FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	LON/00BA/LSC/2020/0057
Property	:	**Flat 7, Wimbledon Close, The Downs, London SW20 8HW**
Applicant	:	**David Hughes**
Representative	:	**In person**
Respondent	:	**Brickfield Properties Limited**
Representative	:	**Imogen Dodds of Counsel**
Type of Application	:	**For the determination of the liability to pay a service charge**
Tribunal Members	:	**Judge W Hansen (chairman)** **Steve Wheeler MCIEH, CEnvH**
Date and venue of Hearing	:	**Remote hearing on 23 February 2021**
Date of Decision	:	**1 March 2021**

DECISION

Determination

(1) The Tribunal determines that the responsibility for repairing and maintaining the towel rails, the radiators and the radiator valves within the demised premises known as and situate at 7, Wimbledon Close, The Downs, London SW20 8HW is, upon the proper construction of the Lease dated 9 April 1980, not imposed on the landlord (and then recoverable under the service charge), but instead falls solely on the tenant under the tenant's repairing covenant at Clause 2(9).

(2) The Tribunal is not satisfied that the Lease permits the recovery of legal costs through the service charge but if it is wrong it considers it just and equitable to make an Order under section 20C of the Landlord and Tenant Act 1985 that the Respondent shall not be entitled to add the costs incurred in connection with these proceedings to the service charge.

Background

1. Mr Hughes ("the Applicant"), is the leaseholder of Flat 7, Wimbledon Close, The Downs, London SW20 8HW ("the Flat"). By an application dated 28 January 2020 the Applicant seeks the Tribunal's determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the payability of a service charge in connection with the repair and maintenance of the towel rail, radiators and radiator valves within the Flat. It is an unusual application to this extent: rather than disputing his liability to pay a service charge in respect of the repair and maintenance of these items, it is the Applicant's case that the repair and maintenance of these items is the landlord's responsibility and that a service charge *is* or *would* be payable. The Respondent by contrast contends that the responsibility for the repair and maintenance of such items within each flat falls on the tenant and is not a service charge item. The Respondent named in the application is Freshwater Property Management but the Applicant's immediate landlord is Brickfield Properties Limited ("the Respondent") who we substitute as Respondent.

2. The Applicant holds the Flat pursuant to a lease dated 9 April 1980 ("the Lease"). The Flat is a 2-bedroom flat in a purpose built block served by a communal heating and hot water system. There are 32 flats in the block where A lives. The Applicant seeks a determination that the costs of renewing the towel rail and supplying and replacing radiator valves <u>are</u> and/or <u>would</u> be recoverable under the service charge provisions in the Lease. The application as brought related to the service charge years 2019 and

2020. The sum in issue for 2019 was £144 pursuant to an invoice dated 20 November 2019 for replacement radiators. However, on 4 March 2020, the Respondent raised a credit extinguishing any liability for this invoice. However, the issue of construction has been raised in relation to 2020, and the Tribunal can and should determine the issue and has the jurisdiction to do so on the basis that the application is an application under s27A(3) of the 1985 Act seeking a determination as to "*whether, if costs were incurred… a service charge would be payable*".

<u>The Lease</u>

3. The premises demised to the tenant under the Lease are described as "*All that flat numbered 7 and being on the first floor of the Buildings… together with the Landlord's fixtures and fittings installed therein*".

4. Clause 2(2) of the Lease requires the tenant to pay a service charge equal to 1.98% of the cost of the expense of:

> *"(ix) The cost of coke gas oil and other fuel required for the boilers supplying the heating system serving the demised premises and the common part of the said Buildings*
>
> *(x) The cost of maintaining repairing and where necessary replacing the whole of the said heating system including the boiler house"*

5. Clause 2(9) of the Lease requires the tenant to "*repair cleanse and maintain and keep the Flat (other than the parts comprised in and referred to in paragraphs (1) and (2) of Clause 5 hereof) and the walls pipes cables wires and appurtenances thereof*".

6. Clause 5(1) of the Lease requires the landlord to "*maintain repair and renew… (a) the structure… (b) the gas and water pipes drains… in and under and upon the said Buildings and enjoyed or used by the Lessee in common with the owners and lessees of the other flats*".

7. Clause 5(4) of the Lease requires the landlord to "*at all times… to supply hot water by means of the boiler and heating installations serving the said Buildings to the flats for domestic purposes and also during the winter months to supply hot water for heating to any radiators fixed in the Flat and the common parts of the said Buildings so as to maintain a reasonable and normal temperature*".

The Submissions

8. It was the Respondent's above-mentioned 2019 invoice seeking payment of £144 in respect of replacement radiator valves on the basis that this cost was "*chargeable to each flat individually",* which led to the parties' current dispute.

9. The Applicant refutes any such liability and relies on: (1) the terms of the lease and alternatively (2) the fact that the costs have previously been put through the service charge.

10. As to (1), the Applicant's position is set out in his letter dated 1 April 2020. He makes the point that the valves are part of the communal heating/hot water system and that it is not possible for the tenant to remove, repair or replace valves as there is no means of isolation within the Flat. He contends that such repairs fall within the scope of the landlord's repairing obligation as part of the annual maintenance of the heating system. He relies on Clause 2(2)(x) of the Lease and says that this specific provision should take precedence of the more general provision in Clause 2(9). The Applicant additionally makes the point that repair and replacement of a radiator valve requires a drain down of the system and a loss of heating to the whole building and in those circumstances he submits that it is not practical for such work to be carried out by tenants on ad hoc basis. He submits that the landlord has a duty of care and that all such work should be carried out by competent tradesmen under the supervision of the landlord. He submits that such work falls within the landlord's covenant in Clause 5(4). The Applicant also relied, albeit by way of fall-back position, on Clause 2(2)(xi) which permitted the landlord to recover via the service charge "*the cost of all other services which the Lessor may at its absolute discretion provide or install in the said Buildings for the comfort and convenience of the Lessees*".

11. The Applicant relies on an expert report from a Mr Amos dated 22 February 2021, which confirms as follows: (i) that "*there is no available access to any isolation in order to work on the pipework and radiators within the property without affecting the communal system*"; and (ii) that he has been "*told that behind an access panel in the bathroom of flat 7 (which is grouted and not easily accessible) there are valves which isolate the towel rail alone*" and (iii) that "*he has not seen any accessible isolation within the property to be able to work on the radiators, valves or pipework*

without draining the entire central heating system. For the leaseholder to be able to replace these valves would need drain down of the entire system".

12. The Respondent applied to cross-examine Mr Amos but we refused that application on the basis that the directions made no provision for cross-examination, no written questions had been put to him and there had been no intimation of any desire on the part of the Respondent to cross examine him until the service of its Skeleton Argument which was served less than 24 hours before the hearing. For completeness, we would also mention that we delayed the commencement of the hearing until 2pm in the face of objections by the Applicant to the late service of the Skeleton Argument. We are satisfied that this short adjournment was sufficient to allow the Applicant to digest and respond to the Respondent's Skeleton Argument and that in those circumstances he was not prejudiced by the late service.

13. As to (2), the Applicant makes the point that such work has historically and consistently from 2001 to 2018 been carried out by the landlord and dealt with as a service charge item.

14. The Respondent's position is that on a true construction of the Lease, responsibility for renewing the towel rails and replacing the radiator valves is not imposed on the landlord (and then recoverable under the service charge), but instead falls solely on the tenant under the tenant's repair covenant.

15. The Respondent submits that the matter turns solely on the terms of the lease. The Respondent's submits that the radiators and towel rails form part of the demised premises/Flat and refers to Woodfall, 13.137 which refers to case law in which it has been held that radiators are fixtures.

16. On that basis it is said that the tenant is responsible for the radiators, valves and pipes *in* the Flat, whereas the Landlord is responsible for the pipes and other parts of the communal heating system enjoyed by the Flat and other flats.

17. The Respondent on clause 2(9) and contends that the radiators (including the valves) and the towel rails form part of the demised premises and fall within the scope of the tenant's repair covenant, at clause 2(9). On that basis it is said that if individual radiator valves or towel rails need to be replaced, the cost of this falls on the tenant.

Discussion and Conclusion

18. The principles which govern the construction of leases are now well-established, and were summarised by Lord Neuberger in *Arnold v Britton* [2015] UKSC 36 at [15]:

> "*When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101 at [14]. And it does so by focussing on the meaning of the relevant words… in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions*."

19. However, he went on to emphasise (at [17]) that:

> "*…the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in Chartbrook [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.*"

20. The Applicant's submissions have much to commend them but ultimately we are driven by the language of the Lease to reject them.

21. The radiators, valves and pipes within the Flat form part of the demised premises and clearly fall within the tenant's repairing covenant. Clause 2(9) is the only clause which expressly imposes an obligation on either party to repair the demised premises.

22. The Applicant contends that Clauses 2(2)(x) and 5(4) are more specific and ought to take precedence over Clause 2(9) but neither places any responsibility on the landlord to repair the radiators, values and pipes within the demised premises. Neither clause assists the Applicant. Clause 5(4) is a landlord's obligation to provide hot water for domestic purposes and for heating to any radiators fixed in the Flat. Clause 2(2)(x) is likewise not such as to displace or trump Clause 2(9). It imposes no express repairing obligation on the landlord in relation to those parts of the heating system within the demised premises; instead, the Applicant's case must be that such an obligation is implied by virtue of the landlord's right to recover "*the cost of* "*maintaining repairing and where necessary replacing the whole of the said heating system*". In principle, a covenant to supply hot water could require the covenantor to carry out whatever works are necessary to provide the service: see e.g. *Yorkbrook Investments Ltd v Batten* (1986) 18 HLR 25. However, it is a question of interpretation in each case and in the present case the "*said heating system*" in Clause 2(2)(x) is "*the heating system serving the demised premises and the common part of the said Buildings*", as defined in Clause 2(2)(ix).

23. In our judgment, the Respondent is therefore right to submit that the clause draws a clear distinction between the "*heating system*" which serves "*the demised premises and common parts*", and the premises themselves and those parts of the system within the demised premises. We consider that on the proper construction of the Lease the "*system*" is intended to be limited to the parts of the Building retained by the landlord which does not include the radiators, valves or the pipes serving only the demised premises. This interpretation is reinforced rather than contradicted by the terms of Clause 5(4) which distinguishes between, on the one hand, "*the boiler and heating installations serving the said Buildings*" and on the other hand, "*any radiators fixed in the Flat*" (and the Flats themselves) which are the destination "*to*" which the water has to be supplied. We are not persuaded that the sweeping up provision in Clause 2(2)(xi) assists the Applicant.

24. We were, at one stage, troubled by the alleged impracticality of imposing this obligation on the tenant because of the necessity to drain down the system. The evidence suggests that a drain down costs £320. However, ultimately we have concluded that the language of the Lease compels the interpretation set out above. In any event, we consider that the suggested impracticality is more apparent than real. No drain down is possible without the cooperation of the landlord and in this way any necessary repairs by individual leaseholders can be coordinated by the landlord. In any

event, it seems to us that the process has the potential to be equally disruptive whether the responsibility is the landlord's or the tenant's. We are not persuaded that the evidence of Mr Amos compels a different interpretation. He did not really answer the question of what steps would be required in order for the leaseholder of Flat 7 to be able to replace the radiator valves in his flat, and how much would that cost, and it appears that he was unable to offer an opinion on all the possible options because he had no "*prior experience with working on the system*".

25. The Applicant did not advance any estoppel argument based on the history but insofar as he seeks to argue that the landlord is bound to proceed in the same way as it has done historically (i.e. putting the costs in issue through the service charge), we would reject any argument based on estoppel by convention. Estoppel by convention only lasts until the parties' common assumption is revealed to be erroneous and does not apply to future dealings: see e.g. *Tingdene Holiday Parks Limited v Cox* [2011] UKUT 310 (LC) at [19].

26. For those reasons we determine that the responsibility for repairing and maintaining the towel rails, the radiators and the radiator valves within the demised premises is not imposed on the landlord (and then recoverable under the service charge), but instead falls solely on the tenant under the tenant's repairing covenant.

27. The Applicant sought an Order under s.20C of the 1985 Act. The issue probably does not arise having regard to the terms of the Lease but we have considered the application nonetheless and concluded that it is just and equitable to make an Order for two reasons. Firstly, the charge of £144 was cancelled after the commencement of these proceedings. Whilst that was done without prejudice to the landlord's position generally in relation to the issue of lease construction, the Applicant has achieved a meaningful practical benefit. Secondly, although the Applicant lost on the construction issue, the application was, in our judgment, an entirely reasonable one to bring and it seems to us that the issue had to be resolved to provide clarity for the Applicant, the Respondent and other potentially affected lessees.

Name: Judge W Hansen **Date:** 1 March 2021