictures including a cut-away and plans for the Property, which extends over four levels. It has several flat roofs. It was clearly intended to be a high specification property.

10. The Property was one of a development of 15 properties at Collection Place. The original landlord was the developer, Vanderbilt (Boundary Road) Ltd ("**the Developer**"), but the current position is that the Company is both the landlord and the management company under the terms of the lease. The Company's freehold title is registered at HM Land Registry under title number NGL515602.

11. All of the tenants are shareholders in the Company, which is now a tenant-owned management company. Ms Andrew is also a director of the Company, Companies House records showing that she was appointed on 23 September 2013.

The Lease

12. Ms Andrew is the leaseholder of the Property, holding under a lease dated 12 February 2008 for a 999-year term from 1 January 2007.

13. By clause 4.2 of the lease, Ms Andrew covenanted with the Company and the landlord (now also the Company) to observe and perform the obligations in among others Part II of the Fourth Schedule to the lease. By paragraph 1 of Part II of that schedule, she covenanted to pay the Company the Tenant's Service Charge Percentage in accordance with the provisions in the Ninth Schedule. It appears this latter reference must be an error and should refer to the Seventh Schedule, that being the one which sets out matters concerning service charge certification and payment, whereas the Ninth Schedule deals only with recalculation and reallocation of service charges for periods when (among other things) a unit has become uninhabitable. The Tribunal has proceeded on the basis that paragraph 1 of Part II of the Fourth Schedule is to be interpreted as referring to the Seventh Schedule and the reference to the Ninth Schedule is a typographical error.

14. In the lease particulars, the Tenant's Service Charge Percentage for the Property is stated to be 8.2200% of the total Service Charge costs incurred by the Company in accordance with the Sixth Schedule. Paragraph 1 of the Sixth Schedule sets out the Company's obligations, subject to payment by the tenant of the Service Charge, to provide various services and also, among other things, to keep in good repair "*(1.3) the main structural parts of the Estate and the external and*

internal load bearing walls and roofs of the Units and the structure of any terrace or balcony."

15. Paragraph 1 of the Seventh Schedule is the focus of the present dispute and reads:

> "*1.* ***That in the event of the Demised Premises being*** *destroyed or* ***so damaged by any risk against which the Landlord has insured the same as hereinbefore mentioned so as to be rendered partially or wholly unfit for occupation and use and provided that the insurance effected by the Landlord shall not have been vitiated or payment of the insurance money refused in whole or in part in consequence of some act or default on the part of the Tenant*** *his family servants or agents* ***then the*** *Yearly Rent and* ***Service Charge hereby reserved or a fair proportion thereof shall forthwith cease to be payable until the Demised Premises shall have been restored and reinstated and again rendered fit for occupation*** *and in case any dispute shall arise regarding this clause the matter shall be referred to an independent surveyor to be agreed between the parties or in default of agreement to be appointed by the President for the time being of the Royal Institution of Chartered Surveyors as a single arbitrator in accordance with the provisions of the Arbitration Act 1996 or any statutory modification or re-enactment thereof for the time being in force."* [emphasis added]

The hearing

16. The Company was represented at the hearing by Miss Georgia Whiting of counsel, who was instructed by Monro Wright & Wasbrough LLP. She also provided a skeleton argument to which the Tribunal has had regard. Ms Andrew was represented by Mr Charles Auld of counsel, who was instructed by Berry Smith LLP.

17. Mr Pow did not attend the hearing and no explanation was given for his absence. Ms Andrew attended and gave oral evidence in addition to confirming her statement. She was cross-examined and also answered questions from the Tribunal.

18. Miss Whiting asked that the Tribunal rely on Mr Pow's statement in any event. The Tribunal has concluded that it may rely on Mr Pow's statement where its contents are not in dispute; but where there is a conflict between his statement and the evidence of Ms Andrew, the evidence of Ms Andrew should be preferred, it having been tested.

19. At the start of the hearing the Tribunal asked the parties their position as to the arbitration clause in paragraph 1 of the Seventh Schedule, bearing in mind the provisions of section 27A(4)(b) of the 1985 Act,

which provides: *"(4) No application under subsection (1) or (3) may be made in respect of a matter which… (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party".*

20. Both counsel confirmed it is not in dispute that the Property remains unfit for occupation and that structural works to the Property are still required and that in those circumstances, both sides agree that the arbitration clause does not prevent the Tribunal deciding issues as to the payability and reasonableness of the service charges.

21. Miss Whiting confirmed that no positive case was put forward by the Applicant as to the nature and extent of the ongoing structural problems with the Property, including as to whether there was an ongoing problem with water ingress. There is no dispute that the Property has been uninhabitable since about January/February 2014 and that as a matter of fact, the problems which rendered the Property uninhabitable at that time continue to the present and have not been resolved.

22. Mr Auld confirmed that while the reasonableness of the service charges was not conceded by Ms Andrew, she had not put forward any positive case in relation to the quantum of them.

23. Ms Andrew gave evidence including as follows. The Tribunal accepts her evidence, as set out below:

- Problems with the Property began in 2009, including damp patches, lots of leaks from the shower and leaks from the flat roof above the master bedroom. Ms Andrews lived at the Property herself from April 2009 until September 2010. She then rented it out for around £140,000 p.a. and had two sets of tenants.

- Following an earlier leak in or around 2010, Ms Andrews had made an insurance claim against Aviva, but when this was not making progress, she had arranged for repairs, some at her own cost and some through the original builder. This included a lot of redecoration and re-covering of one of the flat roofs. That money spent on repairs had been wasted because the leaks recurred.

- Thereafter, problems had increasingly manifested themselves. From January 2014 onwards there were incidents of serious water ingress both as rainwater from roofs and external areas and as leaks from defective pipes, including water flowing into electrical units, and water pouring in from the front door when it rained. Water leaked from the front door podium into the basement. The property became uninhabitable, and the tenants left around February 2014.

- With the Company's agreement, Ms Andrews made a claim under the buildings insurance to Aviva. This was for her loss of rent and the cost of redoing the interior parts of the Property for which she was responsible under the lease.

- She had obtained expert evidence as to the defects for the purposes of the insurance claims but had not disclosed this in these proceedings. She did produce a large number of photographs of the Property in a folder. Although undated they were presented as showing the Property's ongoing condition. They show the Property as being in a state of serious disrepair, including of the bathrooms, flooring and some internal walls.

- She had received an insurance payment from Aviva of approximately £600,000 in total. This was paid in 3 instalments: one in 2014 for around £130,000, most of which was for loss of rent. There was a further payment in 2015 of around £70,000 for loss of rent. The final and largest payment was in July 2018 and was in excess of £300,000, which included most of the costs for repair works. Overall Aviva had agreed to pay in excess of £200,000 for the internal repair works, with the remainder being loss of rent. The internal works covered by the insurance payment included replacing every bathroom, putting back joists, flooring, costs of investigations and surveyors' costs. There was no final payment for the repair works until July 2018 because the scope of the works required was not agreed with the insurers until 2018.

- The Company had separately received an insurance payment for the loss of her service charge payments up to July 2016. This was not disputed.

- There had been a negotiation with Aviva as to the period within which the works for which she was responsible should have been completed. Aviva's loss adjuster had said this was 69 weeks but eventually they had compromised at a 97 week period. This was the basis of the calculation of the sums paid to her. She accepted that if there had not also been exterior/structural damage to the Property, the interior works could have been done within that period.

- She reported all defects to the freeholder from 2009 onwards via the concierge provided by the Company. The Property had an NHBC certificate extending to building defects emerging in the first 10 years. The Company's consistent approach was simply to pass on these reports, but when the Developer would no longer deal with the problems, the Company said it was up to Ms Andrew to resolve them. She had become a director of the Company to make it easier for her to bring claims both against Aviva and under the NHBC policy.

- She was currently negotiating with the NHBC as to the payment which should be made in relation to the defects with the build. This only related to her Property. A meeting had taken place on 17 September 2019 and the NHBC had indicated they would come back with an offer at the end of October. There had been a difficulty with a payment in relation to the first 2 years because the Developer had not been notified of the claim. However, as to the following 8 year period, they were accepting there were problems with the roofs, drainage, front door and with water under the floorboards. The issue was with the quantum. Their first offer had been only £5,000.

- She agreed that perhaps it would have been better to have brought proceedings against the landlord for breach of their duty to keep the structure of the Property in good repair, to get them to repair the exterior. However she had been advised to pursue the NHBC warranty as otherwise she would be asked why she had not exhausted her remedies against the NHBC first. In hindsight she didn't realise it would be so difficult to pursue the NHBC. She could not understand why the Company was not engaging with the NHBC claim.

- She wants to do the repairs tomorrow. The only reason she is not doing them is because the internal work would be completely wasted until the structural and exterior problems have been dealt with, and she would not be able to make a further buildings insurance claim. She is losing £140,000 p.a. in rent, the service charges are much less than this.

- She accepts that she received all of the service charge invoices until recently. She also accepts she received all the service charge accounts including 2018, but the 2018 accounts were not audited. She initially said she did not receive any document in the form of the 2 page sheet headed "Service Charges – Summary of Tenants' Rights and Obligations" (which was produced to the Tribunal). She then said that there was a difference in the documentation sent from June 2018 – prior to that the information on the back of the service charge demands was illegible (faint print and half size, about 7 point).

- Ms Andrews' property is at one end of the terrace. There have apparently been no similar problems with other properties in the terrace.

Submissions on behalf of the parties

24. On behalf of Ms Andrew, Mr Auld submitted that the primary duty to pay service charges arises under the Fourth Schedule, Part II,

paragraph 1, with the Seventh Schedule dealing with payment of service charges. Under paragraph 1 of the Seventh Schedule, a trigger event occurs if the Property is damaged so as to become uninhabitable by a risk against which the Company has insured the property and the insurance or payment of insurance monies has not been vitiated by the act of the tenant. Once unfit, the liability for service charges is suspended until the Property is rendered fit for occupation. There is no dispute that the Property is not habitable. It is still uninhabitable as a result of an insured event which has not been put right, so there is no obligation to pay service charges. By the terms of the lease, even if she has received insurance monies to carry out the works, the tenant can elect whether to do so, or whether to keep those monies, not carry out the works to make the Property fit for occupation and not pay the service charges.

25. There was no case for implying into the lease a term requiring the tenant to carry out the repair works to the interior if, or as soon as, she had received insurance monies for that purpose. In a covering letter accompanying service of Ms Andrew's witness statement, her solicitors had asked that if there was going to be an argument that a term should be implied, this should be dealt with in the statement filed on behalf of the Company. No such case had been put. It was not open to the Company now to advance a case for an implied term. In any event, there was no case here for implying such an implied term because:

- The lease was a very full document, drafted by City solicitors, which set out all the apparent terms;

- No term should be implied where the lease already deals with a matter. Here there was express provision [paragraph 1 of the Sixth Schedule] that where the landlord had received insurance monies as a result of damage to the Property by insured risks, then it should cause all such monies to be paid out "*with all convenient speed in rebuilding repairing or otherwise reinstating the Estate…*". There was no equivalent obligation on the tenant. Since it appeared the issue had been expressly considered and no equivalent obligation imposed on the tenant, a clause to that effect should not be implied.

- The argument that Ms Andrew had a duty as a director of the Company to act in good faith as regards the Company was not one which was justiciable by the Tribunal. In any event, the allegation did not withstand scrutiny: if further work to the interior was done before the external walls, roof and structure of the Property was made wind and watertight, the internal work would be ruined, and no further insurance payments would be made. A director could not be in breach of fiduciary duty for not carrying out work in such a situation.

- Alternatively, the reference to insurance in paragraph 1 of the Seventh Schedule included an insurance claim under the NHBC certificate as well as the Aviva insurance.

- Further, the Property cannot be deemed habitable from January 2016 simply because that is the date when the 97 week period agreed by Aviva expired. There is no deeming provision in the lease: the service charges are not payable until the Property is restored, not until when the insurers say it should have been.

- In any event, by their letter of 9 November 2019, a copy of which was produced to the Tribunal, the Company's solicitors had accepted that in situations where the Company had received insurance monies, service charges would not become repayable again until after the insurance monies had been received and the works substantially completed. Since Ms Andrew did not receive the insurance monies to pay for the works until July 2018, even if an equivalent provision was implied against the tenant, service charges would not become payable until 97 weeks after July 2018. That would take out all the claim currently before the Tribunal.

- The Company had a power under the lease to reallocate between the other units any service charges which were not payable for one unit because it was uninhabitable. The Company had a remedy; its ability to manage the development was not, or should not have been, prejudiced.

26. Leaving aside the terms of the lease, Mr Auld submitted that it made no sense to repair the interior of the Property while the structural works had not been done. If the service charges were payable, Ms Andrew would in any event have an unanswerable set-off for breach of the Company's obligations to keep the structural parts of the Property in good repair, which would extinguish the service charge claim. The Company only had itself to blame because it could itself have pursued the NHBC and got those works done, in which case it would have been able to recover service charges.

27. On behalf of the Company Miss Whiting submitted that while the initial flooding of the Property was an insured risk, this was only true for the period for which Aviva had accepted sums under the policy were payable. That period expired on 14 January 2016 and Aviva had confirmed that any further works would be classed as uninsured losses. As a matter of construction, the Property could not be said to have been damaged by a risk against which the Company had obtained insurance so that service charges were not payable, for any period after 14 January 2016. The wording of the clause entitling withholding of payment was not met after that date and the service charges claimed were accordingly calculated from that date. The terms of the clause did

not extend to defects covered by an NHBC claim but only to the risks covered by the insurance with Aviva.

28. In any event, any delays in the payment of the insurance monies were the result of Ms Andrew opting to deal with Aviva directly. There must be an implied term similar to the express obligation on the landlord, requiring the tenant to carry out the works within a reasonable period where it was the tenant who received the insurance payment. In addition, the actions of Ms Andrew had contributed to the fact that the payment had not been made to the Company, because she had arranged for the monies to be paid to her.

29. She submitted there must in any event be an implied term obliging the tenant to utilise insurance monies received to carry out repairs. It would be a nonsense if a tenant could just leave the Property in an uninhabitable state for years and still not be required to pay any service charges. The circumstances were unusual because Ms Andrew was a director and undertook liaising with Aviva herself. The amounts of the service charges were reasonable and had been accepted by Ms Andrew as being reasonable. In the absence of sight of Ms Andrew's expert evidence, the Company had limited evidence as to the problems because they had not been involved.

30. In answer to a question from the Tribunal Miss Whiting accepted that in his statement Mr Pow had not rebutted Ms Andrew's case that the Company had a duty to repair, and that there were ongoing problems with water ingress which the Company was obliged to put right.

Decision

31. On the question of the proper interpretation of paragraph 1 of the Seventh Schedule to the lease, the Tribunal accepts the submission of Mr Auld for Ms Andrew that where the Property is damaged so as to be rendered unfit for occupation by a risk against which the Company has insured, then that is a trigger for service charges to cease to become payable until the Property has been "*reinstated and again rendered fit for occupation*." The trigger is the manifestation of the risk against which insurance was obtained – here damage caused by water leaks resulting from defective roofs and other defective structural parts of the Property. The trigger does not cease to be effective merely because the period for which the insurance company has been willing to make a payment (to either landlord or tenant) has expired.

32. The Tribunal interprets the reference to "insurance" in that paragraph as meaning insurance which the Company has procured pursuant to Part I of the Sixth Schedule. This is because paragraph 1 of the Seventh Schedule refers to risks against which the landlord has "*… insured the [Property] as hereinbefore mentioned…*", limiting insurance to that

mentioned in the lease. The Tribunal does not consider therefore that "insurance" includes a claim against the NHBC.

33. There is no dispute that the cause of the Property being uninhabitable has been the same from January 2014 until the present. All of the evidence before the Tribunal supports the conclusion that the Property is and remains uninhabitable because the necessary structural repairs to among other things the roofs have not yet been carried out, so there have continued and will continue to be leaks to the Property, with consequential damage to it.

34. The Tribunal therefore concludes that the damage which has rendered and continues to render the Property unfit for occupation was caused by a risk against which the Company insured under Part I of the Sixth Schedule. Paragraph 1 of Part I refers to insurance against "*the usual comprehensive risks",* which would include the Aviva insurance.

35. Paragraph 1 of the Seventh Schedule is subject to the proviso that neither the insurance nor the payment of insurance monies should have been vitiated by any act or default of Ms Andrew. The Tribunal accepts that there has been no such act or default by Ms Andrew, on the evidence it has seen, and so that neither the policy nor any claim has been vitiated. That conclusion is not affected by the fact that it would not be possible for either the Company or Ms Andrew to make any further claim against Aviva in relation to any ongoing effects of the defective roofs and other structural parts of the unit, which have still not been repaired.

36. The Tribunal also accepts that it is reasonable for Ms Andrew not to spend the monies she has received for internal works to the Property on having those works carried out while the structural works which are the underlying cause of the water leaks have not been done. It is clear from Ms Andrew's evidence that the monies she received from Aviva were all in her capacity as a tenant (for loss of rent from sub-letting and for repairs to the interior) and were not on behalf of the Company for repairs to structural parts of the estate, including the roofs, for which it is responsible. The Tribunal is fortified in this conclusion by the fact that the Company has separately received compensation from Aviva for loss of service charges from Ms Andrew for the period to January 2016.

37. At present, Ms Andrew's claim against the NHBC in respect of the defects in the structure of the Property has not yet been resolved. The Company has not joined with Ms Andrew in making that claim. Nor has the Company carried out works to repair the roofs and/or any structural parts of the unit pursuant to its obligations under paragraph 1.3 of the Sixth Schedule to keep the structural parts of the estate, external walls or roofs in good repair. Neither has Ms Andrew brought any proceedings against the Company to enforce those obligations.

38. The Tribunal cannot and does not comment on the validity of any such claims, but notes that consequently there are outstanding problems with the roofs and other structural parts of the unit which Ms Andrew is not responsible for repairing but which are a continuing cause of water ingress and damage to the Property, and which have on the evidence available to the Tribunal been such a cause since January 2014.

39. The Tribunal does not consider that a term should be implied into this lease which would require Ms Andrew to use the insurance monies which she has received to carry out repairs to the internal parts of the Property in circumstances where works to the roofs and other structural parts of the unit needed to prevent future water ingress (works for which she is not responsible) have not yet been carried out. To do so would be to imply an obligation requiring her to do something futile, which on any view the Tribunal should not do. It therefore declines to imply such a term into the lease.

40. The Tribunal does not reach any conclusion, because it does not need to do so, on the hypothetical question of whether an obligation on the tenant should be implied into this lease to use insurance monies received for works to the interior to carry out those works within a reasonable time where the only works necessary to render the Property fit for occupation are those internal works.

41. Accordingly, the Tribunal determines that no service charges are payable by Ms Andrew under the terms of the lease for any of the years 2016, 2017, 2018 or 2019. The issue of reasonability does not therefore arise.

42. In those circumstances the Tribunal further determines that the Company's costs of bringing this application are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by her and makes an order to that effect under s.20C of the 1985 Act. This is because it would not be reasonable for them to be taken into account in this way.

Name: Judge N Rushton QC Date: 22 October 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).