11843

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AC/LSC/2015/0462**
Property	:	**13 Landor Court, 48 Lyonsdown Road, London EN5 1HY**
Applicant	:	**Walkwall Flat Management Company Limited**
Representative	:	**Paul Benjamin**
Respondent	:	**Alan Baptist**
Representative	:	**No appearance**
Interested Parties	:	**1. The Kasner Charitable Trust (Freeholder)** **2. Mrs Consolas (Flat 15)**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge Robert Latham** **Mr Trevor Sennett MA FCIEH**
Venue	:	**13 January 2016 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**8 February 2016**

DECISION

Decision of the Tribunal

(1) The tribunal determines that applicant is not obliged to reimburse the respondent for the sum of £300 + VAT which he has had to incur in making good flood damage.

(2) The tribunal determines that the respondent shall pay the applicant £255 within 28 days of this decision, in respect of the reimbursement of the tribunal fees paid by the applicant.

The Application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act"). The applicant asks this Tribunal to determine whether it is obliged to pay the respondent the excess under an insurance claim relating to a leaking pipe from the flat above. If the excess is to be paid by the applicant, it will seek to recover the excess through all the lessees, including the respondent, through the service charge account.

2. The applicant is a management company under a tripartite lease. The three parties to the lease, which is dated 22 April 1982, are: (i) Kasner Charitable Trust (the landlord); Mr Alan Baptist (the tenant) and Walkwall Flat Management Company Ltd (the management company).

3. The lease is at Section 5 of the Bundle. By Clause 6 of Part IV, the management company covenants to

> "insure and keep insured the Property (including the lifts if any) in the names of the Lessor and Lessees his Mortgagees (according to their respective estates and interests) and the Company against comprehensive risks ... including loss or damage by fire and loss and damage or liability to any persons arising from the ownership or occupation or user of the Property (including the lifts if any) and all other risks usually described as Property Owners Liability and such risks (if any) as the Lessor or its Agents may think fit in the full value thereof (inclusive of Architects and Surveyors fees) and will in the event of the Property or any part thereof being damaged or destroyed by an insured risk as soon as reasonably practicable apply the insurance monies payable in respect thereof in the repair rebuilding or reinstatement of the Property in good and substantial manner under the direction and to the satisfaction of the Lessor or its Surveyor for the time being and if the money to be received under any such policy of insurance shall be insufficient for the purpose to make good the deficiency out of the Company's own monies".

4. The management company has taken out an insurance policy with Allianz Insurance PLC which is at Section 7. There is a £350 excess for any claim.

5. Mr Baptist is the tenant of Flat 13. He lets out his flat under an assured shorthold tenancy. In February 2014, there was a flood from the flat above (Flat 15). The cause would seem to be from a pipe which the tenant of Flat 15 was obliged to keep in repair. It damaged the bathroom and hall ceilings in his flat. On 26 March 2014 (at 8.1), Mr Baptist sought to recover the cost of the repairs against the management company under this term of the lease. He conceded that were the management company to be liable for the claim, it would be able to recover the cost from the tenant of Flat 15. Mr Baptist initially obtained estimates in the sums of £600 (8.2) and £708 (8.3). In the event, the repairs were executed at a cost of £300 + VAT (8.26).

6. This is not the first occasion on which Mr Baptist has sought to seek an indemnity against the management company. In April 2011, a District Judge found against him at the Aylesbury County Court. Mr Baptist contends that the Judge did not understand the concept of an indemnity covenant.

7. Mr Benjamin, a director of the management company appeared on behalf of the applicant. Mr Baptist did not appear. He did not file any statement of case in response to the claim. On 7 January, he wrote to the Tribunal that he had recently broken his leg and ankle. He was content for the application to be determined in his absence.

The Tribunal's decision

8. We agree with the applicant that the management company is not liable to reimburse Mr Baptist for the costs that he has had to incur in making good the flood damage. This was not a loss against which the management company was obliged to insure. The leak emanated from a pipe in Flat 15. This was a pipe which the tenant of Flat 15 was obliged to keep in a proper state of repair under Clause 3(1) of their lease. Mr Baptist should have pursued this tenant for any claim. This would be covered by the tenant's household insurance policy, had he or she taken out such a policy.

9. The management company is obliged to insure "the Property" against risks "usually described as Property Owners Liability". Insurance against fire is expressly specified. It would normally extend to risks such as lightening, explosion, storm, flood or subsidence. The lease requires the management company to make up the shortfall where an insurance claim does not cover the full cost of repairs. Where, for example, the property is damaged by fire, the management company is obliged to use the insurance monies to repair, rebuild or reinstate the Property. If the actual cost of the required works exceed the insurance

sums received, the management company must make up the shortfall. It would be entitled to recover any shortfall through the service charge.

10. That is not the situation in the current case. The leak from a pipe in Flat 15 was not a risk against which the applicant, management company, was obliged to insure. Any claim that the respondent might have would be against the tenant of Flat 15 or under his own domestic insurance policy.

Refund of fees

11. Having regard to our determination in favour of the applicant, we are satisfied that it is appropriate to order the respondent to reimburse it the tribunal fees of £255 (an issue fee of £65 and a hearing fee of £190) paid by the applicant within 28 days of the date of this decision pursuant to Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. We are satisfied that the applicant had no option but to issue this application in the light of the long running dispute with the respondent over this issue. Mr Benjamin is an unpaid director of the applicant, a company in which all the lessees are shareholders. He has acted in person to limit the costs that will be borne by the lessees.

Judge Robert Latham

8 February 2016

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

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 identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Date: 8 February 2016

Note to: Jackie Benjamin
From: Tim Powell

Re: Flat B, 103 Southlands Road, Kent BR2 9QT

Please write back to JB Leitch, with a copy to the respondents' solicitors:

Thank you for your letter of 29 January 2016, which has been considered by a procedural judge. He has asked me to reply, as follows.

The original county court claim was for unpaid rent, service charges, administration charges, interest and fees under the lease; and statutory interest and costs as part of the proceedings. On 15 January 2016, the county court remitted the matter (without distinction as to its constituent parts) to the tribunal for determination.

While it is usually considered that the tribunal does not have jurisdiction to deal with ground rent, statutory interest and costs, nonetheless, for the reasons given below, the tribunal intends to deal with all of these issues at the forthcoming hearing.

Schedule 9 of the Crime and Courts Act 2013 has made amendments to the County Courts Act 1984. In particular:

- the county court is now able to sit anywhere in England and Wales (amended section 3 of the County Courts Act 1984 and subject to directions given by the Lord Chancellor, in consultation with the Lord Chief Justice); and
- all First-tier Tribunal judges are now judges of the county court (see paragraph 4 of Schedule 9 of the Crime and Courts Act 2013, which amends section 5(2)(t) and (u) of the County Courts Act 1984).

The Civil Justice Council has set up a working group on flexible deployment of judges, chaired by Mrs Justice Pauffley, which has agreed to run a pilot in the Property Chamber of the First-tier Tribunal, whereby, in appropriate cases, tribunal judges may also sit as county court judges, with tribunal members as county court assessors. The Lord Chief Justice has also given general authorisation for the county court to sit in tribunal hearing centres, when necessary.

As indicated in the tribunal directions dated 28 January 2016, the tribunal has decided that the tribunal judge eventually appointed to the case will exercise the power to sit as a county court judge at the same time, and to appoint my tribunal wing members as assessors. This will allow the judge to hear all the relevant evidence in relation to the disputed issues at the same time and to make a determination in respect them.

In the tribunal's view, the interests of justice are best served by one body hearing all the evidence and making all the relevant decisions in this case; and there will be an advantage to the parties as well, by saving both time and expense.

If after reading this letter the parties are content for the tribunal to proceed in this way, please kindly confirm this to me within the next 7 days. If, however, the parties object, please let me know within the same time scale, with your reasons; and, in both cases, sending a copy to the other party.

I look forward to hearing from you in due course. .

Yours etc

Copy to Carpenter & Co