



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

Case Reference : **CAM/22UH/LSC/2021/0070 (V)**

Property : **281 High Street, Ongar,
Essex CM5 9AA**

Applicant : **Edward Alexander Knipe**
Represented by Helen Greaves-Park

Respondent : **Martin Soloman**
Unrepresented

Date of Application : **12 October 2012**

Type of Application : **Section 27A Landlord and Tenant Act 1985
("the 1985 Act")**
**Determination of the payabiity of service
charges**

Tribunal : **Judge J Oxlade
Judge K. Saward
Mrs. M. Wilcox BSc. MRICS**

**Date of Hearing
Hearing** : **7th June 2022
remotely by CVP**

DECISION

For the reasons given below, the Tribunal finds as follows:

- (i) In respect of the insurance issue, the Applicant is liable to discharge only 1/8th of those costs incurred by the Lessor from 1st July 2018 onwards, as detailed herein,
- (ii) In respect of the roof repairs charged to the lessee as a service charge in the sum of £1000, the Lessee is not liable to discharge this sum,

- (iii) In respect of £560 expended by the Lessee on self-help roof repairs, he is solely liable for these costs, as they fall within his obligations under the lease,
- (iv) The Applicant and Respondent do equally share the application and hearing fees of £300.

REASONS

Background

1. The Applicant is the lessee of 281 High Street, Ongar, Essex, CM5 9AA (“the flat”), a duplex flat located on the first and second floors of a building, which building (“the block”) is comprised of eight units: four studio flats on the ground floor (converted from offices in c. 2012) and four duplex flats, located directly above and in alignment with the studios.
2. The Respondent is the freeholder and lessor of the block. He used the offices on the ground floor until 2012, then converted them into studio flats, and so is also the lessee of the four studio flats.

The Application

3. An application pursuant to section 27A of the Landlord and Tenant Act 1985 was issued, citing the Applicant’s discontent with service charges demanded in respect of (i) buildings insurance of £204.14 in July 2020 and £127.14 in July 2021, with concern expressed about future insurance costs, (ii) repairs to a patio/roof area, of £1000 made in July 2020 (“the repairs to the patio/roof area issue”), and (iii) a demand for backdated ground rent for the period 2014 to 2020.
4. The application included a request for repayment of fees paid/to be paid to the Tribunal of £300 (£100 application fee, and £200 hearing fee). We shall refer to this as the “fees issue”.

The issues for the Tribunal to determine

5. The dispute has evolved over the course of the proceedings, as follows.
6. Firstly, though the application referred to a dispute over ground rent, the Applicant was advised by the Tribunal in an email to the parties dated 11th March 2022, that it did not have jurisdiction to determine issues concerning ground rent; so, this aspect of the application does not further feature in this decision.
7. Secondly, the insurance sums in issue were clarified by the Applicant at the hearing as £199.53 for 2020/21 (in place of £204.14), £124.22 for the year 2021/22 (in place of

£127.14), and a global sum of £686.11 for the period 1.9.15 to 31.8.19, first demanded on 1st September 2019 (broken down at page 42). We shall refer to this as the “insurance issue”.

8. Thirdly, in the Applicant’s skeleton argument, the Applicant sought recovery of (a) £560 described as expended by him as a “self-help” remedy for repairing a hole in the roof above his flat, and (b) £3000, referenced as “costs” therein, but also mentioned in his application (at page 14) as works done by him which the Respondent had agreed to off-set against the cost of a lease extension. During the course of the hearing the Tribunal indicated that it did not have jurisdiction to resolve issue (b); works said to have been done in exchange for a lease extension, would be more suited to resolution by the County Court, concerning whether or not there was a legally enforceable agreement(s) to undertake works, and if so, the consideration agreed upon/settled upon by the parties; that might invoke questions of “set off”, as suggested.
9. However, the issue of £560 was dependant on lease interpretation and so within the Tribunal’s jurisdiction. We shall refer to this as the “self-help flat roof issue”.
10. Accordingly, the issues for the Tribunal to determine are as follows: the insurance issue, the repairs to the patio/roof area issue, the self-help flat roof issue, and the fees issue.

The Documentary Evidence

11. The Tribunal was provided with the following: a bundle consisting of 239 pages (“B1”), 50 pages (“B2”), 25 pages (“B3”), and in addition, an email containing an audio and video recording, and an Appellant’s skeleton argument with covering email.

Hearing

12. The application came before the Tribunal to determine on 7th June 2022, remotely, by Cloud Video Platform; no party objected prior to nor at the hearing, to consideration of the issues in such a way. Although there were several technological challenges, the technology performed sufficiently well, and both parties and witnesses were able to hear and to be heard.
13. The Applicant had the assistance of Ms. Helen Greaves-Park, a friend of the Applicant, who acted as his advocate; the Applicant was present, and able to assist the Tribunal specifically on the question of the patio/roof area; the Applicant’s friend and current occupant of the flat (Mr. Atkin) was present (in the event that he was needed), but was not called upon. The Respondent represented himself, and Mr. Glover of Stratton Management attended, although his laptop worked on the basis of being “mute”, so he was audible to the Tribunal only by telephoning into the hearing. Regrettably, the person within Stratton who had managed the section 20 consultation and the works on the patio/roof area following on from the consultation, was not available, and so not present to fill in detail. Mr. Glover therefore did the best that he was able to do on the information available to him.

Preliminaries

14. It was agreed at the outset that the Tribunal would look at each issue, point by point, so that each party had its “turn” on each issue as a discrete issue, before moving onto the next. The Tribunal took its own record of proceedings for the purpose of the post-hearing discussion and decision-making; this is additional to the recording that HMCTS will hold of the entire hearing.
15. At the outset it is important to say that the Tribunal has appreciated that all participants did their very best to assist the Tribunal, and did so ably; they are to be commended in view of having to grapple with a lease which was far from straightforward, all without legal training, and both Ms. Greaves Park and Mr. Solomon had their own health issues. All demonstrated a willingness to engage with the issues and determined to try to find solutions, although each had their own view of the other, and there was a considerable background of pent-up emotion about these issues.

Summarising the parties respective cases

The Insurance Issue

16. The Applicant’s case is that prior to Stratton being appointed as managing agents in 2019, he had not received a demand for service charges, and then on 1st September 2019 he received a demand for 1/8th of the cost of buildings insurance, for the period 1st September 2015 to 31st August 2019 in the sum of £686.11, which he has paid, and that in subsequent years the sums claimed were £199.53 for 2020/21 (in place of £204.14), and £124.22 for the year 2021/22 (in place of £127.14).
17. His first point is that there was a considerable time lag in receiving the first demand. Secondly, when provided to him the Applicant noted that the schedule of insurance included items which bore little or no relation to the premises as they now exist i.e. loss of rent, book value, and items which spoke to commercial premises (shop front and frame displays) and not residential. Thirdly, having suffered water ingress, he (the Applicant) wished to make a claim, but could not do so, and so had to rely on a self-help remedy i.e. to repair the roof himself. There was some ambiguity as to whether or not these should be treated as service charges or not. As to what the cost of insuring really should be, the Applicant drew on what is the average cost of insuring homes in the UK with a re-build cost of £200,000, and on-line tables, provided in the hearing bundle; these would work out at c. £157 per unit, so approximately £41/42 less than that placed by the Respondent. This all left him concerned about cost, fitness for purpose, and accessibility. Having raised the issue, he has noted that the costs in the years 2020 and 2021, which has rather reinforced his sense that the costs in earlier years were not reasonable.
18. The Tribunal identified within the insurance issue, the following points: (i) whether or not a demand for payment in respect of insurance was a “service charge” payable under the lease, (ii) whether the delay in claiming payment until 1st September 2019 meant that

some was not (fully) recoverable, because of section 20B of the 1985 Act, (iii) whether the other sums demanded for other years were reasonable and payable.

19. The Respondent's case is that he bought the block without intending to be a landlord or lessor, just to use the offices. Having done so, he insured it, and did not make demands against any of the lessees for many years, until he moved to the USA. He realised that this state of affairs had to change, approached Stratton to take over, and made demands including for insurance. He owns the ground floor, and as most of the flats are rented, it seemed reasonable to include a "loss of rent" provision. The lease terms provide that he can insure for specific risks, and "other risks as the Lessor may from time to time think fit", and did so. He pays 50% of the insurance bill, as he owns four studio flats, so it would not be in his interests to overpay. The division of 1/8th per unit is not unreasonable for the Applicant, as it is more than 1/8th of the physical building. They have to drive through a petrol forecourt and commercial premises; so the extra provisions are for the protection of the lessees.

20. It was agreed that the reference in the schedule to "shop front" was a hangover from when the premises were a shop, and as for the "loss of book debt", he simply did not know.

21. He rather felt that the unnecessary criticism had been made surrounding this, particularly as he had carried the costs for many years, without seeking to defray them. When the annual insurance costs rose to £2,000, that provoked him into considering shopping round for other deals - he had not done so before, having not previously felt the need to do so.

22. As to the Applicant's ability to make a claim on the insurance policy for damage to the roof, he rather suspected that this was because the excess was £1000, and so the Applicant's claim would not have been recoverable.

The repairs to patio/roof area issue

23. The Applicant says that he received a demand for £1,000 from Stratton, in respect of the replacement of the roof covering over a patio/roof area, which followed a section 20 consultation in which process he did not have confidence; feeling that his views were neither welcomed nor taken into account; that the contractor whom he had put forward was not invited to tender. Initially, he was alarmed to learn that the concern expressed was for the concrete slab itself, forming the base of the patio and roof below. This area is physically located over the studio flats, which were accessed by means of an external staircase from the ground floor, onto a patio/roof/sun deck area.

24. The Tribunal heard directly from Mr. Knipe, who - whilst not claiming to give an opinion as an expert witness - had observations to make, having expertise in building maintenance. He questioned why the whole area needed doing and to be stripped back and replaced, as a thorough investigation into the reasons for water penetration had not

been conducted, and so it cannot have been appropriate to make assumptions as to the remedial works needed. Further, the quality of the works done was of concern: for example, the product used to seal the membrane required a drying time, and so should not have been walked upon, though occupants were not advised of this.

25. The Applicant questioned his liability to pay service charges in respect of it; he sought advice from LEASE, who advised that “the responsibility for maintaining the external balcony at the rear of the first and second floor is common parts and as a result responsibility of the management company to maintain”.
26. The Respondent’s position was set out as to the detail, by Mr. Glover, trying to do the best that he could. He assured the Tribunal that proper processes were followed, that all views had been taken into account, that the work had been done well. There was urgency in doing the works, because the requirement to do so was made by Epping Forest Council. A surveyor was engaged to establish what needed doing, and to oversee the works. Mr. Solomon made the point that he paid ½ of the costs of the works, and would not have undertaken unnecessary works and incurred unnecessary expense.
27. The Respondent’s firm view was that the Lessor’s responsibility in respect of the building was very limited to insurance/laying out receipts in the event of repair/reinstatement, maintenance of the boundary fence and car park, ensure that the lessees abide by the rules and covenants.
28. So, the maintenance/repair of the patio/roof area fell within the Applicant’s liability to maintain and repair according to the terms of the lease ¹, which provide for the Lessee to maintain and repair his demised premises, and the common parts which fall within the demised premises, marked on the plan attached to the Seventh Schedule.
29. The Respondent’s ability to recover the costs of doing this work, arise because of Clause 2 of the Fifth Schedule; namely, to permit the Lessor access to view the state of repair and condition, who may give the Lessee notice of default, and in the event of the Lessee not diligently within 3 months of that notice executing the works of repair, the Lessor can do so and recover and the costs himself, as arrears of rent (“the recovery in default provision”).

The self-help flat roof issue

30. The Applicant says that there was water ingress to his ceiling, coming from damage to the roof above his flat. He discovered this in 2019, so Stratton were notified of the issue, and there was an inspection. The Applicant said that the Respondent agreed to pay the costs, but that it was for the Applicant to undertake repairs, but would need permission and to make an insurance cost. Absent of progress the Applicant ensured that the work was professionally done, at a fraction of the costs. There was subsequent correspondence

¹ 5th Schedule, Clauses 1 and 2

concerning other works needed to the roof, over which he sought clarification, whilst not refusing to pay.

31. The cost of the materials was £640, and he calculated the cost to the Respondent was 7/8th of that, so £560.
32. The Applicant relied on advice from LEASE, who said that it was the freeholder who was liable to maintain the roof.
33. The Respondent's simple point in reply, is that the lease is clear as to his liabilities, as specified in paragraph 27 above. He noted that the Applicant's interpretation of the lease on this point was contrary to that argued on the patio/roof area issue.

Findings of Facts and consequential decisions

34. For the following reasons, the Tribunal makes these findings.

Decision on the insurance issue

35. The lease provides that the Lessor "shall" insure and keep insured the block², and pay for it, but can demand the same from the Lessees. The risks include fire, lightning etc with other risks that the "Lessor may from time to time think fit"³. The Lessee shall pay 1/8th of the costs of insurance as "additional rent" ⁴, as he would in repayment of the Lessors other obligations under the Sixth Schedule. The Tribunal considers that insurance costs are recoverable under the lease, as rent, and so fall within the definition of "service charge", so the Tribunal's jurisdiction under section 27A.
36. It is clear from the evidence of Mr. Solomon that he did not approach the question of placing insurance for the building - and recovering the costs from the lessees - in any structured way. A Counsel of perfection would explain that a Lessor would be beyond reproach if he - perhaps through a broker - went into the market place to secure quotes, using up-to-date rebuilding costs. That Counsel would also advise him to include in a policy only that which was reasonably necessary - so, that the policy would not include such matters such as loss of book value or damage to shop fronts.
37. However, the Tribunal's function is to assess what sum is reasonable, and we have difficulty here in departing from the annual premium costs, absent of having been presented with comparable apposite quotes by the Lessee for the years in dispute. It is not possible for us on the material provided to conclude - as the Lessee would wish - that the sums demanded of the Applicant are outside what is reasonable. The Tribunal cannot assume that editing the policy to tailor it to the needs of the specific building

² Sixth Schedule, Cl. 1

³ Pre-amble (j)

⁴ Clause 1.7.1.

would have any measurable impact on the cost of the policy, nor what that would be. We appreciate that having gone to the market in 2021 for quotes (the cost having risen to above £2000), the cost to the Lessees is lower, but we cannot infer that the costs in earlier years were therefore too high. It would be too crude an analysis to say that as the cost was £40/50 lower in the current year than the earlier year, it was too high in those earlier years, and so should be reduced.

38. The problem for the Respondent in seeking to demand payment from the Applicant for earlier years (2015 to 2018), is the section 20B⁵ point, which was raised at the hearing. The statute prevents a Lessor from recovering costs incurred more than 18 months before demanded. From the information provided at page 42 of the bundle, it looks as though insurance is placed on or around 15th July each year, so the demand for service charges made on 1st September 2019 can go back only to July 2018 (not July 2017, which would be outside the 18 month period). Whilst we appreciate that the cost maybe defrayed by the Lessor on a monthly basis, it is the time at which the costs is “incurred” (i.e. that he entered into the agreement to pay it) is relevant.
39. The Tribunal finds that the Applicant is liable to discharge the insurance costs demanded of him for all years from 15th July 2018 onwards, namely £182.40 (2018/19), £190.61 (2019/20), £199.53 (2020/21) and £124.22 (2021/22). The Tribunal’s note indicates that it was told that the Applicant had paid from 2015 onwards, so the parties will need to liaise to organise re-payment from the Lessor to the Lessee to reflect the decision made.

Decision on the repairs to the roof/patio area

40. The Tribunal’s jurisdiction under section 27A is to decide whether a sum is payable under the terms of the lease, and if so, under sections 18 and 19 to go onto whether it was reasonably incurred, and whether the works were to a reasonable standard.
41. Though this aspect of the claim has raised many points – section 20 consultation, lease interpretation, standard of work, necessity of works – resolution is straightforward, for this reason. The only basis on which the Respondent claims to be able to recover the cost from the Applicant is under the Fifth Schedule, under the “recovery in default provision”. Yet, no evidence was adduced that the Lessor had followed the following steps identified in the lease: entered the demised premises upon notice; given notice in writing to the Lessee of the defects and wants of repair; given 3 months’ notice to execute and complete works, with which the lessee failed to comply; then undertaken the works himself and now sought to recover costs. Rather, the Respondent’s case is that the matter had urgency because of the involvement of Epping Council, that he sought and secured advice from Stratton, who undertook a section 20 consultation, and then got the works done. There is no suggestion that the Lessee was invited to do works, and failed to do them, in default of which the Lessor did so.

⁵ Landlord and Tenant Act 1985

42. Accordingly, the sum of £1000 is not recoverable from the Applicant, and is not a recoverable service charge.

Decision on the self-help flat roof issue

43. This issue raises the sole question of lease interpretation: whose responsibility is it to maintain and repair the roof, and to defray costs ?

44. For the following reasons, the Tribunal finds that the responsibility lies with the Lessee/Applicant for the roof lying above his flat.

45. The lease is explicit in setting out the Lessor's very limited responsibilities, namely, those obligations contained within the Sixth Schedule, summarised at paragraph 27 above, and the "recovery in default provision". The lease does not explicitly make the Lessor responsible for the roof, or maintenance of the building generally.

46. Rather, the Lessee is responsible for maintaining and repairing "the demised premises"⁶ which are defined in the pre-amble, as "described in the Seventh Schedule". Further, by clause 4, Fifth Schedule, he is to "keep and maintain such parts of the common parts as are within the demised premises whether inside the building or in the grounds". The Seventh Schedule refers to a plan, delinating the flat in red and where the lease includes under "Upper flat" the "common parts as including "TOGETHER WITH...". "(iii) the roof and the structure thereof above the flat". There is no provision in the lease for the lessee to recover from other lessees the costs that he incurred in maintaining or repairing the common parts.

47. From this the Tribunal concludes that whilst the roof covering is not part of the demised premises, it comes within the definition of common parts, which the Lessee agreed to maintain, by virtue of clause 4, Fifth Schedule. Accordingly, the Lessee's self-help remedy was in fact in accordance with his obligations under the terms of the lease, and so no costs are recoverable from the Lessor in this regard.

Cost/Fees issue

48. It is apparent that both have struggled with lease interpretation in this case, and that this has set back resolution prior to issuing proceedings. Though there was submitted a without prejudice bundle, we have declined to consider this, relying rather on the findings that we have made above. Both parties have been partially successful on the issues before us, and necessarily partly not successful.

49. Costs and Fees orders are an entirely discretionary, and when taking a step back, in light of our findings, we consider that the parties should share the costs equally, in view of

⁶ Cl 1, Fifth Schedule

each partial success on the issues raised and resolved above. The costs amount to £300, so each party should pay £150.

50. In light of the findings the parties will need to liaise over what sums have been paid already, what needs to be repaid, and what sums are irrecoverable.

.....

Judge J. Oxlade

8th July 2022