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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AY/LSC/2018/0189**
Property	:	**11 Goldborough House, Springfield Estate, Wandsworth Road, London SW8 2RN**
Applicant	:	**Mr Paul Chilton**
Representative	:	**In person**
Respondent	:	**London Borough of Lambeth**
Representative	:	**Mr Rasel Ahmed, Enforcement Officer**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Mr P M J Casey MRICS** **Mr H Geddes**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**15 October 2018**

DECISION

Decisions of the tribunal

(1) That under the terms of his lease the applicant is obliged to pay by way of service charge contribution to the respondent's costs in connection with the works to the district heating system.

(2) The tribunal determines that the works are necessary for the respondent to carry out to fulfil its repairing obligations under the terms of the lease.

(3) As no sums have yet ben demanded the tribunal declines to make any decision as to the reasonableness of the respondent's choice of repair method or the reasonableness of the proposed cost of such works as it has not been presented with sufficient evidence to do so.

(4) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

(5) The tribunal determines that the respondent shall not be required to pay the applicant in respect of the reimbursement of the tribunal fees paid by the applicant.

The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") as to the amount of service charges payable by the applicant in respect of the service charge relating to major works to the communal heating and hot water system (the district heating system) serving the block in which his flat is situated.

2. It was initially understood that the application arose from a service charge demand made by the respondent on the applicant but it transpired in the course of the hearing that no such demand had been made and the sum of £9,663 which the applicant disputes is the amount given as his estimated contribution to the cost of the proposed works as notified to him by the respondent in a revised Notice under the provisions of Section 20 of the Act dated 29 September 2017. The application thus falls to be considered under Section 27A(3) of the Act: whether, if costs were incurred for services, repairs, etc a service charge would be payable for the costs etc including the amount which would be payable.

3. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

4. The applicant appeared in person at the hearing with a Mr Capon as a witness who also helped with questions and submissions and the respondent was represented by Mr Rasell Ahmed, an enforcement officer employed by the respondent.

The background

5. The property which is the subject of this application is a purpose built one bedroomed flat on the first floor or a four storey plus mansard roof building containing 27 flats. The block was built some 60 to 75 years ago.

6. Photographs of the building were provided in the hearing bundle. 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.

7. The applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

The issues

8. At the start of the hearing the parties identified the relevant issues for determination as follows:

   (i) Is the respondent entitled to recover by way of service charge from the applicant the costs of replacing the heating and hot water pipework that form part of the district heating system serving the flat, radiators within the flat and installation of a Heat Interface Unit?

   (ii) Did the works need to be undertaken?

   (iii) Is the estimated service charge to be paid in respect of these works reasonable pursuant to S19(2) of the Act? and

   (iv) Is the decision to replace the component parts of the district heating system with a similar one an unreasonable decision and should the respondent have opted to instead replace it with individual heating systems for each flat?

9. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Liability to pay a Service Charge

10. In relation to issue 8(i) the applicant refers to clause 2.9a of the lease "There is included in this covenant as repairable by the Tenant (i) ... (vii) all conduits pipes and cables which are laid in any part of the Building of which the Flat forms part and serve exclusively the Flat (viii) all fixtures and fittings in or about the Flat (other than Tenant's fittings). None of the exclusions which follow at 2.9.b relate to the heating or hot water system. He says he has been repeatedly told by the respondent's staff that the radiators and pipework within the flat are his responsibility and has in the past incurred considerable costs in the repair and subsequent removal of some radiators in the property. Thus he says it is not the respondent's obligation to replace these items and he should be not be service charged for them.

11. Mr Ahmed took us to other provisions of the lease. At Clause 2.2 is the tenant's covenant to pay the service charge. The Fourth Schedule sets out the landlord's heads of expenditure in respect of which the service charge is payable including at paragraph 2"The cost of periodically inspecting maintaining overhauling improving repairing renewing and where necessary replacing the whole of the heating and domestic hot water systems serving the Building ...". Clause 3.2.c is the landlord's covenant to maintain, repair etc the boilers and heating and hot water system in the building whilst 3.h is the covenant to supply heating (15th October to 15th May each year) and hot water. Thus the lease makes it clear that any expenditure incurred by the landlord on maintainance repair etc of the district heating system can be included in the service charge which the tenant is obliged to pay his share of.

The tribunal's decision

12. The tribunal is satisfied that the applicant is obliged to pay his share of the costs to be incurred by the respondent in the works to the district heating system under the terms of his lease.

Did the works need to be done?

13. The district heating system in place provided the flats in the block with hot water to a cylinder in each throughout the year and with heating by hot water radiators in the period prescribed in the lease. There is a plant room containing the three boilers pumps burners etc at the mansard roof level accessed via the central stairwell. The system for distributing the hot water produced by the boilers to the cylinders and radiators in each flat uses four pipes which rise from the boilers, are

routed through the roof space before dropping down to the flats. Much of the pipework is encased within the fabric of the building and was installed when the block was built.

14. The respondent commissioned a Condition and Option Appraisal Report in October 2014 by a specialist company, Frankham Consultancy Group to advise on the condition of the district heating system and what if any works were required to it. The report advised that the boilers and associated plant were in good order having been replaced some 10 years ago. However concerns were raised regarding the pipework and radiators (over 30 years old). The pipework in the roof voids was said to be in reasonable condition but the risers and pipework in the flats was variable. Flats have connections to other flats passing through them which makes for repair/replacement difficulties as access is needed to more than one flat. Many isolation valves fail to close and the pipes have been damaged in areas within the flats. The radiators are steel single panel without convector fins and do not have thermostatic controls. They and the hot water cylinders are failing regularly due to their age. The report concluded that the system save for the boilers etc had reached the end of its economic life and should be replaced as to do nothing would result in further failures and disruption whilst refurbishment was not practicable as pipework and radiators could only be replaced.

15. The problems with the existing system were also the subject of the evidence given by Michael Axtell, the respondent's Project Manager, Mechanical. He said the pipework and radiators were well over the life expectancy of such items given by the CIBSE guide for indicative life expectancy of building services plant, equipment and systems which he included as an appendix to his witness statement. They were old and heavily corroded and now pose a serious risk of leakages. Every time there is a burst or leak the system loses pressure which causes the plant to shut down to protect the plant from damage from low water levels. The lack of thermostatic controls, the non-functioning of many of the isolating valves and the outmoded design of the radiators meant the system did not run as efficiently as the boiler plant would allow and the difficulty of isolating individual flats from the pipework complicated and increased the cost of repairs. In the respondent's statement of case the numbers of breakdowns over the years 2013-2015 were given based on the repairs log. In 2013 there were 67 including 8 to radiators, in 2014 46 and 11 respectively and in 2015 37 and11. Repairs disrupted the whole system Mr Axtell said and at times left flats without heating and hot water.

16. Mr Chilton referred to the Frankham report which said the boiler plant was in good working order, the pipework in the roof space is believed to be reasonable and in flats "viable" (in fact it says "variable"). No inspections were carried out to see the condition of radiators and the report fails to make the case for the proposed works which would in any case be an improvement not a repair.

Decision

17. From the evidence before us we are satisfied that the existing pipework and radiators in the building have significantly exceeded their economic life expectancy and are increasingly prone to leaks and breakdowns necessitating costly and difficult repairs as well as disrupting the service. The respondent's decision to accept the advice of their expert consultants that extensive works should be undertaken to the system is clearly a reasonable decision to have taken as it is plain that such works are needed. Even if an element of improvement is involved in what is being done that is permitted under the lease terms.

Is the respondent's choice of repair method reasonable and is the cost reasonable?

18. The respondent following the advice in the Frankham report decided to replace component parts of the existing system, namely the pipework hot water cylinders and radiators. A two pipe system has been designed (and largely by now installed) with heat interface units (HTU) in each flat with the pipework rerouted to ensure each flat has independent isolation. The HTU in each flat provides the heating via new thermostatically controlled radiators as well as instant hot water. Hot and cold water storage tanks are to be removed from each flat and the mains cold water pipework is to be re-arranged. According to Mr Axtell the new system will be much more efficient than the old which will not only give better controlled heating in the flats but save on fuel costs.

19. Mr Ahmed pointed out that the respondent had been advised by the experts who they commissioned that this was the best option. Replacing the district heating system with individual boilers and pipes/radiators in each flat would have cost more. The respondent had an obligation to provide heating and hot water to the flats under the terms of the lease which also obliged it to maintain, repair etc the system and in its absolute discretion improve it. It was for the landlord to decide how to fulfil its obligations and if faced with alternative options to choose what it thought best provided that it acted reasonably in doing so which in his submission in this case it had having followed the advice of its experts. It had as required also consulted on its proposals under the provisions of S20.

20. Mr Chilton referred to a quotation he had obtained for his own flat to install an independent boiler and new radiators in the sum of £2,818.80 including VAT. He appreciated that what had to be looked at was replacing the system for the whole block so that he multiplied this sum by 27, the flats in the black, to give £76,107.60. Again he accepted that some flats were larger than his and indeed told us the cost for his flat had gone up by £1,000. Even so it would still be significantly less than the landlord was spending and would give each flat a totally controllable system unlike the existing which ran the heating year

round. Individual systems had replaced district heating systems in other bocks on the estate without any apparent difficulty. When questioned by Mr Ahmed he accepted the quotation he had obtained made no provision for decommissioning the existing but when asked if it allowed for upgrading of the gas supply which would be needed and add significantly to the costs he pointed to the letter from Southern Gas Network dated 16 May 2018 which he had received to say they were planning to install a new supply and no extra cost would be involved. The only way the respondent could justify its decision to adopt what the Frankham report called Option 3 was to greatly overstate the cost of providing individual systems to each flat (Option 4). He had repeatedly asked for the Frankham report which was eventually supplied but when he questioned its lack of detail with the respondent's major works co-ordinator was told there was a detailed internal document on which the feasibility report (Frankham?) was based but this has never been revealed to him. The Frankham report contains a single figure for Option 4 but despite repeated requests he has never been provided with a breakdown of how this figure was arrived at. The estimated cost of the applicant's proposals differed from the estimate given in February 2016 and there had been no competitive element or schedule of rates in awarding the contract to OCO Limited. Mr Capon supported what Mr Chilton had said.

21. In reply to some of the points raised by the applicant Mr Axtell admitted those were problems turn the heating off in summer months but the residents and leaseholders were not charged the cost of heating fuel in those months. Frankham no longer acted for the respondent and it had not been possible to get a breakdown of their estimate of the cost of Option 4. The contract with OCO was an NEC3 contract and Bailey Garner Mechanical Engineering Consultants wrote the specification and check and approve all invoices. Mr Ahmed said that in 2016 it had been intended to do the works by selecting a contractor from three firms invited to tender and the 2016 estimate for S20 purposes was based on the successful tender in that exercise but the contractor involved withdrew and the respondent decided to give the contract to OCO who currently run the system and with whom they had a S20 compliant long term agreement which encompassed works of this kind. Their estimated cost was also lower and indeed because of an error was even lower than the figure in the S20 notice of £9,633.26. The estimate presently stands at £8,856.86 for Flat 11.

22. In submissions Mr Ahmed referred us to the Court of Appeal decision in Waaler V Hounslow London Borough Council [2017] EWCA Ci45 on the meaning of repair and reasonableness as well as several UT decisions. He also said the decision by the gas company to upgrade the supply to the bock was not known by the respondent till this year when the works have largely been completed.

Decision

23. We agree with Mr Ahmed that it is largely a matter for the landlord to decide how to effect repairs to its building to comply with its lease obligations especially when there are alternative options. It is certainly not for the tribunal to impose its own choice over the landlord and provided costs do not differ substantially between options the landlord has some element of latitude in making its choice even if it opts for a slightly more expensive course of action. In this case its decision was at least in part based on its consultant's advice that Option 3 was cheaper than Option 4. It should also be borne in mind that only 13 of the 27 flats in the block are held on long leases so the respondent will bear more than 50% of the cost of the project. That said if the landlord's choice leads to significantly higher costs to leaseholders than an acceptable alternative it cannot then say the costs incurred are reasonable and recoverable in full. The applicant has put forward two arguments which we do not think the respondent has answered which go to the choice of option and the reasonableness of cost. Firstly why in the other blocks on the estate were district heating systems replaced with individual systems for each flat? We appreciate the witness the respondent intended to rely on is absent on long term sick and Mr Axtell was not involved in such decisions indeed he was unaware other blocks had had district heating systems but Mr Chilton had raised the issue in his statement of case and it has not been answered. It may be that the other blocks needed full renewal of boiler, etc plant hence raising the cost but we have not been told. The second point regarded a proper breakdown of Frankham's estimated cost of Option 4. All that is given is a total figure with no explanation. Even if Frankham is no longer used we would have expected the respondent to have produced expert cost evidence to justify the choice of Option 3. Such evidence would of course address more than just initial costs but would include life cycle costing and comparative running costs. In the absence of such evidence the tribunal finds it difficult to say that the choice of Option 3 and its cost were reasonable. However as the applicant has not yet been invoiced for his rateable and proportionate share of the cost of these works through his obligations to pay the service charge we think these questions can be left until such an invoice is issued and challenged.

Application under s.20C and refund of fees

24. The applicant had made an application for a refund of the fees that he had paid in respect of the application/ hearing[1]. Taking into account the determinations above, the tribunal does not order the respondent to refund any fees paid by the applicant.

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[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

25. In the application form the applicant applied for an order under section 20C of the 1985 Act. Taking into account the determinations above, the tribunal does not think it appropriate to make such an order.

Name: P M J Casey **Date:** **15 October 2018**

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 the 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 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 the appropriate 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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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 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 that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property 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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).