7129

Residential
Property
TRIBUNAL SERVICE

Case Reference
LON/00AG/LSC/2011/0428

THE LEASEHOLD VALUATION TRIBUNAL

FOR THE LONDON RENT ASSESSMENT PANEL

IN THE MATTER OF
THE LANDLORD AND TENANT
ACT 1985 ("The Act")
SECTIONS 27A AND 20C

Re: 21 Churchway
London,
NW1 1LJ

Applicant:	Ms Amanda Benson
Respondent:	London Borough of Camden
Appearances:	The Applicant in person
	Ms R Patel, Court Officer and Mr R Cossill, Final Accounts Officer, London Borough of Camden, for the Respondent
The Tribunal:	C Norman FRICS (Chairman) Ms S Coughlin MCIEH O N Miller BSc
Hearing:	25 August 2011 Held at 10 Alfred Place London WC1

DECISION

Preliminary Matter: Jurisdiction of the Tribunal

1. It appeared to the Tribunal that this case concerned (amongst other matters) the law relating to negligent misstatement which is part of the law of torts (civil wrongs). Consequently, prior to commencing the hearing the Tribunal referred to and read out the following paragraphs of the decision of His Honour Michael Rich QC, sitting as a Member of the Lands Tribunal, *in Canary Riverside Pte Limited and Others and Dr & Mrs Schilling and Others* (LRX/65/2005). In his Decision, the learned judge said at Paragraphs 42 and 43:

> "...s[ection] 27A of the Act of 1985...provides, without limitation that "an application may be made to the leasehold valuation Tribunal for a determination whether a service charge is payable". Mr Fancourt [QC] raised both before the LVT and before this Tribunal a number of examples of issues which it would hardly be appropriate for the LVT to undertake to determine, at least if another more appropriate Tribunal was seized of the matter. This, however does not mean that Parliament has not also given the LVT jurisdiction to determine such issues.
>
> No doubt, if a party to proceedings before a LVT takes proceedings for the determination of such an issue before what the LVT accepts is a more appropriate court, the LVT will, as it did in the course of the Service Charges application adjourn its proceedings pending such determination. It has power so to do under its inherent jurisdiction to regulate its own procedure. That this would be a reasonable and proper course if an issue were raised, to take Mr Fancourt's examples, as to voidability for mistake, forgery or misrepresentation, I do not doubt. Such matters are better determined under Court procedures and by judges, rather than by specialist tribunals, encouraged to adopt comparatively informal procedures."

2. The Tribunal then invited both parties to consider whether they wished to issue proceedings in the County Court and to have their dispute heard there rather than in the Tribunal. The Tribunal adjourned to enable the parties to consider their positions. Upon resumption of the hearing, both parties said that they did not wish to issue proceedings in the County Court and that the Tribunal should hear the case. The Tribunal therefore proceeded to do so.

Background

3. This matter concerns the liability of the Applicant to pay a service charge to the Respondent. The application is made under section 27A of the Landlord and Tenant Act 1985 ("the Act").

4. Application was made to the Tribunal in June 2011.

5. Directions were given on 29 June 2009 in which it was determined that a pre-trial review was unnecessary.

6. There are related applications, made at the hearing, for an Order under section 20C of the Act and an application for reimbursement of the Applicant's fees under the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003. These matters are addressed below.

7. The subject property is a maisonette within a large estate of flats of which the Respondent is the freeholder. There is a communal heating and hot water system powered by central boilers. The Tribunal did not consider than an inspection was necessary.

8. The Applicant completed her purchase of the lease of the subject property on 13 November 2009.

9. The Applicant disputes her liability to pay a prospective service charge of £10,688.94. This is her proportionate share of the estimated cost of replacement of the distribution and internal pipework to the communal heating system. The total estimated contract sum is £509,639.49. A Notice of Intention was served on the Applicant on 7 June 2011. The work has not yet been carried out. The Applicant does not question the reasonableness of the sum or the necessity of the works but rather her liability to pay her proportionate share.

10. There was some uncertainty at the hearing as to whether the applicant was also challenging other amounts demanded by the Respondent. The Applicant clarified that she was challenging only the payability of the £10,688.94. (For the purposes of this decision, the Tribunal will refer to this as £10,689).

11. Prior to the Applicant's purchase, Ms Benson instructed a firm of solicitors, Messrs Taylor Walton, to act for her in this matter. The vendor also instructed solicitors, Messrs Healeys. As is standard conveyancing practice, Taylor Walton were sent various Enquiries before Contract (property information forms). The Applicant's solicitors also received from Healeys an eight page document referred to in the hearing as an "assignment pack". This followed a request made by Healeys to the Respondent, who created and supplied the assignment pack.

12. The assignment pack contained information to prospective purchasers of matters in the knowledge of the Respondent, in its capacity as freeholder. It is relevant that a fee of £150 was paid by Messrs Healeys to the Respondent for that assignment pack.

13. Of central importance in this case is a document contained in the assignment pack. This is a single A4 page headed "Future Major Works". This is appended.

The Applicant's Case

14. The Applicant's case is that the Future Major Works document did not refer to the need for the distribution pipework to be replaced, that the Respondent knew that this replacement work would be needed, and that no reasonable recipient of the Future Major Works document would think that the Respondent would then carry out major work giving rise to a proportionate share for the subject lease of £10,689.

15. Further, Ms Benson made it clear that she relied upon this information. Ms Benson said that had the information provided correctly referred to the replacement pipe distribution work then she would have either not proceeded with the purchase or otherwise sought a price reduction equal to the amount of the addition liability of £10,689.

16. For the above reasons the Applicant disputes her liability to pay this charge.

The Respondent's Case

17. The Respondent's case was that the Future Major Works page stated that the capital works team was awaiting information from the mechanical contract manager in the renewals division but that the timing of this information was unknown.

18. Ms Patel explained the entries on the Future Major Works document. She stated that the Table 5 entry "maintenance & repairs works possible" was a reference to cyclical costs such as roof repairs, window replacement and internal and external painting.

19. The second table entry termed "integrated reception system" was a reference to future telecommunication expenditure.

20. The last two paragraphs state that "boiler renewal is due to take place at the property". Ms Patel accepted that this boiler renewal was a reference to contract 09/197, costing some £4,537.09. This contract is quite separate from the disputed works. The Applicant has agreed to pay for the boiler renewal works.

21. Ms Patel therefore accepted that the replacement of the distribution and internal pipework was not referred to in the Future Major Works document, because all the entries related to other matters.

22. Ms Patel stated that there was a known problem with the pipework but that matters came to a head when a pipe burst in spring 2010. This then led to investigations which prompted the need for this very large expenditure (the estimate for which exceeds £500,000).

23. Ms Patel also initially suggested (when there was doubt as to the scope of the Applicant's complaint) that the Applicant and her solicitors were at fault in not raising further questions on the Future Major Works document to ensure that there

were no changes as between its date of issue, 1 October 2009 and the sale date, completion of which occurred on 13 November 2009.

24. However, Ms Patel later accepted that as far as the pipework replacement was concerned, no further information would have been provided prior to the completion date even if such a request had been made.

25. The Respondent's statement also referred to emails disclosed by Ms Benson between her and her solicitors in relation to the Future Major Works document. These covered the period both before and after her purchase. Prior to the purchase, Ms Benson received an email dated 21 October 2009 from Richard Atkins Esq., Property Partner, Taylor Walton LLP.

26. Mr Atkins stated "I would draw your attention to the page headed "future major works" from which you will see that it is possible that maintenance and repair works will be carried out in the next five years at an estimated cost of £3,000 per flat".

27. The Respondent also referred to some subsequent emails after Ms Benson had completed the purchase. Those concerned advice relating to her unexpectedly receiving notification of a future demand for £4,537.50. On 15 January 2010 Ms Caroline Collins of Taylor Walton wrote to Ms Benson advising that "unfortunately, we do not think that you would be able to pursue the Council on this point."

The Lease

28. The subject lease was granted by the Respondent to the original lessee (Chee Weng Tan) on 9 August 1993 for a term of 125 years from 14 May 1990. The Applicant acquired the residue of the lease, with this completing on 13 November 2009 (the Applicant was unable to state the contract exchange date). The assignor was a Mr M A Hariyato.

29. The Applicant has not taken issue with the construction of the lease or disputed that the Respondent is entitled to levy service charges under it. The Tribunal is satisfied that the lease, which is in modern form, contains provisions entitling the Respondent to recover service charges for the cost of the replacement pipework.

30. In particular, by clause 3.2.1 the tenant covenants to pay his or her specified proportion of the service charge in accordance with the fourth schedule. The fourth schedule sets out the relevant accounting mechanisms and allows charges for future expenditure to be imposed and on account demands levied. Paragraph 2 of the fifth schedule (itself headed "(items of expenditure)") specifically allows the landlord to recover the cost of repairing and replacing the whole of the heating and domestic hot water systems, water pipes and cables serving the Estate.

Section 20 Consultation Procedures

31. On 7 June 2011 the Respondent sent to the Applicant a "Notice of Intent to carry out replacement of the distribution & internal pipework to the communal heating system to 1-31 Churchway (odd) and 1-79 Doric Way (Odd)". The work is to be carried out under a partnering agreement. No issue was taken in respect of consultation procedures.

The Law

The Relevant Statutory Provisions concerning Service Charges

32. By s.27A of the 1985 Act:

> "(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.

The Law of Negligent Misstatement

33. Halsbury's Laws of England Volume 78 (2010) 5th Edition)/1 states the law as follows at Para 14:

> "Negligent statements.
> Where a defendant makes a statement which is reasonably relied upon by a claimant in the way intended by the defendant, there may be an assumption of responsibility sufficient to give rise to liability for economic loss flowing from the reliance. It is not necessary that the statement be made directly to the claimant; communication through an intermediary is sufficient. However, it is necessary that the defendant knows that his statement will be communicated to the claimant either specifically or as a member of an

> ascertainable class, and that the statement is likely to be acted upon by the claimant for the purpose for which the statement was made and that such was objectively the intention of the defendant. That purpose may be clear from the terms in which it is requested or required, but it may also be implied from the circumstances. Thus the purpose of a surveyor's report to a building society is not only to enable the society to meet the statutory requirement for the property to be valued but also to inform the purchaser, for it is common practice for such valuations to be passed to, and relied upon by, the purchaser [...].The claimant's reliance on the statement must be reasonable in order to give rise to a duty. The nature of the relationship between the parties, for example its commercial context or informal nature, may suggest that reliance is not reasonable. The specific circumstances may suggest that the claimant should have verified the information before placing reasonable reliance upon it; but the fact that the statement is one of opinion, or even as to future policy, does not preclude reasonable reliance provided the maker of the statement presented himself as having the requisite knowledge or authority.[...]" (footnotes omitted).

34. The Tribunal accepts the foregoing, extracted from a distinguished work, as an accurate statement of the law.

Findings

35. The Tribunal finds that the Future Major Works document is confused and unclear. The Tribunal considers that the first paragraph in stating "the table below is an accurate reflection of the current works scheduled..." gives the impression that the table is complete. That table then omits reference to the boiler renewal which appears in the last two paragraphs of the document. It is unclear whether or not the boiler paragraphs are an amplification of, or addition to, the matters stated in table 5.

36. The Tribunal finds that the document makes no reference at all to the distribution and internal pipework replacement. This finding is supported by the email from Mr Atkins to Ms Benson of 21 October 2009 in which a senior property solicitor had clearly not read the document as giving rise to the type of liability now being sought to be imposed by the Respondent. However, the weight which the Tribunal gives to this email is limited because Mr Atkins did not give evidence and could not therefore be cross-examined.

37. In any event, Ms Patel stated that at least one officer in the Council did know that the pipework was an ongoing problem and would need replacing, although the timing of the works was not clear. This is consistent with Para 36 of the Respondent's statement which records: "The heating works to this estate was (sic) always part of a borough wide programme of heating schemes works..."

38. The Respondent's case on this and other points was hampered by it not calling any factual witnesses who could give clear evidence about these matters.

39. Further, the Tribunal finds it implausible that the likely need for these very expensive and essential works providing heating and hot water to a large number of its tenants (approximately 55 dwellings) was completely unknown to the Respondent as at 1 October 2009 when it issued the assignment pack.

40. For the above reasons the Tribunal finds, on the balance of probabilities, that the Respondent did know of this problem and, had the Respondent addressed their mind to it, that there was a real likelihood that works would be required in the short or medium term.

41. Consequently, the Tribunal finds that the Future Major Works document was deficient in not specifically referring to the likely need for pipework replacement, or at the very least of explaining that there was a specific risk that such work would be needed.

42. The Tribunal also finds that the Respondent knew that a prospective purchaser would rely on the Future Major Works document in deciding whether to proceed, that the Respondent was in a position of special knowledge in relation to the this matter, and that the Respondent had charged a fee of £150 in providing that information.

43. For those reasons the Tribunal finds that the Respondent assumed a duty of care to the Applicant to take reasonable care in producing the Future Major Works document.

44. The Tribunal further finds that there was a breach of that duty because the Future Major Works document was inaccurate in not making reference to the likely need to replace the distribution and internal pipework or at least of the risk of this. Further, the Respondent should have realised that this would involve a large potential expenditure and be a matter of great importance to any purchaser.

45. The Tribunal also finds that the type of damage suffered by the Applicant, namely over-paying for the property, was a kind of harm that was clearly foreseeable as a result of the Respondent's breach of its duty of care.

46. The Tribunal, in response to the Respondent's submission that the Applicant's solicitor ought to have raised further inquiries immediately prior to exchange, referred to and read out section 1 of the Law reform (Contributory Negligence) Act 1945. This states at section 1(1):

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage..."

47. Ms Patel then accepted that the section had no application to this case.

48. The Tribunal finds that there is no contributory negligence by the Applicant.

49. For completeness, the Tribunal should address the suggestion that Taylor Walton had advised Ms Benson that she would not be able to pursue the Council (Ms Collins' email of 15 January 2010). It is quite clear from the chronology that Ms Collins' advice related to the boiler works cost of £4,537.60 and not the pipework replacement. This is because the notice of intention to carry out the pipework replacement was not issued until 7 June 2011. Furthermore, the Tribunal is in no sense bound by legal advice given to parties.

50. The Tribunal found Ms Benson to be a straightforward witness. It accepts her evidence that she relied on the Future Major Works document in deciding to proceed with the purchase. This finding is also supported by the email exchange with her solicitors in connection with the boiler works. Referring to this in an email to Ms Collins on 14 January 2010, the Applicant said "it would have potentially affected my decision on purchasing the property had I had the correct information..."

The Effect of the Findings on the Future Claim for Service Charges

Main Findings

51. The law relating to the defences of the kind in this case and their relationship to the Respondent's claim is complex. The Tribunal heard no argument in relation to this.

52. In summary, the defence of liability in negligent misstatement could potentially be an "equitable set-off" against the future claim for the cost of pipework replacement or alternatively as a "counter-claim" against the Applicant to the Respondent. An equitable set-off is a defence; a counter-claim is not a defence but a separate action from the Applicant to the Respondent.

53. An equitable set off would have the effect of extinguishing the Respondent's claim whereas a counter-claim would be a cross-claim against the Respondent. In *Federal Commerce & Navigation Co. Ltd. v Molena Alpha Inc* 1979 Lord Denning MR said

> "To qualify as an equitable set off it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it and it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim."

54. The Tribunal finds that there is a sufficiently close relationship between the negligent misstatement by the Respondent and its demand for future service

charges so as to give rise to an equitable set off in this case. The reasons are as follows.

55. Firstly in making both the misstatement and in intending to levy future service charges, the Respondent was acting in the same capacity as the freeholder of the property. Secondly, there is a direct and clear relationship between the omissions in the Future Major Works document and the future sums to be demanded for the pipework replacement.

56. The Tribunal therefore finds that it would be inequitable for the Respondent to claim for the cost of the replacement pipework against the Applicant. The Tribunal therefore finds that the Applicant is entitled to an equitable set off against a future service charge claim in respect of this item by the Respondent.

57. The practical effect of this is that no service charge arising from the pipework replacement will be payable by the Applicant to the Respondent. This extends to demands for payments on account in respect of these works.

Alternative Findings

58. Should the matter go on and should the Tribunal be found in error in holding that the Applicant is entitled to an equitable set off, it would alternatively find that the Applicant had a counter-claim against the Respondent. This requires quantification of the counter-claim. The normal measure of damages in tort is that sum of money necessary to place victim in the same position as if the tort had not occurred. The date of assessment is the date of exchange of contracts in 2009. Ms Benson made it clear that, if the pipework replacement had been disclosed, she would have sought a price reduction equal to the amount of the cost. The Tribunal accepts that evidence.

59. Although the amount or estimated cost of the pipework replacement was self-evidently unknown to Ms Benson when she made her offer for the property, an amount has now been put forward by the Respondent. In those circumstances the Tribunal is entitled to consider the matter in light of what is known as at the date of the hearing.

60. In the leading authority on this point, *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co*, [1900-03] All ER Rep 600 Lord MacNaghten when referring to an Arbitrator said

> "In order to enable him to come to a just and true conclusion it is his duty, I think, to avail himself of all information at hand at the time of making his award, which maybe laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?"

61. As at the date of the hearing, the best evidence of the Applicant's loss at the date that she contracted to buy the property is £10,689.

62. The effect of this would be that the Applicant is entitled to relief from liability for the cost of the pipework replacement up to £10,689.

However, should the final sum payable exceed £10,689, she would be liable to pay the amount in excess of that sum.

The Application for an Order under section 20C of the 1985 Act

63. Section 20C of the Landlord and Tenant Act 1985 (inserted by the Landlord and Tenant Act 1987) provides:

> "(1) A tenant may make an application for an order that all or any of the costs incurred ... by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal ... 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."

64. The sole guidance as to how such application is to be determined is contained in sub-section (3) as follows:

> "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."

65. In the Tribunal's judgment this is the only principle upon which the discretion should be exercised. This will include the degree of success of the tenant and the conduct of the parties.

66. Ms Patel informed the Tribunal that the Respondent would not seek to impose a charge on the service charge fund in respect of the hearing. However, the Applicant has won her case and the Tribunal considers it just and equitable to make an Order under Section 20C.

The Application for Reimbursement of Fees under the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003

67. The above regulations in so far as relevant provide

> "9.—(1) ...in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings."

68. The Applicant made an oral application at the hearing. The Respondent's case, which was included in its written submissions, was that the Applicant had not exhausted the Council's internal complaints procedures before bringing this action and consequently should not have her fees reimbursed. The Tribunal finds that the

Applicant was under no legal duty to exhaust any internal complaints procedure (of which no detail was provided) and also accepts that the Applicant had been advised to make her Application by the Citizen's Advice Bureau. Furthermore, the Tribunal does not consider that there was any real prospect of the matter being settled without litigation.

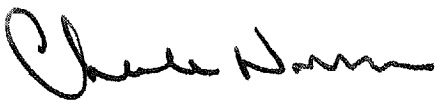
69. Accordingly, the Tribunal finds that the Applicant was justified in bringing these proceedings in which she has succeeded. For those reasons the Tribunal considers it just and equitable that her application and hearing fees are reimbursed in full by the Respondent, such costs to be paid within 21 days of the date of this decision.

Formal Determinations

70. The Tribunal finds that the amount that will be payable (including sums payable on account) by the Applicant to the Respondent in respect of the pipework replacement is nil.

71. The Tribunal **ORDERS** that none of the costs incurred by the Respondent in connection with proceedings before the leasehold valuation Tribunal under case no LON/00AG/LSC/2011/0428 are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant to this action.

72. The Respondent shall reimburse the Applicant her application and hearing fees in connection with these proceedings such amounts to be paid within 21 days of the date of this decision.



C Norman FRICS
Chairman

5 September 2011

Future Major Works

The table below is an accurate reflection of the current works scheduled at this moment in time. Please note, this schedule and costs may be subject to amendment as these works have not been finalised. The amounts listed are based on budget forecasts, these works have not yet been tendered out. **All Major works charges are subject to the addition of a 10% 'Management Charge' as provided for under the terms of the lease. Charges for major works schemes also carry an additional fee for technical surveys. This could be up to a further 20%.**

Table 5.

Future Major Works		
Description	**Date**	**Programme Cost**
Maintenance & repairs works possible*	Not yet known	£ 3,000.00
		estimated cost for this flat
Integrated Reception System**	Within the next	£ 400.00
	5 years	estimated cost for this flat

*This flat has already received external works through the Council's capital programme. The works were completed in August 2003. It is therefore possible that maintenance and repairs works will be carried out in the next five years at an estimated cost of £3,000 per flat.

In the event of works being programmed, statutory consultation would take place before these begin and leaseholders recharged for their contribution towards the works.

**Work is due to take place within the next 5 years to upgrade the communal aerial to an Integrated Reception System which will allow it to receive a digital television signal. The anticipated maximum cost for this is £400 per flat.

Boiler renewal is due to take place at the property. The Capital Works Team in Home Ownership Services (HOS) is awaiting information from the Mechanical Contract Manager in the Renewals division before sending S20 notices to leaseholders. A Capital Service Charges Officer has advised that she has chased for relevant information, but does not know when HOS will receive this or when the S20 notice will be sent.

We advise that no further information is currently available in respect of the nature of the works or the timetable of when they are to commence. A S20 notice will be issued prior to the works going ahead which will provide relevant information and contact details.