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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/43UC/LSC/2013/0080

Property : Flats 33 & 7, Teddington Close,
Epsom, Surrey KT19 9DW

Applicant : Roseberry Housing Association

Representative : Not applicable

Respondent : Mr Richard Nimse and Ms Jill Romaine

Representative : Not applicable

Type of Application : Service Charges
Sections 20C and 27A Landlord
and Tenant Act 1985

Tribunal Members : Judge Paul Letman and Mr Robin Potter

**Date and venue of
Hearing** : On Paper

Date of Decision : 08 November 2013

DECISION

The Application

1. The Applicant Roseberry Housing Association (hereafter 'Roseberry') is the successor in title to the local authority and current freeholder of 4 blocks of flats at Teddington Close numbered 1-8, 9-17, 18-25 and 26-33 and 1 block at Nimbus Road numbered 55-59 all on the Longmead Estate, Epsom, Surrey.
2. The Respondents are private leaseholders; Mr Nimse is the lessee of flat 33 and Ms Romaine the lessee of flat 7, in each case under a lease for a term of 125 years, all as set out in greater detail below. Each block of 8 flats contains 4 privately owned flats subject to such long leases and 4 flats retained by the housing association.
3. By application (in form LVT4(06/11)) dated 05 July 2013) Roseberry applied pursuant to sections 27A and 19 of the Landlord and Tenant Act 1985 for a determination whether if the costs of proposed works to replace the communal lighting installation in each block were incurred a service charge would be payable for those costs.
4. The scope of the proposed work (so the application states) includes (1) Rewiring of all the existing lighting circuitry (2) Replacement of all the existing light fittings (3) Provision of emergency lighting (4) Provision of photo cell control to the lighting, and (5) Renewing control gear. The estimated cost of these works to the communal lighting system ('the system') is some £8,000 per block and therefore £1,000 per property.
5. More particularly Roseberry requests the tribunal to determine 'whether the cost of the works [referred to above] are repairs and the costs recoverable or improvements in which case the cost would not be recoverable in accordance with the terms of the lease.' However, Roseberry also states that it accepts that the cost of the provision of emergency lighting 'is an improvement and no costs for this part of the work will be recovered.' The tribunal accept the latter concession, and accordingly make no determination herein in respect of the emergency lighting.

Procedure

6. The application itself invites the tribunal to deal with the case on the fast track. On 22 July 2013 Directions were made by Judge Agnew. The directions confirmed that the tribunal proposed to deal with the matter on the paper track, and made

provision for the filing and service of a statement of case firstly by the Applicant, to be followed by a statement in reply by the Respondent.

7. Pursuant to the said directions the Applicant provided a statement of case dated 14 August 2013 signed by the neighbourhood officer Susan Ellis, to which were appended the following:
 - 1) A report dated April 2013 commissioned by the Applicant from Hulley & Kirkwood Consulting Engineers Limited, reporting on the landlord's lighting installations at Teddington Close and Nimbus Road,
 - 2) Copy maintenance report for the period from about November 2010 until April of 2013.
8. In response on behalf of the Respondents Mr Nimsehas provided a statement of case, with appended correspondence between himself and Roseberry, a CD showing the existing lights in his block, and copy weekly maintenance reports from Cleanscape covering weeks in August and September of 2013.

The Lease

9. The tribunal has before it a copy of the lease of flat 33 (the 'Lease'), being a lease for a term of 125 years from 25 March 1980 subject to the terms set out therein and yielding and paying a rent and service charge. It is understood and taken to be the case for present purposes that all of the said leases are in substantially the same form.
10. In so far as is presently material the Lease provides as follows:
 - 1) Under the first recital, paragraph (8) 'the Property' means the property described in the Second Schedule hereto (I) 'the Flat' means the premises described in the Third Schedule hereto (J) 'the Services' means the existing and future gas and water pipes, boilers, ducts and pipes and any other things installed for the purpose of supplying hot water or central heating, water tanks, cisterns, ducts, drains, sewers, electric wires, cables, ducts, conduits, cable or other installations for the receipt directly or by landline of visual or other wireless transmission ... and electric meters.
 - 2) By clause 2 of the Lease the lessee covenants with the landlord amongst other things as follows (a) to pay the Service Charge as defined in and in the manner and at the times more particularly referred to in the Sixth Schedule hereto
 - 3) By clause 3 the landlord covenants with the lessee amongst other things (a) to perform and observe the covenants set out in column I of the Seventh Schedule hereto subject to the payment by the lessee of the Service Charge

- 4) Under the Second Schedule the property is defined as the building together with its gardens and grounds and other appurtenances situate at and known as 26-33 Teddington Close, Epsom as the same is shown coloured pink on the said plan A (no copy of the said plan is provided).
- 5) Under the Third Schedule the Flat is defined as the Flat known as Flat No.33 on the second floor of the Property and shown edged red on Plan B (again the plan is not provided) together with a store and piece of garden area.
- 6) Under the Sixth Schedule Part I the Service Charge is defined in so far as is presently material to include at (2)(a) a reasonable proportion of the expenses of the following:
 - (ii) the provision of any service for the benefit of the Flat and the other flats or of any installation of any other thing for the benefit of the Property or the undertaking of any matter which in the reasonable opinion of the landlord is necessary or desirable for the proper repair maintenance management or administration of the Property.
- 7) Under the Seventh Schedule Part I, at paragraph 2 Repair, that the landlord will keep the following parts of the Property in repair (a)(ii) the common entrance way(s) and hall(s) stairways landing and all other common parts, and (b) the landlord will keep the following in repair gas and electricity meters.
- 8) Further under the Seventh Schedule Part I, at paragraph 3 Services, that (a) The landlord will keep in repair the Services in the Property used by the landlord in common with the occupiers of the other flats.
- 9) Yet further under the Seventh Schedule Part I, at paragraph 5 Common Parts, that the landlord will so far as is practicable keep the common entrance way(s) hall(s) stairways and landings and other common parts clean and tidy and keep adequately lighted all such parts thereof as are normally lighted or should be lighted.

The Law

11. Under section 18 of the Landlord and Tenant Act 1985 (as amended) service charges are defined as amounts payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and the whole or part of which varies or may vary according to the relevant costs.

The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord (lessor), or a superior landlord, in connection with the matters for which the service charge is payable.

12. By section 19 entitled Limitation of service charges: reasonableness, it is provided at sub-section (1) that 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 provision 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.
13. Under section 27A of the 1985 Act the tribunal has jurisdiction to determine what is often referred to as payability, that is to say in respect of costs yet to be incurred whether, if costs were incurred for services, repairs, maintenance, improvements, insurance, or management of any specified description, a service charge would be payable for those costs, and if so, the amount which would be payable.
14. In determining whether costs in question would be payable, therefore, the tribunal must first consider whether the proposed works are covered by the provisions of the lease, because they are to remedy some disrepair or otherwise, and then the statutory test, whether if the costs were to be incurred they would be reasonably incurred. In assessing the latter question in advance of the works being carrying out, the tribunal must examine whether the extent of the proposed works and their costs are reasonable (see *Forcelux v Sweetman* [2001] 2 EGLR 175). There is no presumption for or against a finding of reasonableness rather a tribunal must reach a conclusion on the whole of the evidence.
15. As to the proper meaning of repair, the case law is extensive. Suffice to say, however, that it is well established that before liability can arise under a covenant to repair, the subject-matter of the covenant must be out of repair (see *Post Office v Aquarius Properties* [1987] 1 All ER 1055, CA). Further, as the questions posed by Roseberry in its application recognise, a covenant to repair does not involve a duty to improve the property. Ordinarily, however, a repair should be carried out in such as way as to satisfy current building and other regulations (*Lurcott v Wakely* [1911] 1 KB 905), provided that is the work required by virtue of the new regulations does not fundamentally alter the subject matter of the covenant.
16. Likewise if the only sensible practical way of carrying out a repair effects an improvement in the subject matter of the covenant the works will still normally

be regarded as works of repair (*Ravenseft Properties v Davstone (Holdings)* [1980] QB 12). More particularly, in relation to electrical wiring, a covenant to keep wiring in repair has been held to require the covenantor to rewire the electrical system one it reaches the end of its useful life (*Roper v Prudential Assurance* [1992] 1 EGLR 5), and there is little doubt that such works should be done in accordance with current regulatory standards.

The Inspection

17. For the purposes of this decision the tribunal visited the subject premises on 07 October 2013 between 10am and 12 noon. It was obviously daytime between these hours, and the weather was fine. The five blocks are all of similar setting, construction and design. Built in the 1980's each comprises a 3-storey building of mainly brick construction with some and a newer tiled and pitched roof (replacing the original flat roofs). The blocks each have an open stairway and landings, and contain 8 flats and ground floor storage areas.
18. The lighting in question comprises multiple ceiling mounted 8W fluorescent luminaires at each level, usually positioned to light the landings just outside the front doors to the flats. At the Teddington Close blocks the tribunal observed a variety of different luminaires, some were originals but generally these had been replaced by newer versions of the old. Indeed the tribunal noted at least 3 different types of replacement fitting, including (in block 18-25) some circular bulkhead luminaires.
19. Generally the wiring for the luminaires is concealed in flush conduit above ceiling and there are accessible landlord's electrical cupboards containing the fuse boxes, emergency lighting test key switch and the time clock that presently controls the installations at Teddington Close. However, the newer replacement luminaires are in some locations combined with emergency lighting installed in 2012 the wiring for which is contained in service mounted plastic conduit. Apart from the replacement luminaires and new emergency lighting the installation is original. A number of luminaires both original and replacement were insecure, some covers cracked and the original covers opaque with age, affecting efficiency.
20. At the Nimbus Road block, however, some more extensive works have been carried out to the electrical installation about 2 years ago. All of the luminaires have been replaced with a range of 28W 2D compact circular bulkhead luminaires, some of which have an integral emergency facility. Further, the lighting here is controlled by a photocell arrangement that has been added to the installation. Otherwise as Mr Critcher indicated to the tribunal on the inspection (the report below is unclear on the point) the wiring and remainder of the installation remains the original.

21. Present at the inspection on behalf of Roseberry were Sue Ellis (referred to above) and their surveyor Robert Critcher. Mr Nimse was also present throughout the visit on behalf of the Respondents. Although the view was not taken as an opportunity for either side to make further submissions, both parties were able to assist the tribunal by pointing out details of the present installation and its current state. In particular Mr Nimse pointed to a number of light covers and bulkhead fittings that were poorly fixed and loose.

The Parties' Cases

22. The Applicant advocates the replacement by way of repair of the existing communal electrical installation, as referred to in the application and recited above. Roseberry's statement of case notes that in recent years they have experienced more frequent problems with the communal lighting, requiring increased re-lamping and replacement of bulkhead fittings. The extract of the maintenance logs support this claim in respect of the Teddington Close blocks but not the one in Nimbus Road.
23. Thus against Teddington Close block 1-8 there are 2 work orders for 2010, 2 for 2011 and one in June 2012, for block 9-17 there is 1 in 2011 and 3 in 2012, for block 18-25 there are 2 works orders in 2011, and against block 26-33 there are 2 in 2011, 1 in 2012 and 2 in 2013, most recently in April. The orders usually describing the works in terms of overhaul, re-lamping or renewing of bulkhead fittings. Whereas the maintenance log only records one work order against Nimbus Road in July 2012, when it was reported that the top floor lights were not working and the middle floor lights were flickering.
24. In support of its case to carry out the replacement of the present installation Roseberry have commissioned and produce a report dated 12 April 2013 ('the Report') from Hulley & Kirkwood Consulting Engineers Limited ('Hulley & Kirkwood') on the landlord's lighting installations in all blocks. The author of the report is one Peter Calderon, and the report refers to his being authorised on behalf of Hulley & Kirkwood by Gordon McInnes, presumably his principal in the organisation. This is the only expert evidence before the tribunal. There is no challenge to the factual content of the report or to expertise of the author, though the interpretation of the report as regards the Respondents' liability is contentious as discussed below.
25. Without reciting the entire text of the Report, the tribunal notes that under 'Existing Lighting Installation' the installation in Teddington Close is described as 'in serviceable condition, however, a number of luminaires are not operating.'

In relation to the Nimbus Road block the Report states that 'Similarly ... there are a number of luminaires which are not operating.'

26. As regards lighting levels the Report records that 'the Teddington Close levels were in the range of 1-50 lux with an average of approximately 20 lux and in Nimbus Road they were in the range of 2 to 101 lux with an average of approximately 35 lux' (figures which would appear to include defective fittings). These illumination levels are said to be 'generally in line with current practice at the time the buildings were constructed' but points out that current CIBSE guidance requires an illumination level of 100 lux at floor level in corridors and on stair treads, so that the existing illumination levels fall far short of current practice.

27. Turning to the key issues of life expectancy and replacement the Report states in particular as follows:

'The lighting installations in both Teddington Close and Nimbus Road have issues of luminaire failure, however, with suitable repair and maintenance regimes, the existing installation could remain as it is for a number of years, albeit that the issues of lighting levels and emergency lighting would not be addressed.

The lighting installation in Teddington Close being more aged is approaching the end of its working life and will require increasing levels of maintenance over the coming years. We would anticipate eventual renewal being required in the next 3 to 4 years.

In the light of the age of the installation, low illumination levels and sporadic emergency lighting levels, we would recommend replacement of the installation with more efficient luminaires with higher output, either high efficiency fluorescent or LED luminaires.'

28. Further, as to the Landlord's switchgear, the distribution boards in Teddington Close are confirmed to be original, no longer readily available and 'at the end of their working lives.' In Nimbus Road the distribution board has been replaced with more modern equipment. As regards the wiring in Nimbus the report says it is 'not clear whether the existing wiring has been renewed, but as noted above the evidence before the tribunal is that it has not been, and in so far as necessary the tribunal find this to be the case.

29. Under the heading Recommendations the Report concludes 'In the short term we would recommend that all failed luminaires are returned to working order and that all luminaires are cleaned and relamped' and that the emergency lighting installation should be addressed. In summary 'to bring the installations in line

with current practice' the report recommends the work proposed by Roseberry in its application (and enumerated at paragraph 4 above).

30. The Respondents by the statement of case submitted by Mr Nimse oppose the replacement of the entire communal lighting system in all of the blocks. Mr Nimse contends firstly that there is no need to do so, and that the system could easily be repaired at far less cost. Secondly, he says that the existing system would have a much longer life if properly maintained by Roseberry. He complains that the maintenance is often delayed and poorly carried out. For example, when bulbs are replaced the covers are not screwed back properly or screws are missing leading to insects and, worse, damp getting into the fittings. Thirdly, the Respondents contend that replacing the entire lighting system is clear an improvement and not a repair, and the leaseholders are not liable for Roseberry's costs of improving their properties. Further, reviewing Roseberry's maintenance records Mr Nimse points out that 'practically every single repair is to the lamps. Not the wiring. Not the switchgear.'

Analysis

31. As the discussion of the law above indicates, the first issue for the tribunal is to determine whether the proposed works are within the scope of the relevant lease provisions, before coming to the statutory test of reasonableness. Further, that merely because remedial works effect an improvement does not mean they are not works of repair. If for example the luminaires, wiring or switchgear are out of repair, the fact that the remedial works would result in replacement of these elements in accordance with current standards so as to effect a significant upgrade of the system would not in the tribunal's view be objectionable, as this must be the only way in which the works can now properly be carried.
32. Whilst the communal lighting system is probably correctly treated exclusively as part of the Services so as to engage clause 3(a) of the Seventh Schedule Part I, even if parts such as the luminaires were instead to be regarded as part of the common parts, stairways or landings so as to engage clause 2(a)(ii) of the said Schedule, the principal obligation on the landlord is the same, 'to keep in repair' the installation comprising the wiring, switchgear and luminaires. The primary issue, therefore, is whether the system is in such a state of disrepair as to oblige the landlord to carry out of all of the proposed works by way of repair and thence recover service charges based upon the costs of replacing the entire system from the Respondents.
33. Based upon the evidence presented and its own inspection the tribunal's judgement is that the system is not in such a state of disrepair that its condition presently justifies the full extent of the works proposed by the Applicant. There are luminaires in disrepair and these should be repaired. In the case of the few original luminaires such is the state of their disrepair, given the deterioration in

the covers and fittings, that they should obviously be replaced with new by way of a proper repair. More recent replacement modern fittings, however, generally do not require replacement but relamping, cleaning and local repairs such as replacement screws and adequate securing of covers to fittings and fittings to bulkheads.

34. With regard to the Teddington Close blocks, given the un-contradicted expert evidence of Hulley & Kirkwood (under section 5.0 paragraph 2 of the Report) that the original distribution boards have reached the end of their useful life and the apparent deterioration over time of these units (indeed on the inspection some of the switching was found to be out of order) the tribunal are satisfied on the evidence that the switchgear in these blocks is in disrepair and needs to be replaced (as noted above, the units are no longer readily available). The same cannot be said, however, in respect of the Nimbus Road block where the switchgear has already relatively recently been upgraded and simply cannot be said at this stage to be in disrepair so as to justify replacement there.
35. As to the system wiring in all blocks, however, there is no evidence before the tribunal that this is in a deteriorated state or has reached the end of its useful life or otherwise is in a state of disrepair. No standard load tests or other evidence is produced that might condemn its continued use. On the contrary the fact that the existing wiring was used when most other parts of the system in Nimbus Road were upgraded indicates that there is nothing wrong with the wiring that might justify the proposed complete re-wire. Certainly, it is not part of the evidence before the tribunal that the wiring has to be replaced as a necessary adjunct to the replacement of switchgear or to repair of luminaires. Indeed again the experience at Nimbus Close would contradict such a claim.
36. Moreover, even looking at the matter more broadly the expert report does not support the carrying out of all of the proposed works. As recited above the existing lighting system (apart from the switchgear) in the Teddington Close blocks is described as 'in a serviceable condition' and in relation to both Teddington and Nimbus it is said that 'with suitable repair and maintenance regimes, the existing installation could remain as it is for a number of years.'. For Teddington Close blocks where in the main the system is the original the number of years is put at 3 to 4. For Nimbus Road where renewal works have been more extensive, the number of years is presumably even greater.
37. In the tribunal's view this expert evidence does not justify replacing the entire system at the present time. Thus even if contrary to the tribunal's assessment above, different parts of the system could be regarded as in disrepair, the costs of the proposed works would not in our view be reasonably incurred at this juncture and accordingly would not satisfy the statutory test. Rather the only works of repair the costs of which would in the tribunal's view be reasonably incurred at this stage, are those justified by the state of disrepair and accordingly covered by

the lease covenants, namely the replacement of original luminaires and local repairs to other luminaires as appropriate together with the replacement of the landlord's switchgear in the Teddington Close blocks.

38. For completeness the tribunal has also considered whether the proposed works, and specifically of course those that in accordance with the views expressed above are not within the scope of the landlord's principal repairing covenants, might be carried out pursuant to some other obligation in the lease. There are two potential candidates (as set out above in full under the lease terms), namely paragraph 2(a) of the Sixth Schedule and paragraph 5 Common Parts of the Seventh Schedule.
39. As to paragraph 2(a) of the Sixth Schedule, however, the power to provide any installation for the benefit of the blocks is in the tribunal's view conditioned by the requirement that the installation is necessary or desirable for the proper repair maintenance management or administration of the block (indeed so much appears to be conceded by the Applicant given their case that they have no power to improve rather than repair the blocks). In the tribunal's view, the proposed works could only potentially be covered by the reference to repair or the analogous duty to maintain, and therefore, for the reasons already stated above this clause does not assist the Applicant.
40. The obligation under the Seventh Schedule Part I, at paragraph 5 Common Parts, that the landlord will so far as is practicable keep the common entrance way(s) hall(s) stairways and landings and other common parts clean and tidy and keep adequately lighted all such parts thereof as are normally lighted or should be lighted, also in the tribunal's view cannot be relied upon to cover the costs of the entire proposed works. The obligation to keep the landings adequately lit must be construed according to the condition of the blocks when demised, and cannot therefore impose any requirement to provide improved lighting. Moreover, this obligation is primarily concerned with everyday maintenance, cleaning and the replacing of bulbs, rather than any greater obligation to repair the system.
41. In any event of course even if the tribunal were wrong in its interpretation of these further obligations, so as the complete replacement of the system could be brought within their scope, the proposed works would still have to satisfy the statutory test of reasonableness. Thus, for the reasons stated above in our view the works for which costs could be recoverable as a service charge would again be limited as detailed at paragraph 37 (above).

Decision

42. For the reasons stated above, subject to correct demands under the leases and compliance with the necessary statutory consultation procedures under the Landlord and Tenant Act 1985, and in due course execution at a reasonable cost and to a reasonable standard, in the tribunal's judgement, of the proposed works, the costs of works for which a service charge would be payable by the Respondents to the Applicant if incurred would be the replacement of original luminaires and local repairs to other luminaires as appropriate in the Teddington Close and Nimbus Road blocks, together with the replacement of the landlord's switchgear in the Teddington Close blocks. However, whilst the intentions of the Applicant are plainly laudable, as demonstrated by its concession in respect of emergency lighting, the costs of the more extensive works proposed, including replacement of all wiring and luminaires, would not in our view be payable as a service charge at the present time.

Appeal

43. Pursuant to rule 36(2)(c) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169) ('the Rules') the parties are duly notified that they have a right of appeal against the decision herein. That right of appeal may be exercised by first making a written application to this tribunal for permission to appeal under rule 52 of the Rules. An application for permission to appeal must be sent or delivered to the tribunal so that it is received **within 28 days** of the latest of the dates that the tribunal sends to the person making the application (a) written reasons for the decision or (b) notification of amended reasons for, correction of, the decision following a review (under rule 55) or (c) notification that an application for the decision to be set aside (under rule 51) has been unsuccessful.

Dated 08 November 2013

Judge Paul Letman