10701

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AT/LSC/2014/0393**
Property	:	**208 Elmwood Avenue, Hanworth, Middlesex TW13 7QA**
Applicant	:	**Miss Sally Burrows**
Representative	:	**In person**
Respondent	:	**London Borough of Hounslow**
Representative	:	**Mr Patrick Maxwell of Counsel**
Type of Application	:	**Section 27A Landlord & Tenant Act1985 Annual Service Charges**
Tribunal Members	:	**Judge Lancelot Robson** **Mr H. Geddes JP RIBA MRTPI** **Mrs J. A. Hawkins Bsc Msc**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR** **15th and 16th December 2014**
Date of Decision	:	**18th March 2015**

DECISION

Decision Summary

(1) The Respondent's management fees for the service charge years ending on 31st March, 2004, 2005, 2006, 2007, 2008, 2009, 2012, 2013 and 2014 shall be reduced by a notional figure of 20% to reflect inadequate management of the Applicant's complaints about foul drainage water leaking into her bathroom. The fees found due are thus;

Year	Actual	Deduction	Payable
2002/3	171.60	Applicant not liable to pay this sum	
2003/4	(Missing from bundle)		
2004/5	178.07	35.61	142.46
2005/6	180.90	36.18	144.72
2006/7	188.64	37.73	151
2007/8	171.84	34.37	137.47
2008/9	188	37.60	150.40
2012/13	209	41.80	167.20
2013/14	220	44	176

(2) The management fees for the service charge years ending on 31st March 2010, 2011 and 2012 were excluded from this application following the decision of Judge Tagliavini made in her Directions dated 20th August 2014, giving effect to the "unless" order of the County Court dated 23rd April 2014.

(3) The estimated management fee for the service charge year ending on 31st March 2015 (£230) was allowed in full, as the defect which was the source of the complaint has apparently now been remedied by the Respondent pursuant to the Tribunal's observations in its Directions dated 17th December 2014, and as both parties are entitled to make a Section 27A application to the Tribunal once the final accounts for the year become available.

(4) The remaining service charges for all the above years are payable in full, particularly the charges relating to unblocking the drains objected to by the Applicant, for the reasons detailed below.

(5) The Tribunal granted the Applicant's Section 20C application and ordered that none of the Respondent's costs incurred in connection with this application shall be charged to the Respondent's service charge.

(6) The Respondent shall inform the Applicant of the actual management charge made in the year ending 2003/4 within 21 days of this decision, and credit the Applicant's account with the reductions made pursuant to this decision within a further 21 days.

Preliminary

1. Extracts from the relevant legislation are attached as Appendix 1 below.

2. The Applicant seeks a determination under Section 27A as to whether annual service charges reserved by a lease dated 15th March 2004 (the Lease) are payable for the service charge years ending on 31st March 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2013, and 2014, excepting the period 1st April 2009 to 1st October 2012 (pursuant to an order of the County Court at Brentford dated 23rd April 2014). The application specifically referred to charges for drainage and gutters, also general maintenance. At the hearing the Tribunal informed the parties that on a proper reading of the application and her comments on the Scott Schedule that the Applicant, in fact, also sought a determination relating to management fees (The application is thus limited to these issues).

3. The Applicant also seeks an order for the limitation of the Respondent landlord's costs in the proceedings under section 20C of the Landlord and Tenant Act 1985.

4. At the start of the hearing on 15th December 2014, the Tribunal found that the Applicant had not made a formal statement of case, which she blamed upon the Respondent's failure to give full discovery of documents relating to the years from 1st April 2009, and being given only a few hours to agree the bundle of documents at a time when she was not at home. Some of these documents were brought by the Respondent to the hearing, but many were missing. The Applicant submitted that some documents previously disclosed appeared incomplete. Also the further Directions given in the case had not allowed for witness statements, which both sides wished to produce in the light of many disputed issues of fact. The Tribunal informed the parties that it would hear submisions relating to parts of the case which were capable of being heard and inspect the property. It would then give further Directions. The Tribunal inspected that afternoon. The following morning the Tribunal made oral observations on its inspection to the parties, which the parties accepted. A fuller note of its inspection is noted below. The Tribunal heard more submissions and then gave Directions that the parties make further statements and produce documents relevant to their cases.

5. Following the Directions, the Applicant made written statements of case dated 23rd January and 8th February 2015. The Respondent made a further statement in reply dated 27th January 2015, attaching a witness statement from Mr J. A. Coates, Head of Financial Services, and a further statement dated 10th February 2015, with statements from Mr B. Virdee and Ms J Matthews. The Tribunal confirms that in accordance with paragraph 11 of the Further Directions dated 17th December 2014, it decided, after considering the new documents and statements, that it had sufficient evidence to proceed by way of a paper determination, rather than put the parties to the trouble and expense of a further hearing.

Inspection

6. The Tribunal inspected the property and the block in which it was situated on the afternoon of the 15th December 2014 in the company of the Applicant, Mr Maxwell, and several other representatives of the

Respondent, which had also provided staff members who were equipped to lift drain covers and were familiar with the drainage systems.

7. The property is on one of a number of staircases within a four storey block built about 1955 with grounds laid to lawn, on an estate of similar blocks, typical of many social housing blocks and estates of its age. Many of the external walls showed signs of water stains near open gullies or defective rainwater goods. It had many internal soil stacks, one of which discharged into the gulley immediately outside the subject property. These gulleys all had quite high lips. If a gulley was blocked, water would fill the gulley to the top of the lip before running off into the adjacent garden area. The Tribunal noted two pipe openings in the gulley outside No 208, several inches below the lip of the gulley. The gulley itself and surrounding area showed stains and signs of debris consistent with the gulley having been blocked on occasions in the past, although it was clear at the time of inspection. Further down the system, the Tribunal saw the junction of this drain with the main drainage system. There the system looked clear, with no obvious signs of blockages in the past. The soil stack connected to the gulley served properties immediately above the subject property. The Respondent's staff stated that the stacks and gulleys were prone to blockages due to misuse by residents above. While this was in the nature of unsolicited evidence, it was not disputed by the Applicant, and was consistent with the Tribunal's own knowledge and experience of such systems. Additionally, the Tribunal noted that the gulleys had no drain covers or other means of protection from leaves and other debris blowing into them.

8. The Tribunal noted that the rainwater gutters on the block appeared to be choked, and with vegetation growing out of them, and water stains on the walls, suggesting that they had not been cleaned out for some time.

9. The Tribunal also noted that an open concreted area close to the block originally intended for drying of washing, showed signs of unrestrained weed growth in the previous growing season. It noticed no shrubs on the estate.

10. Inside the subject property, the Tribunal inspected the floors and walls in the rooms described by the Applicant as affected by water ingress, particularly the bathroom. The Tribunal noted from the Applicant's descriptions that dirty water appeared to flood the bath from the plug to a depth of several inches, and also dirty water flowed out from under the bath. The Applicant and the Respondent's Ms Matthews agreed that when occupied by a previous tenant there had been a shower in that room. The shower had been removed and the bath had been reinstated at the tenant's request. The Tribunal noted that the floor of the bathroom appeared to be slightly lower than the ground level outside. The Tribunal concluded that the most likely cause of the ingress of water into the property was that the top lip of the open drain gulley serving the property and the premises immediately above, was several inches higher than the waste pipe from the bath, and the redundant shower waste pipe. When the gulley became restricted and flooded, waste water would tend

to run back into the property, rather than escape harmlessly into the garden.

Applicant's case

11. The Applicant submitted that since the year 2000 she had made repeated complaints about the drains. She considered the Respondent was in breach of its repairing obligations under the Lease. There had been constant flooding due to blockages. She blamed some of the blockages on debris being washed into the drains. On six occasions she had had to pay personally for the costs of repairs. The walls of the property were damp. She had ongoing chest infections and had moved out of the property about a year before the application. She did not dispute her liability to pay the service charges demanded in principle, but she should not have to pay for maintenance that was not being done. In the Scott Schedule she referred to 24 call outs for blocked drains and 5 floods up to 31st March 2009, and 4 call outs for blocked drains since 1st October 2012. It was unclear if the all the call outs for blocked drains included flooding, although on many of these occasions she referred specifically to bad odours.

12. The Applicant challenged several items of general maintenance, (excluding one prior to her purchase of the property) e.g. trimming shrubs on 1.5.2004 (none at property), scaffolding on 5.5.2006 and 30.1.2007 (none seen – one job related to drains and the other to cleaning out rainwater gutters), two jobs in 2013 under one number (6289675 - charged at different prices), another two jobs under one number (6436745 – again charged at different prices).

13. The Applicant also produced a copy of a complaint form on the Respondent's headed paper referring to a flood on 10th October 2013, but the Respondent had taken no action. Mr Allen, a neighbour, had assisted in clearing the drain on that and a later occasion.

14. The Applicant produced photographs showing work done to the drain on 27th January 2015 by the Respondent in response to the Tribunal's observations on 16th December 2014. The redundant shower drainpipe had been (roughly) blocked with mortar, and part of the gulley lip had been cut down to below the level of the bath drainpipe. The Respondent had also cleaned out the gutters on the estate on two days up to 4th January 2015. The Respondent stated that 10 black bags of debris had been removed from the rear gutters of the block.

15. The Applicant also referred to the Local Government Ombudsman's report dated 15th August 2002 made in response to the Applicant's complaints, including the issues of water penetration and blocked gutters. The Ombudsman concluded that the Council had delayed unduly, based on the Council's own admissions, and noted that it had paid compensation relating to her carpets. In answer to Mr Maxwell's oral submissions, the Applicant stated that the shower had been removed and the bath reinstated by the Respondent when she was still a tenant.

Respondent's case

16. The Respondent submitted that all the service charges in dispute were payable in full. The Applicant had previously been the tenant of the property, but had become responsible for service charges under the terms of the Lease from 23rd June 2003. She was not entitled to dispute service charges prior to the period when she had been liable to pay them.

17. The Respondent submitted that in relation to the job numbers she disputed, she had produced no evidence in support of her allegations. The Respondent relied upon "screen shots" of work sheets from their computer, which it alleged confirmed that the works had been carried out.

18. Relating to the alleged duplication of certain jobs, Mr B. Virdee, solicitor employed by the Respondent, in his statement dated 10th February 2015. explained that jobs were initially priced according to a standard rate, but might later be negotiated to another figure (upwards or downwards), depending upon the actual work done. He stated that the Respondent operated a 7/8 year cycle to repair and clean gutters on the estate, the last time being on 30th January 2007. He drew the Tribunal's attention to the relatively small actual cost to the Applicant of a number of jobs in issue. He could not comment on the Applicant's evidence that a complaint had been made on 9th or 10th October 2013, except that there was no record of the complaint. He noted that the Applicant had not made a formal witness statement.

19. Ms J. Matthews, project manager and building surveyor for the Respondent in her statement dated 10th February 2015 stated that where repairs were required she agreed the scope of works required with senior managers and possibly loss adjusters, which was then passed to the in-house repairs team to carry out. She would only oversee and inspect work herself on large projects. She endorsed the statement of Mr Virdee relating to apparent duplications of jobs, costs to the Applicant, and that there was no record of the complaint made on 9/10 October 2013. The nearest date for repairs order she could find was 5th August 2013. She stated that there was no evidence that the damage to the Applicant's wc had been reported previously. She confirmed that the works to the drain and gutters (also noted by the Applicant) had been ordered and completed after the Tribunal's visit. The redundant waste pipe had been removed and filled.

20. Mr A. Coates, in his statement dated 27th January 2015 explained how the Respondent calculated and charged its management costs. While he had no evidence of the methods used prior to 1st April 2009, he believed it had been calculated in a similar way. The Respondent charged only its actual costs of providing the service. The calculations were based on averages of staff time spent on various aspects of their jobs throughout the borough, but excluded items such as District heating costs, Major Works management, and Right to Buy management costs. Major Works management costs, and District heating costs would be recovered from

leaseholders involved. He stated that District heating costs were not charged to the Applicant. He went into considerable detail, but since the Applicant had not queried the general calculation, the Tribunal decided not to summarise the details.

21. Mr Maxwell, making oral submissions for the Respondent, submitted that the Applicant had purchased the property in 2003 with the defect, and the terms of the Lease made the pipes exclusively serving the property the responsibility of the Lessee. This was reinforced by the tenant's handbook. He understood that the Applicant had removed the shower after she became the Lessee. The Respondent did not accept that the contractor doing the work had satisfactorily blocked off the shower pipe. Further, even if the Tribunal found the Respondent to be in breach of its obligations relating to the Applicant, it was not proper for the Tribunal to penalise the Respondent relating to costs it had reasonably incurred to clear the blocked drains for the benefit of all residents. He referred the Tribunal to Continental Property Ventures v White (Lands Tribunal) LRX/60/2005, particularly on the question of "historic breach". He also considered that the six year limitation rule applied to this case.

Decision

22. The Tribunal considered the evidence and submissions. The Applicant accepted the Respondent's interpretation of the Lease, and had not disputed the Respondent's submission that she was not entitled to dispute service charges prior to the period when she had been liable to pay them. At the hearing she had been satisfied by the Respondent's explanation that the reference to trimming shrubs in the accounts, in fact related to grass cutting.

23. Considering the evidence relating to the works actually carried out, and the standard of that work, the Tribunal noted that the Applicant's case largely (but not entirely) relied upon her own assertions. Nevertheless, these were first hand evidence of facts. For the period up to 31st March 2009, the Respondent was only able to rely upon screenshots from its computer, as its staff who had dealt personally with the matter had moved on. While the Tribunal (and also the Applicant) had some sympathy for the Respondent's situation, particularly in view of the lapse of time, screen shots from a computer are not first- hand evidence. While the officer authorising the job was identified, with a brief summary of the job, the dates and price, there was no evidence as to who had actually done the job, or any report from the contractor on completion. Nevertheless the screen shots provided some evidence that work had been ordered, priced, and paid for. Their main weakness related to questions about whether the work was checked, the standard of the work, and lack of contractors' comments, which, in the Tribunal's experience, can provide valuable management information about the state of the item worked on, and the efficacy of the job they were instructed to do.

24. The Tribunal found Mr Maxwell's submission that the problem with the drains was the responsibility of the Applicant under the Lease was unattractive. The Tribunal decided that the evidence showed, contrary to the submission, that this problem had been identified some years before the Applicant purchased, and the underlying work had been done by the Respondent. More relevantly, the problem causing the water penetration was not the redundant pipe itself, or water from the Applicant's system, but the blocking of the communal drain. If the communal drain was working properly, then no water flowed back into the property. If the drain was blocked it was out of repair, and that repair (and any consequential damage) was the responsibility of the Respondent.

25. The Tribunal did not accept the relevance of Continental Property Ventures v White (supra), except to the extent that it discussed the "stitch in time saves nine" maxim in relation to the concept of "historic breach". In fact the Applicant's case was much simpler, she queried why the Respondent had done nothing about the water ingress into her property over many years, except repeatedly clean out the drains, and she saw no reason why she should to pay for a service which was not fixing her problem. While the Applicant (a lay person) had directed her attention to the costs of apparently ineffective work, the Tribunal clarified the issue at the hearing and gave the parties the opportunity to make further representations on the standard of the management, which was the crux of the matter.

26. The Tribunal decided to dispose of the specific complaints relating to works first of all. The Applicant doubted that some works relating to the gutters and drains had in fact been carried out. The majority of this work related to a period many years ago. The evidence on both sides was vague and/or inconclusive, and it was agreed by all that the Respondent was at some disadvantage. The Tribunal rejected Mr Maxwell's (rather late) argument that the six year rule applied, particularly as the years from 2002 – 2008 had been added at the Directions stage without complaint. The Tribunal nevertheless decided that the Applicant had not proved her case on those items on the balance of probabilities.

27. The Tribunal further decided that, notwithstanding the lack of particular benefit to the Applicant, the drain clearance works charged for were reasonable, in that they were necessary or reasonably done for the comfort and safety of the residents of the block collectively. While the design of the drainage system had some inherent weaknesses, this was not the particular fault of the Respondent. In the Tribunal's experience, misuse of a drainage system by residents is a common problem. Once a problem had been reported it was reasonable for the Respondent to cure it.

28. The Tribunal then considered whether the management fee was reasonable in the circumstances which had occurred. The Tribunal decided firstly that, assuming that a satisfactory level of service was being achieved, the management fees charged for all years compared favourably with market levels in the area. While the Tribunal noted that

the actual cost to the Landlord was not conclusive of a reasonable charge, it was a reasonable starting point. The Applicant made no specific complaint about that issue.

29. There was some disagreement between the parties, but generally the evidence showed a reasonable standard of reactive maintenance, e.g. when a problem was notified, some action would be taken. However, satisfactory management must include some element of active management. For example, continually patching an old roof will not be the most effective, or even the cheapest way of dealing with the problem. An active manager will read the signs, and inspect to find a better way to deal with the problem. In this case those signs were present by 2003 at the latest, as is evident in the Ombudsman's Report. It is perhaps unfortunate that the quality control system for repairs described to the Ombudsman by the Respondent has apparently not endured. The Respondent's own evidence shows that since 2003, calls had been made several times a year relating to the drains.

30. The Tribunal also noted with concern that the Respondent considered that a computer printout demonstrated for all years in issue that works had been done, when there was no evidence on the printout that the work had actually been done. Ms Matthews statement was also telling. She only inspected major works. Repair work was passed to another team. This is not intended as a criticism of Ms Matthews, but even the spot checks described to the Ombudsman in 2002/3 would have been more effective. On the evidence, the Tribunal concluded that no one was actively managing the repairs. The Tribunal took only a few minutes to identify the cause of the problem, but the Respondent's staff had failed to identify it in 14 years.

31. Also, looking more generally at the management, the Tribunal noted several factual inconsistencies with reported practice in the Respondent's witness statements. One example was in Mr Coates' statement to the effect that that the cost of managing district heating systems and other block specific costs were not passed on to lessees who did not have such facilities. In 2011/12 the subject block management charge was £206 per unit, but the same charge was made for the same year on the Brent Lea Estate (See Exhibit LBH/10) for a property with lifts and a district heating system. Further, the Respondent's evidence on cleaning out the guttering was weak. In oral submissions the Respondent stated that they were cleaned out on a four year cycle, but later (presumably after examining its own evidence), it submitted in a witness statement that it was cleaning out the gutters on a 7/8 year cycle.

32. The Tribunal decided that a deduction should be made in the Respondent's management charges to reflect the lack of active management in the years in dispute. Without very detailed evidence of the Respondent's charging system, the Tribunal adopted a broad brush approach. Clearly some management was taking place, work was being ordered and paid for, bills were being sent out, arrears were being chased. Thus a relatively minor deduction was indicated, but one which

would have some real effect. The Tribunal decided that a deduction of 20% for all years in issue was reasonable, which added up to a total figure of £267.29.

Costs – Section 20C

33. The Applicant had made a Section 20C application. Mr Maxwell submitted that costs should not automatically follow the event. It was a discretionary power.

34. The Tribunal noted that the Respondent was likely to have spent very considerably more on the application, having instructed Counsel at both the case management conference and the hearing, than the cost of identifying and fixing the problem. It had not been suggested that this case would have repercussions for the Respondent's other lessees. All matters considered, the Tribunal decided to order that none of the Respondent's costs incurred in connection with this application shall be charged to the Respondent's service charge.

Chairman: Judge Lancelot Robson
Signed: Lancelot Robson

Dated: 18th March 2015

Appendix 1

Landlord & 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

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