



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

Case reference : **CHI/00LC/LSC/2021/0068**

Property : **32b Foord Street, Rochester, Kent
ME1 2BX**

Applicant : **Ashcorn Estates Limited**

Representative : **J B Leitch Limited**

Respondent : **Jonathan Paul Malka**

Representative : **-**

Type of application : **Transferred Proceedings from
County Court in relation to service
charges and administration
charges**

Tribunal member(s) : **Judge D Whitney
Mr P Turner-Powell FRICS**

Date of hearing : **20th January 2022**

Date of decision : **27th January 2022**

DECISION

Background

1. The original proceedings were issued in the County Court on 11 November 2020 under Claim No. G33YY631 and were transferred to the Tribunal by District Judge Avent by order dated 22 June 2021. The claim was principally for non payment of insurance and administration claims with ancillary claims for interest and contractual costs.
2. The Respondent defended the claims and also sought a set off. The Respondent has made applications under Section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002
3. The Tribunal issued directions on 6th August 2021 including for a remote hearing. Following an application by the Respondent further directions were issued on 11th October 2022 providing that a hybrid hearing would take place. This was originally listed for 28th October 2021 but the hearing was adjourned until 20th January 2022.
4. The directions were substantially complied with. A hearing bundle was supplied and references in [] are to the pdf page numbers within that bundle. Mr Malka had supplied a separate bundle of his statement and documents. Although most were within the main hearing bundle certain documents were not and so reference to R[] refer to this bundle.

Hearing

5. The Applicant was represented by counsel Ms England. She attended the hearing remotely by video as did her witness Mr Boon and Ms Thomas from J B Leitch Solicitors. Mr Malka attended the hearing in person.
6. This decision records a precis of the submissions and evidence given to the Tribunal and is not a transcript of the hearing.
7. At the beginning of the hearing the Tribunal explained it would determine those matters within its jurisdiction being the liability to pay and reasonableness of the insurance premiums and administration charges claimed together with Mr Malka's claim for a set off. It would then announce its decision but provide written reasons subsequently and then the Judge sitting as a Judge of the County Court would determine any outstanding matters. The Tribunal confirmed the documents which it had considered were the main bundle, the Respondent's bundle, Applicants statement of costs and Respondents comments upon the same.
8. Mr Malka had sent to the Tribunal an additional statement. Ms England confirmed the Applicant was happy for the statement to be

admitted as a factual update only but not as a basis for further matters to be argued. The Tribunal confirmed it would consider the statement as further witness evidence.

9. Ms England presented the case for the Applicant. The insurance arrears amounted to £1234.53 covering the insurance premiums for the period 25th March 2019 until 24th March 2020 and March 2020 until March 2021 and various administration charges.
10. Ms England referred to the lease dated 31st August 1990 [60-78]. Ms England explained the clauses relied upon including those for interest and costs.
11. Ms England then called Stephen Boon to give evidence. He had provided a witness statement [97 and 98]. He confirmed the statement was true and he had re-read the statement and statement of case the day before.
12. Mr Malka cross examined Mr Boon.
13. He explained that E & J Capital Partners Limited (“Capital”) receives commission for the placing of the insurance as set out in his statement and deals with the Insurance Broker. The commission received is 14.4% and this is distinct from any commission paid to the broker. Capital is a representative of the appointed broker A J Gallagher. The work undertaken by Capital is set out in paragraph 16 of the Applicant’s reply [148].
14. He confirmed the process by which the insurance is placed is set out within the reply [143 and 144]. The whole portfolio is offered to the market. The portfolio was put out to tender in 2021 and prior to that 2018. In 2018 16 insurers were approached and the insurance was renewed with Zurich on the basis of the criteria in the reply [144]. This portfolio consists of about 1400 blocks.
15. Mr Boon explained that E & J Estates Limited demand and collect the ground rent and insurance. He explained that this property was acquired when a company was purchased. He explained the rebuild costs for this building were last assessed in or about 2017 and due to be re-assessed now.
16. Mr Boon confirmed that Killean Limited (the previous freeholder) had agreed that the leaseholders could manage the building themselves. A formal deed was entered into [190-193]. He explained that the freeholder had over time become risk adverse and was no longer prepared to leave responsibility to leaseholders. As a result the freeholder had given notice ending the leaseholders management.
17. In reply Mr Boon confirmed that payments made by the Respondent had been applied to the longest outstanding debts.

18. Mr Boon confirmed that as far as he is aware Mr Malka is not up to date with his service charges. He explained that there is a separate managing agent which demands and collects the service charge. He explained he understands that the managing agent is addressing issues in relation to the roof. He confirmed that new managing agents were being appointed but he did not know from what date. He understood it was part of a wider rationalisation of agents used by the freeholder.
19. Ms England confirmed the demands relied upon were those within the bundle [85-94].
20. Mr Malka then presented his case. He relied on his own bundle and statement.
21. He explained that in 2018 to 2019 the insurance premium had nearly doubled as he recalled. He is a retired chartered surveyor and he felt the sum insured which amounted to approximately £3/£1000 was excessive. He had offered amounts which he believed were reasonable as a gesture of goodwill.
22. He explained how over the Christmas period the ceiling in his flat had collapsed and he had made arrangements for repairs to be undertaken. He was concerned that he did not believe that the current insurers had been notified of this disrepair and so their may be an issue over cover for the building.
23. Mr Malka believed that the alternative quotes he had obtained R[6-21] were significantly cheaper and showed that the insurance could be obtained at a lower cost. He referred to the case of Cos Services Ltd v Nicholson and Willans [2017] UKUT 382 (LC). In his opinion the quotes he has obtained show that the landlords insurance is unreasonably high and they have failed to demonstrate any benefit from a block policy.
24. He explained that when he became aware that the freeholder was looking to take back management he went to inspect his flat which is let. He explained that his tenant is housebound. The new agent took over in or about March 2020.
25. He says that it has taken some 18 months for any works to be undertaken to the roof. In his view he is entitled to a set off. In his submission the Landlord was in breach of his repairing obligations in that they had not repaired the roof. He had a long term tenant but given the disrepair he had not increased the rent. His tenant paid £400 per week but he believed the property could achieve £710 per week being the rent the downstairs flat commands. He also is entitled to damages to cover the costs he had incurred in undertaking a self help remedy in paying for repairs to the roof to be undertaken. He accepts he should only recover 50% of these sums as he would always have had to pay half the amount.

26. Mr Malka referred to the case of Smith v Muscat [2003] EWCA Civ 962. In his view he could off set damages against the rent claimed. In his view all works should have been completed by the end of 2020.
27. Ms England cross examined Mr Malka.
28. Mr Malka explained that he knows no claims have been made against the insurance policy. In his view his quotes do provide similar cover and he stated that certain amounts covered are less as he believes the amounts of the Applicants cover is excessive. He explained he believes his tenant is a professional working tenant.
29. Mr Malka explained the first time he was aware of potential roof problem was when he inspected in or about February 2020. His tenant had not raised the issue with him. He accepted prior to March 2020 he and his neighbour had jointly been responsible for repairs.
30. Mr Malka accepted that there were separate court proceedings in respect of his failure to pay the service charges and a hearing was listed in the County Court for March 2022.
31. On questioning by the Tribunal he explained he tended to go to the property every couple of years or so. He explained he had lost contact with his tenant who was reclusive.
32. He explained external redecoration works had been undertaken about 4 years ago and this had been arranged by the downstairs leaseholder.
33. In closing Mr Malka stated whilst he accepts the insurance cost the landlord goes with does not need to be the cheapest it should be reasonable. In his submission it is not. He also referred to Loria v. Hammer [1989] 2 EGLR 249 in respect of his ability to seek a remedy of self help.
34. Ms England stated that her client was an experienced landlord who was risk adverse and placed the insurance via a block policy. She suggested the evidence showed the landlord tested the market.
35. In respect of the administration charges she stated Mr Malka admits that he did not pay the sums demanded. He paid lesser amounts. In her submission the administration charges are due and payable.
36. Ms England contends that the Respondent is not entitled to seek a set off against the insurance rent. In her submission there is no nexus between these sums and the alleged disrepair. Mr Malka is effectively alleging historic disrepair. The lease provides that the landlords repairing obligation only bites when the service charge is

paid. It has not been paid. Further he had not pleaded any breach of covenant.

Decision

37. The Tribunal thanks all parties for their measured and considered submissions. The Tribunal did announce its decision to the parties prior to the Judge determining the matters within the jurisdiction of the County Court. These are our reasons for the Tribunal's decision.
38. We have considered the authorities referred to although we were not provided with copies. We have taken account of the general points made in respect of the same. We have taken account of all of the documents presented to us and the oral evidence and submissions made during the hearing whether expressly referred to or not.
39. Mr Malka did not seek to challenge that the lease allowed the landlord to demand insurance or administration charges or that the demands were valid. We did however consider the lease and we are satisfied that the demands relied upon by the Applicant are in accordance with the lease and the various statutory requirements. We are satisfied that the clauses referred to by Ms England entitle the landlord to seek to recover the insurance premium as rent and if not paid that administration charges may be levied against the Respondent.
40. Looking at the insurance we note that Mr Malka has made certain payments. The Applicants deny receipt of certain letters now included within the documentation provided by Mr Malka. The Applicants state that payments received were allocated to the longest outstanding amounts. We find on the basis of the evidence of Mr Malka and Mr Boon that no notice was given at the time of payment or prior to payment that payments were only to be appropriated to certain sums. We are satisfied that the Applicant was entitled to appropriate the payments in the way that it has done so.
41. Looking at the amounts we accept the evidence of Mr Boon explaining the process adopted for placing the insurance and testing the market. We are satisfied that such a process is reasonable and take note of the fact it is for the Applicant to determine the level of cover to be provided. We are satisfied that whilst the level of cover obtained by the Tribunal falls within the band of what may be said to be reasonable given the evidence that the Applicant is risk adverse.

42. The Respondent had obtained what he said were two quotes. These were not like for like with the Landlords quotes and were obtained more recently. We note that even on the Landlords case the price for insurance had actually reduced. It may not be unreasonable therefore to assume that lower quotes would be obtained. These quotes did have significantly different excesses and indemnities as well as differences in other terms such as to the type of occupiers to the property.
43. In our judgment these differences mean that the quotes are not like for like. We accept that the cost per £1000 is lower but given the terms offered we would expect this. We accept the argument of Ms England that it is for the landlord to choose the cover to be obtained. Mr Boon explained that his client had grown more risk adverse due to changes over the past few years and by way of example explained his client was no longer willing to allow leaseholders to self manage by agreement. We accept this evidence.
44. We have looked at the policy in the round and the evidence presented, both oral and within the bundle. We are satisfied that we have no evidence which leads us to believe the premium charged is unreasonable. As a result we determined the sums claimed for insurance totalling £781.33 are reasonable.
45. Mr Malka did not look to challenge the reasonableness of the administration charges per se. His argument was that the monies were not due and owing. We accept that the lease allows the Applicant to recover costs of taking action to recover rent. The insurance premium is specifically said to be recoverable as rent under the lease. Mr Malka accepts he has not paid the full amount demanded. We are satisfied that the sums claimed are payable and reasonable.
46. Mr Malka seeks a set off as a result of disrepair. On the face of the evidence and the photos it would appear that there is a significant issue with the roof at the Property. This is supported by the recent collapse of the ceiling in Mr Malka's flat as shown in photos attached to his updating statement. This is not however the whole story.
47. Mr Malka and his neighbour were responsible for repairs up until March 2020 under the terms of a deed entered into with the previous freeholder. Mr Malka did not suggest otherwise. He suggests in or about June/July 2020 he notified the landlords managing agents Warwick Estates but works were not undertaken. He states that following a failure of the ceiling at Christmas 2021 he himself has now undertaken repairs.
48. Looking at the various photographs we believe that any damage to the roof must have occurred prior to March 2020. Arguably it is Mr Malka and his neighbour who have been neglectful. We note that

the lease specifically provides that the landlords obligation to repair only arises when service charges have been paid. Mr Malka accepts service charges have been demanded (he attaches copies of demands to his updating witness statement) and that he had not paid the same.

49. Ms England suggests for the Respondent to be able to seek a set off there must be a nexus between the loss. We agree and accept Ms England's submission. Whilst we accept the Tribunal does have powers to consider a set off against sums due and owing it must in our determination relate to the sums being claimed. In our judgment insurance premiums are entirely separate under this lease which allows such sums to be claimed as additional rent. The service charge for repairs are a separate matter. In our judgement it is not appropriate to set off what is effectively a claim for historic neglect against the insurance premiums due.
50. Further even if we are wrong on that point we were not satisfied that there was any evidence to enable us to quantify the set off.
51. We are not satisfied under the set off pleaded that Mr Malka was entitled to claim any part of the costs he is now incurring undertaking what he calls "self help". As an aside we saw no evidence that notice had been given to the Applicant or their agent that if they failed to undertake works that Mr Malka would do works and recover the costs. In our view this is a prerequisite of such action.
52. Mr Malka referred to the rental of the flat being reduced due to the lack of repair. We had no evidence of the current rent he achieved such as tenancies or rent statements. Further there was no evidence as to what if any steps Mr Malka had taken to increase the rent. We find that Mr Malka on his own evidence did not inspect more than every couple of years and by his own evidence he had lost touch with the tenant. The tenant being a person who relied upon his family to assist with communications and does not appear to leave the flat on a regular basis. The evidence put to the Tribunal did not satisfy us that Mr Malka had made or intended to make any attempts to increase the rent. To the contrary he seemed satisfied to have a long term tenant who made little or any demands upon him.
53. As a result we are not satisfied that even if a claim for a set off had been made out that there was evidence before us to determine any amount of set off.
54. For these reasons we found that the sum claimed in the County Court totalling £1234.53 was reasonable and payable by the Respondent. The question of interest and costs was left to the Judge sitting as a Judge of the County Court.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.