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Residential Property
TRIBUNAL SERVICE

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985 (as amended) Sections 27A and 20C

LON/00AN/LSC/2005/0318

Property:	3, Irene House, Sulgrave Road, London W6 7QP
Applicant:	Miss J K N Farrar
Represented by:	Mr B Farrar
Respondent:	R C Glaze Properties Ltd
Represented by:	Mr T Jackman, Willmotts Property Services Limited Mr B Burlikowski, Willmotts Chartered Surveyors
Date of Hearing:	18 January 2006
Date of Decision:	18 January 2006
Members of the Tribunal:	Mr J C Avery B Sc FRICS Ms M Krisko B Sc (Est Man) BA FRICS Mrs M B Colville JP LLB

Introduction

1. The Applicant, the Lessee of No 3 Irene House, one of six flats in the building, had applied to the Tribunal for a determination of her liability to pay a service charge of £1573 for the year 2005 in respect of "Dry rot works to Flats 2 and 4". Directions were issued on 17 November 2005 and documents were produced by both parties shortly before the hearing date

2. In her application and subsequent documents the Applicant challenged the charge on three bases: (i) that the work should have been covered by insurance, (ii) that the cost should have been divided across all sixty six flats covered by the insurance policy, and (iii) that the work should be paid for by the Lessees of the flats in which the work was done.

Preliminary Issue

3. Having considered the terms of the lease of Flat 3 the Tribunal determined that, as a preliminary issue, it would hear representations on the Applicant's third basis of challenge – that the work did not fall within the repairing covenant of the Lessor so as to be charged to all Lessees of the building.

Repairing Responsibilities in the Lease

4. The Tribunal were not shown the leases of the affected flats, 2 and 4, but had seen the lease of the Applicant's flat, dated 28 May 1999, which contained at Clause 4 (7) a Lessor's covenant that subsequent leases would contain similar Lessees' covenants and, in respect of any flat not let on a similar lease, the Lessors would observe and perform similar covenants. The Respondents did not deny that the terms of the lease of No 3 would apply to Nos 2 and 4.

5. The Service charge provisions are in Clause 4(3) and 2(a) and (b). By Clause 4(3) the Lessor covenants "to repair and keep in good repair and condition the structure including the external and interior load bearing walls roof gutters drainpipes exterior (excluding the glass in the windows) fire escapes and the common passage and boundary walls of the building and all additions to the same and all water tanks and service conduits wires and drains the use of which is common to the Demised Premises and the remainder of the building and the main door entryphone". By Clauses 2(a) and 2(b) the Lessee covenants to pay one sixth of these costs (among others).

6. The Lessee's responsibilities are contained in Clause 2(3), in which the Lessee covenants to repair the interior of the demised premises "(other than internal load bearing walls and including in particular ... floor joists boards ceilings and door sashes". Clause 2 includes in the "Demised Premises" " ... the floors and joists and the ceilings doors windows and internal walls (other than internal load bearing walls) and the inner faces of the external walls ..."

7. If the Lessee does not comply with the covenant to repair the interior a Proviso to the Lessee's repairing covenants gives the Lessor power to enter (without notice in cases of urgency) to view the condition of the premises, to give the Lessee notice to repair, and "at the expense of the Lessee ... within three months ... amend and repair ... in accordance with the covenant on the part of the Lessee ..."

The Respondent's Case

8. From the documents it appears that the Respondent's agents did not utilise this right to do Lessee's work at the Lessee's expense, but commissioned the remedial work in the apparent belief that it was a Lessor's responsibility under the lease. Willmotts said in a letter dated 30 November 2004 that the work was "necessary to prevent further deterioration to the building, on an emergency basis" and, in a letter dated 17 January 2005, "Dry rot untreated can and will destroy the structure of the building. Because of this, it is deemed a structural repair and therefore the responsibility of the freeholder to repair."

The Hearing

9. At the hearing on 18 January 2006, the Applicant was represented by her father, Mr B Farrar, and the Respondent by Mr T Jackman and, after an adjournment, also by Mr B Burlikowski.

10. The copies of letters submitted by the parties and the evidence given at the hearing described the discovery of the defects and the remedies taken. At the outset of the hearing Mr Jackman said that he did not believe that any work was carried out to the main load bearing walls but confessed himself unable to deal with detailed questions relating to the work. He could not explain why Willmotts had paid for internal work to Lessees' flats, and charged it to the service charge account, in the face of what appeared to be the clear wording of the lease. He had come to the hearing in the belief that he was to deal with the issue of the denial of liability by the Insurance Company. He was therefore allowed a short adjournment (55 minutes) to consult colleagues, and Mr Burlikowski arrived.

11. Mr Burlikowski said that the first work involving dry rot had been completed when he first inspected, and was paid for by the affected Lessee/s. The second work, caused by damage to the stability of supporting timber by wet rot, and involving the removal of a hearth and substantial disturbance of two bathrooms, he had considered a structural problem because the hearth was "cast into the external wall" and the external wall was the Lessor's responsibility. He considered that the internal work of removal and refitting bathroom fittings flowed from that problem and was therefore also a landlord's cost, chargeable to the Lessees under the service charge.

12. Mr Burlikowski could not explain why there should have been a hearth in the bathroom but he described the hearth construction as concrete poured into timber form-work formed between joists. After removal it had been replaced by new joists bolted to the wall.

13. Mr Farrar's case was that all the work was the financial responsibility of the Lessees of the affected flats.

The Work

14. There is some inconsistency between the documents and the oral evidence, eg as to whether one hearth or two were involved and whether dry rot had affected one area or both. In his oral evidence Mr Burlikowski said that only one hearth was affected (contrary to the reports of the two builders who quoted) and, although Willmotts' letters to the Lessees gave them to understand that the problem was dry rot, he said that wet rot (not dry rot) was found in the second investigation. In the Tribunal's experience the distinction between dry rot and wet rot is important, as dry rot is a much more severe problem.

The Tribunal finds as fact the following:

15. While carrying out work at Flat 2 builders had removed a ceiling to the bathroom and discovered dry rot in the joists supporting the floor of Flat 4 above. The dry rot had been caused by a leak from the bathroom in Flat 4. Remedial work had been done without expense to the Lessor or the other Lessees. On further investigation of the ceiling further deterioration was found to timbers supporting one or more hearths. This had been caused by the same leak but the timbers were affected by wet rot. The remedial work involved repair of floor timbers/joists, removal of one or more hearths, refitting of bathroom fittings in both flats, plastering, decoration and tiling.

Decision

16. The Tribunal was concerned that facts that appeared reasonably clear from the documents were represented differently in oral evidence, in particular Willmotts' letters make it clear that dry rot was a feature of the negotiations with the Insurance Company and was also the reason for the urgency to protect the building, whereas Mr Burlikowski's oral evidence is that it was wet rot, not dry rot, that had caused the disputed work.

17. However, the issue turns upon whether the hearth was a structural element repairable by the Lessor within its repairing covenant and rechargeable to all the Lessees. The Tribunal does not accept Mr Burlikowski's analysis that it was part of the structure. It was, according to his evidence, a separate element in the construction of the building, poured into timberwork fixed to the joists after the joists were themselves fixed into the structural walls. It was in fact no different in kind to the joists, which are specifically included in the definition of the Demised Premises, for the repair of which the Lessee is responsible, and indeed was replaced by joists bolted to a structural wall.

18. The Tribunal finds, on the evidence before them, that the hearth, or hearths, were not a structural element repairable by the Lessor, that work to the floor of Flat 4 and ceiling of Flat 2 was not work for which the Lessor was responsible under the terms of the lease of Flat 3, and was not chargeable to the Applicant as a service charge. The other issues relating to insurance are a matter for the Lessor and the Lessees of Flat 2 and 4 and do not therefore require determination by the Tribunal. The amount of £1573 should be credited to Miss Farrar's account.

19. This decision on the preliminary issue was given orally to the parties after a short adjournment.

Section 20 C

20. Mr Farrar asked that any costs incurred by the Respondent in the proceedings should not be included in any service charge. Mr Jackman undertook that no such charge would be included.

Reimbursement of Fees

21. Mr Farrar also asked for a refund of the fees totalling £250 paid by the Applicant and Mr Jackman agreed that she would be reimbursed with that sum.

Reimbursement of costs

22. Mr Farrar also asked for reimbursement of his travelling costs to the Tribunal, £120. Under schedule 12 (10) of the Commonhold and Leasehold Reform Act 2002 the Tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings if a party has, in the opinion of the Leasehold Valuation Tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings

23. In the opinion of the Tribunal, although Willmotts did not interpret with sufficient rigour the respective responsibilities under the lease and wrongly sought to recover from the Applicant money that they should not have charged to her, their actions fall well short of frivolous, vexatious, abusive, disruptive or otherwise unreasonable. Accordingly no order is made for reimbursement of Mr Farrar's costs.

Signed J C Chairman Date 24 January 2006