LON/00AG/LSC/2007/0255

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER THE LANDLORD AND TENANT ACT 1985: SECTION 27A, AS AMENDED

Address:	88 Fitzjohns Avenue, London, NW3 6NP
Applicants:	Mr and Mrs Jacob
Respondent:	88 Fitzjohns Avenue (Flats) Ltd
Application:	5 July 2007
Inspection:	N/A
Hearing:	1 October 2007

Appearances:

Tenants

Mr and Mrs Jacob	Leaseholders	For the Applicant

Landlord

Miss M Macro	Counsel	
Miss R McConaghie	Solicitor	
Miss V Harris	Managing Agent	For the Respondent

Members of the Tribunal: Mr I Mohabir LLB (Hons)
Mr I Thompson BSc FRICS
Ms S Wilby

IN THE LEASEHOLD VALUATION TRIBUNAL

LON/00AG/LSC/2007/0255

IN THE MATTER OF SECTION 27A OF THE LANDLORD & TENANT ACT 1985

AND IN THE MATTER OF 88 FITZJOHNS AVENUE, LONDON, NW3 6NP

BETWEEN:

MR & MRS JACOB

Applicants

-and-

88 FITZJOHNS AVENUE (FLATS) LIMITED

Respondent

THE TRIBUNAL'S DECISION

Introduction

1. This is an application made by the Applicants, Mr and Mrs Jacob, pursuant to s.27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of their liability to pay and/or the reasonableness of various service charges arising in the years 2005-2007. The service charges in issue are particularised further below. Unless stated otherwise, the page references, where relevant, are to the pages appearing within the Applicants' bundle [AB] and the Respondent's bundle [RB].

2. The Applicants are the leaseholders of Flat 5 in the subject property by virtue of a lease dated 7 January 1976 granted by J Saunder & Sons (Continuation) Ltd to Timothy Richard Graham for a term of 999 years from 1 January 1975 ("the lease"). There are 12 flats within the property. It is not necessary to set

the details out the relevant service charge provisions in the lease because the contractual liability to pay a service charge contribution at the rate of 6% of the total expenditure is accepted by the Applicants. It is also not disputed by the Applicants that the service charge costs in issue in this application are, *prima facie*, recoverable as relevant service charge expenditure within the meaning of the lease.

3. Paragraph 2 of the Third Schedule of the lease provides that the annual service charge year shall commence on 1 January and end on 31 December in any given year based on an estimated expenditure by the managing agent. The service charge contribution is payable in advance by two equal instalments on 1 January and 1 July.

4. The Respondent company is the freeholder. Each of the 12 issued shares in the company is held by the lessees.

5. It seems that the Respondent at some point in the past took the decision to develop an area of land into parking spaces from which additional income could be derived. Any income so received would be applied to the overall service charge expenditure, thereby reducing the service charge contribution sought from the lessees. Any surplus profit would be divided equally between the lessees on the basis of a one twelfth share. The application of this income is dealt with below by the Tribunal.

6. The Applicants' position has all along been that they have either failed to understand how their service charge contribution has been calculated and/or that it was wrongly calculated. In the alternative, the Applicants challenged some of the service charge costs as being unreasonably high. There had been a number of meetings between the parties and extensive *inter partes* correspondence entered into in an attempt to resolve both the Applicants' service charge liability and other matters without success. On 5 July 2007, the Applicants made this application.

Decision

7. The hearing in this matter took place on 1 October 2007. The Applicants appeared in person. The Respondent was represented by Miss Macro of Counsel. The Tribunal did not inspect the subject property. It dealt with this matter largely on the basis of the submissions made by the parties.

8. In relation to all years, the Applicants generally submitted that the method of calculating their service charge contribution was incorrect. The correct approach should be that, firstly, their liability for the total annual service charge expenditure should be calculated at 6% and, secondly, to then deduct one twelfth of their share of the parking income, if appropriate. At present, the parking income is deducted from the total service charge expenditure in the first instance and then the Applicants' liability is calculated at 6% of the remaining amount.

9. It is perhaps convenient at this point for the Tribunal to deal with the matter of the parking income in this application. Whilst this income has a direct bearing on the Applicants' service charge liability, strictly speaking, the Tribunal has no jurisdiction to make any ruling as to how, if at all, it is to be applied to the service charge account. The parking income is not a "service charge" within the meaning of s.18 of the Act. None of the leases appear to contain any express provision to deal with the application of this income. Unless and until the leases are formally varied, it appears that the parking income will continue to be applied at the discretion of the Respondent and by agreement with the lessees. Accordingly, for the purpose of this application, the Tribunal had no regard to the parking income when determining the Applicants' liability. It was solely concerned with the service charge expenditure claimed. Nevertheless, the Tribunal was satisfied that the quantum credited to the service charge account by the Respondent and the present method adopted when applying the parking income appeared to be correct and fair. The method of calculation proposed by the Applicants would result in a disproportionate benefit accruing to tenants with a lesser service charge liability. The benefit of the parking income should be applied equally and that can only be achieved by setting it off against the total service charge

expenditure in the first instance and then calculating each lessee's individual liability based on the contractual rate set out in the various leases.

Y/E: 31 December 2005

9. The Applicants' service charge contribution for this year was originally calculated as being £1,800. It was comprised of two amounts, namely, £1,080 and £720. The former sum (paid by the Applicants) was the estimated annual service charge expenditure and the latter sum represented the service charge contribution for redecoration costs totalling £12,000, which remains unpaid.

10. In an earlier decision dated 30 November 2006, the Tribunal determined that the Respondent had not carried out any of the statutory consultation required by s.20 of the Act in relation to the redecoration work and, accordingly, limited the sum that could be recovered as a service charge contribution payable by the Applicants to £250.

11. The two challenges made by the Applicants in relation to this year were:

    (a) they wanted an explanation from the Respondent that the sum disallowed for the cost of redecorations in the earlier LVT decision had in fact been credited to their service charge account because it does not appear to have been done.

    (b) they considered they had no liability to pay the sum of £750 for solicitor's costs incurred in relation to the earlier LVT decision because they "won the case".

12. In relation to the redecoration costs, it was accepted by the Respondent that the Applicants service charge account should be credited with the sum of £470, being the amount not recoverable. At paragraph 3 of her witness statement[1], Miss Harris, the managing agent, explained that this sum was credited to the Applicants' 2007 service charge account. In her view, the net

[1] See AB/Tab 4/B

financial effect was the same. The Applicants accepted this explanation. Their misunderstanding arose because they expected this credit to be applied to the 2005 service charge account, thereby reducing their liability, which they had calculated on this basis. Although their 2005 liability appeared to remain the same, it was offset in the 2007 service charge account and the Tribunal was also satisfied that this had been done.

13. Turning to the issue of the solicitor's costs of £750, a proper reading of the earlier LVT decision at paragraph (d)[2] reveals that the Tribunal made no order under s.20C of the Act. What this means is that the Tribunal did not *disentitle* the Respondent from being able to recover the costs it had incurred in those proceedings. It is not for this Tribunal to enquire into the reasons why the earlier Tribunal made no order under s.20C. It was satisfied that these costs were incurred in the earlier proceedings. Paragraph 1 of the Third Schedule of the lease expressly provides that these costs can be recovered as relevant service charge expenditure. The Applicants did not challenge the quantum of these costs as being unreasonable. They only challenged their liability to pay. The Tribunal determined that this liability or entitlement on the part of the Respondent had not been extinguished by the earlier Tribunal and, accordingly, it allowed these costs as being reasonable and payable by the Applicants.

14. The Applicants liability for this year remains at £720 plus a further sum of £607.28, which is a reconciliation amount to balance the service charge account when the final account was prepared.

Y/E: 31 December 2006

15. In relation to this year, the Applicants repeated the same challenges made in the previous year at paragraph 11(a) and (b) above. The credit accruing to the Applicants as a result of the earlier LVT decision has already been dealt with above. It cannot be claimed by the Applicants again in this year because this

[2] see RB/44

would amount to double counting. The earlier LVT decision only applied to the redecoration costs claimed in the previous service charge year only.

16. The total solicitor's costs claimed in this year are £3,250. Miss Macro, on behalf of the Respondent, told the Tribunal that all of these costs were incurred in relation to the earlier LVT proceedings. She submitted that having regard to the numerous issues and time taken to deal with them, the fees were not unreasonable. The Tribunal, having regard to the level of *inter partes* correspondence and the number of issues raised by the Applicants, agreed with that submission. The Applicants' challenge appeared to be limited to their liability to pay these costs and this point has already been dealt with above. For the avoidance of doubt, the Tribunal determined that the solicitor's costs were reasonable and payable by the Applicant as claimed. The Tribunal also records that the Applicants conceded the sums of £2,250 and £3,008, less a credit of £448, claimed for Counsel's fees and architect's fees respectively were reasonable and payable by them.

17. The third challenge made by the Applicants was in relation to the management fees of £3,818.75 charged by The Heathgate Group Ltd ("Heathgate") as managing agents. It was submitted by the Applicants that this was too high and should be limited to an inflationary increase. The explanation of the management duties carried out by Heathgate and how its fees are calculated are set out at paragraph 7 of the first witness statement of Miss Harris[3]. The Applicants contended simply that no management service as such had been provided by Miss Harris. She was not a member of ARMA and appeared to be charging by the hour.

18. It was submitted by Miss Macro that the management fees were reasonable having regard to the level of work and issues raised by the Applicants. Heathgate were also responsible for "company matters". Although there was no formal management agreement in place, Heathgate's fees, albeit increased, had been agreed at the AGM and recorded in the minutes of that meeting.

[3] see AB/Tab5/R

Furthermore, Heathgate did not charge a call out charge or additional hourly rate when required to additionally attend the property.

19. When asked by the Tribunal, Miss Harris said that Heathgate only managed two other buildings. Its core business was residential sales and lettings. It charged £230-240 per flat when calculating its fixed fee. Having regard to the very limited management experience of Heathgate, the Tribunal considered this to be the main reason for the rather muddled way in which the service charge accounts had been prepared. This had, in the main, led to the misunderstanding of the accounts on the part of the Applicants. Heathgate appeared to be charging approximately £270 per flat. The Tribunal considered this to be on the high side even for an experienced managing agent. The Tribunal accepted that Heathgate's involvement was perhaps greater then it would otherwise have been given the level of correspondence required as a result of the issues raised by the Applicants. Nevertheless, the Tribunal was of the view that an experienced managing agent would have been able to deal with these matters in less time. Accordingly, the Tribunal allowed a rate of £250 plus VAT per flat as being a reasonable amount for management fees. This in total equates to £3,525 inclusive of VAT.

Y/E: 31 December 2007

20. The estimated total service charge expenditure for this year is placed at £39,000. The Applicants' estimated liability is £540. The only items of service charge expenditure challenged by them were solicitor's fees in the sum £1,706.14 and the management fees of Heathgate in the sum of £5,875.

21. In relation to the solicitor's fees, the Applicants submitted that they lacked clarity. They were only estimated and they had been told that the hourly rate had not been decided. They should be told how the costs had been arrived at and the charging rate should be set out clearly.

22. The Tribunal saw no merit in the Applicants' submission. The solicitor's costs claimed were estimated and amounted to no more than a budgetary figure as part of the anticipated expenditure for this year. The Tribunal was

satisfied this was the reason why the cost could not be better particularised by the Respondent. This figure was, in any event, subject to reconciliation at the end of the year once the actual expenditure was known. Save for the Applicants' assertion that the cost *may* be unreasonable, they adduced no evidence that it was. Accordingly, the Tribunal allowed this sum as being reasonable and payable by the Applicants.

23. The same challenge was repeated by the Applicant's regarding the management fees charged by Heathgate. Again, for the same reasons adopted by the Tribunal at paragraph 19 above, it determined that Heathgate's fees should also be limited to £3,525 inclusive of VAT.

Costs

(a) Section 20C

24. The Applicants submitted that the Tribunal should make an order under s.20C of the Act preventing the Respondent from being able to recover the costs it had incurred in these proceedings through the service charge account. The main reasons for making the application are that no explanations had been given when sought about the service charge accounts, did not want to meet to resolve matters and had not allowed the Applicants to inspect the relevant books of account. In so doing, the Respondent had acted unreasonably.

25. Miss Macro accepted that a more sufficient explanation should have been given to the Applicants about the service charge accounts. Indeed, a meeting had been arranged some time before the hearing for that explanation to be given. However, approximately 1.5 hours before the meeting was due to take place, the Applicants withdrew unilaterally.

26. The Tribunal determined that no order should be made under s.20C of the Act. The Respondent was effectively a "tenant owned" company and the effect of making such an order would to be penalise the other lessees in costs. As stated by the earlier Tribunal, those costs would have to be paid out of the parking income and this would in turn leave the Applicants worse off if that income was not applied to the service charge account.

(b) Schedule 12 Paragraph 10

27. Miss Macro made a further application that by withdrawing from the meeting arranged prior to the hearing without good reason, the Applicants conduct had amounted to an abuse of process within the meaning of Schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002 and that they should be ordered to pay the Respondent's costs limited to £500.

28. The Tribunal did not grant the application sought. It appeared to be predicated on an assumption that had the arranged meeting taken place it would have resulted in agreement between the parties and avoided the time and expense of a hearing. In the Tribunal's view, that was not inevitable. Given the rather protracted history of this matter, on balance, a successful outcome was unlikely especially having regard to the significant amounts disallowed for Heathgate's fees. At the time the meeting was arranged this matter had been fixed for hearing and the Applicants were entitled to withdraw and seek a determination from the Tribunal instead. That conduct did not, in the Tribunal's view, amount to an abuse of process.

Fees

29. The Tribunal also determined that the Respondent should reimburse the Applicants the issue fee of £70 and the hearing fee of £150 paid by them to the Tribunal. It was accepted by Miss Macro that an explanation was needed about the rather muddled service charge accounts and, certainly, at the time the application had been issued it had not been provided to the Applicants. Furthermore, at the time the proposed meeting had been arranged, this matter was listed for hearing and even if the meeting had proved to be successful, the Applicants had already incurred a hearing fee and would have forfeited it in any event. Moreover, the Tribunal had regard to the fact that the Applicants had succeeded in having significant amounts disallowed for the management fees of Heathgate. It is highly unlikely that those concessions would have been made by the Respondent at a meeting.

Dated the 23 day of November 2007

CHAIRMAN.....

Mr I Mohabir LLB (Hons)