FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/22UJ/LSC/2020/0040 A**
Property	:	92 Moor Tower, Waterhouse Moor, Harlow, Essex CM18 6BE
Applicant	:	Imran Iqbal
Respondent	:	Harlow District Council
Representative	:	Denise Westwood
Type of Application	:	for determination of reasonableness and payability of service charges for the year 2019/20 [LTA 1985, s.27A]
Tribunal members	:	Judge G K Sinclair & R Thomas MRICS
Date of Hearing	:	Friday 22nd January 2021 by BTMeetMe telephone conference call
Date of this decision	:	3rd February 2021

DECISION

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1. In this application the applicant leaseholder raised a number of issues concerning the service charge for the year in question but, by the time he submitted his more detailed statement of case (as directed) he confirmed that everything had been amicably resolved with his landlord save for the charge for major works, namely the replacement of the two lifts in the block.

2. Insofar as that remaining issue was concerned the only argument advanced by him justifying non-payment was the fact that, due to the lift to his floor being out of action at the time, his mother who was visiting him felt dizzy and had to be escorted in the other lift back to the ground floor where she stumbled and fell, grazing her head and having to be taken by ambulance to hospital. Although not set out in the appropriate legal language he effectively sought to set off damages for her personal injuries, extinguishing his contractual liability to pay his share of the cost of the major works.

3. For the reasons which follow the tribunal declines to permit any such set-off or counterclaim and determines that the sum of £4 642.65 demanded on 17th July 2020 as his share of the overall cost of the major works is payable in full.

Background

4. On 2nd December 2013 the applicant acquired a long lease of his eighth floor flat at Moor Tower in Harlow under the statutory right to buy. In 2017 his local authority landlord commenced a section 20 consultation process concerning the replacement of the two lifts in the building. It appears that one serves the odd-numbered floors and the other the even-numbered ones, so that if one is out of action the only way of reaching an unserviced floor is by going to the floor above (where possible) and walking down the stairs.

5. From the documentation it appears that the applicant took no part in any of the consultation events save for submitting a negative critique in a questionnaire in August 2020.

6. The lift replacement works started in 2019, were completed in early 2020 and a one year guarantee period followed during which call-outs for snagging or other problems were to be carried out by the installer free of charge. Call-outs for each lift were recorded and appear in the hearing bundle at pages [212–213]. Most are for early 2020, but at [213] is an entry for 5th August 2020, the date of the incident involving Mr Iqbal's mother. It shows that the lift was repaired the same day, being out of action for a matter of hours only.

The lease

7. The lease is a typical local authority "right to buy" lease, with the annual service charge being estimated in advance and comprising elements A and B : A being the council's estimate of the costs likely to be incurred in the forthcoming year and B being an adjustment to credit in the following year any underspend or add any underpayment of the actual expenditure incurred the previous year. The regular service charge is payable by monthly instalments. Contributions to the cost of major works are dealt with separately, by one-off demands after costs have been incurred.

8. The applicant did not dispute his contractual liability to pay service charges.

Material statutory provisions

9. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :

> an amount payable by a tenant of a dwelling as part of or in addition to the rent...

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management...

10. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
    a. only to the extent that they are reasonably incurred, and
    b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

11. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

12. Insofar as qualifying long term agreements are concerned, ie those in respect of which the annual contribution of any tenant liable to pay towards the service charge will exceed £100, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have been either complied with in relation to the works or dispensed with by (or on appeal from) the appropriate tribunal. As the applicant is a "public body" for the purposes of the Public Contracts Regulations 2015[1] (implementing the European Public Contracts Directive[2]) the consultation requirements prior to entry into a qualifying long term agreement are those appearing in Schedule 2 to the Service Charges (Consultation Requirements) (England) Regulations 2003[3] (as amended).

The tribunal's jurisdiction

13. In view of the approach taken by the applicant (who did not have the benefit of legal advice) it is important to explain the limited jurisdiction of the tribunal and its relationship with the courts.

14. While the work undertaken by the Residential Property division of the First-tier Tribunal (Property Chamber) is wide and varied – ranging from the recognition of tenant associations, assessment of fair or market rents, management of flats (including determination of service and administration charges and appointment of managers or RTM companies), deciding whether a residential leaseholder is in breach of covenant, appeals against financial penalties, orders or notices served by local housing authorities concerning poor housing conditions or management, and resolving questions arising from site agreements under the Mobile Homes Acts – every single aspect has been granted by statute. The tribunal has no authority to resolve any other type of dispute.

1 SI 2015/102

2 Directive 2014/2 4/EU of the European Parliament and of the Council

3 SI 2003/1987

15. However, jurisdiction is not universal : sometimes, as with the determination of service charges, it is shared with the County Court while in others it is reserved exclusively to the court. Thus, by way of example only :
    a. In flat management cases :
        i. Where a landlord seeks to recover sums owing to it the tribunal has no jurisdiction concerning recovery of ground rent – often the most minor item in dispute
        ii. If a lease does not provide for the payment of contractual interest on arrears and a claim is made to recover statutory interest under section 69 of the County Courts Act 1984
    b. In collective enfranchisement cases :
        i. The validity of the initial notice and whether, if the landlord fails to serve a counter-notice, to make an order in the terms contained in the initial notice
        ii. If the landlord fails to transfer the property in accordance with terms and at the price determined by the tribunal, and the nominated purchaser applies to the court within the time limit
    c. In park home cases the tribunal can determine almost any question arising from a site agreement under the Mobile Homes Act, but not whether to terminate the agreement due to non-compliance with its terms by the occupier.

16. In an attempt to ameliorate any judicial knowledge gap, and to streamline and speed up the resolution of all issues in both jurisdictions – but only where there are live claims in both court and tribunal – a pilot programme has been initiated.

17. Pursuant to a report by the Civil Justice Council (May 2016) on the distribution of property cases between the courts and the Property Chamber of the First-tier Tribunal judges are now deployed in such a way as to ensure that litigants are able to resolve all the issues in a dispute in one forum; the premise for the idea being that in many cases litigants might otherwise be required to have part of their dispute resolved in the County Court and part in the Property Chamber. Since all First-tier Tribunal judges are now also judges of the County Court (and vice versa), a Tribunal judge or a Court judge is appointed to decide all aspects of multi-faceted cases in one place and at one hearing.

18. On 20th June 2018, in the case of *Avon Ground Rents Ltd v Child*[4], Holgate J and HHJ Hodge QC (sitting both as the President and a judge of the Upper Tribunal (Lands Chamber) and also as judges of the County Court) issued further guidance on how such cases should be dealt with, clearly separating the functions of court and tribunal. Thus, any non-judicial members of the tribunal can play no role insofar as the County Court's jurisdiction is concerned; this being exercised by the judge alone.

The hearing

19. In view of the current measures imposed by the court and tribunals to minimise risk to all parties during the current coronavirus pandemic the hearing was conducted remotely by telephone. Mr Iqbal, the applicant, represented himself while Ms Westwood appeared for his landlord council. Mr Iqbal confirmed that

4 [2018] UKUT 204 (LC)

he had not obtained any legal advice before bringing this application, stating that due to Covid-19 the Citizens Advice Bureau office was closed on the day he attempted to visit. He had not thought of approaching a personal injury solicitor, even on a "no win-no fee" basis.

20. As directed, the respondent council prepared the hearing bundle. It included two witness statements on behalf of the council : a detailed statement with exhibits by Kathy Conway, Major Works and Dispute Resolution Officer, and a short one by Bob Purton, Operations Manager of the Housing Operations (Property) team. There was no witness statement from the applicant; just a brief statement of case confirming that the only issue remaining concerned his liability for the cost of the lift replacement. The only point he sought to make justifying elimination of his contractual liability in full was the damages due for the injury sustained by his mother when she fell and grazed her head.

21. Unfortunately the bundle was rather bulkier than necessary, as it contained three copies of the lease :
    a. An unsigned and undated copy filed with the application
    b. A copy of the executed lease, exhibited to Ms Conway's statement; and
    c. A second copy of the executed lease, with coloured plans, behind the final tab.

    The first and second were unnecessary, and should have been replaced by a single sheet of paper stating that the document had not been reproduced because a complete copy appeared at tab 6. That would have saved upwards of 80 pages per bundle.

22. Several days before the hearing the applicant applied to introduce by way of additional evidence his mother's discharge summary from the Princess Alexandra Hospital at Harlow. Although, in view of the legal difficulties unseen by Mr Iqbal, the tribunal considered the document to be of doubtful relevance it was admitted because it helped explain what the hospital was actually treating her for, her date of admission, and why she was not discharged until ten days later.

23. As the applicant's mother is not a party to these proceedings, and the tribunal has seen no actual consent for the document's disclosure, this decision shall be rather circumspect about its description of her medical complaint and treatment.

24. Mr Iqbal, who informed the tribunal of a number of medical complaints of his own, including a poor memory, attempted to give an account of his mother's accident on 5th August 2020. He said that, accompanied by his brother, she came to see him in his flat but found that the left-hand lift (which served the even-numbered floors) was not working. Mother and brother therefore took the other lift to the ninth floor, intending to walk down one flight of stairs to the eighth floor. There was no suggestion of any malfunction or sudden jolting to a halt of the lift, merely that having got out his mother felt dizzy. Whether she had even started to descend the stairs was unclear. Instead of continuing down the stairs, supported by her son, she decided to abort the visit entirely and go home, so she got back into the lift and returned to the ground floor. Having exited the lift, and perhaps even the building, she again felt dizzy, fell to the ground and grazed her head.

25. Later, towards the end of the hearing, when Mr Iqbal stated that he did not feel that he could continue much longer, he said that his mother took the lift to the seventh floor rather than the ninth (which would require her to walk up one flight – which would be unusual), but that he really could not remember.

26. What he was insistent upon was that an ambulance was called, probably by his brother, and the paramedics took her to hospital – again with brother. A copy of an Emergency Services Patient Care Record was handed to him, but it appears at [54] to be one lower sheet from a multi-copy form numbered 2060467 and, when photocopied, whatever has been entered in pen was too faint to reproduce. To all intents and purposes it is a blank document.

27. Asked about how long the lift was out of action he thought it was a day or so. At this Ms Westwood interjected and said that the lift was repaired that afternoon, referring to a call-to schedule at [212-213] listing all call-outs to both lifts. Those for the left-hand lift (serving the ground and even-numbered floors) were on 1st December 2019, 17th February 2020 (before official sign-off), 29th February, 12th March, 25th April, 27th June and 5th August. With the sole exception of an evening call on 29th February – attended to the following morning – all were resolved on the same day. On 5th August the incoming call was logged at 12:05 and the job, which included adjusting the ground floor lock closer and lock box, completed by 14:35.

28. For the sake of completeness the schedule reveals that calls were received for the right-hand lift (serving ground and odd-number floors) on 10th, 19th and 28th February and 22nd April. All were attended to the same day, save that in one case the engineer had to order a new part under warranty and return to fit it on a later date. The lift was left in working order in the interim.

29. Despite Mr Iqbal's complaints about the service record of the new lifts there was no evidence before the tribunal about the condition of the old ones other than that they were very old and therefore expensive to maintain. However, Mr Iqbal freely admitted that they were often out of action – sometimes both at the same time, requiring him to walk up to the eighth floor. This only confirmed, Ms Westwood submitted, that they needed to be replaced. The call-out schedule for the new lifts showed, by contrast, that they were fit for purpose.

Discussion and findings

30. The tribunal is satisfied from the undisputed evidence provided that the section 20 consultation exercise, including the meeting arranged for residents in July 2019 following service of a Schedule 3 notice and estimated breakdown of costs in May 2019, was satisfactory. It is not the council's fault that Mr Iqbal chose not to attend.

31. It is also satisfied that replacement of the aging lifts was reasonable and that the new ones are both satisfactory and fit for purpose. Some snagging is always to be expected with new work, and a few call-outs refer to interference with the lifts by third parties. Neither landlord nor installer can be held responsible for those. The call-out schedule is undated but was sought for the purposes of Ms Conway's statement dated 2nd December 2020. The fact that the last call-out recorded was on 5th August in therefore noteworthy.

32. As to the accident that befell Mr Iqbal's mother, the tribunal finds that it took place on 5th August as stated. This is corroborated both by the call-out schedule and also by the hospital discharge summary. The latter records her admission to A&E by ambulance on 8th August following "a week's history of feeling unwell and reduced mobility". It records that "she also fell down three days previously when outside and has since been having difficulty mobilising". No bony injury was detected. What she was treated for was a serious infection. She was deemed fit for discharge from an acute medical ward on the afternoon of 18th August.

33. If, as Mr Iqbal stated, his brother called an ambulance on 5th August after she fell and accompanied her to hospital then the discharge summary produced is for a later visit; and one which might perhaps explain the dizziness as a result of the infection from which she was already suffering. Nowhere does Mr Iqbal explain the cause of the dizziness or how it can be attributed to his landlord's negligence.

34. Even were his mother's graze to the head relevant to his challenge to the council's contractual claim then causation (i.e. grounds for fault) has not been proved.

35. In *Continental Property Ventures Inc v White and another*[5] Judge Michael Rich QC, sitting in what was then the Lands Tribunal, said, at [14] :

> ...that there can be no doubt that breach of the landlord's covenant to repair would give rise to a claim in damages. If the breach were to result in further disrepair, imposing a liability upon the lessee to pay service charge, that is part of what may be claimed by way of damages. At least to that extent it would, as was held by the Court of Appeal in *Filross Securities Ltd v Midgeley* (Peter Gibson, Aldhous and Potter LJJ, 21 July 1998)*, give rise to an equitable set-off within the rules laid down in *Hanak v Green* [1958] 2 QB 9 and, as such, constitute a defence. This would not mean that the costs incurred for the "nine stitches" had not been reasonably incurred. It would, however, mean that there would be a defence to their recovery.

36. He went on, at [15] to observe that :

> I accept that the LVT has jurisdiction to determine claims for damages for breach of covenant only in so far as they constitute a defence to a service charge in respect of which the LVT's jurisdiction under section 27A has been invoked. I see no reason of principle why such jurisdiction should not extend to determining even a claim for loss of amenity or loss of health arising from a breach of a repairing covenant, but would draw attention to what I said in *Canary Riverside Pte Ltd v Schilling* LRX/65/2005, unreported 16 December 2005, as to the desirability of the LVT's exercising restraint in the exercise of the extended jurisdiction given to it by the Commonhold and Leasehold Reform Act 2002...

37. Mr Iqbal's claim to set off his mother's injuries against his admitted contractual liability must fail for the following reasons :
    a. His mother is a separate legal entity, and if she has a personal injury claim then it is hers, not his

5 [2006] 1 EGLR 85

b. There is no evidence that she has brought any such claim, which would be in all probability a small claim in the County Court
c. Had she done so she would need to have assigned the benefit of such claim to her son. That is not straightforward, and there is no evidence of her having done so
d. The County Court personal injury claim would, if validly assigned to him, have to be referred to the tribunal for hearing by the same judge as this application – which is very unlikely as it is unrelated to the contractual claim under the lease
e. No evidence has been produced showing that the landlord is responsible in any way for his mother's dizziness and subsequent fall; and
f. The applicant has produced no evidence of quantum, i.e. the value of the personal injury claim. In all likelihood a graze leading to her discharge the same day would be an extremely low value claim if it could be proved, and significantly below the value of the major works invoice.

38. Such a claim could not constitute an equitable set-off because it is unrelated to the landlord's liability for repair under the lease, so in the absence of a County Court claim that had been validly assigned to Mr Iqbal and transferred by that court for hearing by the tribunal judge (sitting as a judge of the County Court) the tribunal lacks jurisdiction to deal with the single point raised by the applicant to justify his refusal to pay the sum lawfully demanded.

39. His application must fail, save that the tribunal determines that £4 642.65 is payable by him for the major works of lift replacement at Moor Tower.

Dated 3rd February 2021

Graham Sinclair
First-tier Tribunal Judge