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Residential
Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/00AK/LSC/2010/0538

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL on an application under Sections 27A and 20C of the Landlord & Tenant Act 1985

Property:	Flats 1-42 Shelley Lodge, 20A Gordon Road, Enfield, Middlesex EN2 0PL
Applicant:	Metropolitan Housing Trust Limited (Freeholder)
Represented by:	Mr Daniel Dovar of Counsel
Respondents:	Mr C. Moreland and all the other leaseholders of Flats 1-42 Shelley Lodge
Represented by:	Ms Nicola Muir of Counsel
Also present:	Mr C. Moreland; (A Respondent) Mr A. Bright FRICS; Alan Bright Associates (Single Joint Expert Witness)
Date of Application:	29th July 2010
Date of Hearing:	7th and 8th December 2010
Tribunal:	Mr L.W. G. Robson LLB (Hons) Mrs A. Flynn MA MRICS Mrs J. Dalal

Preliminary

1. The Applicant seeks a determination under Section 27A of the LANDLORD AND TENANT ACT 1985 (as amended) as to the liability of the Respondents to pay service charges for the rectification of drains and associated works under a specimen lease (the Lease) dated 22nd May 1998. Extracts from the relevant legislation are attached as Appendix 1. A copy of the Lease is attached as Appendix 2.

2. Proceedings in case reference CHY09397 were stayed by an order of District Judge Lightman in the Central London County Court dated 7th September 2010, pending the outcome of this Application.

3. Directions for Hearing were given at a pre-trial review on 31st August 2010 for a hearing on 7th and 8th December 2010, to deal with the following agreed issues

   a) whether the drains are in disrepair

   b) if so, whether the Applicant is obliged, under the terms of the relevant leases , to repair the drains

   c) whether the costs so incurred are recoverable as relevant service charge expenditure under the terms of the leases and the extent of the lessee's liability for those costs

4. The Applicant's statement of case is dated 14th September 2010, supplemented with legal submissions by Counsel dated 13th September 2010. The Respondent Mr Moreland's statement of case is dated 10th November 2010, also supplemented with legal submissions by Counsel. No inspection by the Tribunal was deemed necessary. A Joint Single Expert, Mr Alan Bright FRICS was agreed by the parties, and his final Report is dated 3rd November 2010.

Hearing

5. At the hearing, Mr Dovar made oral submissions based on his legal submissions. A witness statement by Mr Moreland was produced, together with a skeleton argument on behalf of the Respondent. Ms Muir made oral submissions following her previous submissions. Both parties presented further authorities to support their submissions. Mr Bright was examined and cross-examined.

Applicant's submissions

6. Mr Dovar outlined the background to the case. The development consisted of 42 units, all let on shared ownership leases, and built about 1997/8. All the current owners of the leases of the 42 flats were named in the Application as Respondents. In early 2000 the Applicant became aware of problems with the drainage system serving Mr Moreland's flat on the ground floor, receiving reports of waste discharges and foamy substances back-surging through the drainage pipes, and splashing out of the sanitary appliances in Flat 18. Mr Moreland alleged that conditions were so bad that it became uninhabitable and he had had to live elsewhere since 2003. The Applicant did not accept that allegation. Various investigations including CCTV recording were carried out. In September 2008 the

Applicant commissioned a report from Mr Alan Bright FRICS into the cause of the problems. Mr Bright reported on 23rd September 2008, concluding that the drains were *"lacking in both design and workmanship... and that they are regularly running close to , or at full bore, and are not self cleansing, evidenced by fatty deposits, and with inadequate falls or back falls evidenced by standing water"*. The Applicant's case was that the drainage problems were caused by design defects for which it was not responsible under its repairing obligations in the Lease. Mr Moreland alleged that the Applicant was responsible and had failed to discharge its repairing obligations under the Lease. On 8th March 2009, Mr Moreland had issued proceedings in the High Court, claiming damages and an injunction to force the Applicant to "put the drains, plumbing and pipe work of the premises into proper working order". He alleged that the Applicant was in breach of its obligations under Clause 5(4) of the Lease, and further that the Applicant owed him a duty of care to ensure that the premises were habitable, and had breached that duty. The case was eventually transferred to the Central London County Court. A formal Claim, Defence and Part 20 Claim (Counterclaim), and Reply had been served. Allocation questionnaires had been filed. The Applicant had then applied for a stay of the proceedings to await the outcome of this Application. The Applicant's main reason for issuing this Application was that the Tribunal's decision would bind the Applicant and all 42 Respondents to this Application, not just Mr Moreland, (which would be the effect of the Court proceedings).

7. Mr Dovar submitted that Mr Moreland's case was:
   a) the defects in the drainage system mean that it is not self-cleansing and can only be rectified by regular cleansing and unblocking of the drains. The Applicant's alleged failure to maintain the system in the manner this system requires, has caused the pipes to become blocked, unhygienic or cause back flow
   b) The Applicant's failure to maintain the system is a breach of clause 5(4) of the Lease, contending that any pipe, sewer, drain or drainage apparatus which is choked and not able to perform its function as a pipe etc. is out of repair.
   c) The Applicant had failed to keep the system in proper working order either by cleansing the system sufficiently regularly, or if it is impractical to do so, to replace the defective parts of the drainage system.
   d) The alleged duty of care to ensure that the flat is habitable is owed under Section 4 of the Defective Premises Act 1972, which has been interpreted as including a duty to ensure that there is no damage to the premises.

8. The Applicant's case was that:
   a) The drainage problems arose out of inherent and design defects rather than disrepair, so it was not liable.
   b) There was no duty of care to ensure the Flat is habitable
   c) Mr Moreland was to prove his losses
   d) The Limitation Act applied for any claim prior to September 2003
   e) Mr Moreland owed rent and service charges totalling £25,019.11

9. The Applicant was now carrying out remedial works to replace the defective drainage serving Flat 18 and wished to recover the cost from the Respondents

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under the service charge by virtue of Clause 7 (5) (f) of the Lease. He submitted that the issues for determination by the Tribunal are:

a) whether there was an inherent defect in the drainage system, the nature and extent of any defect and whether rectification of the same falls within the landlord's obligation under clause 5(4) of the Lease,
b) Whether the costs of any rectification of an inherent defect are recoverable from the lessees under the terms of the Lease, particularly Clause 7. If in principle such costs are recoverable, would this extend to replacement of the whole drainage system, to replacement of part or simply to periodic cleaning
c) whether the drainage system is in disrepair, the extent of any disrepair, and whether any repair falls within the landlord's obligations under Clause 5(4)
d) If there is no obligation to rectify, repair or do any works to the drainage system, but the landlord carries out the work, whether the costs of the same are recoverable under the service charge provisions in Clause 7 or otherwise.

Applicant's Legal Submissions

10. Mr Dovar submitted that Mr Bright had identified that the problem with the drainage system was one of workmanship and design. The system had insufficiently steep levels which caused back flow and a bend which further restricted the flow of waste. The pipe work was too small for the number of flats it serviced. Mr Dovar submitted that the build up of fatty deposits within the pipe was not in itself disrepair. The drains did not function correctly because of their size and layout which meant that they did not allow waste to flow correctly. This was a design problem. It had been present since construction of the block. It was in the same condition as it was at the time that the block was built. Nothing had fallen out of repair, see *Quick v Taff-Ely Borough Council [1986] QB 809 CA* . We were also referred to *Post Office v Aquarius Properties Ltd (1987) 54 P & CR 61(CA)*

11. Further, clause 5(4) only provided for the Applicant "to maintain repair decorate and renew..." This was not sufficiently wide to cover rectification of an inherent defect. The context of the clause emphasised repair and maintenance, thus the word "renew" should be construed as meaning no more than renewing parts that have fallen into disrepair, see *Collins v Flynn [1963] 2 All ER 1068* . In the absence of any express provision for remedying a defect, the Applicant was not to carry out any remedial works (*Hart v Windsor (1844 12 M&W 68*, and *Travers v Gloucester Corporation [1947] KB 71*).

12. Alternatively, if the rectification of an inherent defect fell within the Applicant's obligations under Clause 5(4) then the cost of rectification was recoverable (subject to consultation and reasonableness) under clause 7(5)(a). Further, if there was such an obligation then at the Applicant's election that must stretch to more substantial works, e.g. replacing the entire or part of the system rather than periodic cleaning, and those costs could be recovered from the lessees.

13. If the system is in disrepair, then that would fall within clause 5(4) and would be covered by clause 7(5)(a). Further, given the nature of the problem it is for the Applicant to determine whether to carry out substantial repairs or periodic repairs.

14. If there was no obligation to carry out the works but works were carried out then recovery of the costs should be permitted under clause 7(5)(f) which permits recovery of sums for works not covered by other clauses, particularly sums expended reasonably in connection with the block. All lessees would benefit from having the drainage system rectified and thus it was reasonable to allow recovery under the service charge provisions.

15. In reply to questions Mr Dovar accepted that the Applicant had done the works to the drains without consulting under Section 20, and would not be asking for a contribution from each lessee in excess of the £250 statutory cap. His client had only become the landlord of this block in 2007, and for some time had thought that the problem emanated from the flat upstairs, but this had proved incorrect. He doubted the Tribunal had power to delay payment of the outstanding rent and service charge as requested by Mr Moreland. There was no enforceable agreement that the Applicant would permit delay in payment of the outstanding amounts. He also queried the effect of *Bishop*, (see below) relied upon by Ms Muir. He also noted that Mr Bright's report had been quite clear that the fatty deposits did not damage the pipe itself.

Respondent's Submissions

15. Ms Muir submitted that under the terms of the Lease the Applicant was required to maintain and repair the pipes, sewers, and drainage. Mr Moreland accepted that he was legally required to contribute to the cost of the repairs via the service charge along with the other 41 lessees. The problems had started in 1999. He had been unable to live in his property due to the Applicant's failure to keep the drainage in repair. He had brought a claim for damages, now in the County Court. Any liability for service charge would be set off against those damages. He sought a determination under Section 27A(1)d) that his share of the service charge should not be payable until the damages claim had been determined by the Court. He relied on the terms of Clause 5(4) and 5(5). He had suffered damage to the lino, bath panel and wall coverings in the bathroom, and carpets in the hall of his flat. Ms Muir confirmed at the hearing that it was not Mr Moreland's contention that the pipe was damaged by the fatty deposits, the contention was that the build up of the deposits caused a complete breakdown of the drainage system.

16. The terms of clause 5(4) of the Lease required the Applicant to: "... maintain, repair redecorate and renew...". Under Clause 5(5) the Applicant covenanted to keep the common parts (including the common service media) clean. Under the Third Schedule the lessee was granted rights (1) to use the common parts for the purposes for which they were intended, and (3) to use the drains sewers and the services and other conducting media... Alan Bright Associates' report of 28th September 2008 identified the causes of the back surge as:

(1) the main drain was undersized with irregular and unacceptable falls
(2) the gradient of the pipework is too shallow to allow self cleansing drainage
(3) flow is further restricted by a tight bend which creates a danger point susceptible to debris build-up and blockages

As a result of the defects the pipes become blocked with grease and fat residue on a regular basis and they become unhygienic and cause back flow. The pipes concerned are common pipes and fall under Clause 5(4). The Applicant's case is that repair of this defect is not maintenance or repair because there is an inherent defect in the drainage system. Mr Moreland's case is that:
a) any pipe, drain or sewer which does not operate efficiently as a pipe drain or sewer is not in repair or properly maintained
b) The Applicant has an obligation to keep the system maintained and in repair, which necessitates that it works for the purposes for which it was installed
c) replacement of a non-functioning system with a functioning system is clearly a repair because the renewal does not give then lessee back a different property which the parties contemplated when they entered the lease.

How the Applicant chooses to comply with the covenant is a matter for the Applicant. The system is part of the Applicant's retained land thus there is no pre-condition that they need to be given notice of the defect, see *British Telecommunications plc v Sun Life Assurance plc [1996] Ch. 69*. The Applicant is thus under a strict liability to keep the system in repair, properly maintained and working at all times. The only way that could be done is to either jet wash the pipe work so often that there is insufficient time for any blockage to occur, or repair the cause of the blockages, i.e. the defective drainage system. The only practical way to remedy the problem, she submitted, was to relay the defective pipework to allow the flow of water and sewage. The Applicant had not suggested any other method of keeping the pipes in repair. Looking at the Lease as a whole, it was clear the parties intended Mr Moreland to have the benefit of a drainage functioning system which would not back surge and contaminate his flat with sewage making it incapable of occupation. Further, the Landlord can only fulfil its obligation by doing remedial work to the system. The issue of whether there is an inherent defect is irrelevant. The build up of fatty deposits is a maintenance issue and the only practical way of remedying it is to relay the pipework. Clause 5(4) of the Lease obliges the landlord to renew the pipework where the drainage system does not operate as such. If the works are carried out under clause 5(4) then the landlord is entitled to recover the cost through the service charge, but if the work is not required under clause 5(4) then the cost is not recoverable through the service charge. However the landlord would be liable to do those works to avoid derogating from the grant of the Lease, i.e. the right to occupy the premises or the right granted in the Third Schedule to use the drains etc., and those costs would not be recoverable through the service charge.

Respondent's Legal Submissions

17. Ms Muir quoted from Woodfall on Landlord & Tenant, para. 13.031. Briefly stated, Woodfall suggested that the true test was always a question of degree whether an item was properly described as a repair or whether it would involve giving back a wholly different thing from that which was demised. An inherent defect is not beyond the scope of an obligation to repair. Some inherent defects cause damage to the property, others do not. In the former case, it is a question of degree whether the works to remedy the defect can be

called repair. In the latter case, the repairing covenant does not bite. Where an inherent defect has caused damage and the works are in the nature of repair, the party obligated may also be obliged to rectify the cause of the damage if it is proper practice to do so, or is necessary to do so in order to do "the job properly once and for all".

18. Ms Muir referred to *Ravenseft Properties v Davstone (Holdings) Ltd [1980] QB 12*, and *Elmcroft Developments Ltd v Tankersley-Sawyer [1984] 1 EGLR 47* in support of the view expressed in Woodfall. In this application the "inherent defect" had caused a build-up of deposits which caused the blockages and back surge, which in turn caused consequential damage to the flat. The Applicant has not suggested that it is practicable to remedy the defect without remedying the inherent defect. As it was clearly within the contemplation of the parties on the grant of the Lease that the flat would have the benefit of a functioning drainage system, remedial work which makes the system function properly cannot possibly be "beyond repair as a matter of fact and degree".

19. Ms Muir also sought to distinguish the decision in *Quick v Taff-Ely* relied upon by Mr Dovar, noting that in that case the landlord's obligation only extended to the structure and exterior, not to the decorations of the property. In this case the defect had caused a build up of fatty deposits which was the cause of the malfunction. This had put the landlord in breach of its covenant to keep the common parts clean. In *Bishop v Consolidated London Properties [1933] All ER 963* a pipe forming part of the landlord's retained premises became blocked by a dead pigeon causing an obstruction and an overflow of water through the ceiling of the tenant's flat. The Court had found the landlord liable under the covenant to keep the exterior of the premises and all parts of the building not let because the covenant included the water system. It held that a pipe which is choked and not able to do its duty as a pipe is out of repair, and the covenant bound the landlord to keep the pipe in repair at all times. It was irrelevant to consider whether it became out of repair suddenly or by a slow accumulation of debris, or without fault on the part of the landlord. Ms Muir submitted that case was indistinguishable.

Decision

20. Certain items of evidence from Mr Bright and Mr Moreland are of particular interest, and are mentioned here.

21. Mr Moreland stated in uncontradicted evidence that he was the first person to move into the block in 1998. It was in autumn 1999 that the problem first started. The problem became more frequent over time, and eventually occurred at least every second day, with the emanations lasting about 2 hours. The bathroom floor and carpeted hall would be covered with a mixture of foam, human waste, toilet paper and other unpleasant items. Photographs were shown to illustrate this. This foam could also be seen at times emanating from manhole covers in the grounds. Various attempts were made to deal with the problem, but none were successful. He had been given direct access to a cleaning company, but they would normally take 4-6 hours to deal with an event. During that time the bathroom was unusable. Repeated complaints to

senior officers of the Applicant over the years had been ignored. He had originally objected to the Application, which seemed mainly to ensure that all the Respondents shared the cost of rectification.

22. Mr Bright stated that fatty deposits would build up from normal use of the drains, due to the poor flow rate. In his view the pipes were undersized, being 100mm in diameter instead of 150mm, or 4 inches instead of 6inches. If the drains were clean, and properly laid, it was theoretically possible for them to cope with the flow, but unless they were cleaned every day they would not function properly, and there was always the risk of a sudden blockage which would lead to another event. Another problem was the fall on the pipe serving Flat 18. In some places the pipe was to all intents and purposes, flat. There was a 90 degree bend at the bottom of the building near Flat 18 which exacerbated problems, and from that point down to the next manhole the drain levels actually rose by 50mm. His considered view was that the system could not cope. Replacement was the only practical option. He also stated that Mr Moreland would have been unable to do this work himself, and there was no reason why the work could not have been done in 1999. The remedial work he had recommended had been finished about 3 weeks ago. He did not yet know whether it had worked. The cost was approximately £35,000 including fees, which was fairly modest in comparison to the value of the estate.

23. The Tribunal considered the evidence and submissions. On balance it substantially preferred the submissions of Ms Muir. The Tribunal also considered that the interpretation of the standard of repair required in the Lease had to be considered against the background of what is now Section 11 of the Landlord & Tenant Act 1985. Section 11 requires that the sanitary conveniences should be "in proper working order". This formulation varies slightly from that of Ms Muir, but the result appears to be the same. Also the Tribunal decided that *Bishop* is indistinguishable from this case. A choked pipe is thus out of repair. In this case the choking appeared temporary, but the design defect coupled with the badly constructed falls produced the unpleasant effects complained of in Flat 18. Mr Dovar at times doubted that there was damage to the landlord's property, but a close reading of *Quick* produces a slightly different picture. The damage does not appear limited to the property retained by the landlord. Property repairable by the landlord is included. The Lease obligation in this case is significantly higher than the obligation in *Quick*, which was based on a predecessor to Section 11. Even if the Applicant's obligation was limited to Section 11, as noted above, Section 11 requires the sanitary conveniences to be in proper working order.

24. The Tribunal particularly considered the issue of "repair". It decided that the works necessary to remedy the problems with the drainage system in this case were "repairs" for three main reasons, firstly the drains were built defectively, and secondly the fatty deposits stopped the drains flushing properly by slowing the flow, which effectively "choked" the pipework temporarily. Also the cost of remedying the defect was relatively modest in comparison to the value of the development as a whole, and the lessee was not getting anything significantly different to that originally let, i.e. a properly functioning drainage system.

25. Having decided that point, the work appeared to fall under clause 5(4) and also 5(5) of the Lease. The Applicant is obliged to do the work, and consequently is entitled to charge the lessees through the service charge under Clause 7(5)(a). Having made this finding, it is not necessary to consider the further arguments made by the parties relating to the effect of Clause 7 and 7(5)(f), or derogation from grant.

26. The Tribunal decided not to make any ruling to delay the date of payment of the outstanding service charges, as asked by Mr Moreland. No evidence other than the total amount had been adduced, and some unspecified amount of that money was in respect of rent. This part of the case had not been argued in any detail. Another application should be made for that matter to be decided. The basis of the request by Ms Muir appeared to be based on hardship to Mr Moreland, rather than any consideration of the legal position as set out in the Lease, or the effect of statute. This Tribunal considers that its power under Section 27A(1) should not extend to extenuating hardship to one party or the other unless that particular matter has been fully argued before it. In any event, the time of payment seemed more properly dealt with by the County Court when it decided the matters not decided by this Application.

Section 20C Application

27. Mr Dovar submitted that the case had been brought about by attempts to resolve an issue with the defective drainage system at the block. The issue affected all lessees and it was therefore appropriate for the Applicant to bring this application for certainty as to its approach. Mr Moreland had insisted on having the hearing. Thus there should be no order under Section 20C.

28. Ms Muir submitted that the Applicant's case is that it has no obligation to render Mr Moreland's flat habitable. As Mr Moreland could not remedy the defect without committing a trespass, effectively their case would deprive Mr Moreland of the whole benefit of his flat. The problem was first reported in 1999 and he has been unable to live in the flat since 2003. The Applicant has taken no steps to remedy the defective system and has sought to avoid liability. Mr Moreland has suffered enormous financial loss. The Application was only prompted by Mr Moreland taking proceedings. The Applicant could have made the application many years ago. It would be wholly unjust to charge the leaseholders for the costs of this action through the service charge.

29. **The Tribunal decided that it would make an order under Section 20C to limit the Applicant's costs of this Application chargeable to the service charge to Nil in respect of all Respondents.** While an order for costs in this jurisdiction does not necessarily follow the event, in the Tribunal's view the Applicant and its predecessor had not treated this problem with sufficient urgency. It agreed with Ms Muir that the Application seemed to have been prompted only by the court proceedings started by Mr Moreland. While the other Respondents had taken no part in the application, the issues seemed highly specific to Mr Moreland's flat. The Application also seemed mainly to

safeguard the Applicant's interests, rather than those of the Respondents individually or collectively, and the other Respondents had done nothing to prolong or delay it.

Signed: Lancelot Robson
Chairman

Dated: 10th January 2011

Appendix 1

Landlord & Tenant Act 1985 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 would be payable, and
e) the manner in which it would be payable

(4) – (7)……..

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 Lands 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)……

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

Appendix 2
Lease dated 22nd May 1998 – See attached