



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

**IN THE COUNTY COURT at
Watford sitting remotely by CVP
video**

Tribunal references : CAM/26UK/LIS/2021/0011
CAM/26UK/LLC/2021/0002

Court claim number : G86YX147

Property : Flat 26 Maple Lodge, Riverwell
Close, Watford WD18 0GZ

Applicant/Claimant : Woodlands Management Company
Limited

Representative : Mr Michael Cameron-Mowat of
Counsel instructed by Realty Law
Limited

Respondent/Defendant : Mr Gregory Stephen Forbes

**Representative in
Tribunal Proceedings** : Mr Philip Jones of Counsel
instructed by Mackrell
Solicitors

Tribunal members : Judge N Hawkes
Mrs M Wilcox BSc MRICS

In the County Court : Judge N Hawkes sitting as a
District Judge

Date of decision : 16 August 2021

DECISION

This decision takes effect and is 'handed down' from the date it is sent to the parties by the Tribunal office:

Summary of the decisions made by the Tribunal

- (1) The Tribunal finds that the set off extinguishes the claim.
- (2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 that all of the costs incurred by the Applicant in connection with these proceedings are not to be regarded as relevant costs to be taken

into account in determining the amount of any service charge payable by the Respondent.

(3) The Tribunal makes an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing the Respondent's liability, if any, to pay an administration charge in respect of the Applicant's costs of these proceedings.

Summary of the decisions made by the Court

(4) For the avoidance of doubt, insofar as the Respondent contends that the Counterclaim exceeds the Claim, the Counterclaim is dismissed.

(5) The Court makes no order for costs.

The proceedings

1. Proceedings were originally issued against the Respondent/Defendant on 27 July 2020 in the County Court under Claim Number G86YX147.

2. The proceedings were transferred to this Tribunal by the order of District Judge Newman dated 15 March 2021 which provides:

“1. The claim be transferred to the First-Tier Tribunal (Property Chamber) to resolve all matters falling within the jurisdiction of the Tribunal.

2. A Tribunal Judge sitting as a County Court Judge exercising the jurisdiction of a District Judge in accordance with the County Courts Act 1984 as amended by the Crime and Courts Act 2013 can determine any aspects of the claim outside the Tribunal's jurisdiction.”

3. In accordance with this order, after the County Court proceedings had been sent to the Tribunal offices, the Tribunal decided to administer the whole claim so that the Tribunal Judge at the final hearing performed the role of both Tribunal Judge and Judge of the County Court (District Judge).

4. Directions were issued on 24 May 2021 and the matter came to a final hearing on 12 August 2021.

The hearing

5. The final hearing took place remotely by CVP video on 12 August 2021. The Applicant/Claimant freeholder, Woodlands Management Company Limited, was represented at the hearing by Mr Cameron-Mowat of Counsel and the Respondent/Defendant leaseholder, Mr Forbes, was represented by Mr Jones of Counsel.

6. The hearing was also attended by Ms Lois Cooper on behalf of the Applicant and by Mr Williams on behalf of the Respondent. The Respondent did not attend the hearing and the Tribunal was informed that he had been unable to take the time of work.
7. The Tribunal is not generally carrying out physical inspections due to the coronavirus pandemic. Neither party requested an inspection but photographs were provided in the hearing bundle.

The issues

8. The Applicant/Claimant brings a claim in respect of service charges in the sum of £1,262.57, which are said to be outstanding, together with interest in the sum of £23.36 and continuing at the rate of 4% above base rate from the date of issue until the date of judgment.
9. The Respondent/Defendant does not dispute the reasonableness or payability of these service charges but claims that he has a set off/Counterclaim which exceeds the sum claimed.
10. The Respondent/Defendant seeks orders under section 20C of the Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 and both parties seek orders for costs.
11. At the commencement of the hearing, a procedural issue arose concerning whether the Tribunal should exercise its discretion to allow a witness statement of the Respondent dated 11 August 2021 to be admitted in evidence.

The determinations of the Tribunal

The Respondent's witness statement dated 11 August 2021

12. By rule 6(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"), the Tribunal may:

“extend or shorten the time for complying with any rule, practice direction or direction, even if the application for an extension is not made until after the time limit has expired”
13. The Tribunal was informed that the Respondent had only recently become legally represented and that he had only recently appreciated that he would not be able to attend the hearing. Mr Jones submitted on behalf of the Respondent that nothing in the Respondent's witness statement should come as a surprise to the Applicant because its contents reflect what is already in the bundle.
14. Mr Cameron-Mowat noted that, due to the Respondent's absence, it would not be possible to test the evidence contained in the

Respondent's witness statement through cross-examination. He submitted that the Respondent could have obtained legal representation at an earlier stage and stated that it is often possible for a person to step out of work for an hour to attend a remote video hearing.

15. Mr Cameron-Mowat noted that Mr Jones did have instructions as to why the witness statement was prepared so late and he submitted that the Respondent was not engaging with the proceedings. He also submitted that, if the matters set out in the witness statement were already in the bundle, the Respondent would not be prejudiced by being unable to rely upon the statement.
16. The Tribunal considered that there was force in Mr Cameron-Mowat's submissions. However, we also noted that value of the Claim and the likely value of the set off are relatively low and that the Tribunal's overriding objective includes provision that:

“Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;”

17. Given the low value of the claim, it is not surprising that the Respondent was not legally represented throughout. Following Mr Cameron-Mowatt's submissions, the Tribunal was informed that the Respondent works as a removal man. It may therefore be difficult for him to attend a hearing during the course of the working day.
18. On the basis that (i) the Tribunal would place limited weight on the witness statement because the Respondent's evidence could not be tested in cross-examination and (ii) if, having considered the evidence and argument, we were of the view that the Applicant was prejudiced by any aspect of the evidence we would disregard the relevant section of the witness statement, the Tribunal determined that we would extend time for service under Rule 6(3)(a) of the 2013 Rules to enable the witness statement dated 11 August 2021 to be admitted in evidence. We have not in fact placed any significant reliance upon this witness statement.

The Respondent's set off

The Tribunal's jurisdiction

19. It is common ground that the Tribunal has jurisdiction to set off damages for breach of covenant against a claim for service charges (see *Continental Property Ventures Inc v White [2007] L & TR 4*).

Whether the Applicant is in breach of covenant

20. The Applicant is the Manager under the Respondent's lease of Flat 26 Maple Lodge, Riverwell Close, Watford WD18 0GZ ("the Lease"). By Schedule 10 to the Lease, the Applicant covenanted:

"To carry out the works and do the acts and things set out in Schedule 6 as appropriate to each type of Dwelling PROVIDED THAT:

1.1 the Manager shall not be held personally responsible for any damage caused by any defects or want of repair to ... the Building ... or any part thereof unless such matters are reasonably apparent by visual inspection OR until notice in writing of any such defect or want of repair has been served on the Manager by the Tenant or any tenant owner or occupier of any other Dwelling and the Manager shall have failed to make good or remedy such matter within a reasonable period following receipt of any such notice.

21. The "works", "acts" and "things" set out in Schedule 6 to the Lease which the Applicant must carry out include, at paragraph 26:

"Inspecting rebuilding repointing repairing cleaning renewing redecorating or otherwise treating as reasonably necessary and keeping the Building (other than the Demised Premises and other Dwellings) and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof."

22. The Respondent contends that the Applicant is in breach of this repairing covenant. In support of this assertion, Mr Jones relied primarily upon documentary evidence contained in the hearing bundle rather than upon the Respondent's witness statement.

23. The Applicant's records include a "ticket" received by the Applicant on 8 February 2020 which provides:

"Resident called to report that there is a leak coming from the 5th floor through the 4th floor ceiling and onto the communal floor since this

morning. He has a bucket catching the water for now and he advised that it is dripping about 2 drips every 5 seconds.”

24. Mr Jones submitted that this document “started the clock ticking” in terms of the Applicant’s repairing obligations. The Applicant’s records also include a document headed “*Actions arising from AFP meeting 30 June 2020*” in which there was an “open action” “*Nick to chase Jarvis on response to leaks, roof repair, flashing*”, followed by an update stating “*11.06 Repair works complete – 22.06 make good ceiling.*”
25. The Applicant contends that the work to remedy the leak which was reported on 8 February 2020 was completed by 11 June 2020 and that a separate leak through the 4th floor ceiling occurred in 2021. The Respondent contends that the leak was not in fact remedied until March 2021 and Mr Jones relied upon contemporaneous correspondence from another resident of Maple Lodge, Leah Bracha.
26. In an email dated 25 August 2020, headed “*Update required on outstanding issues at Maple Lodge*”, Ms Bracha states (emphasis supplied):

“I am emailing on behalf of residents at Maple Lodge to express our dissatisfaction and disappointment at the lack of progress and follow up to our snags and defects, a significant proportion of which were reported well over 12 months ago.

...

Another major outstanding item is the fourth floor leak which has not been fully resolved. This was reported back in February and frankly it’s appalling that it is still outstanding and we are continually having to chase a resolution. It has continued to cause cosmetic damage to the surrounding areas and there is still a big hole in the ceiling. Actual leaking itself seems intermittent but was occurring **as recently as last week**. Considering the high service charge expected from us, we in return expect clean and fully functioning communal areas. Given the general urgent nature of this issue, and how long it has been going on for, we would expect this to be a priority to get closed.

27. Accordingly, on 25 August 2020, Ms Bracha asserted that the leak was still continuing in the week of 18 August 2020, that is well after the remedial work was said to have been completed on 11 June 2020.
28. In a response to Ms Bracha’s email sent at 11:01 on 26 August 2020, Nick Donovan, a Project Manager, states:

“Jarvis have been working at Woodlands since mid-June”, (that is after 11 June when the leak was said to have been remedied), “initially on the communal areas only – Nearly all items on defects reports are closed out, except for the leak on the top floor which was made worse following the storm damage works, this now appears to be closed and works to make good the corridor will soon start.”

29. In a further response to Ms Bracha’s email sent at 16:01 on 26 August 2020, Mark Doyle, CEO of Jarvis Contracting Limited, the Applicant’s contractor, states:

“Dear Leah,

Firstly, please accept my apologies on behalf of Jarvis for the delays to the matter that you have raised in your recent email to Nick Donovan as clearly this is a frustrating and an unacceptable position to find yourself and the residents of Maple Lodge in. There have been extremely extenuating circumstances this year that have impacted our ability and that of our supply chain to fully address the relevant matters in a timely manner, that we would ourselves have expected. This does not excuse some of the longer term matters ...”

30. In a further email dated 28 August 2020, Ms Bracha reported:

“A smell coming through to Flats 26 and 27 and others on the fourth floor, due to the corridor leak as reported previously and referenced for.”

31. Ms Bracha goes on to state:

“There is a leak from the ceiling at one end of the fourth floor corridor which was first reported weeks ago and nothing has been done... the air poses a health risk, and furthermore the leak is right next to a light panel preventing [sic] a health and safety risk... leaking ceiling causing damage to the building and putrid smell in the surrounding areas.”

32. Under the heading “AOV Smoke Vent Systems” Ms Bracha states:

“During Storm Denis further damage has been caused. As of today the hatch remains open and rain continues to quite literally pour into the building”

33. In the Applicant’s Defence to Counterclaim, the Applicant accepts that, on 2 January 2021, one of the residents of Maple Lodge reported that there was water leaking through the ceiling of the 4th floor hallway

again. The Applicant states that Jarvis was again contacted and on 19 March 2021 internal repair work was completed.

34. The Tribunal was referred to colour photographs of the leak/water damage. The Respondent does not contend that the leak continued after March 2021.
35. The Respondent relies upon documentary hearsay evidence. It is common ground that hearsay evidence is admissible in civil proceedings, although it carries less weight than oral evidence. The Applicant did not call any oral evidence concerning the allegations in the Counterclaim.
36. In considering the case put forward by the Respondent, we take into account the fact that some of the documents relied upon emanate from the Applicant and its contractors; the fact that the Respondent is not the only lessee to have complained of the leak; the contemporaneous nature of the email correspondence relied upon; and the fact that there is photographic evidence of the water penetration.
37. On the basis of the evidence to which we were referred by Mr Jones, the Tribunal is satisfied that it is more likely than not that a leak occurred through the ceiling of the fourth floor hallway at Maple Lodge from 8 February 2020 to 19 March 2021. Ms Bracha's assertions that the leak continued after 11 June 2020 were not challenged in the Applicant's contractors' responses to her correspondence. However, as discussed further below, we consider it unlikely that the leak was of uniform severity throughout this period.
38. The covid 19 pandemic was beginning in early 2020 and we accept Mr Cameron-Mowat's submission that this is likely to have caused a degree of disruption. In all the circumstances, we find that 6 weeks was a reasonable period following the receipt of notice for the Applicant to have carried out effective repairs to remedy the leak into the fourth floor hallway. Effective repairs were not carried out until 19 March 2021 and therefore we are satisfied on the balance of probabilities that the Applicant was in breach of covenant for a period of 12 months.

Quantum of the set-off

39. In *Earle v Charalambous* [2006] EWCA Civ 1090, at [32] the Court of Appeal stated:

“A long-lease of a residential property is not only a home, but is also a valuable property asset. Distress and inconvenience caused by disrepair are not free-standing heads of claim, but are symptomatic of interference with the lessee's enjoyment of that asset. If the lessor's breach of covenant has the effect of depriving the lessee of that

enjoyment, wholly or partially, for a significant period, a notional judgment of the resulting reduction in rental value is likely to be the most appropriate starting point for assessment of damages.”

40. The Respondent asserts that he has made enquiries of two local estate/letting agents who have advised him that the rental value of the property is around £1,500 per month. However, he has provided no documentary evidence from the estate agents in support of this assertion. Further, because he did not attend the hearing to give oral evidence, it was not possible to ask the Respondent what information was given to the estate agents concerning his flat.
41. Accordingly, the Tribunal has relied primarily upon its general knowledge as an expert tribunal that the rental value of two bedroom flats in this area is generally in the region of £1,300 to £1,400 per month. As the Tribunal was not referred to any photographs of the inside of the Respondent's flat or to a floor plan, we are not satisfied on the evidence that its rental value is likely to exceed £1,300.
42. The Respondent claims that his use and enjoyment of the Property has been “severely” affected by the water ingress. The matters of which he complains include a wet and soggy carpet, staining to the walls of the common parts, a strong damp smell in the common parts and in the property, and a health and safety hazard caused by water in a light fitting.
43. The Respondent contended in his written evidence that he is entitled to general damages at the rate of £400 to £500 a month. In our view, this assertion is not realistic in the absence of any oral evidence of loss of use and enjoyment and in the absence of any photographic or other evidence showing severe damage. Mr Jones submitted that damages should be awarded at the rate of £50 per week or £200 a month, a notional reduction in the rent of around 15%. We consider this submission to be more realistic but accept the Applicant's contention that it is still too high.
44. As stated above, the Tribunal is of the view that the loss of use and enjoyment occasioned by the leak is likely to have varied in severity over time. Ms Bracha refers in her correspondence to the leak being intermittent and we find that the smell, the staining, and the dampness to the carpet is likely to have been greater during and immediately following times of heavy rainfall than during drier periods.
45. Doing our best on the limited information available, we find that damages in the region of £25 per week or a notional reduction in the rent of about 8% is appropriate. Accordingly, we find that the set off is equal to the service charge claimed. On the limited information available it is not possible to assess damages for breach of covenant

with sufficient precision to find that the damages are a few pounds more or less than the service charge.

46. In all the circumstances and, in particular, having regard to our finding that no service charge is outstanding, we are satisfied that it is just and equitable to make (i) an order under section 20C of the Landlord and Tenant Act 1985 that all of the costs incurred by the Applicant in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent and (ii) an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing the Respondent's liability, if any, to pay an administration charge in respect of the Applicant's costs of these proceedings.

Determinations of the Court

47. For the avoidance of doubt, having considered the evidence referred to by the Tribunal, the Court is not satisfied on the balance of probabilities that the value of the Counterclaim exceeds the value of the claim.
48. No sum of money is outstanding and the Court makes no order for costs.

Name: Judge N Hawkes

Date: 16 August 2021

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.
3. 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.

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers
5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.

Appealing against the County Court decision

1. A written application for permission must be made to the court at the Regional tribunal office which has been dealing with the case.
2. The date that the judgment is sent to the parties is the hand-down date.
3. From the date when the judgment is sent to the parties (the hand-down date), the consideration of any application for permission to appeal is hereby adjourned for 28 days.
4. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.
5. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers.
6. If an application is made for permission to appeal and that application is refused, and a party wants to pursue an appeal, then the time to do so will be extended and that party must file an Appellant's Notice at the appropriate County Court (not Tribunal) office within 14 days after the date the refusal of permission decision is sent to the parties.
7. Any application to stay the effect of the order must be made at the same time as the application for permission to appeal.

Appealing against the decisions of the tribunal and the County Court

In this case, both the above routes should be followed.