FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LAC/2023/0024**
Property	**:**	**Flat 91, Hermitage Court, London, E1W 1PW**
Applicant	**:**	**Mr Ken Horn**
Representative	**:**	**Ms Sarah Lancaster**
Respondent	**:**	**Knighten Street Freehold Company Limited**
Representative	**:**	**Mr Hugh Rowan of Counsel, instructed by Wallace LLP**
Type of application	**:**	**For the determination of the liability to pay administration charges**
Tribunal members	**:**	**Judge N Hawkes** **Sarah Phillips MRICS**
Venue and date of hearing	**:**	**9 May 2024 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**10 June 2024**

DECISION

Decision of the Tribunal

The Tribunal has no jurisdiction to determine this application because it concerns matters which have been agreed by the Applicant.

The application

1. The Applicant seeks a determination pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of administration charges payable by the Applicant arising out of a fire at Flat 91, Hermitage Court, London, E1W 1PW ("the Property") and the subsequent flooding of neighbouring properties.

2. The disputed charges have been broken down by the parties as follows:

   1) Landlord Legal fees: £1,000.00 + VAT (paid) + £1,200.00 (not paid) (the "Legal Sum");

   2) Costs not covered by the building insurance: £1,906.50 (paid) (the "Damages Sum"); and,

   3) Costs to cover future increase in insurance premium: £3,222.22 (paid) (the "Insurance Sum").

3. The Applicant contends that these sums are not reasonable or payable. The Respondent contends that:

   1) The Applicant has agreed and/or admitted the above items and the Tribunal therefore has no jurisdiction to determine the Applicant's application;

   2) Further or alternatively, the Damages Sum and the Insurance Sum are damages and are not administration charges and the Tribunal has no jurisdiction over them;

   3) All charges are in any event reasonable. .

The hearing

4. The final hearing took place as a face-to-face hearing at 10 Alfred Place, London WC1E 7LR on 9 May 2024. The Applicant was represented by Ms Lancaster at the hearing and the Respondent was represented by Mr Rowan of Counsel.

5. At times, the Tribunal permitted the Applicant to speak directly to the Tribunal notwithstanding the fact that he was represented by Ms Lancaster.

6. The Tribunal's overriding objective pursuant to rule 3 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 includes provision that dealing with a case fairly and justly includes avoiding unnecessary formality and seeking flexibility in the proceedings and ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.

7. The Respondent did not object to the Applicant addressing the Tribunal directly as well as his representative, and the Tribunal was satisfied that it was fair and just, in accordance with the overriding objective, to allow him to do so.

8. Mr Rowan was accompanied by Ms Rhiannnon Saunders, a Senior Associate at Wallace LLP, and by Ms Aysegul Kazdal and Mr Jagdish Menezes who are both Directors of the Respondent Company. The Tribunal heard oral evidence of fact from Ms Kazdal.

The background

9. The Property is located on the top floor of a residential block containing approximately 100 flats. The Applicant is the long lessee of the Property and the Respondent landlord is a not-for-profit tenant owned company. The Property has a balcony and it has at all material times been sublet by the Applicant.

10. It is common ground that there was a fire at the Property on 6 August 2022. The cause of the fire is strongly disputed. The Applicant contends that the fire was a "freak accident" caused by the weather. The Respondent's case is that the fire was caused by the acts and/or defaults of the Applicant's subtenants.

11. The Tribunal has been informed that the London Fire Brigade attended on 6 August 2022 and put out the fire. On 15 August 2022, the tenants of Flat 70 Hermitage Court reported a leak into their flat from above. Following the fire, the Applicant's subtenants reported flooding on the balcony of the Property.

12. London Block Management ("LBM"), who were the Respondent's managing agents at the material time, instructed emergency contractors, Unbloc Drainage Engineers Ltd ("Unbloc"), to attend. Unbloc appears to have found that the drain on the balcony of the Property was blocked and Unbloc noted in an engineer's report dated 15 August 2022 that: *"Tenants confirmed they had a fire and cole [sic] had gone down the stack"*.

13. The Applicant subsequently sought to sell the Property and sought a Licence to Assign from the Respondent. There then followed an exchange of open and without prejudice correspondence concerning the Licence to Assign and the outstanding costs and expenses caused by the fire and the subsequent water penetration. At this time, Ms Pia Unwin, a Licensed Conveyancer at Buss Murton Law Solicitors, was acting on behalf of the Applicant, and Ms Wayne was the solicitor acting on behalf of the Respondent.

14. The Respondent contends that, at this point, a binding agreement was reached that the disputed charges would be paid by the Applicant and that the Tribunal therefore has no jurisdiction to determine the Applicant's application.

The issues

15. The hearing bundle in this matter comprises in the region of 800 pages and there are numerous disputes of fact between the parties. It was unlikely to be possible to hear all the evidence and argument on each of the matters in dispute within the one day which had been allocated for the hearing.

16. At the commencement of the hearing, the Tribunal proposed that the issue of whether or not a binding agreement had been reached should be dealt with as a preliminary issue. If the Applicant's case on this issue succeeded, consideration could then be given to relisting the remainder of the application with a more realistic time estimate. Alternatively, if the Respondent's case on this issue succeeded, the proceedings would come to an end.

17. The parties agreed to adopt this approach. Given the need to hear oral evidence in addition to legal argument in order to determine the preliminary issue, there would have been insufficient time to address any further matters on 9 May 2024.

The Tribunal's determination

18. Schedule 11, paragraph 5 of the 2002 Act includes provision that:

"(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made …

(4) No application under sub-paragraph (1) may be made in respect of a matter which

(a) has been agreed or admitted by the tenant…

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment."

19. By email dated 12 September 2022, the Applicant asked LBM whether there was any update concerning the terrace repairs for the Property and whether the insurance assessor had visited the Property. There was subsequently a further email indicating that an offer had been received and that the buyer's mortgage was due to expire. However, the mortgage offer must have been extended because, on 7 December 2022, Ms Lancaster wrote to Ms Kazdal stating that the mortgage was only approved to January 2023.

20. By an email sent at 14.32 on 8 December 2022, Ms Unwin wrote to the Applicant forwarding an email which had been sent to her by Ms Wayne concerning the proposed Licence to Assign which stated:

'With regard to the insurance claim made in respect of the fire resulting from your client's breach, I understand that £1,906.50 is not being covered by the insurers. My client's position is that those costs would not have been incurred were it not for your client's breach and consequent required clear up and that, accordingly, it requires your client to be responsible for the costs of £1,906.50 plus its legal fees of £750 plus VAT which total £2,806.50 in addition, the tenant would be responsible for any increase in the insurance policy premium and the attached rider will be needed to be added to the licence (with hand amendment suitably initialled after clause 9 to read "10. See Rider").

Please let me know if this is agreed…'

21. By a further email to the Applicant sent at 4.42 pm on 8 December 2022, Ms Unwin stated:

'Dear Ken/Sarah

… I note your various comments and concerns. I will liaise with a colleague who specialises in dispute resolution to see if he can provide you with any advice in this situation, but in the meantime, please see below the response from the landlord's solicitors to my request for a breakdown of the costs being claimed:-

"I understand that the breakdown is as follows:

£118.80 – London Drainage Facilities – Inv 102567 – works to check on fractured pipe – date attended 26/08/22

£721.20 – Unblock – Invoice 98340 – works to jet and replace timesaver – date attended 28/09/22

£201.50 – A P Property Maintenance – Invoice 10023 – Works to divert gutter line

£252.50 – A P Property Maintenance – Invoice 10022 – Works to assist Unblock

£612.50 – A P Property Maintenance – Invoice 10021 – Works to assist Unblock

The additional legal fees relate to considering the terms of the lease and the insurance claim and advising in that regard. Please note the following clauses of the lease which are relevant to your client's breach:

[the clauses of the Lease relied upon by the Respondent are set out]

Rider

10 <u>INSURANCE PREMIUM</u>

10.1 The parties acknowledge that an insurance claim has been made by the Landlord in relation to a fire caused at the Property due to the Tenant's breach of Lease and the damage thereby caused ("the Claim").

10.2 It is hereby agreed by all parties that, in the event that there is any increase in the buildings insurance premium for the building of which the Property forms part which is attributable to the Claim, such increase shall be at the sole cost of the tenant for the time being of the Property which sum shall be payable immediately on demand. '

22. By an email sent to Ms Wayne at 11.43 hours on 14 December 2022 marked "Without Prejudice and Subject to Agreement", Ms Unwin stated on behalf of the Applicant (emphasis supplied):

'Following further discussions with my client, he would like to propose that he pay the full amount of the additional costs that your client is claiming from him as well as an up front sum for any possible increase in the buildings insurance premium as a result of the recent claim on the basis that the Rider to the Licence to Assign will not then be required and that ***these payments will be in full and final settlement of all claims and potential claims that your client may have against them in relation to the property***.

I look forward to hearing from you as soon as possible as to whether this proposal can be agreed please. '

23. At 15.55 hours the same day, Ms Unwin writes to Ms Wayne, copying in the Applicant, and stating (emphasis supplied):

'Thank you for your earlier email with your client's instructions ***to accept my client's proposal*** *to pay the additional costs claimed as well as the proposed sum of £3,222.20 in anticipation of any increase in insurance premium, and to therefore remove the Rider from the Licence to Assign. I would be grateful if you could please provide your client's formal written agreement to this effect noting that the payments are made by my client without any admission of liability and* ***on the understanding that the payments will be in full and final settlement*** *of all claims and potential claims that they may have against my client in relation to the service charge, insurance premium (or, indeed, the property and the Lease as a whole), both future and present.*

I will also notify our buyer's solicitors that ***the Rider is no longer required as all matters regarding the breach and insurance claim have been settled directly between our respective clients***. *'*

24. Around eleven minutes later, at 16.06 hours, Ms Wayne replied stating;

'You will appreciate that I have picked up this matter today notwithstanding it is my day off to assist your timings. However, I am only on my phone and not in a position to draft what you propose

Please provide a draft of what you propose for consideration and passing to my client. It can only relate to the payment in respect of the insurance premium to which it relates. What is the issue with the service charges as I was not previously aware? Please also note that this additionally requested document and need to agree the same will prolong timings.

Finally, please also confirm that your client will pay the full amount of my legal fees for dealing with this matter which continues to increase with your additional requests.'

25. The Tribunal was referred to a copy of an email from Ms Wayne to Ms Unwin which did not specify the time and date when the email was sent. In light of its contents, the Tribunal finds on the balance of probabilities that this email was likely to have been sent before completion. This email states (emphasis supplied):

'Further to your email below, I have taken instructions from my client and I have been advised as follows:

*"**We are happy to remove the rider if they will settle the outstanding amount sent previously and contribute to the expected increase in premium** (see below).*

The current premium is 64,444.00 (tax is not included). The insurers have said:

At the moment insurers are applying between 5-15% rating increase for claim free/low claim policies before the application of RICS index linking which is currently at circa 15%.

As they are willing to pay the outstanding costs and a sum upfront, we are happy to go to the lower end of the scale with the understanding that our premium will increase due to the costs.

At a 5% increase, we would ask the sellers to apply an additional 3222.2 to cover the cost of any increase

If they are happy with this then the sale can be finalised"

Please note that my fees for dealing with this additional matter I estimate to have increased from £750 plus VAT to £1000 plus VAT…'

26. The following day, 15 December 2022, completion occurred and the completion statement includes: *"Additional payments not covered by recent insurance claim"* in the sum of £1,906.50; *"Landlord's Solicitors' Legal Fees"* in the sum of £1,000 plus VAT of £200; and *"Payment for any potential increase in the Buildings Insurance Premium"* in the sum of £3,222.20. The Rider which had initially been proposed was not included in the Licence to Assign.

27. On 20 December 2022, Ms Unwin acting on behalf of the Applicant sent Ms Wayne an email which included the following statement (emphasis supplied):

"Your clients agreed with mine *that they would accept the costs as detailed by you as well as a sum of £3222.20 in respect of any possible increase in the insurance premium, in full and final settlement of any claim they may have in this regard.* ***This amount was therefore paid to you on completion of the sale*** *along with the full amount of your fees for the Licence to Assign, so the matter should therefore be fully finalised and completed."*

28. After considering this correspondence, the Tribunal expressed the preliminary view that the offer to make the payments referred to above in full and final settlement of the breach of covenant allegations, and the acceptance of that offer and the making of those payments constituted a binding agreement as confirmed by the Applicant's own legal representative on 20 December 2022. Ms Unwin clearly has ostensible authority to act on the Applicant's behalf.

29. The Applicant then explained that his case was that he had been put under duress to enter into the agreement to pay the sums which he now seeks to challenge in these proceedings. His position in relation to duress had arguably not been fully particularised in advance of the hearing. However, in the Tribunal's judgement, the Respondent was in a position to meet the Applicant's assertions and, having carefully considered the overriding objective, the Tribunal permitted the Applicant to advance his case in relation to duress. The Tribunal also adjourned for 30 minutes in order to give the Applicant and his representative time to read *Avon Freeholds Limited v Garnier [2016] UKUT 477,* an authority which was relied upon by the Respondent.

30. The Tribunal accepts the Applicant's account that he felt under a degree of pressure at the time the agreement was entered into due to significant increases in interest rates, the position of his proposed buyer, and the general economic situation. However, in our judgment this was simply the commercial reality of the market at the time and these matters do not give rise to a legal entitlement to avoid the contract (see Chapter 11 of *Chitty on Contracts 35th Ed.*).

31. Ms Kazdal gave oral evidence and she was carefully questioned. We found Ms Kazdal to be a credible and reliable witness. Accordingly, we have no hesitation in accepting on the balance of probabilities her evidence that the Respondent did not seek to delay the Applicant's sale and did not deliberately seek to conceal relevant matters from the Applicant but rather the Directors of the Respondent company prioritised matters relating to the Applicant's proposed sale over and above various other issues concerning Hermitage Court.

32. We find as a fact that it was reasonably necessary for the Directors of the Respondent company to obtain information from third parties such as the loss adjusters and then to take independent legal advice before the proposal concerning the Rider to the Licence to Assign was made. The

Directors of the Respondent company are volunteers with no legal or expert qualifications and we are satisfied that they proceeded in a reasonable manner and applied "*no wrongful or illegitimate threat or other form of pressure*" on the Applicant (see paragraph 20 of *Avon Freeholds Limited v Garnier* [2016] UKUT 477).

33. Accordingly, we find (i) that the Applicant's case in relation to duress is not made out on the facts, and (ii) that the matters summarised at paragraph 28 above give rise to a binding agreement or admission concerning the sums which form the subject matter of these proceedings within the meaning of paragraph 5(4) of Schedule 11 to the 2002 Act, so as to out the jurisdiction of the Tribunal to determine this application.

Section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the 2002 Act

34. At the conclusion of the hearing, Mr Rowan confirmed that the Respondents will not seek to pass the legal costs of these Tribunal proceedings on to the Applicant through the service charge or as an administration charge. He explained that this is because the Applicant is no longer a lessee of the Respondent.

Name: Judge N Hawkes **Date:** 10 June 2024

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).