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MIDLAND RENT ASSESSMENT PANEL

Case Number: BIR/00CN/LSC/2006/0003

Landlord and Tenant Act 1985 as amended by  
Commonhold and Leasehold Reform Act 2002

**DETERMINATIONS OF THE LEASEHOLD VALUATION TRIBUNAL**

In the matter of

**Cooks Lane and Gressel Lane Management Limited**

**(the Applicants)**

and

**Michael John Kielty**

**(the Respondent)**

**on the Applicants' application under section 27A for determinations of liability to pay service charges for the years 2003, 2004, 2005 and 2006**

**Properties: 392 Gressel Lane, Tile Cross, Birmingham B33 9UX**

Heard at: The Panel Office

On: 27<sup>th</sup> July 2006 and 27<sup>th</sup> October 2006

**APPEARANCES:**

The Applicants: Mr. Blee of the Applicant Company at both hearings and (27<sup>th</sup> October 2006) Eyre and Co., Solicitors

The Respondent: No Appearance

Tribunal members:

Mr W J Martin, (Chairman)

Mr D J Satchwell F.R.I.C.S.

Date of determination: 27<sup>th</sup> October 2006

**DETERMINATION:** That the service charges demanded of the Respondent are not payable because the Applicant has not complied with the requirements relating to service charge assessment and demand contained in the Lease

**The application:**

- 1 The Applicant applied to the Tribunal (the '**Application**') dated on 3<sup>rd</sup> March 2006 for a determination of the Respondent's liability for service charges for the years 2002/2003, 2003/2004, 2004/2005 and 2005/2006. The commencement date of each year is 1<sup>st</sup> December, and according to the Applicant, the Respondent has paid no service charges since December 2001. The Applicant states in the Application that '*pursuant to Clause 2(12) of (the Lease) a service charge of £20 per month is levied. No service charge has been paid by the Tenant since December 2002*'.

**The Properties and adjoining/adjacent property:**

- 2 The subject Property (the '**Flat**') comprises a first floor flat in one of three purpose built blocks in Tile Cross, Birmingham. There is a garage in a separate block. There are a total of thirty similar flats in three separate blocks in the development.

3 **The Statutory Provisions**

**Section 27A of the Act:**

**27A Liability to pay service charges: jurisdiction**

(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) – (7) *(not relevant to the Application)*

**The Lease**

- 4 The Flat is held under an Underlease (the '**Lease**') dated 21<sup>st</sup> November 1975 and made between David Charles Estates Limited (1) and David Jackson Smith and Jean Frances Smith (2). The term of the Lease is 99 years (less three days) from 30<sup>th</sup> June 1961 and a ground rent of £30 per annum is reserved. Clause 2 contains the Lessee's covenants, which includes the following covenant at Clause 2 (12):

*'To pay to the Lessor the Lessee's contribution to the Lessor's expenses as defined by and assessed pursuant to and in the manner set forth in the Sixth Schedule hereto and so that such contribution shall be recoverable by distress as if the same were rent in arrear'*

Clause 3 contains the following covenant by the Lessor:

*'The Lessor hereby covenants with the Lessee during the said term to paint repair uphold cleanse maintain and manage the Lessee's Block and the Retained Property in accordance with the provisions of the Fifth Schedule hereto'*

The Fifth Schedule contains eight paragraphs relating to the upkeep of the development. Paragraph 8 reads:

*'8 To keep or cause to be kept proper accounts of the Lessor's expenses as defined by the Sixth Schedule'*

The Sixth Schedule is divided into three parts. The first part defines 'the Lessor's Expenses' in carrying out the obligations in the Fifth Schedule. Parts 2 and 3 of the Sixth Schedule provide:

*Part II*

*'The Lessee's Contribution'*

*The Lessee's contribution to the Lessor's expenses shall be one equal thirtieth part of the Lessor's expenses*

*Part III*

*Assessment and payment of the Lessee's Contribution*

- 1. The Lessor or its agent shall estimate in advance the Lessee's contribution for each year or part year of the term ending (except in the last year) on the twenty fifth day of March and shall serve written notice of such estimate on the Lessee.*
- 2. The Lessee shall pay such estimated sum by four equal instalments in arrear on the twenty ninth day of September the twenty fifth day of December the twenty fifth day of March and the twenty fourth day of June provided that no such instalment need be paid less than fourteen days after the service of such notice as aforesaid*
- 3. The Accounts of the Lessor's expenses to be kept pursuant to paragraph 8 of the Fifth Schedule shall within three months after the end of the year of the term to which they relate be audited by the Lessor's Accountants who shall within such time as aforesaid assess the Lessee's contribution in accordance with the provisions of this Schedule and certify the same*
- 4. Such estimate and accounts as aforesaid may if so determined by the Lessor or its agents make provision towards a reserve fund for major repairs expected to be required to or in respect of the Lessee's Block and the said three other blocks during the next five years of the term (or any shorter period) after the year in question Provided that any such reserve fund shall be invested in trustee investments or deposited with a Bank and the income therefrom shall be credited to such fund.*
- 5. The Lessor shall without delay after such assessment and Certificate by the Accountants as aforesaid serve on the Lessee copies of the audited accounts and assessment and Accountant's Certificate and within twenty one days after such service the Lessee shall pay to the Lessor or shall be entitled to receive from the Lessor the balance over or under the estimated sum paid by the Lessee as aforesaid*

*6. The Certificate by the Lessor's Accountant as to the amounts of the Lessors's expenses and of the Lessee's contribution thereto shall be conclusive and binding on the Lessor and Lessee save in the case of any manifest error appearing therein.*

**Jurisdiction**

- 5 Our jurisdiction is not contested and we are satisfied that we have the jurisdiction to determine the Application.

**Inspection and Hearing**

- 6 We inspected the exterior of the premises on 27<sup>th</sup> July 2006 in the presence of Mr. Blee, a representative of the Applicant. We were unable to gain access to the interior. Following the inspection a hearing was held at the Panel Office, which was attended by Mr. Blee. As a result of the inspection and the hearing, the following became apparent:

- 7 (a) The Applicant is a management company set up by the owners of the 30 flats in the development, and in 1996 the Applicant acquired the head leasehold interest. Mr. Blee informed us that all of the 30 tenants are shareholders (although, according to the financial statements provided by Mr. Blee, only two shares have in fact been issued out of the 30 that are authorised).

(b) Regular meetings of the tenants take place, at which it has been agreed by a majority of those present, that the service charge would be set at £20 per month, and that the ground rent of £30 per annum would not be collected. All tenants are given notice of the meetings and they are all circularised afterwards.

(c) In order to keep costs down, only the lawns and other gardening and exterior maintenance is being carried out. The tenants are now responsible for the exterior painting, although the Lease provides for this to be carried out by the Applicant as part of the services.

(d) The majority of the tenants are happy with the arrangements, but the Respondent, and one or two others, neither attend the meetings, nor pay the service charge.

(e) The Applicant has made the Application, as it desires a determination by the Leasehold Valuation Tribunal that the unpaid service charge is reasonable preparatory to commencing proceedings for recovery.

- 8 We were concerned that the Applicant had not fully appreciated that section 27A of the Act requires the Leasehold Valuation Tribunal, when an application is made to it, to be satisfied that the service charge

is payable, before it can determine whether the amount of the charge is reasonable. Because a majority of the tenants had elected that the service charge would not be assessed in accordance with the provisions of the Lease, but instead would be fixed by agreement among the majority, and that the obligations of the Lessor would be modified to effectively keep the service charge amount down, did not mean that those who did not wish to be bound by the new arrangements could be made to comply with them. Of particular concern was the lack of an accountant's certificate as normally, where a lease provides for the amount of the service charge to be certified by the landlord's accountant or surveyor, the issue of a valid certificate is a condition precedent to the tenant's liability to pay.

- 9 We were also concerned that, if we were to find that the service charges which are the subject of the Application were not payable, this could materially affect the other 29 tenants. We considered, therefore, that these other tenants should all have the opportunity to be joined as parties to these proceedings if they wished. The hearing of 27<sup>th</sup> July was therefore adjourned and further Directions issued, in which the concerns of the Tribunal were set out.
- 10 From a list of flat owners provided by the Applicant, all were circularised. In the event one other party applied to be joined as an applicant and permission was given for this. However, he subsequently applied to withdraw and this request was also granted.

**The Applicant's statement and the reconvened hearing**

- 11 In accordance with directions of the Tribunal, the Applicant provided a witness statement by Mr. Blee which deals with the history of the development and the formation of the management company. From 1992 onwards it had been agreed by the various property owners at the time that the practice of maintaining their own properties would continue and the Housing Association (the Landlord at that time) would undertake general maintenance. Rather than do each job and collect an apportioned amount from each owner it was agreed that a monthly amount of £17.50 would be paid. This was increased to £20 in 2002. This amount is sufficient to pay for the general maintenance and also provides a reserve fund for unexpected items, such as guttering and driveway repairs. This arrangement has continued to the present day with only three property owners being in arrears, the Respondent being one of them.
- 12 The statement also confirms that any property owner who disagrees with any action or policy of the Applicant can raise the matter with the management team, and that if the response is unsatisfactory, then the owner can canvas support of other property owners. The Respondent has not done so and has not expressed a view either way. He has simply declined to pay the service charges. Mr. Blee noted that the Tribunal have identified as a concern the lack of an accountant's certificate. It is not clear whether the accountant can post date the certificates. The Applicant is now looking into insuring the common parts of the estate, but this will be an extra expense, as will the exterior painting. However, the Applicant's failure to deal with these matters in the short term should not negate the Respondent's obligation to pay

service charges, which the majority are happy to pay as the monies are, of course, spent on the common good.

- 13 The hearing was resumed on 27<sup>th</sup> October 2006. At the resumed hearing, the Applicant was represented by Ms Jessica Adeniran of Eyre and Co, solicitors. The Respondent was not present. The Applicant had nothing further to add to the witness statement provided, and the hearing was brought to a close.

#### **Our Determination**

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(a) An application to a leasehold valuation tribunal under section 27A of the Act is, in the first instance, an application for a determination that the service charge is lawfully payable in accordance with the terms of the Lease.

(b) The provisions of the Lease provide a mechanism for the assessment and collection of the service charge and that the Applicant's alternative method of dealing with the service charge does not comply sufficiently with the terms of the Lease

(c) In particular, we find that the provisions in the Sixth Schedule to the Lease requiring the service charge accounts to be certified by the Lessor's Accountant are a condition precedent to the Respondent's liability to pay a service charge. However, even if this condition precedent were met by the preparation and certification of accounts for the services, the Applicant's practice with regard to the assessment of the service charge are so far at variance with the provisions of the Lease that we doubt whether this Tribunal would have found the service charge payable.

(d) For the above reasons we find that the service charges for the years set out in the Application are not payable by the Respondent

- 15 We fully appreciate the points made by Mr. Blee at the Hearing and in his statement. It is, from the perspective of the development as a whole, unfair that out of the 30 flat owners, 27 should pay the service charge and the other three should enjoy the benefits of the services provided without making a contribution. However, the underlying principal behind the determination we have made, and the law upon which it based, is that the Lease contains rights and obligations which are binding upon both parties to the Lease and all of their successors in title until the Lease is determined. The fact that a large majority of flat owners in the development have agreed to a modified procedure which is not in accordance with the provisions of their leases does not in any way mean that the rights and obligations of the Lessor and the Respondent under the Lease of the Flat are thereby legally affected.

Signed



Dated 13 DEC 2006

**W.J. Martin, Chairman**