Y Tribiwnlys Eiddo Preswyl
Residential Property Tribunal Service (Wales)
Leasehold Valuation Tribunal (Wales)
E-mail: rpt@gov.wales

Landlord and Tenant Act 1985, S.27A

Premises: 95-97 Cathedral Road, Cardiff CF119PG ("the premises")

LVT/0001/04/21

Applicants: Mr and Mrs Fairclough

Respondent: Mr Brynley Morgan

Tribunal: Judge Shepherd
Mr R. Baynham FRICS
Mr K. Watkins FRICS

DECISION AND REASONS OF LEASEHOLD VALUATION TRIBUNAL

1. In this case Gavin Fairclough and Amanda Fairclough ("The Applicants") are seeking a determination pursuant to section 27A of the Landlord and Tenant Act 1985 as to the reasonableness of costs incurred by their landlord Mr Brindley Morgan ("the Respondent"). The service charges challenged are for the years 2020 - 2021 and 2021-2022. The Applicants challenge the scope of proposed major works and costs. They also argue they are entitled to raise an equitable set off in relation to damage to their flat allegedly caused by the Respondent's failure to comply with his repairing responsibilities.

2. The Respondent owns the freehold of 95 - 97 Cathedral Rd, Cardiff, CF11 9PG ("the premises"). The premises consist of two semi-detached houses constructed around 130 years ago which have been combined and converted into a mixture of commercial and residential accommodation. The ground floor and basement levels are let for commercial purposes and the rest of the building comprising eight flats are on long-term leases.

3. The Applicants are the registered proprietors of flat eight which was let under a lease dated 8 April 1993 for a term of 99 years. The Applicants became the proprietors on 11 December 2006. They do not live at the premises but let them out until the latter part 2018 when they say the premises have been unlettable due to water ingress.

4. In 2009 the Respondent instructed a surveyor Roger North to inspect the premises and prepare a maintenance programme. This was done and a cost estimate of about £30,000 was provided. The Respondent says that the leaseholders were reluctant to meet these costs. A schedule of works was drawn up and a tender was received from

a firm called CREAN on 30 January 2012. They were offering to complete the works for £43,141.34.

5. A service charge demand was issued for the year 25th of March 2013 to 24 March 2014 which included those costs together with administration fees. The Applicants were asked to pay £10,224.43 in two tranches, half on 25 March 2013 and half on the 26th September 2013. They did not pay and the matter came before the Leasehold Valuation Tribunal in August 2013. On the second day of the hearing the parties reached an agreement that dealt with most of the issues and the LVT decided that Mr Morgan's administration fee should be removed. The agreed route between the parties did not resolve the matter and it came back before the LVT in September 2014 when there were various issues between the parties including the amount to be contributed in respect of the works. In an effort to reduce the cost the Respondent removed the proposed car park works and there was a revised tender cost of around £22,000.The LVT reduced the revised tender to £18,519.88 plus VAT. The supervision fee was recalculated to account for the lower tender price. At paragraph 112 the LVT directed the parties were to agree the outstanding liability and refer back if agreement could not be reached by 30 January 2015. No application was made.

6. It would have been hoped that the parties would have drawn a line under things once the LVT had made its determination in 2015 but works did not progress and significantly the leaseholders did not pay the sums due despite a determination that they should do so. The Applicants say the Respondent is at fault as he didn't serve a service charge demand. The Respondent says he couldn't do the works until the leaseholders had paid their service charges. A stalemate ensued and there was an aborted effort by the leaseholders to acquire the freehold in 2018. On conclusion of that matter the Respondent instructed Mr Bond of Roger North Ltd to draw up a fresh schedule of works and serve a section 20 notice. There were lengthy negotiations and partial payments were pledged under protest in September 2020. The works were scheduled for a September 2021 start and are estimated to cost £92,736 plus VAT with fees at 10%.

7. The Applicants say that the cost of the works have increased by a multiple of around five since the 2015 determination. The Respondent says that in fact the works are not identical to those of the 2015 works. The Applicants also say that additional works are required which they believe have arisen because of the delay and the Respondent’s failure to carry out the repairs in a timely fashion they say that their flat has become uninhabitable because of water ingress. They say that the Respondent is in breach of his obligation to repair and because of this breach the costs of the works have increased fivefold. They complained that after the 2013 and 2015 determinations the Respondent did nothing, he did not start the works and did not issue a service charge demand. The Respondent denies this. He says that the cost of works being assessed by the LVT in 2015 was incorporated into the demand for the year 25th of March 2013 to 24 March 2014, there was a relevant demand because it's referenced by the LVT and its 2013 decision. In the decision it is noted that 50% was payable on 25 March 2013 and the rest payable on 29 September 2013. The Applicants did not pay anything

until recently. The Respondent says that the Applicants were liable to pay and he was unable to proceed until monies had been received.

8. The Applicants say that the service charge provisions of the lease do not operate as a condition precedent so there is not a requirement for the tenants to pay for the works before the landlord does the work. They rely on the well-known case of *Yorkbrook Investments Ltd v Batten* (1986) 18 HLR 25. In that case the court concluded that the intention of the parties was not to make the landlord's obligation to repair conditional on having payment in advance. However in *Bluestone v Portvale Holdings* [2004] HLR 49 Buxton LJ said obiter that *Yorkbrook* was not binding authority to the effect that a clause could never be a condition precedent.

9. The Applicants say that the Respondent has sought to circumvent the determination of the LVT in 2015 by delaying the works and then telling the tenants that the cost has gone up. The Applicants claim a set off by way of counterclaim against the Respondent on the basis that they failed to carry out the works after the 2015 determination and that they are not therefore able to share the additional cost of the works. They rely on the case of *Continental Property Ventures INC v White* [2007] L and TR 4. In White His Honour Judge Rich QC accepted that the LVT has jurisdiction to determine claims for damages for breach of covenant only insofar as they constitute a defence to a service charge in respect of which the LVT's jurisdiction under section 27A has been invoked. The Applicants say they repeatedly asked for the repairs to be done and the Respondent was warned that the cost of repair would increase. The Applicants claim that their flat (flat 8) is uninhabitable following water ingress in 2014. They say that the last tenant moved out of the premises in 2018. They claim that they have suffered rental losses of £19,800 between 1 October 2018 and 1 October 2021. They also claim the cost of council tax payments that they've had to make to Cardiff County Council during the period the flat has been empty. Finally they claim a loss of amenity.

The lease terms

10. Under the lease at paragraph 6C the lessor covenants:

    That (subject to contribution and payment as hereinbefore provided) the lessors will maintain repair redecorate and renew (I) the roof's main structure and foundations of the building; (II) the boundary walls fences gutters and rainwater pipes of the building; (III) the gas and water pipes drains and electric cables and wires in under and upon the building other than those serving only one flat in the building.

11. The Fourth schedule of the lease details the costs expenses outgoings and matters in respect of which the lessee is to contribute and include:

    The expenses of maintaining repairing redecorating and renewing (a) the roof's main structure gutters rainwater pipes… Of the building… And (c) the entrances entrance hall's landings and staircases of the building leading to the flats.

    The expenses of decorating the exterior of the building…

The expenses of maintaining repairing and renewing (a) the boundary walls and fences of the building and (B) the access ways gardens and grounds of the building

The hearing

12. At the hearing Mr Fairclough represented the Applicants. Brittany Pearce of Counsel represented the Respondent.

13. It was confirmed at the start the hearing that the works had not yet commenced. There was no confirmation as to the start date although it was said by the Respondent to be imminent. Mr Fairclough had paid his proportion of the service charges in April 2021 as had the other leaseholders.

14. Mr Fairclough said he'd been trying to get the Respondent to do the works. In 2018 there had been water ingress into the Applicants' flat. In 2019 a section 20 notice was served. Mr Morgan did some patch repairs but the substantial work was not started.

15. Mr Fairclough said that he'd been asking for a service charge demand. He valued his counterclaim at rental losses of £19,800. The refurbishment works were £9376.80 and the council tax the Applicants had had to pay was £5103.31.

16. Mr Fairclough challenged Roger North's fees of £1500. The Respondent said there was a need for a structural report. There was a general concern about the structure of the building.

17. Mr Fairclough accepted that most of the items in the Scott schedule were required works. He accepted that the roof coverings needed to be replaced at the rear and at the front of the building. He challenged the extra charges largely on the basis that they were due as a result of the landlord's failure to carry out the works originally.

Reasonableness of service charges

18. In their statement of case the Applicants challenge the reasonableness of Roger North's fees invoiced on 2nd May 2020, 15th June 2020 and 9th July 2020. A total sum of £1500, together with 15% management fee. They say that these sums would not have been necessary if the Respondent had carried out the works as determined by the Tribunal. Pausing here, the difficulty with this argument by the Applicants which pervades their whole case is that the determination by the Tribunal was in relation to service charges which the Applicants did not seek to pay until nearly six years later.

19. The Applicants also challenge the reasonableness of the s.20 works in the sum of £92,736.60 and the structural engineer's report at £900. The Applicant's proportion being £17,151.60. The main basis of this challenge is that the increase in the cost of works resulted from the Respondent's delay in commencing them. The Respondent counters that there are additional costs but there are also additional works involved.

There was no expert evidence on which the Tribunal could rely in relation to the allegation that the works costs had increased through historical neglect.

The Roger North invoices

20. It was entirely reasonable for the Respondent to incur the costs of Roger North's input into the consultation process. The fact that the works had not been carried out after the 2015 Tribunal hearing did not preclude the need for these inspections and the costs were not excessive. The Applicants failed to detail exactly why the costs were not reasonable. The passage of time meant that further inspections were required. This was a prudent approach to take. **The Roger North costs are allowed in full.**

The s.20 works

21. As general comment the Tribunal accepts that the proposed works have been subject to a competitive tender process and LCB were the appointed contractor. The Tribunal also considers that although the works were similar to those envisaged in 2015 they are not identical. Most obviously the extent of the roof repair has increased, the parapet works had increased and there is provision for car parking. The Applicants say that the reason for the increase in costs is the Respondent's failure to carry out works envisaged at the 2015 LVT. As already indicated the determination of the LVT was in relation to sums payable. These sums were not paid by some or all of the leaseholders until 2021. The Tribunal could not elicit a reason for this from Mr Fairclough. He said that the Respondent had not sent him a demand but he had been informed of the amounts due by the Tribunal. The Respondent says that he could not commence the works until he had received the sums determined. The Tribunal has some sympathy for his position because once the Tribunal makes a determination it is expected that the parties will comply with it.

22. The Tribunal was faced with cogent evidence on one side showing that a tender process had been carried out and on the other assertions by the Applicants that the costs were inflated. There was no expert evidence to support this argument. Using its own expert knowledge the Tribunal is satisfied that all of the works proposed by the Respondent are reasonable and the proposed costs are also reasonable. Indeed Mr Fairclough accepted that most of the works proposed were necessary. He did not put forward alternative quotations for any of the works. He also accepted in cross examination that prices would be expected to rise since the works were originally envisaged. **The s.20 costs are allowed in full.**

Set off

23. Mr Fairclough sought to claim an equitable set off against the sums due to the Respondent. This was based firstly on his argument that additional costs had been incurred as a result of delays by the Respondent and secondly on the basis of damage caused by water ingress into the flat he and his wife own. For this he claims damages which exceed the amount claimed by the Respondent. He relies on the case of

*Continental Property Ventures Inc v Whit*e [2007] L & TR, 4 a decision of the Lands Tribunal in which HHJ Rich QC stated the following:

> *There can be no doubt that breach of the landlords covenant to repair would give rise to a claim in damages. If the breach results in further disrepair imposing a liability on the lessee to pay service charge, that is part of what may be claimed by way of damages. At least to that extent it would, as was held by the Court of Appeal in Filross Securities v Midgely (Peter Gibson, Aldous and Potter LJJ, July 21st, 1998), give rise to an equitable set off within the rules laid down in Hanak v Green [1958] 2QB 9 and as such constitute a defence. This would not mean that the costs incurred for the nine stitches were not reasonably incurred. It would however mean that there would be a defence to their recovery.*

24. These principles were approved and considered in *Daejan Properties Ltd v Matthew* [2014] UKUT 206 where the lessees sought to set off damages against the sum claimed for beam replacement work on the grounds that it would have cost less if it had been done earlier. As the expert evidence did not support that conclusion the tenant's application failed.

25. In relation to the allegation of historic neglect there was no expert evidence provided by the Applicants to link the increased costs with failures by the Respondent. It is not enough to show that costs have increased over time. In any event the Tribunal finds that the Respondent was precluded from carrying out the works envisaged in 2015 because the Applicants and other leaseholders failed to pay service charges despite there being a determination by the Tribunal.

26. The problem with a set off claim in relation to alleged damage in Flat 8 is that the claim is not based on historic neglect as such. The claim relates to allegations of ongoing breach by the Respondent which has caused damage to the Applicant's flat. The Respondent is not seeking to recover service charges for the repair of the Applicants' flat and therefore the service charge claim and the proposed set off are not so closely connected that it would be manifestly unjust to allow the landlord to enforce its demand without taking the cross claim into account (*Geldorf Metaalconstructie NV v Simon Carves Ltd* [2010] 4 ALL ER 847). Also for the reasons given at paragraph 29 below the Appellants cannot be said to have clean hands in their claim for equitable set off and this prevents a claim in equity.

27. Further the fact that the Applicants are seeking to recover more than the sums sought by the Respondent in service charges would limit the Tribunal's ability to deal with the damages claim properly. It is not within the Tribunal's jurisdiction to award damages to a party and therefore its jurisdiction would be limited to reducing the service charge contribution. It is not satisfactory to leave part of the Applicants' claim unresolved in this way.

28. Finally, the Tribunal has some sympathy with the arguments put forward by the Respondent's counsel in relation to the set off application. She highlighted the case of *Bluestorm Ltd v Port Vale Holdings Limited* (2004) HLR 49 in which the Court of Appeal held obiter that the lease created a close link between payment by the tenants and performance of the works of repair by the landlord. In those circumstances it was prepared to hold that provision making performance by the landlord conditional on payment by the tenant should be taken at face value and created a condition precedent - a different conclusion than had been reached in the *Yorkbrook* case. Significantly, aside of the condition precedent point, the Court of Appeal in *Bluestorm* found that in that particular case the tenant's failure to pay service charges was a substantial cause of the landlords non - performance of its repairing covenants. The Tribunal has already found that the failure to pay by the Applicants and other leaseholders following a previous determination made by the tribunal was a substantial factor in preventing the Respondent from carrying out the works. Part of which was reroofing.

29. The Applicants' failure to pay despite the determination by the Tribunal does affect their entitlement to make a claim in equity. It can be said that they do not have "clean hands". The appropriate course they should have followed which they only followed this year was to pay the sums due and then challenge them.

30. In summary the Tribunal does not accept that the Applicants have an equitable set off against the service charge claim. It is of course open to the Applicants to seek damages for disrepair in the County Court. The Tribunal has deliberately sought to avoid addressing the Applicant's substantive claim so as not to prejudice it in the county court.

31. The Tribunal will not exercise its discretion pursuant to s.20C Landlord and Tenant Act 1985. The reason for this is that the Applicants have been largely unsuccessful in their application.

Dated this 10th day of November 2021

Judge Shepherd