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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL UNDER SECTION 27A OF THE LANDLORD & TENANT ACT 1985

Case Reference:	**LON/00AG/LSC/2011/0691**
Premises:	81 Croftdown Road, London NW5 1EY
Applicant (Landlord):	London Borough of Camden
Respondent (Tenant):	Ms Linda Long
Leasehold Valuation Tribunal:	Ms F Dickie, Barrister, Chairman Mr N Maloney, FRICS Mr L Packer
Date of hearing:	23 January 2012
Date of decision:	28 February 2012

Decision of the tribunal

None of the disputed costs are payable as a service charge by the Respondent. The tribunal makes an order under s.20C of the Act.

Preliminary

1. The Applicant is the freeholder of the subject premises and the Respondent the holder of the leasehold interest. The Applicant issued Claim number 1UC72842 in the Central London County Court. By order of District Judge Price made on 26 September 2011 the matter was transferred to the Leasehold Valuation Tribunal, where directions were issued on 25 October 2011.

2. The subject premises are a first and second floor maisonette situated within a pair of adjoining purpose-built semi-detached buildings each comprised of two dwellings. The ground floor flat below the subject premises

is known as 83 Croftdown Road). The claim was issued in respect of an unpaid demand for a service charge contribution towards of the landlord's expenditure on remedial works carried out to address rising damp within the ground floor flat. The works in question were carried out exclusively to flat 83. The work comprised the application of waterproof render to external and partition walls, and the renewal of the kitchen floor to include a damp proof membrane.

3. The tribunal carried out an inspection of the exterior of the building and the interior of flat 83, as well as of flat 85 (the ground floor flat within the adjoining semi-detached building). The construction of the building is of a pitched roof with tiled covering over the main nine-inch thick masonry walls. These are pointed with mortar and finished in part with a cement render. Access to the subject premises is by a private ground floor entrance, with a solid staircase leading to the first floor that has moved away from the main building slightly. The home is built on a sloping site. Within the ground floor (flat 83) the internal partitions appear also to be of solid structure with plaster and decorative finishes. Floors to the kitchen are solid with overlaid "Lino". There was no plumbing or pipe work adjacent to the party wall with No. 85 and the kitchen was relatively newly installed.

4. The relevant statutory provisions are set out on the schedule attached to this decision. The lease dated 30 May 1989 demises the premises for 125 from 1 October 1984. It is not necessary to set out its terms, though we note that "the building" (in respect of which the tenant covenants to contribute to maintenance and repairs) is defined as 81 Croftdown Road. The landlord covenants to maintain, repair etc. the structure of the building, and in particular "the roofs foundations external and internal walls ... thereof", and may recover a contribution towards these costs as a service charge from the tenant under the Third Schedule.

Background to the Application

5. The repairs in dispute were carried out under an existing qualifying long term agreement consulted upon or entered into before 31 October 2003, which was therefore subject to consultation under Schedule 3 of the Service Charges (Consultation etc.) (England) Regulations 2001.

6. The landlord's notice of intention was dated 28 June 2008 and the tenant's observation dated 28 July 2008 was made (as invited) by email and included the comment "I do not have a party wall with this property but the neighbour who does tells me that the damp problem he was suffering has virtually disappeared since the former tenant and her leaking washing machine vacated number 83."

7. The Council accepted it had a statutory duty to reply and a response was sent to the tenant dated 6 August 2008 which gave an interpretation of the

Respondent's liability under the lease to contribute to the works and said the comments regarding the virtual disappearance of the damp problem would be forwarded to the Council's building surveyor. That surveyor, Ms Hull, commented in an internal email that the works are not related to leaks that had dried out in the kitchen.

8. The total estimated expenditure on the work was £7453.34. The tenant's proportion was 376/658 based on rateable value. The invoice for the actual cost of the works was dated 29 September 2009 and in the sum of £5119.38, reflecting the actual charge to the tenant. The amount of £4971.78 is outstanding in respect of this invoice and in dispute. The works were subject to a 20 year written guarantee, produced in evidence at the hearing.

9. The tribunal heard evidence from the Council's Maintenance Surveyor, Rachael Hull, whose qualifications included City and Guilds in Carpentry and Joinery, and BSc Hons in Building Surveying. The landlord's reason for the works was the manifestation of rising damp in the external and partition walls and the lack of an effective damp proof membrane to the kitchen floor concrete slab.

10. Flat 83 had become void on 1 May 2008 and a works order was raised by Ms Hull that day for gas an electrical checks and clearance. She inspected on or around 8 May 2008 and took low-level Protimeter readings on the walls of the kitchen and bathroom and noted that there was damp. There was no mastic to the kitchen worktop. She ordered all of the kitchen units to be removed and the water supply capped off, which was done within a week. The damp was given time to dry out thereafter and Ms Hull rechecked her readings on 27 May and found they were still high to the kitchen but that the bathroom had dried out. She asked RLH Developments Limited to inspect and report on the damp.

11. RLH are a nominated sub-contractor of the contractor under the qualifying long-term agreement. They surveyed on 29 May 2008 in respect of rising damp and concluded that high levels of moisture recorded intermittently on the majority of external and partition walls appeared to be mainly due to rising damp resulting from the apparent absence of an effective DPC.

12. A trial pit about 6 inches in diameter and 8 inches deep was dug (by Council operatives or RLH) and Ms Hull saw very loose light concrete or clinker beneath the floor slab which had been washed away in part to leave a void containing standing water which was not foul smelling. This in her view would cause a problem to the building if there was no effective damp proof course. There was no evidence of excessive mould at windows or moisture running down from them, and the damp had not dried out quite quickly, as she would expect condensation to do. In her experience of other

properties in the area where there were a number of tributaries, such ground water was stubborn to keep out. Ms Hull presumed that the only solid floor in the flat was in the kitchen, and that the rest were not damp because they were of suspended construction, as suggested by air vents in the external walls. A works order was raised on 6 August 2008, which included the provision of a chemical damp-proof course to wall by either silicone injection or cement-based mortar. There was no evidence of exterior injection to the external walls.

Decision and Reasons

13. The tenant did not present persuasive evidence that the cost was unreasonable for the works carried out. The tribunal was unable to attach weight to quotations she produced as they either did not relate to the subject premises or were not genuine quotations obtained at arm's length. The tribunal was not satisfied on the evidence however that the cost of the remedial works in question had been reasonably incurred. The diagnosis of rising damp needs careful and systematic thought because it can easily be confused with penetrating dampness and condensation. Companies specialising in damp proof course replacement obviously have a commercial interest in finding problems with rising damp. The diagnosis needs to be treated with caution.

14. The history of damp reports by the previous tenant and her neighbours, their cause, and associated internal works orders, had not formed part of the Council's consideration in determining the cause of the damp. The Respondent gave evidence that there had been a history of problems of damp in that flat, caused by the former tenant, who from her earliest encounter with the Respondent when she took the tenancy in around 2001 had told her several times that she did not like the flat and wanted to move out. Ms Long gave evidence that on at least two weekends the bath in number 83 had been left running, flooding that flat, and she had seen water flooding out of the back door (located in the kitchen), but had not reported this herself to the Council. A letter was presented from Mr Shadbolt, the leaseholder of 85 Croftdown Road (the freehold of which had been purchased from the Council), stating that his flat had never suffered from damp except in a cupboard adjacent to flat 83, a problem which had resolved when the former tenant of that flat moved out. However, Mr Shadbolt did not attend to give evidence in person and submit to cross-examination.

15. Ms Hull had checked the Council's computerised records of external repairs to the property, and noticed work to the gutters in February 2008 and a leaking overflow from the loft repaired January 2007. However, she had not looked at records of internal repair, did not know the history of fault reporting in flat 83 when previously tenanted, and did not seek to confirm

whether there had been damp to flat 85 or any work carried out there. In the view of the tribunal it would have been prudent for the Council to check if there was a history of reports of internal damp within flat 83 and what, if any, investigations had been carried out and conclusions drawn.

16. In compliance with its statutory duty under section 20 of the Act to have regard to the tenant's observations regarding a leaking washing machine, the Council ought to have made such an enquiry before issuing its response. Though Ms Hull considered that the damp was not the result of a leaking washing machine, which in her view would have caused only localised damp to the wall and the edge of the floor, a serious leak could in fact have caused more substantial damp. However, owing to the lack of enquiry it cannot be known whether sufficient evidence of the former tenant's behaviour might have surfaced so as to indicate a cause of dampness.

17. Technical analysis to identify the presence and cause of damp was been inadequate. Testing had been by Protimeter only, which should only be a preliminary test, and neither RLH nor Ms Hull had recorded any of the readings. The diagram of RLH appendixed to its report did not show them and would not comply with the relevant British Standard. Ms Hull had not requested this information and did not discuss with the insurers the suggestion in the RLH report that there might have been moving ground water damaging the structure. No testing was carried out by the more reliable method of drilling holes and testing brick dust (Carbide or Speedy Test). The period of time allowed for drying out was only two weeks, which was far too short to exclude condensation as a cause of dampness.

18. There was insufficient evidence of the absence of an effective damp proof course. Ms Hull did not observe and note whether any damp proof membrane was present in the floor and did not take photographs of the trial pit. On top of the floor screed there had been latex and then a vinyl floor, which was removed in the area of the trial pit. Ms Hull said when she tested the floor for damp she used her Protimeter to take readings between the floor tiles. She acknowledged that she did not check if there was a metal content in the tiles or adhesive, but thought the floor covering was more modern than that. However, materials in such a floor covering or adhesive may be present that could increase conductivity of electricity of the two needles of the Protimeter (usually metal content), thus giving a false reading of damp. This in the opinion of the tribunal is a matter that ought to have been checked and recorded, or the floor covering removed entirely before testing.

19. If flooding of the nature described by Ms Long had taken place, it could very well have been the cause of any damp to the kitchen floor, held above any effective damp proof course. Mrs Hull said at the hearing that she did not think there was any solid pipe work within the kitchen wall. Given that

pipe work is not usually surface run around a kitchen but through the floors, the tribunal considers it is a possibility that leaking pipe work might have been a contributory factor that should have been considered before rising treatment was undertaken, but there is insufficient evidence that it was. The bath overflowing, the washing machine or the waste pipe leaking could have trapped moisture – which might have dried out if the vinyl had been tiles lifted and a longer drying period than the two weeks the Council allowed. The damp readings in the rest of the accommodation may have been caused by rising damp, but may also have been penetrating damp from poor pointing in brickwork, gaps in the structure (such as movement in the front entrance step) or leaking gutters.

20. No chartered surveyor was instructed to report on the presence and cause of damp. Ms Hull said this was not normal practice unless there were structural problems in the building. However, in the present case the tribunal considers such independent professional advice should have been sought, not least because of the conflict of interest between the Council and the Respondent. Ms Hull argued that the Council could not reasonably have waited 5 or 6 months to see if the damp would dry out because it had to relet flat 83. She said she therefore worked on assumptions to reach a judgment on what is a reasonable course of action to get the property tenanted. The Council has a statutory responsibility as a housing authority, as well as a fiduciary duty to let and collect the rent. The Council had commercial and other interests in letting flat 83 that were not necessarily consistent with the interest of Ms Long to exclude the possibility that the damp was caused by condensation or actions of the previous tenant and would dry out in time.

21. There is no question of bad faith on the part of Ms Hull, whose integrity is beyond doubt. However, in the present circumstances, in the view of the tribunal, the Council ought to have sought independent objective support for a scheme of works. Whilst the subcontractors had to go through a system of checks and references, the works were not competitively tendered, and the subcontractor asked to report was the one who would carry out the work. When carrying out works wholly within their own property and to which the Respondent would contribute more than half, in order to meet their own objectives to relet the void flat quickly, as well as seeking to comply with their obligations as freeholder, the Council will require robust and independent detailed justification for carrying out the works. Such justification did not exist in this case.

22. In any event, there is slim evidence that works of the scope done – to whole flat – were necessary. The scope of the works was not shown to be reasonable. Two walls had been rendered to full height. Ms Hull could not comment on the decision to do this, other than believing that damp readings had been quite high up on those walls. She acknowledging that it was very

unusual for rising damp to be found at high level and the tribunal found insufficient justification for rendering to full height.

23. The structure of the building is defined as 81 Croftdown Road, but it is unnecessary for the tribunal to consider and determine whether all elements of the works fell within the landlord's covenants to repair in Clause 3(2) (e.g. the internal walls of flat 83). Regardless of the proper interpretation of the lease, since the tribunal finds that the cost of the works was not reasonably incurred, it is not payable by the Respondent tenant as a service charge. In respect of the service charges in dispute in the County Court Claim, referred to this tribunal for its determination, no contribution is reasonable and payable by Ms Long.

Section 20C

24. The Council confirmed at the hearing that it would not add its costs in the proceedings to the service charge. For the avoidance of doubt and, to the extent that the lease allows for such recovery, on the application of the tenant the tribunal grants an order under section 20C prohibiting the landlord from doing so.

Signed .....

Ms F Dickie, Barrister

Chairman

Dated 28 February 2012

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(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.

Section 19

(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 provisions 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.

Section 27A

(1) An application may be made to a Leasehold valuation 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 amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a Leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the Tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the

proceedings are concluded, to any leasehold valuation tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.