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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2015/0025 & CAM/00KF/LBC/2015/0009**
Properties	:	**First Floor Flat, 383A London Road, Westcliff-on-Sea, Essex SS0 7HU**
Applicant	:	**Stewart Duff**
Represented by		**Polly Plant (lay representative)**
Respondent	:	**Brett Kelly**
Represented by		**James Sandham of counsel (Chennells)**
Date of Applications	:	**various**
Type of Applications	:	**1. To determine reasonableness and payability of service charges and administration charges** **2. For a determination that a breach has occurred in a covenant or condition in a lease between the parties (Section 168(4) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"))**
The Tribunal	:	**Bruce Edgington (lawyer chair)** **Stephen Moll FRICS** **John Francis QPM**
Date and venue of hearing	:	**20th May 2015, The Court House, 80 Victoria Avenue, Southend-on-Sea, Essex SS2 6EU**

DECISION

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1. In respect of the amount claimed by the Respondent from the Applicant for service charges, the decision of the Tribunal is that £2,465.00 is reasonable and payable plus the agreed insurance premium.

2. In respect of the amount claimed by the Respondent from the Applicant for variable administration charges, the decision of the Tribunal is that £1,000.00 is reasonable and payable.

3. As far as the Respondent's application for a determination that the Applicant is

or has been in breach of a covenant or condition of the lease, the decision of the Tribunal is he has not been and is not in breach.

4. The Tribunal makes an order pursuant to section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") preventing the Respondent from recovering his costs of representation before this Tribunal in respect of these applications.

Reasons

Introduction

5. The Applicant asks for orders that service charge claims and variable administration charges claimed by the Respondent are both unreasonable and not payable. The Respondent freehold owner has made a last minute application for a declaration that the Applicant is or has been in breach of the terms of the lease. The Applicant has agreed for this to be determined at the same time as his applications.

6. The dispute started about 3 years ago when the Respondent realised that damp was penetrating his commercial office below the property. He assumed that this was a leak from the property itself and set about making a claim from the Applicant. It became clear to both parties that there was a more serious general damp problem but they were unable to resolve matters between themselves and resorted to instructing solicitors. Matters were almost resolved when the parties agreed to a jointly instructed expert.

7. The allegation that the Applicant is in breach of the terms of his lease relate to:-

   (a) The installation of a satellite television receiver causing damage to the property in breach of clause 3(4). (the lease provides that the tenant is not to 'cut injure or maim' the roof)
   (b) The installation of the said receiver without the Respondent's consent contrary to clause 2 and regulation 7 of the 3rd Schedule (The Schedule provides that no television or radio aerial shall be fixed to the outside of the building without the landlord's written permission)
   (c) Failure to keep the property in good and tenantable repair contrary to clause 3(20) in that there was a burst pipe in the bathroom which caused damage to the commercial premises below
   (d) Failure to inform the insurer that the property was vacant which resulted in 2 claims being rejected
   (e) Installation of laminate flooring by the Applicant which did not have 'sound damping qualities' contrary to clause 2 and regulation 6 of the 3rd Schedule

8. Mr. D. Plaskow FRICS from the well known and well established local firm of chartered surveyors known as Hair & Son LLP was the jointly instructed single joint expert. He surveyed the property and reported on the 12th May 2014. He determined, in effect, that most of the damp was coming from defective and/or unmaintained gutters and downpipes. He conceded that some of the damage could have come from a 'slight leakage' from the bath in the flat but this only caused localised damage to a very old and fairly poor ceiling below. He also refers to damage from the flat roof at the front which he says is "*beyond the end of its useful life*". He recommends remedial work and a further examination and

report by him.

9. His report was not accepted by the Respondent. Nevertheless, the recommended remedial work was undertaken but the Applicant says that it was not undertaken properly. The correspondence has become more and more acrimonious. Even the Tribunal's own directions which required the parties to agree one bundle for the hearing with one set of numbering has been ignored and the Tribunal has had to cope with 2 bundles containing many un-numbered pages and a large amount of correspondence which, although illuminating, is of practically no help at all.

10. Finally, in terms of introductory matters, the Respondent has produced a letter from a property adjuster, John Gibson of Cunningham Lindsey, employed by his insurers dated 11th August 2014. The main point of the letter is to reject a claim but the letter does say that no efforts have been made to remedy any defects and that the cause of the damp problem "*appears to emanate from a number of locations, ie the toilet and bath in the first floor flat, the external down pipe and/or defective guttering. The last two leak every time it rains causing the damage downstairs to worsen*".

11. One additional point which arises is that the Respondent is seeking a large contribution of £1,500 for a reserve or sinking fund which the Applicant is disputing because, in essence, he doesn't trust the Respondent to spend it properly.

The Inspection

12. The members of the Tribunal inspected the property which is the second floor of a 2 storey semi-detached property built in the early part of the last century. It is of part rendered brick construction under an interlocking concrete tiled pitched roof with a flat roof over part of the front of the commercial premises below. This joins the flat roof of the adjoining restaurant. The window frames are uPVC replacements.

13. The location is in a line of similar properties with shops and offices on the ground floor and flats above close to a shopping centre in Westcliff-on-Sea and on a bus route to nearby Southend-on-Sea. It is just about within walking distance of a railway station for trains into central London.

14. The members of the Tribunal were able to see the ground floor office accommodation and there were clear signs of damp on an internal wall and on the external walls towards the rear where the dry lining referred to by the expert, had been removed to expose the solid brick walls. The Respondent said at the hearing that he had noticed what would appear to be salt coming out of the bricks which may well be a sign of the walls drying out.

15. A part of the ceiling to one of the rooms at the rear had collapsed or had been removed. It revealed that 2 of the joists had been rather crudely 'mended'. A 3rd joist next to them showed signs of rotting at the end and presumably the other 2 had been worse. The 'mend' seemed to just consist of a section at the end, under a foot long, having been sawn through and removed with another piece of wood inserted. The 'join' was effected by attaching small pieces of wood no more than an inch or so wide to each side of the joists. The Tribunal took the view that

this arrangement would almost certainly remove almost all of the strength of these 2 joists at that end and would probably allow for some 'flexing' of the floor above which appeared to be under the bath of the flat.

16. As far as the flat was concerned, it had a laminate floor throughout and was generally in reasonable condition save for the rear wall of what appeared to be the bedroom which was saturated with water.

17. There was access to the loft which the surveyor member of the Tribunal inspected with a torch in so far as he was able to do. It was pointed out to him that daylight could be seen. It was true that there was a small area where daylight could be seen but it was not considered that this was particularly significant and is probable repeated in many homes. There was nothing of note to record which would contribute to the damp problems on what was a very brief inspection.

18. As far as the outside was concerned, it appeared that the rainwater goods had been changed although one of the downpipes to a hopper was too short. Large sections of the brick walls appeared to be wet and quite a lot of re-pointing needs doing. There is a large diameter soil and vent pipe leading from the ground up to the roof, a section of which appears to have been recently replaced. From a joint half way up the pipe is a short branch soil pipe running from the toilet in the flat. For some completely unknown reason this was not replaced during recent works and now has a large hole in it.

19. This pipe is, in effect, a soil pipe serving the flat but is also a vent pipe for the underground sewer serving the whole building.

20. Finally, the Tribunal saw the flat roof at the front and it was clear that some work had been done to it although it had not been completely replaced as was anticipated by Mr. Plaskow. A black cable leading through the felt just under the front window to the flat was for cable television. It did not seem to be disputed that this was there when Mr. Duff entered into the lease. The satellite dish referred to by the Respondent had gone and there was no sign of any fixings. It was said that this had a light coloured cable which was still there and appeared to go round the front of this window and then in through the window frame on the other side. It did not penetrate the roof.

The Lease

21. The Tribunal was shown what purports to be a copy of the lease which is dated 24th March 2005 and is for a term of 125 years with an increasing ground rent. The Applicant is the original leaseholder and pays half the service charges for the building. Of relevance to the dispute in this case, the demise includes "*all drains pipes ventilating ducts and wires solely serving the flat*".

22. There are the usual covenants on the part of the landlord to insure the building and maintain all of the building which is not included in the demise. The window frames are part of the demise.

23. As far as costs are concerned, clause 3(7) enables the landlord to claim for "*all expenses including solicitors' costs and disbursements and surveyors fees incurred by the Landlord incidental to the preparation and service*" of a

forfeiture notice under section 146 of the **Law of Property Act 1925** *"and to pay all expenses including solicitors' costs and disbursements and surveyors' fees incurred by the Landlord of and incidental to the service of all notices and schedules relating to wants of repair of the Building"*. No evidence was given at the hearing that a decision had been taken to forfeit the lease, despite the section 168 of the 2002 Act application.

24. Paragraph 4 of Part 1 of the 4th Schedule also enables a claim to be made for *"the fees and disbursements paid to any....solicitors or other professional person in relation to....the collection of rents and service charge contributions from the Tenant"*.

25. Paragraph 8 of the same schedule allows the Respondent to collect *"any proper sum for future or contingent liabilities and any reasonable reserve"*.

The Law

26. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

27. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

28. Section 20C of the 1985 Act allows this Tribunal to make an order which, in effect, prevents a landlord from recovering any costs of representation in this application as part of any future service charge.

29. Paragraph 1 of Schedule 11 ("the Schedule") of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") defines an administration charge as being:-

> *"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable...for or in connection with the grant of approvals under his lease, or applications for such approvals...or in connection with a breach (or alleged breach) of a covenant or condition in his lease."*

30. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

> *"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"*

31. Section 168 of the 2002 Act introduced a requirement that before a landlord of a long lease could start the forfeiture process and serve a notice under Section 146 of the **Law of Property Act 1925,** he must first make *"...an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred"*.

32. On 1st July 2013, the Leasehold Valuation Tribunal was subsumed into this Tribunal which took over that jurisdiction.

The Hearing

33. The hearing was attended by the 2 parties and their representatives as mentioned above. There was some discussion about whether Ms. Plant should represent the Applicant as she worked for and continues to work for a firm of solicitors which has previously been involved in this dispute. She is the Applicant's partner's mother. It was agreed that she could represent the Applicant on the basis that both counsel for the Respondent and the Tribunal chair would keep a careful eye on what was said. In fact Ms. Plant behaved entirely appropriately but she should know that she will not be permitted to take this role in the unlikely event of a future case involving these parties.

34. The only witnesses to give evidence were the 2 parties. The relevant parts of their evidence and the comments of the Tribunal thereon are set out in the discussion and conclusions below.

Discussion

35. The jointly instructed expert came to a clear view as to what caused the damp problems in this building and the Tribunal, from its own observations and experience, agrees with all his conclusions. Mr. Kelly decided not to accept Mr. Plaskow's conclusions following discussions with builders and the main reason seems to be that an internal wall of the office has clear signs of being very wet and that could not have come from rainwater on the outside.

36. He needs to know that when a building suffers severe water penetration over a number of years, as this one has, it can penetrate into the very core of the structure. The wet wall in the flat showed clear signs of coming from blocked or inadequate gutters. The water from that wall alone must have gone down to the office below.

37. The real problem in this case is that both parties seem to have concentrated all their efforts on blaming each other. One could argue all day about who started it but a competent freehold owner would have either realised that something was seriously wrong with the fabric of the building caused by faulty rain water furniture or would have sought his own expert advice. The water penetration at the front of the office and at the side under the bathroom of the flat were really just side issues to what was clearly and obviously a much more serious damp problem which simply could not have been caused by the satellite dish and the bath overflow alone.

38. Taking that on board, the only issue is that damage to the structure is the freeholder's responsibility and he should take the lead in sorting it out, knowing that the leaseholder of the flat has to pay half the cost of remedial work. If the Applicant was obstructive, Schedule 2 to the lease allows him to enter the flat to effect repairs. This is a standard lease clause to cover just this sort of situation.

39. In evidence, Mr. Kelly accepted that he was an inexperienced landlord and didn't really know how to cope with this situation. Be that as it may, the truth of the matter is that he was the only one who could sort out the main problem and if he gets it wrong, then, bluntly, he has to pay the metaphorical and actual cost. He practises as 'Kelly and Company Accountants' and will therefore be well versed in

writing and receiving letters.

Conclusions

40. As far as the **service charges** are concerned, the Applicant accepted in evidence that if the remedial work had been done properly, he would have paid for the work undertaken by Roofix i.e. the 2 invoices in the bundle at pages 98 and 101 totalling £1,810.00. To suggest, as Mr. Duff does, that they caused the damage to his soil pipe is impossible to determine. What is clear to this Tribunal is that the pipe should have been replaced anyway as part of the contract because it would have been only a small increase to the contract price and the upper part of the downpipe at least serves both properties as a vent.

41. Mr. Duff complains about a number of defects in the work and certainly one of the downpipes is too short because it does not reach the hopper which means that rainwater is probably still splashing over the brickwork at that point. Some of the other complaints were impossible to check. Mr. Kelly said in evidence that he is unable to contact the contractor. He found Roofix on the internet and it is noted that the copy invoices in the bundle contain no address.

42. Doing the best it can from the limited information available, the Tribunal determines that an appropriate deduction from the £1,810.00 claimed is £200 to cover the defects. In addition, the soil pipe should be dealt with as a service charge item. That very short piece of pipe may only serve the flat but the piping as a whole, including that joint serves the whole building. The estimate in the bundle is from Roofix. If they cannot be found or do not respond, it would clearly be sensible to select another contractor but for the purposes of this decision, the £320 quoted is agreed as a payment on account for the work. Thus, the total cost of the claim becomes £1,400 + £410 + £320 = £2,130 less £200 to cover the defects. The net figure is £1,930 and half of that is £965.

43. The next part of the claim is for £600 being half the cost of another surveyor. It is simply too early to obtain another report. A basic and fairly unscientific 'rule of thumb' for surveyors is that saturated walls dry out at the rate of one inch thickness per month once the cause of the damp is removed. The parties should encourage the walls to dry out by using dehumidifiers and, if possible, by using the properties so that they are warm and adequately ventilated. This would obviously mean that the work to the soil pipe would have to be dealt with urgently and one room in the flat could not be lived in for the moment.

44. Then, as recommended by Mr. Plaskow, he should be called back at the end of the summer in, say, September, to see how the drying out process has cured the problem. If there is still damp penetration, he might then be able to isolate the cause e.g. a leaking pipe or something of that nature. More importantly, he will be able to assess the other problem of the joists as noted by the Tribunal. Thus, it is too early to call for that cost.

45. The £1,500 requested for a sinking fund or reserve is reasonable and sensible. It is simply good management practice to have such a fund when the lease allows it, as in this case. Both parties will by now know that such money is held as trust money. Mr. Duff will no doubt have been advised that if the money is used for service charges which are unreasonable, then they can still be challenged in this

Tribunal. Thus the amount of service charges payable by Mr. Duff at this stage are £965 + £1,500 = £2,465.00.

46. Turning now to the **administration charges**, the parties will have gathered that the Tribunal is very unhappy about the extent to which solicitors have been used for what is, in law, a very straightforward matter. Lengthy correspondence has occurred which is born of mistrust and seems to consist of 'points scoring' almost throughout. It is unedifying both for the parties and, it must be said, for the lawyers concerned. The total amount claimed is £7,523.16 and the Tribunal has no hesitation in saying that most of this is unreasonable for the Applicant to pay as it does not come within the ambit of Schedule 4 of the lease.

47. In the bundle provided for the Tribunal, virtually nothing was provided to give the Tribunal any basis for calculating the reasonableness of the costs i.e. the grade of the fee earners, the time spent, the number of letters written and telephone calls made etc. Any solicitor involved in litigation will know that a court or tribunal needs basic information when dealing with an assessment of costs, be it detailed or summary. As the hearing was finishing, the solicitor instructing Mr. Sandham did hand in a breakdown of time spent by Chennells but obviously Mr. Duff had no chance to consider this in detail or take advice on it.

48. The Tribunal cannot just wash its hands of the matter. It is charged to make a decision and, in doing so, it takes into account the correspondence it has seen in the bundle and the 30 years experience of the tribunal chair as a solicitor in private practice dealing with litigation. The parties were informed of this at the hearing.

49. The Tribunal is not attracted to the suggestion made by Mr. Sandham that all the costs are payable following the allegation of a breach of the terms of the lease because, as will be seen, the Tribunal is not satisfied that, on the balance of probabilities, there has been a breach. It is determined that there is liability in accordance with the terms of the lease for solicitors costs arising from matters arising in the 4th Schedule to the lease. The Applicant has saved the cost of a managing agent which, since November 2010, could have amounted to £800 i.e. £200 per year.

50. Because there was no managing agent, Mr. Kelly has had to seek advice on basic management matters which would have included legal matters such as advice on the lease and some of the matters relating to the obvious damage to the building including some raised by Mr. Duff. If he used an experienced solicitor charging, say, £200 per hour, the most that the Tribunal can consider as being reasonable would be about 8 hours work to include correspondence etc. over a period of about 18 months which is the period claimed. Including VAT, the Tribunal therefore allows £2,000 or, from Mr. Duff, the sum of £1,000.

51. Finally, the Tribunal turns to the **alleged breaches of the terms of the lease**. Its conclusions are:

    (a) The allegation that the Applicant installed a satellite receiver dish causing damage to the flat roof and damage to the shop below is not accepted. It seems to have been agreed by both parties at the hearing

that the satellite dish was not actually fixed to the roof and the cable came round the front window of the flat and came in through a hole in the window frame which is demised to the Applicant. The leak into the shop below could have been caused by many things. As The Tribunal pointed out to the parties at the inspection, there appears to be a defect in the roof to the adjoining property which could well have caused that problem. The Respondent has not proved a breach.

(b) The allegation that this 'TV receiver' was installed without consent is, once again, not proved. The Tribunal was satisfied that the satellite dish arrived before the Respondent purchased the freehold and there was simply no evidence as to whether permission was sought or given. The previous freehold owner does not appear to have been asked and, significantly, Mr. Duff was not even asked whether he sought or obtained permission at the hearing.

(c) The allegation about a burst pipe in the bathroom of the flat causing damage to the shop is not proved. Indeed, the Tribunal has seen no evidence of a 'burst' pipe as such. The evidence shows that the floor beneath the bath was probably flexible which may have caused a pipe to crack with the weight of water and a person. The evidence seems to show that it is unlikely that there was a failure to keep fixtures and fittings in good order.

(d) The alleged failure to notify the insurance company about the flat being empty is not proven. The Tribunal did not accept Mr. Kelly's evidence that he had sent the terms of the policy to Mr. Duff. He produced a letter at the hearing (for the first time) written on 27th October 2011 written to the property but not to Mr. Duff. It says "Please find enclosed your copy of the buildings insurance that has now been renewed for the year". Below that is the request for payment of "Buildings Insurance_____£156.93". The Tribunal considers that the enclosure was simply the certificate of insurance showing the amount of the premium which is what one would expect. Thus the Tribunal concludes that Mr. Duff did not know of the need to notify the insurance company. With landlord's insurance this would be unusual anyway. With a large block of flats, for example, there is no way a landlord would know if a particular flat was empty. In any event, the allegation is that he, Mr. Duff, failed to notify the insurance company. According to the policy itself, it is for the landlord to notify the insurer.

(e) Finally is the allegation that Mr. Duff installed laminate flooring without the required sound damping. Mr. Duff's evidence was that the flooring is exactly what was there when the lease started. From the Tribunal's inspection, this would appear to be the case. The flooring, particularly in the kitchen area, was worn and the Tribunal is satisfied that the wear is consistent with the floor being 10 years old. Mr. Kelly admitted that he did not inspect the flat when he bought the freehold but merely noticed that he heard movement upstairs in 2012. The flat had been empty for almost a year when, in September 2012, Mr. Plant

moved in which would be consistent with Mr. Kelly's observation. As it is the Tribunal's conclusion that Mr. Duff has not installed any flooring, its view is that he cannot be in breach of this provision in the lease. Whilst it is not evidence which the Tribunal considered when making this decision, a subsequent search on the internet has revealed that the estate agents' sales particulars in 2004 prior to the commencement of the lease advertised the flat with laminate flooring.

52. On the issue of an order under section 20C of the 1985 Act, the Applicant has applied for such an order. The Respondent was ordered to respond to this but has not really done so. The Tribunal considers that it would be just and equitable to make such an order because the main part of the hearing for which representation was required dealt with the alleged breaches of the terms of the lease. As has been said above these issues were really irrelevant to the main issue. It is also the Tribunal's view that the failure of the Respondent to grasp the real issue at an early stage has cost the Applicant considerably in terms of time and, possibly, money.

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Bruce Edgington
Regional Judge
26th May 2015