FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**MAN/00BR/LSC/2020/0033** **MAN/00BR/LSC/2020/0048** **MAN/00BR/LSC/2020/0047**
Property	**:**	**Flats 24, 29 and 30 Heath View, Kellbrook Crescent, Salford M7 3GH**
Applicants	**:**	**Dr Faramarz Djavanroodi -Flat 24** **AG Partnership Property Investments-Flat 29** **Faramarz Abbasi-Ghelmansarai - Flat 30**
Representative	**:**	
Respondent	**:**	**Moor Lane (Salford) Management Co LTD**
Representative	**:**	
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	**:**	**Judge J White** **Ms S D Latham (valuer)**
Venue	**:**	**Paper (p)** **Northern Residential Property First-tier Tribunal, 1 floor, Piccadilly Exchange, 2 Piccadilly Plaza, Manchester, M1 4AH**
Date of decision	**:**	**21 September 2021**
Date of determination	**:**	**23 September 2021**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the full amounts of Service Charges demanded, are payable by the Applicants in respect of the service charges for the years 2014- 2019 .

(2) The tribunal determines that the Applicants do not have a claim for set off against the service charge within this application.

The Application

1. The Applicants seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicants in respect of the service charge years 2014, 2015,2016,2017,2018 and budget 2019.

2. The Applicants seeks an order under section 20C of the Landlord and Tenant Act 1985 that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

3. The Applicants seeks an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). that none of the landlord's costs of the tribunal proceedings may be passed to the Applicants as an administration charge

4. Faramarz Djavanroodi made his application on 3 March 2020, following a case management conference the other applications were made on 13 May 2020, and the matters joined. On 7 October 2020, the Tribunal issued Directions. In accordance with those directions the parties submitted documents as set out below.

5. Neither party requested an inspection, and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

6. The hearing took place on the papers. The Tribunal considered whether we were able to determine the application fairly, particularly as there were disputes as to fact and very significant issues of credibility. We decided that we were able to do so and that a hearing would not resolve these issues, particularly as the Respondent's witness is no longer a director, and that we were able to make findings to enable us to reach a fair decision. None of the parties had requested an oral hearing.

The Law

7. Section 18 of the 1985 Act provides: (1) in the following provisions of this Act "service charge" means "an amount payable by a tenant of a dwelling as part of or in addition to the rent (a) which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and (b) the whole or part of which varies or may vary according to the relevant costs. (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable. (3) For this purpose (a) "costs" includes overheads, and (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

8. Section 19 provides: (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period (a) only to the extent that they are reasonably incurred, and (b) where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly. (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction, or subsequent charges or otherwise.

9. Section 27A provides: (1) an application may be made to an appropriate tribunal for a determination whether a service 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 date at or by which it is payable, and (d) the manner in which it is payable. (2) Subsection (1) applies whether or not any payment has been made. (3) ..... (4) No application under subsection (1)...may be made in respect of a matter which – (a) has been agreed 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.

10. The right of equitable set-off, applies to service charge cases only in clear cut cases. Where a landlord is in breach of an obligation under the lease (for example, a landlord's repairing obligations) the lessee may set off against the service charge a claim for liquidated or unliquidated damages for breach of that obligation. (*Filross Securities Ltd v Midgeley [1998] 3 E.G.L.R. 43*; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd [1980] 1 Q.B. 137*). However, the lessee must show that the cross-claim is so closely connected with the landlord's demand for payment that it would be manifestly unjust to allow the landlord to enforce its demand without

taking the cross-claim into account (*Geldof Metaalconstructie NV v Simon Carves Ltd [2010] EWCA Civ 667; [2010] 4 All E.R. 847*).

The background

11. The properties which are the subject of these applications are three flats, flat 24, 29 and 30 Heath View Kellbrook Crescent Salford M7 3GH (the Properties).

12. The Properties form part of residential development constructed in the early 1970 known as Heath View (the Development). There are thirty apartments divided between three connected, but self-contained, purpose built, three storey flat roofed blocks. Two blocks have four flats on each floor and the third two on each floor. Each block has its own ground floor entrance hall containing a stairwell to a landing on each floor.

13. On 4 January 2002 Mr Faramarz Abbasi-Ghelmansarai and Mrs Shahnaz Abbasi-Ghelmansarai became the leaseholders of flat 30. It is one of two flats on the second floor of the third block.

14. In December 2006 Mr Faramarz Djavanroodi became the leaseholder of flat 24. It is located on the second floor of the second block.

15. On 4 December 2019 AG Partnership Property Investments LTD ("AG LTD") became the leaseholder of flat 29. The Applicants predecessors in title were, from September 2014, the partners of AG LTD (Faramarz Abbasi-Ghelmansarai and Mrs Shahnaz Abbasi-Ghelmansarai) . It is located on the second floor of block three.

16. The Applicants each hold a long lease (999 years from 25 March 1975) of the Properties. It is tripartite lease. The Vendor is the original developer, and the Company is the Respondent Company. Every leaseholder is a shareholder in the Company. Heath View Management is the managing agent. The lease requires the Company to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The Applicants' case

17. The Applicants' case is set out in the applications. They specifically do not challenge the reasonableness of the service charges. They wish to challenge:-

    (i) The extent to which the Respondents ability to enforce payment of the claimed arrears is time

barred (to include the extent to which the credit claimed by the Applicants may be applied in discharge of any time barred arrears). The correct calculation of the balance due.

(ii) The extent to which the Applicants is entitled to set off against the amount properly due the cost incurred by the Applicants in carrying out, with the agreement of the Respondent, works of repair to the building of which the Properties form part. Flat 24 seeks to set off £2750. Flats 29 and 30 seek to set off £9,550 to be divided equally between both flats.

18. They submit a statement of case for each flat setting out similar grounds supported by evidence as detailed below.

The Respondents' case

19. The Respondent sets out their response in their statements of case Witness Statements of Mark Passmore together with evidence. In general, their response is:-

(i) All leaseholders are in arrears of SC that are payable.

(a) Flat 24- £2647.
(b) Flat 29-£5,716
(c) Flat 30-£4417.55

(ii) The Applicants do not have a claim for set off as there was no agreement to carry out the work, the amounts claimed are exaggerated. Any failure there may have been on the Respondents part was caused by the Applicants.

Set off

The Applicants evidence

20. The Applicants state that that the Respondent is covenanted to keep the structure, exterior and common parts of the buildings within and forming part of the Development and all fixtures and fittings in a good and tenantable states of repair decoration and conditions both internally and externally. In breach, the Respondent failed to keep the structure and exterior, the stairwell and landings of blocks two and three (the Blocks) within the same in good and tenantable repair and condition. The flat roofs of both blocks had deteriorated to the point of requiring substantial repair and had progressively failed to prevent the

ingress of rainwater to the Property and other parts of the interior of the Blocks.

21. On numerous occasions during 2016 and 2017 Faramarz Djavanroodi of Flat 24 and Faramarz Abbasi-Ghelmansarai of flat 30 and 29 complained to the Respondent's director Mark Passmore and David Latham. In reply Mark Passmore informed Faramarz Djavanroodi and Faramarz Abbasi-Ghelmansarai that they were unable to effect repairs as they did not hold sufficient funds and were reliant on a claim on the Property insurance policy.

22. In or about March 2017 the Applicant Faramarz Abbasi-Ghelmansarai and Mark Passmore made an oral agreement that Faramarz Abbasi-Ghelmansarai would carry out the repair and reinstatement to Block three, flat 29 and 30 and the Respondent would credit to the service charge account of flat 29 and 30 the reasonable costs incurred effecting those repairs and would allow for set off of the cost against the service charges accrued and in future accruing payable until the costs of the repairs were extinguished. The oral agreement is evidenced by a written memorandum dated 23 November 2018 delivered to Faramarz Abbasi-Ghelmansarai by the Respondent.

23. In or about October 2017 the Applicant Faramarz Djavanroodi and Mark Passmore made an oral agreement that Faramarz Djavanroodi would carry out the repair and reinstatement to Block two and the Respondent would credit to the service charge account of flat 24 the reasonable costs incurred effecting those repairs and would allow for set off of the cost against the service charges accrued and in future accruing payable until the costs of the repairs were extinguished. The agreement was made orally. There is some email correspondence and text/WhatsApp messages between Faramarz Djavanroodi and Mark Passmore during April to November 2017. Faramarz Djavanroodi contends that these are evidence of an agreement.

24. The repairs agreed consisted of the removal of perished felt covering the flat roof of Blocks to remedy the water ingress including, repair where necessary, replacement of the underlying wooden structure where required and the re-felting, sealing, and making good of the roof to watertight condition.

25. Further works were agreed to the communal area of Block 3. These were the removal of water perished plaster to the ceilings and walls of the entrance halls, patch replastering and redecoration. Cleaning and treating damp damaged and stained interior walls of the stairwell and repainting the same. Cleaning and revarnishing of the stairway handrails. Removal and replacement of water damaged carpeting and edgings to the stairs and landings.

26. Faramarz Abbasi-Ghelmansarai carried out the works between April to June 2017 at a cost of £9,550. This is reflected in three invoices:

(i) Amount £5,500 (no VAT) Dated 15/4/2017 from Metro Buildings Services 2 Chestnut avenue, Whitefield, M45 7HN Phone. "Works Carried out on the roof of 29 and 30 Heath View Skip, labour & Materials". It was found that the wooden roof structure required only partial removal and replacement of rotted sections so that the roof repair amounted to.

(ii) Amount £2250 (no VAT). Dated 22/5/2017 from PREB Building Services to remove all affected plaster and skim, prepare and sand walls and ceiling, paint all woodwork.

(iii) Amount £1800 (no VAT). Dated 13/6/17 from PREB to remove and replace carpets and trim.

27. These were sent to the Respondent at an undisclosed date and sent again on 24 December 2019 following a demand for payment of arrears on 19 December 2019 for flats 29 (£5252.89) and 30 (£4397) totalling £9,650. edgings to the stairs and landings. Faramarz Abbasi-Ghelmansarai made a payment of £100.87 in settlement of the balance.

28. Faramarz Djavanroodi carried out the repairs to the roof above flat 24 in November 2017 at a cost of £2,750 reflected in an invoice of 12/12/2017 from Metro Building Services.

29. Pursuant to the agreements the Applicants are entitled to set off these amounts against service charges. They are further entitled to set off the amount by way of the Respondents' breach of covenant to repair. Alternatively, by effecting the works they became entitled to an equitable set off.

30. Faramarz Djavanroodi and Faramarz Abbasi-Ghelmansarai has signed a statement of case for each application, though not provided a witness statement. They have submitted a copy of the invoices together with screenshots of messages as set out below.

31. The Applicants do not contest the reasonableness of the service charges.

The Respondents evidence

32. Mark Passmore did advise Faramarz Abbasi-Ghelmansarai there were insufficient funds in the "pot" due to substantial arrears of service charges including by Faramarz Abbasi-Ghelmansarai and Mrs Abbasi-Ghelmansarai and others. Flat 30 had been in arrears since August 2012. They failed to make any payments to clear the arrears.

33. Faramarz Djavanroodi first contacted Mark Passmore in April 2017. Mark Passmore did not say that there were insufficient funds. Rather he stated that he would contact the insurance company, which he did in April 2017, following the Applicants texts. The insurance company advised that there would be a long delay due to the country suffering from severe flooding at that time. The insurers survey inspected flat 24 in June 2017 and found that the problems in the flat were due to lack of ventilation and the toilet cistern overflowing for a number of years. They took the photographs that were produced by the Applicant Faramarz Djavanroodi . As a result, they refused cover.

34. It is denied that there was any written or oral agreement between the parties in relation to effecting repairs or a set off. Mark Passmore states that he did not enter into an agreement. He did not write a letter dated 23 November 2018. The letter is a different type face to the one he uses. The letter is PPd and he does not recognise the signature. He had resigned as director on 5 November 2018. The new Director appointed on 6 November 2018 was Shlomie Kinn.

35. The work that was purportedly agreed includes inconsistencies;

    (i) The roof is stramit board not a wooden structure

    (ii) The walls in the blocks are brick with not plaster

    (iii) A small area to the ceiling was affected. This had plasterboard replaced, was skimmed, and painted but no artex was added to match the rest of the ceiling.

    (iv) The stairway handrails are painted not varnished.

    (v) There was never a skip during that period as stated in the Invoice of Metro Building Services.

    (vi) The leaseholders of Block 1 clubbed together to buy a new carpet with treads at a cost of £800, well below the £1800 claimed for Block three.

(vii) The assessment of the cost of the works carried out to the roof by a specialist is £2000. The works carried out were unworkmanalike.

36. The Respondent questions the invoices in a number of respects.

(i) The invoices are unreceipted and no evidence of payment has been provided. The invoice had not been presented to the Respondent whilst Mark Passmore was a director (June 2006 to 5 November 2018).

(ii) The invoice refers to repair to wood roof. The roof is Stramit board and green mineral torch on felt as evidenced by the roof report.

(iii) Two invoices are in the name of Metro Building Services. The phone number on the invoice comes up as Skylite Options Ltd. The address on the Home page is 4 Dewhurst Street, Manchester which is the same address as Flat 29's company. Skylite Options Ltd is registered at Companies House. Faramarz Abbasi-Ghelmansarai was a director until 18 July 2018. He is the leaseholder of flat 30 and a director of A G Partnerships that is the leaseholder of flat 29. His daughter Farnaz Abbasi-Ghelmansarai is listed as a director of Skylite Options Ltd from 18 July 2019 and is a director of A G Partnerships that owns flat 29. The company has only ever filed accounts on 17 November 2015, only ever holding £100 cash.

(iv) The only reference found to PREB building Services is on Facebook. The address is 88 Princess Street Manchester, not 173 Bury Old Road, Prestwich on the invoice. The phone number is the same. The business is showing as permanently closed and the Facebook page has not been updated since 2014.

37. As a result of a major leak from Flat 24 in May 2019 caused by the negligent workmanship of the Applicants tradesmen, the insurance premium increased significantly from £400 to £1,400 per month. The Applicant Faramarz Djavanroodi of flat 24 received a payment of £7,500 from the subsequent insurance claim.

38. At a meeting of leaseholders on 19 December 2019 all leaseholders were informed that "before commencing any works – all contractors working on any flat must provide public liability insurance, method statement, health and safety assessment (if required). This is essential in order

that we do not have any more claims, due to incompetent trades persons." The Applicants did not attend the meeting though were sent a copy of the minutes.

39. Faramarz Djavanroodi contacted the Respondent in respect to a leak into flat 24 on 14 December 2020. The Respondents roofing contractor inspected the roof and reported that someone had been on the roof and carried out sub-standard repairs.

40. The amount payable is £45 per month (£540 per year) for service charge years 2010-2017 and 1/1/2018 to 31/10/2018 (10 months). £86.14 per month 1/11/18 to 31/5/2019 (7 months) and £70 per month 1/6/2019 to 31/12/2019 (7 months).

41. The arrears set out in the schedules of service charge arrears and payments as at 12 January 2021 are

    (i) Flat 24: has not paid the service charge since 1 July 2017 and is in £2,647 arrears.

    (ii) Flat 29: has not paid the service charge since 1 January 20102 and is in £5,716 arrears having made the payment of £50.43 on 24/12/2019.

    (iii) Flat 30 has not paid the service charge since 1 August 2012 and is in £4,417.55 arrears having made the payment of £50.43 on 24/12/2019.

The tribunal's decision

The Applicant have not established that they have a claim for set off against the service charges.

Findings

42. In around March 2017 Faramarz Abbasi-Ghelmansarai , the owner of flat 30 and a partner of AG Partnership who own flat 29 carried out some repairs to the flat roof immediately above the flats and communal hallway. This is admitted by the Respondent in various correspondence as set out below. It is also admitted that he repaired the ceiling in the hallway and replaced the communal stair carpets. Faramarz Abbasi-Ghelmansarai says this was following a verbal agreement, though provided no particular details of that agreement. He did not send any invoices relating to the repairs until after a demand for arrears of service charges on 19 December 2019.

43. On 12 April 2017 Faramarz Djavanroodi , the owner of Flat 24, sent a text to Mark Passmore asking for his email address reporting a leak and possible imminent collapse of the ceiling in the flat. He sent photos of a bowing ceiling covered in black mould. Mark Passmore said he would report it to the insurance company, though they were unlikely to pay out if longstanding. The tribunal has been provided with copies of these texts.

44. There is no evidence, beyond an assertion by Faramarz Djavanroodi , that reports were made earlier. The email contradicts the assertion as it states that the leak was recent as there was no evidence of damp when visited a few months before [3 of Flat 24 docs]. On 26 April 2017 Faramarz Djavanroodi sent emails and referred to the seriousness of the leak . The same day Mark Passmore replied that the roof was fixed 8 weeks ago. He had sent a text to Faramarz Djavanroodi three days before saying the leak came from the communal hallway in the block next door. It was leaking for months, and no one informed him [7] On 6 July 2017 Faramarz Djavanroodi again emailed Mark Passmore said he had just visited, and the roof was still leaking. On 10 July 2017 Mark Passmore replied that "the roof was repaired end of March 2017 which was undertaken by Faramarz Abbasi. We have spoken to him recently and informed him of the roof situation in Flat 24" [1].

45. On 14 June 2017, the Respondent wrote to the occupants of flat 24 requesting they telephone to arrange an inspection by the Insurers Surveys [4 R-docs].

46. On 11 July 2017 Faramarz Djavanroodi replied stating that "I hereby give you 24 hours' notice to sort the problem and start repair of the roof and the ceiling which has been damaged, otherwise I will do the repair and send you the invoices…Mr Abbasi informed me that he only repaired his own side of the third block, and nothing was done on our block" [1]

47. The tribunal has been provided with an incompletely dated report only stating that on 5 September (Kal Single Ply Roofing Ltd inspected the roof and produced a Survey report. It found that the Stramit board is in excellent condition. The torch on felt roof waterproofing on all blocks is no longer fit for purpose. The roofs of block two and three "were in a very poor condition after a number of repairs were conducted on the felt waterproofing…It is possible that the repairs could leak in the near future. Block one has no repairs, however there are signs of the felt, which will eventually split the felt and cause a leak. blistering in places [6 of Res doc flat 29]. On all the blocks you can see the green mineral felt has worn away and lost its ability to reflect the sun, therefore the sunlight will damage the roof and cause blistering and potential leaks [7]. Although the Stramit board is in excellent condition, if the torch on felt is not replaced then this will cause the cost of the work to massively increase as it will inevitably damage the Stramit board, over time and

that will need replacing also. Therefore, I propose that the whole of the torch is placed with a single ply PVC membrane overlaid system, which can be glued directly onto the top of the torch roof [14]. " There was no cost associated with the work in the report.

48. The letter produced by Faramarz Abbasi-Ghelmansarai dated 28 November 2018 purported to be PPd on behalf of Mark Passmore appears to be fabricated. He denies any knowledge of it. There is no reason to doubt his assertions as he convincingly questions the other evidence produced by Faramarz Abbasi-Ghelmansarai . He was no longer a Director on that date.

49. However, what is clear is that Mark Passmore had knowledge of the repairs as evidenced by the correspondence with Faramarz Djavanroodi and a further report of Kal Single Ply Roofing Ltd dated 6 December 2019. This says "I can confirm that the previous repairs were not carried out to a high standard, and it is very clear that an unskilled tradesperson had carried out these repairs. Even though these repairs could stop the leaks, it would only be temporary and the then the roof would leak again. As the photographs show, if this felting was done to the standard required for felt roofs all laps would not be staggered and would be in line with each other and certainly not have any liquid waterproofing covering the laps. If I was to give an estimate for the cost of the repairs to be carried out in the correct way, I would quote £2,000 [15]."

50. At a general meeting held on 9 December 2019 it was reported that the necessary repairs have been actioned to "get us through the winter… we may have to serve a section 20 notice in the new year as regards the roof…The quote we have obtained is just over £32K plus VAT"[24].

51. On 24 December 2019, following a service charge demand, Faramarz Abbasi-Ghelmansarai sent an email to the Respondent. " As you know, I reached an agreement with the company, in 2017, that because the company did not have the funds to pay for essential repairs which were required to the building, I would affect these, at my expense, and that the cost I incurred in doing so would be set off against my service charge liability. That agreement is confirmed by a document, of which I enclose a copy. The repair cost I incurred totalled £9550, for which I sent copies to the contractors invoices to the former managing agents, but I further enclose copies with this letter." He paid £100.83 as the balance of Service Charge. This was split equally with flat 29 and allocated against the Service Charge arrears. The Respondent denies previously receiving the invoices and the Applicants have not provided contemporaneous evidence that they have done so.

52. On 12 October 2020, the respondent sent notice of arrears in connection with flat 30. "a payment of £50.43 was paid to you on 24th December 2019 and allocated to this property as you deem that service

charge was now payable following deduction of the monies you claim to have expended by way of repairs. To date no further payments have been received in respect to the service charge on the amount owing as a at today's date, to include the months January to September 2020 inclusive, is £630." It is unclear why they have only included the seven months of £70 when the schedules of arrears sent on 4 May 2020 in connection with flat 29 include the full arrears. The wording of the letter sent on 12 October 2020 does not specifically indicate acceptance of a set off.

53. On 14 December 2020 Faramarz Djavanroodi emailed the respondent reporting a leak. "The water is leaking from multiple places causing damage to the newly renovated walls and my tenants' furniture's. As you are aware I have fixed the roof above my flat and I don't have any issues there. The leaks are from the roof of communal hallway and our neighbours flat 22 to the edges of the new fixed roof above my flat…"[25] later he says "The leak is from the roof through the wall in the living room and hallway (the wall is common between flat 24 and 22). Also, in the bedroom the water is from the roof through to the common wall between the bedroom and communal hallway"[25]

54. On 21 December 2020, the Respondent replied saying that the roofer attended…and carried out the necessary repairs. He also found more substandard repairs…we can only assume you authorised these works……We cannot stress enough how delicate the current roof covering is and any unnecessary traffic could cause untold damage."[26].

55. The invoices for the work were only sent to the Respondents on 24 December 2019. The authenticity of those invoices is in doubt. The Respondent has established that there is a connection between Faramarz Abbasi-Ghelmansarai and the businesses on the invoices. The detail of the work is vague, does not refer to the building, and the cost invoiced inflated. The reasons provided by the Respondent as set out above are cogent, supported by evidence and consequently accepted by the Tribunal. None of the Applicants have since provided evidence to contradict the Respondents arguments. Neither did they provide any other supportive evidence in their applications, statements of case or disclosed documents..

The Lease

56. The lease does not prevent a claim for set off. The words " pay without deduction" in clause 1 are not clear enough in accordance with *Connaught Restaurants v Indoor Leisure [1994] 1 W.L.R. 501.*

57. The second schedule defines the Reserved property, and this includes the roof and common parts.

58. Clause 4 of the 7th schedule provides that the P shall ---before repairing joists or beams .. Clause 6 gives the Vendor the right of entry and repair

59. Clause 4 of the 8th schedule provides that "the Company shall to the satisfaction of the vendor keep the Reserved Property…in good and tenantable state of repair decoration and condition (both internally and externally)..including the renewal and replacement of all worn or damaged parts PROVIDED that nothing herein contained shall prejudice the vendors or the Company's rights to recover from the Purchaser or any other person the amount or value of any loss suffered by or caused to the Vendor or the Company or the Reserved Property … by the negligence or wrongful act or default of the Purchaser or any other person"

Reasons

The principles

60. *Continental Property Ventures Inc v White* [2007] L & T.R. 4 held that:-

> " *In fact the LVT was entitled to determine whether the costs claimed by the landlord were "payable" within the meaning of s.27A. They were entitled to conclude that a breach of the landlord's covenant to repair would give rise to a claim in damages and that if the breach resulted in further disrepair imposing a liability on the lessee to pay an increased service charge that is part of what might be claimed by way of damages. Such a claim would give rise to an equitable set-off within the rules laid down in Hanak v Green [1958] 2 Q.B. 9 and as such constitute a defence. This would not mean that these increased costs of repair were not "reasonably incurred" but it would mean that there was a defence to their recovery."*
>
> 72"*…the LVT has jurisdiction to determine claims for damages for breach of covenant only in so far as they constitute a defence to a service charge in respect of which the LVT's jurisdiction under s.27A has been invoked. I see no reason of principle why such jurisdiction should not extend to determining even a claim for loss of amenity or loss of health arising from breach of a repairing covenant but would draw attention to what I said in Canary Riverside Pte v Schilling (LRX/65/2005…as to the desirability of the LVT's exercising restraint in the exercise of the extended jurisdiction." The Tribunal can determine "any issue incidental to such a determination*."

61. In *Daejan Properties v Griffin [2014] UKUT 0206 (LC)*. It was said by the Upper Tribunal at 89.

> "*The only route by which an allegation of historic neglect may provide a defence to a claim for service charges is if it can be shown that, but for a failure by the landlord to make good a defect at the time required by its covenant, part of the cost eventually incurred in remedying that defect, or the whole of the cost of remedying consequential defects, would have been avoided. In those circumstances the tenant to whom the repairing obligation was owed has a claim in damages for breach of covenant, and that claim may be set off against the same tenant's liability to contribute through the service charge to the cost of the remedial work. The damages which the tenant could claim, and the corresponding set off available in such a case, is comprised of two elements: first, the amount by which the cost of remedial work has increased as a result of the landlord's failure to carry out the work at the earliest time it was obliged to do so; and, secondly, any sum which the tenant is entitled to receive in general damages for inconvenience or discomfort if the demised premises themselves were affected by the landlord's breach of covenant.*"

62. Consequently, the Tribunal only has jurisdiction where an applicant has established a breach of covenant or other act or omission by the landlord causing an increase in the service charge.

Breach of Covenant

63. The Respondent has a duty to keep the roof and common parts "in good and tenantable state of repair decoration and condition" as provided by the second schedule and Clause 4 of the 8th schedule.

64. There is evidence to suggest that the Respondent is in breach of that duty as evidenced by their own survey report and recurrent leaks through the roof in flat 24. Both suggest that short term patch repairs will not prevent further leaks. The Respondent did not carry out the repairs following the leaks in 2017, though carried out temporary repairs in late 2019. The Applicants carried out some temporary patch repairs during 2017 and possibly later.

65. Whether it is acceptable to patch repair as opposed to renew is beyond the scope of this decision. Clearly the Respondent's own expert has recommended full felt replacement and if they do not do so, the Stramit board is likely to become damaged that would necessitate more expensive repairs so that delaying repairs now may affect the reasonableness of more major repairs in the future as was said in *Loria*

v Hammer [1989] 2 E.G.L.R. 249 . as quoted *Continental Property Ventures Inc v White* :

" It is of the nature of building defects that they get worse with the passage of time, often at an accelerating rate. A stitch in time, he reminds me, can save nine; the landlord can, as it were, recover the cost of the timely one stitch but, if he fails to make that one stitch, he cannot later pass on the cost of the nine which would have become necessary simply because the one was not made or was not made in good time".

66. In any event, if there has been a breach of repairing obligations the Applicants can bring a claim for specific performance and damages in the courts in so far as they can properly establish their loss. It is not contended that the repair works have affected the level of service charges in this application, and so the Tribunal's jurisdiction is not engaged (*Continental Property Ventures Inc v White*).

67. It is undisputed that the Applicants have a duty to pay their service charge and the service charges were reasonably incurred. All were in substantial arrears at the date of the repairs.

Contractual set off

68. The Lease neither prevents nor allows for a set off. The Applicants have not provided persuasive evidence that the parties have entered into a separate contract to effect repairs and set the cost off against the service charge owing. Faramarz Abbasi-Ghelmansarai provides little in the way of particularity about the verbal agreement, including date and words used. The purported letter, even if genuine, is at least 18 months after the date of the works and again provides little in the way of particularity. Faramarz Djavanroodi says there is email evidence. This merely shows a one-sided assertion that he will affect repairs within 21 days if the Respondent fails to do so.

69. Similarly, the Respondent is not estopped from demanding service charges to the value of the works, as there is not persuasive evidence that there was such a promise beyond an acknowledgement that the Faramarz Abbasi-Ghelmansarai had carried out the repairs.

Equitable set off

70. Does the disrepair and apparent lack of funds to undertake an effective repair or renewal of the felt together with knowledge of the Applicants repairs create a right of equitable set off? This is problematic for a number of reasons. In our view the applicants conduct disentitle him from relying on an equitable set off (*Bluestorm LTD v Portvale holdings LTD [2004] EWCA Civ 289*) for the following reasons:

(i) The Applicants of flats 29 and 30 have contributed to the lack of service charge funds that has prevented the Respondent from carrying out major repairs to the roof.

(ii) The Applicants have appeared to have exaggerated the cost and extent of the works undertaken, and paid companies where Faramarz Abbasi-Ghelmansarai has a major interest, though it is not suggested that Faramarz Djvanoodi had any knowledge of this as he did not appear to know Faramarz Abbasi-Ghelmansarai,

(iii) Faramarz Abbasi-Ghelmansarai has appeared to fabricate the letter of 23 November 2018,

(iv) They have affected repairs that are poor quality as set out in the roofing specialist report and may have caused more damage to the roof.

71. The Applicants have not established the second limb of the Daejan test above. Though Faramarz Djvanoodi provided a photograph of damage to the ceiling of Flat 24, the Applicants provided nothing further in relation to internal damage. No further details were given. In addition, Faramarz Djvanoodi has been paid £7500 from the insurance company for the damage to his flat and so has already been compensated for that element of loss. In any event, the Tribunal is not the venue for a standalone claim for damages. There is not, as yet, a connection to service charges.

Statute Barred

72. The Applicants have raised in their initial application that the Respondents are statute barred from recovering the service charge, though have provided no submissions on this point. There is no binding authority on the applicability of the Limitation Act 1980 to section 27A of the Act. In these applications, where the service charge has gone unpaid without challenge to the reasonableness of the service charge, the Tribunal determines that all service charge years in arrears are payable.

Costs and refund of fees

73. Taking into account the determinations above, the tribunal does not order the Respondent to refund any fees paid by the Applicants.

74. For the same reason the Applicants application to reduce or extinguish the lessee's liability to pay costs is denied .

Name: J White **Date:** 24 September 2021

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).