



**Residential
Property**
TRIBUNAL SERVICE

**LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT
ASSESSMENT PANEL**

LON/00AG/LSC/2007/0415

Applicants: Mr L Goldstein

Respondent: Mr R Conley

Represented by: Ms Sarah Lippold of counsel

Property: Hall Floor Flat, 27 Belsize Park Gardens
London NW3 4JH

Leasehold Valuation Tribunal: Ms Helen Carr
Mr C Kane FRICS
Mr L Packer

Date of Decision 4th August 2008

DECISION

The Tribunal determined that the Respondent is not liable for the service charges demanded as they arose as a result of the Applicant's failure to carry out the necessary investigation of water ingress to the rear bay window of the property in a timely manner. The Respondent is therefore entitled to set off the damages for the Applicant's breach of covenant against the service charge demand.

BACKGROUND

1. The Tribunal was dealing with an application dated October 15th 2007 and made under section 27A of the Landlord and Tenant Act 1985, as amended (the 1985 Act) for a determination as to liability, and if so, the extent of, the respondent's liability to pay service charges.
2. The application relates to the premises at Hall Floor Flat, 27 Belsize Gardens, London NW3 4JH
3. The Applicant is the owner of the freehold of the building containing the premises and a number of other flats, and is the landlord under the lease of the premises.
4. The Respondent was the owner of a lease of the premises which is dated 9th April 1974 and made between the Applicant of the one part and L.M. Friedland of the other part for a term of twenty one and three quarter years (less the last three days thereof) from 25th December 1973. By a lease dated 8th September 2000 the Applicant granted to the Lessee a new lease under s.56 of the Leasehold Reform, Housing and Urban Development Act 1993 for a term of ninety years from 26th September 1995. By a lease dated 15th February 2007 the Applicant granted to the Lessee a new lease under s.56 of the Leasehold Reform Housing and Urban Development Act 1993 for a term of one hundred and eighty years from the 26th September 1995.
5. The Application arises out of a dispute relating to disrepair to the respondent's premises. The disrepair was first reported in writing to the Applicant in May 1999. Subsequently the Respondent obtained a number of county court orders in relation to the specific performance of the repairing covenants in the lease. The latest of these orders was made by District Judge Gilchrist on 4th December 2006.
6. Following completion of the repair works the Applicant sought to recover the costs from the respondent. A leasehold valuation tribunal determined a number of service charge issues between the parties in a decision dated 3rd May 2007 and numbered LON/00AG/LIS2005/0110 and 0124. In the course of that application the Tribunal specifically

gave the Applicant leave to present a fresh application based on the service charges for the (calendar) years 2004 to 2006 which are the subject of the application being determined by this decision.

7. At a preliminary hearing relating to this application the Tribunal determined that it had jurisdiction to determine the service charge dispute between the parties. In particular the Tribunal stated at paragraph 9 & 10 of that decision,

‘Having read the decision of District Judge Gilchrist the Tribunal can find no decision that the landlord should not be entitled to recover for the cost of carrying out the repairs based on the fact that the tenant has or may have a damages claim which is equal to or exceeds the cost of the works.

The issue as to what sums the landlord is entitled to recover (if any) in respect of these works has never been determined and falls to be considered in the present application. The Tribunal may decide that all or part or none of the cost of repairs is recoverable from the Respondent when it has heard all of the evidence’.

8. The hearing took place on 4th August 2008. The Applicant represented himself. The Respondent was represented by Ms Lippold of Counsel.

DETERMINATION

9. The issues before the Tribunal and requiring determination are

- a. Whether the respondent is prima facie liable to pay one fifth of the following service charges:

2004		
	i. Stephen Ashford Associates – surveyors fees	£ 1,499.23
	ii. Hutton and Rostron – dry rot investigation	£ 1,645.00
2005		
	iii. Stephen Ashford – survey fees	£ 376.28
	iv. John Lovell – structural engineer	£ 352.50
2006		
	v. George Fraser – Bay Roof repairs	£37,957.00
	vi. Springett Gould and Keel – surveyors	£14,108.71

- b. Whether the amounts claimed by the Applicant are reasonable

- c. Whether the Respondent is entitled to an equitable set off from any liability he might have to pay service charges.
10. The issues arise in connection with major building works carried out on the respondent's flat in the years 2004 – 2006. The building works have been the subject of extensive litigation between the parties.
11. The first two issues before the Tribunal can be dealt with briefly. The service charge provisions are set out in clause 2(3) (i) of the lease. The lessee is obliged to pay to the lessor a service charge equal to one fifth share of the reasonable expenses of:-
 - a. Repairing cleansing building renewing and maintaining the main walls timbers floor joists and main structure (including the roof and foundations) of the building and the main drains services and pipes walls fences gutters paths entrance hall staircases and passages used or to be used in common by the occupiers of the Flat and the occupiers of the other flats in the building.
12. The lease gives the responsibility to the lessee of repairing and decorating the interior of the flat. Clearly however the landlord's repairing obligations would extend to internal repair works if those works were necessitated by damage to the structure and exterior of the property.
13. Counsel raised no issue that the works which had been carried out by the Applicant were within the service charge provisions of the lease, and that in normal circumstances the Respondent would be responsible for a one fifth share of the costs of the work.
14. The Applicant gave evidence that the service charges incurred were reasonable. In particular he pointed out that contractors were only appointed on the recommendation of Mr Birchall, the surveyor appointed by the court in connection with the disrepair litigation. In these circumstances he felt that his obligations to appoint reasonably qualified professionals charging reasonable fees were discharged. There were some questions raised by the Tribunal about the charges made by Mr Ashford, the first surveyor instructed in connection with supervising the works to the property. The Applicant said that he had been satisfied with the work done by Mr Ashford, though felt he had been slow in sending out schedules, and content with his charges. His reason for switching to a new surveyor Mr Keele for the supervision of the actual work was that he was more local and would have lower travel costs, and would provide closer supervision. He said that Mr Birchall had agreed the change. The Tribunal accepted that explanation.
15. Counsel informed the Tribunal that the Respondent had no problem with the reasonableness of charges that were incurred, for the work as carried out. Indeed she made the point that in the course of the litigation in the county

court, the qualifications and plans of those involved with the works had been closely scrutinised.

16. The Respondent's objection to discharging his liability for the service charges was quite distinct; he considered that the service charge liability only arose because of the landlord's historic breach of covenant, and that he was therefore entitled to set off the damages which flowed from this breach against the service charge demand. This is the crux of the Respondent's argument.
17. The Applicant's response to this argument can be summarised as follows:
 - (i) He was reluctant to incur any expenses in connection with repair to the property because of the history of litigation between the parties and the reluctance of the respondent to pay any service charges at all
 - (ii) He had tried to deal with the disrepair by carrying out patch repairs
 - (iii) The Respondent had himself caused delays to the effective repair of the damage to the property by refusing access to the property
 - (iv) Structural work needed to be carried out to the property and would have been required regardless of the date of commencement of the work. Therefore some proportion of the incurred costs should properly be borne by the Respondent.
18. In making a determination on this matter the Tribunal considered the chronology of events carefully.
19. According to the Applicant, the Respondent first informed him of a leak to the rear bay window of his flat in late 1998. At that time a contractor was on site and he carried out a patch repair to the bay. On 12th May 1999 the respondent wrote to the Applicant's solicitors, Tibber Beauchamp Ward, with a copy to the managing agents Beust Citron & Co, as follows:

A leak has recently developed in the rear bay, causing water to drip through when it rains heavily with a saucepan needed to catch the drips, and discolouration and damage of the ornate cornice. Such leaks have occurred in the recent past in five separate places and caused damage to the cornice work which may be serious; remedial work was carried out on the bay on one occasion (installation of a lead flashing), however this has subsequently leaked which I have repaired myself.

Now another new leak is dripping through. A leak is merely a sign or symptom of unseen damage behind the leak; it is necessary to find out what is causing this ongoing problem in order to correct it properly. There may still be a problem with the flashing, or it may be something else altogether, or both.

20. There was some correspondence between the managing agents of the property and the Respondent. However no work was done on the property in response to the letter from the Respondent. On 9th July 1999, in the course of a letter to the solicitors, the Respondent made the following points about the damage to the bay roof.
- 'But the matter is now extremely urgent. There has been heavy rain recently and the valuable cornice work is now sodden, stained, and smells musty. In my opinion there is a serious risk of downfall, which will have the usual serious consequences as regards expenditure: and since the Freeholder has been informed this time in writing unlike on previous occasions, it is he who will be responsible personally if serious damage does occur and not the leaseholders jointly via the service charges. I look forward to the immediate arrival of someone to assess the situation and then remedy it without delay'.*
21. Some further effort at repair seems to have taken place in August 1999. However on 24th August 1999 Mr Conley wrote to the Applicant informing him that the bay roof was still leaking and reminding him of his concerns that if the damage was not properly inspected there could be serious consequences.
22. There is then a letter from the Applicant to the Respondent dated 13th March 2000 enquiring whether the repairs effected had proved to be satisfactory. The Respondent replies to this letter on 18th July 2000. In this letter he informs the Applicant that the repair has not been effective; there continues to be leaks through the bay roof and in hot weather there is a pungent musty smell. On 30th September 2000 the Respondent reports continued serious leakage in his letter to the Applicant.
23. The Applicant then instructs a surveyor, Mr P. Bensted [Can we put in his professional qualifications here please?] of Fenton Associates to report on various problems to the property. In a report to the Applicant dated 5 December 2000 Mr Bensted makes the following observations about the water penetration to the bay roof:
- 'If this has continued for a prolonged period there are strong risks of wet or more seriously dry rot which could be both expensive and disruptive to rectify and it is therefore important that the concealed roof timbers are exposed and examined for signs of such defects before a remedial specification is finalised'.*
24. The Applicant sent a copy of the report to the Respondent on 10 December 2000 asking him to arrange for Mr Bensted to inspect the internal damage to the ceiling of the bay. On 2nd January the Applicant attempts to arrange such an inspection. However on 12th January Mr Bensted informs the Respondent that as he has already submitted his initial report on the cause of the water ingress he does not require access to the flat at this stage.
25. On February 4th 2001 the Respondent informs the Applicant that there are still leaks to the bay roof. On 15th February the Applicant writes to the Respondent

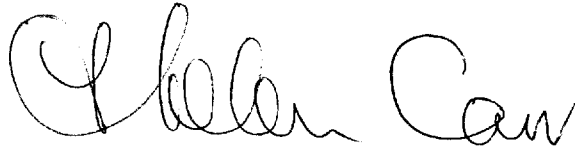
telling him that repair works will commence shortly. However the repairs had not taken place by September 2001. On 13th September 2001 the Respondent issues proceedings for breach of repairing covenant. In December 2001 there is some evidence of some further effort at patch repair of the bay roof, but no action is taken to follow up the specific recommendation of Mr Bensted.

26. On 2nd October 2002 the Respondent reports in his letter to the Applicant that *'.....at some time on the 2nd October the proof of what I am alleging suddenly appeared on the inside of my living room: a large fungoid growth bursting through between the cornicework and the frame'* On 21 February 2003 the court appointed expert Mr Richard Birchall produced a report on the damage to the bay area of the Respondent's flat. He observes that *'dry rot is now affecting the entire curved section of the cornice to the bay and the floor above which will require the demolition and reconstruction of those areas, which in turn will include rebuilding of the flat roof over, that is the supporting timbers and any roof covering'*. However even at this stage the extent of the spread of the dry rot had not yet been established.
27. There is then a series of further delays which were either the subject of or caused by the litigation process.
28. Eventually the works were completed in 2006.
29. This chronology demonstrates considerable delay in the Applicant responding appropriately to the problems raised by the Respondent. It is not that the Tribunal considers that it is unreasonable to first respond to leakage from a flat roof through patch repairs. On the contrary that seems a sensible first step. However once it is apparent that such patch repairs are not working, and that there is a persistent problem of water ingress it is clear that serious investigation works need to be carried out. The Tribunal considers that the Respondent's letter of July 1999 was sufficient to put the Applicant on notice that there were likely to be serious consequences if the problem was not rectified. Certainly by the time of Mr Bensted's report of 5th December 2000 and its very specific warnings on the potential for rot damage, further delay in a serious investigation of the extent of disrepair to the bay roof was unacceptable.
30. The Applicant argues that he was reluctant to undertake repairs to the premises as he always found it difficult to recover his expenses from the Respondent. The Tribunal has some sympathy with his predicament. However it considers that he allowed the antagonism between him and the Respondent to interfere with his judgement about the proper management of the property. What was being reported was a serious problem of disrepair which, if not properly and expeditiously handled would have serious consequences for the structure of the property with all the expense and inconvenience that would entail.

31. The applicant also argues that delay was caused by the Respondent. However the Tribunal considers that the relevant delay was the delay from 1999 to October 2002 and the Applicant has produced no evidence that the Respondent was responsible for delay during that period. The Tribunal did question the Respondent on his delay in replying to the Applicant's enquiry of March 2000 about whether the patch repairs had worked. The Respondent informed the Tribunal that at that stage he was involved with Court of Appeal litigation against the Applicant and that had probably taken priority at that time.
32. The Tribunal therefore **determines** that the delay in instigating a proper investigation of the extent of disrepair to the bay roof was unreasonable and a neglect of the Applicant's responsibilities.
33. The next question for the Tribunal is whether the delay caused the damage to the structure of the property. The Respondent needs to demonstrate on the balance of probabilities that the delay led to the expensive reconstruction of the bay area and that otherwise the expense would not have been incurred.
34. The Applicant argues that some of the work was inevitable because there was structural damage to the bay area. However he produced little evidence of this and despite being given time over a 90 minute lunch break to consider the matter, the information he provided was not specific enough to persuade the Tribunal of the Applicant's contention about how much of the costs of the work related to inevitable structural repair.
35. The Respondent points to the reports of the experts involved in the works. He draws particular attention to the report prepared by Mr Birchall, the court appointed expert, and argues that the dry rot is more likely to follow a long period of water leakage and that dry rot causes structural damage. The Tribunal is mindful that this report was produced in connection with the Respondent's claim for specific performance of the lessor's repairing covenant and not for the purpose of the Tribunal hearing. However his views are persuasive when taken alongside the very specific warning of the risk in Mr Bensted's report, and Tribunal's own expertise. The Tribunal therefore **determines** that it is more likely than not that the delay in attending to the problem caused the damage to the structure of the property.
36. Counsel drew the Tribunal's attention to the decision of the Lands Tribunal LRX/60/2005 *Continental Property Ventures Inc and Mr and Mrs White*. In this case – which involves similar facts to the case before the Tribunal - Judge Rich made it clear that the LVT has jurisdiction to determine claims for damages for breach of covenant where these constitute a defence to a service charge in respect of which the LVT's jurisdiction under s.27A had been invoked. The Tribunal is therefore able to determine that where there is a neglect by the lessor to take the necessary steps to prevent more extensive damage, that the costs of the consequent damage should not be borne by the leaseholder. The Tribunal therefore determines that the Respondent is not liable for the service charges that are the subject of this Application. He is

entitled to set off the damages to which he is entitled because of the Applicant's breach of covenant against those service charges.

Signed

Handwritten signature in cursive script, appearing to read "Helen Can".

Dated

18 / 08 / 08