First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CHI/29UN/LIS/2020/0055**
Property	**:**	**Flat 5 Chapel Apartments, 10 Hawley Square, Margate, Kent CT9 1PF**
Applicant Represented by	**:**	**Dewstar Ltd. John Craggs of counsel (Keebles LLP)**
Respondent	**:**	**Stephanie Margaret Wynne Price**
Date of transfer from County court	**:**	**7th August 2020 but not received until 22nd October 2020**
Type of Application	**:**	**to determine reasonableness and payability of service charges and administration charges**
The Tribunal	**:**	**Judge Bruce Edgington Richard Athow FRICS MIRPM David Ashby DipSur FRICS**
Date and venue for Hearing	**:**	**10th March 2021 as a video hearing from Havant Justice Centre in view of Covid pandemic restrictions.**

DECISION

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1. In respect of the Respondent's claim for monies on account of service charges the Tribunal determines that the amount that is reasonable and payable is £13,662.11 which should be paid by the Respondent to the Applicant by 4.00 pm on the 13th April 2021.

2. The Application for an order under paragraph 5A of Schedule 11, part 1 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") extinguishing the Applicant's ability to claim litigation costs from the Respondent is refused.

3. Whilst the Applicant has what would appear to be a valid claim against the Respondent for contractual costs, such costs incurred in the Tribunal proceedings are administration charges and they are not payable until a formal demand with the necessary statutory information has been served.

4. The matter is now transferred back to the county court sitting at Havant Justice Centre (a) for a determination of the issue as to whether there is a valid equitable set-off and (b) for any other county court order which needs to be made within the proceedings.

Reasons

Introduction

5. The Applicant's solicitors have lodged an e-bundle of documents and any page numbers quoted in this decision will be the page numbers in that bundle. Further documents have been filed and these will be referred to specifically if necessary.

6. This is a claim by the freehold owner of 10 Hawley Square, Margate CT9 1PF for payment of money on account of service charges alleged to be reasonable and payable under the terms of a long lease of the property granted by the Applicant's predecessor in title to the Respondent. The lease is dated 9th November 2007 and is for a term of 125 years from the 1st January 2006. It would appear that the building is a converted Methodist Chapel built in the early 19th century which now consists of some 15 flats.

7. Proceedings were issued in the county court on or about 18th February 2020 and, following the filing of a defence by the Respondent, an order transferring the dispute to this Tribunal was made on the 7th August 2020. Regional Judge Tildesley OBE held a telephone case conference on the 20th November when he ordered that information should be lodged so that the extent of the dispute could be ascertained. There then followed further directions orders timetabling the case to this hearing.

8. In summary, Judge Tildesley noted that there had been previous court proceedings (claim no. F4QZ2F3X) relating to service charges which had been discontinued. There was some confusion about what had been included in those proceedings but it appeared that some, if not all, of the service charges then demanded had been paid. In the end, it was determined that any matters arising from the earlier proceedings had been resolved and could not be resurrected.

9. This just left it clear to both parties that the matters to be resolved by this Tribunal and/or the Tribunal Chair sitting as a county court judge, would be the reasonableness and payability of a demand for £13,662.11 which is for substantial works of repair to the building plus any interest and/or costs claimed in connection with these proceedings.

10. The Respondent had also been ordered to lodge any application under paragraph 5A of Schedule 11, part 1 of the **Commonhold and Leasehold Reform Act 2002** ("paragraph 5A") asking for an order extinguishing the Respondents liability to pay the landlord Applicant's litigation costs relating to this matter.

11. The application starts at page 66. However, the Applicant is said to be the managing agent of Dewstar Ltd. and the Respondent is Ms. Price. In fact such an application can only be made by a tenant and it is therefore assumed that the Applicant is Ms. Price and the Respondent is Dewstar Ltd.

12. The Respondent does not specifically challenge the reasonableness of the actual work being undertaken to the property save for the assertion that there is dry rot or wet rot and this should be recognised and dealt with. She also does not contest the reasonableness of the cost of that specific work. Her dispute is far more fundamental. At page 71 in the bundle the Respondent says, "*after being overwhelmingly convinced by the original freeholders that the conversion of 10 Hawley Square had been botched and dry rot had been covered up to the extent that they commissioned a specialist company to investigate and confirm this occurrence, was left with no doubt that she had been significantly mislead prior to purchase and so had the surveyor representing the mortgage company*".

13. She then goes on to describe how "*dry rot/wet rot ridden timbers that had been covered-up by the developers. Costs that were no fault of the Respondents were steadily increasing with the threat of more when the property very quickly, due to internal and external leaks, became repeatedly uninhabitable. This is why the Respondent withheld maintenance payments due to the already escalating losses associated with the property and lack of culpability by the then, solicitors and vendors and Freeholders (all one in the same) would not take full responsibility for post-development issues but pestered for money to make repairs that they had advised they would pay for*".

14. In other words, she says that the conversion of the building into flats was incompetent and possibly fraudulently undertaken and (a) she should not have to pay to put it right and (b) she has been incurred in extra cost as a result, which she should be able to recover.

15. Several comments made on behalf of the Applicant in documents filed within the proceedings say that no detailed counterclaim has been set out. Whilst the Respondent has filed replies to the Applicant's submissions generally, that remains the position. In one of her statements making representations at page 29, paragraph 14 she gives the most detail i.e. "*The Respondent has lost £28,074.87 towards the repair, maintenance including lost earnings connected to the property within a 7 year period and despite the repair obligations and promises given by the consecutive freeholders*". That is dated 20th November 2020. The amount of £28,074.87 is then repeated in a further such statement at page 55 but that has no explanation as to what the figure consists of.

The Lease

16. There is no dispute about the terms of the lease which say, in clause 2(3), that the landlord will, on the 1st January in each year, prepare an estimate of the expenses to be incurred in that year, as certified by a surveyor or other qualified person. The tenant must then pay that sum by 2 instalments on the 1st January and 1st July.

17. Clause 3(d) is a covenant by the landlord that it will keep the building in which the property is situated in good repair "*subject to the contribution being paid as aforesaid*".

18. Clause 2(17) provides that any legal and surveyors fees and expenses incurred "*for the purpose of or incidental to the preparation and service*" of a forfeiture notice shall be paid by the tenant. The landlord has made it clear in the county court proceedings that forfeiture is clearly being considered.

The Law

19. Sub-section 27A(3) of the **Landlord and Tenant Act 1985** ("the 1985 Act") says that this Tribunal has jurisdiction to determine "*whether, if costs were incurred for services repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to…*" who would pay and the amount that would be payable.

20. Sub-section 18(2) of the 1985 Act defines a service charge as being "*an amount payable by a tenant*" being "*the costs or estimated costs incurred or to be incurred by or on behalf of the landlord*".

21. With large potential service charges, section 20 of the 1985 Act together with the relevant regulations sets out a procedure whereby a landlord must consult with tenants about the work, obtain quotations and ask the tenants to comment as to who should do the work. In this case, the Respondent does not raise any issue about consultation. Copies of the appropriate consultation and demands are at the end of the bundle.

The Inspection

22. At the Tribunal's request, a copy of the specification for the works which has been used to obtain quotations, has been supplied. Such works are extensive and are clearly intended to bring the condition of the structure up to a reasonable standard. It was also said, in evidence, that such works have been 75% completed.

23. As there is a full description of the building in which the property is situated in the earlier **Larkvalley** case referred to below, the Tribunal members decided that a pre-hearing inspection was not necessary. They reserved the right to inspect after the hearing if this became necessary, which it was not.

The Hearing

24. Those attending the hearing were John Craggs, counsel for the Applicant together with witnesses Nick Brend and Mark Belcher. The Respondent represented herself. The county court hearing immediately followed the Tribunal hearing.

25. The Tribunal chair introduced himself and the Tribunal members. He then said that he had some questions to raise on the papers filed. He would do that and then ask the parties to put their cases and he would ask the other Tribunal members to ask any questions they had at the appropriate time. He explained that the court hearing would follow on from the Tribunal hearing without a break and this was agreed by everyone. That is in fact how the hearing was dealt with.

26. The Tribunal chair explained that its members had fully considered the written statements of Nick Brend, Mark Belcher and the Respondent together with all exhibits. They had also considered the court pleadings plus the written representations made by and/or on behalf of the parties together with reports, letters and other documents attached.

27. The Respondent helpfully said that she did not really have any basis for challenging the actual cost of the planned work. She also did not really have any challenge to the actual work being done at the moment save for the lack of any clear statement that dry and/or wet rot would be resolved.

28. The Tribunal member David Ashby, a chartered surveyor, asked the witness Nick Brend, who appeared to be in charge of the arranging of the works being undertaken, whether, if dry rot or wet rot were to be exposed when plaster was taken off, work would be undertaken to remove it and/or treat it. He confirmed that this was definitely the case. The Respondent was asked whether she wanted to question him on the point and she declined.

29. The main thrust of the Respondent's stated case was that (1) the original conversion was not done properly mainly because dry and wet rot had been covered up, (2) the building has not been maintained properly, (c) these breaches of contract have cost her money and (d) she should not have to pay towards the current works being undertaken.

Discussion

30. It should be said at the outset that the Respondent is clearly very upset by what she sees as an injustice. However, she has not actually produced any evidence save for her own comments. She has commented on the reports and statements in the bundle at some length. As an example, the Applicants have now produced a complete copy of Nick Brend's statement which covers some 11 pages of 1½ spacing. The Respondent has written a 12 page response of single spacing in which she just criticises Mr. Brend over and over again about almost everything.

31. The main issues she raises are (1) there is dry rot and wet rot in the building which has not been considered (2) that she was told before this Applicant came on the scene that she would have some maintenance undertaken without charge and (3) the property was flooded in 2018. She then says that Mr. Brend has not properly considered reports from Graham Forsyth BSc (HONS) who was a single joint expert in previous proceedings involving an earlier freehold reversioner and letters written some time ago by other companies, one of which is called 'All Tied Up!' which deals with dry rot and wet rot and did some work on the building some years ago.

32. The problem with this approach to these proceedings is that all the Tribunal can do is determine whether the work being undertaken is reasonable and at reasonable cost. It has seen the lengthy specification and notes that there has been a proper consultation process. It also notes the evidence of Mr. Brend and that the other long leaseholders have paid their share of the monies requested.

33. In her written submissions, the Respondent refers to a previous Tribunal decision namely **Larkvalley Ltd. v Ms. S. Price** CHI/29UN/LSC/2011/0013. She refers to certain matters relating to that decision and this Tribunal therefore obtained a copy of the decision document. It is dated 9th May 2011 and gives a full description of the property following the Tribunal members' inspection. They say that "*signs of new plasterwork could be seen, which we understand was replaced following treatment of a dry rot outbreak*".

34. It goes on to say that "*the decorative condition of the common parts was generally considered poor with signs of damp staining, some possibly historic, in various places*".

35. As to the Respondent's case at the time, that Tribunal says "*It is common ground that the leaseholder is withholding payments…..as she considers that the landlords have failed to carry out their obligations. According to Mr. Houghton the other leaseholders are paying their service charges*".

36. Thus, the position almost 10 years ago was that the property did have remedial work for dry rot and there seems to have been damp penetration. As Tribunal Judges did not then have county court jurisdiction, a counterclaim for losses allegedly incurred was not determined. The Tribunal said "*…the leaseholder's claim is best taken forward by her instituting proceedings in* (the county court). *She may wish to take additional legal advice*".

37. Turning now to the question of the burden of proof to be applied, the Tribunal notes the case of **Schilling v Canary Riverside Development PTD Ltd** LRX/26/2005; LRX/31/2005 & LRX/47/2005. His Honour Judge Rich QC had to consider this issue in a service charge case. At paragraph 15 he stated :

> *"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the* (Tribunal) *to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."*

38. As has been said, the Respondent mentions the figure of £28,074.87 as a cross claim for alleged damages including loss of earnings but there are no figures stated as to how this amount is made up or, indeed, any supporting evidence. Despite being ordered to file evidence to support her claim, the Tribunal still has no idea of the details of her claim or how it is made up.

39. It may be unfair to say it, but she gives the impression that she feels that these hearings are, in effect, a public enquiry and that the Tribunal and the court should produce its own evidence. That is not the case.

40. The Applicant obtained the freehold reversion on the 18th March 2016. It seems to have realised that there were problems fairly quickly and wrote to the leaseholders within a few months stating that works were to be undertaken to resolve the problems. The Applicant's representatives consulted the leaseholders, obtained quotations and then demanded £13,662.11 on account of remedial works on the 25th June 2019. Such works are substantially under way as the other leaseholders have paid their shares. The Tribunal is satisfied that this freeholder has progressed remedial works reasonable quickly and any contractual breach by it has not resulted in any quantifiable additional loss to the Respondent.

41. Using its expertise in such matters, the Tribunal can confirm that listed buildings erected in the early 19th century which are converted into flats are likely to cost more to maintain than new buildings. In the **Larkvalley** case referred to above the service charges for 2008, 2009, 2010 and the estimated charges for 2011 were, respectively, £164.31, £300, £300 (excluding insurance premium) and £300 (again, leaving out insurance). Compared with other properties of this age, these seem to be very low. Indeed, all the Tribunal members have seen many service charge bills of more than £1,000 per annum per flat for older listed buildings.

42. Another issue where the Tribunal has used its expertise is in considering the specification of works. It is clear that the quotation includes £20,000 to rectify damp problems in the flats including £6,000 for flat 5. Work is included to repair and maintain timberwork and a figure of £10,000 is also included as a provisional sum for any unforeseen works.

Conclusions

43. The Tribunal, having taken all the evidence and representations into account determines that the amount of £13,662.11 is reasonable and payable under the terms of the lease. The matter is therefore transferred back to the county court for it to determine whether there is any right of equitable set-off.

Costs

44. It is now established law the in situations where cases are transferred between the county court and this Tribunal, any claim for costs, contractual or otherwise, has to be dealt with individually by each forum. In other words, costs incurred when the county court was dealing with the case have to be assessed by the court and, similarly, once cases have been transferred to the Tribunal, costs incurred there have to be assessed by it as administration charges as defined by paragraph 1, Schedule 11 of the 2002 Act.

45. Paragraph 5A gives the Tribunal or a county court the power reduce or extinguish a tenant's liability to pay for the costs of representation of a landlord, despite what is in the lease. As this Tribunal is not dealing with the issue as to whether an equitable set-off applies, it is referring the decision under these provisions to the county court.

46. The Tribunal cannot decide the amount of any administration charge in this case. Before such a charge can become payable, a statutory demand

has to be made. The Tribunal wrote to the Applicant's solicitors a week or so before the hearing making this point but counsel could not say whether any statutory demand had been served. In order to assist the parties, the Tribunal has considered the claim for costs incurred in the part of these proceedings heard before the Tribunal and comments as follows. This is, of course, subject to any order the court may make under paragraph 5A of Schedule 11, Part 1 of the **Commonhold and Leasehold Reform Act 2002**.

47. The charging rates claimed for the various fee earners are reasonable, as is the claim for letters and telephone calls.

48. The 'schedule of work done on documents' is reasonable save for the last 2 items. The solicitors are entitled to claim for creating the index to the bundle of documents but the creation of the bundle itself is an administrative task which does not have to be undertaken by a fee earner. Furthermore, the costs are assessed on an indemnity basis. A solicitor would not be able to charge a client for calculating the amount of costs which is, in effect, what form N260 is.

49. Finally, it is noted that all of counsel's fees are for work before the Tribunal. That is not correct as the main issue raised by the Respondent is equitable set-off which is to be dealt with in the county court. The Tribunal would split the fee in two. £1,000.00 is rather high but is just about within acceptable limits on an indemnity basis. £500 for each hearing would be allowed.

50. Therefore the sums of £180 and £125 are deducted from the work on documents leaving a balance of £2,302.50 plus £460.50 VAT for the solicitors' fees. The advocate's fee and counsel's fee are now £635.00 plus £127.00 VAT. The total that the Tribunal would consider to be reasonable is therefore £3,525.00.

51. It should be made absolutely clear that if the Applicant is registered for VAT purposes, it will be able to recover the VAT element as the legal services were supplied to the Applicant and not the Respondent. In those circumstances, an allowance must be made for that. The solicitors must provide a certificate to the Respondent confirming whether the Applicant is so registered.

Signed

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Judge Edgington
15th March 2021

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.