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LON/00AW/LSC/2007/0237

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

Address:	Flat 5, Kensington Heights, 91-05 Campden Hill Road, London, W8 7BA
Applicant:	Campden Hill Developments Ltd
Respondent:	Mrs Parvin Azimi
Application:	20 February 2007
Inspection:	17 December 2007
Hearing:	17-19 December 2007

Appearances:

Landlord

Mr A Rosenthal	Counsel
Miss A Avery	Solicitor, Russell-Cooke
Mr B Jones	Chartered Surveyor (expert witness)
Mr Barnett-Salter	Managing Agent

For the Applicant

Tenant

Miss A Cafferkey	Counsel

For the Respondent

Members of the Tribunal:	Mr I Mohabir LLB (Hons)
	Mr P M J Casey MRICS
	Mr L G Packer

IN THE LEASEHOLD VALUATION TRIBUNAL

LON/00AW/LSC/2007/0237

IN THE MATTER OF FLAT 5, KENSINGTON HEIGHTS, 91-95 CAMPDEN HILL ROAD, LONDON, W8 7BA

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

BETWEEN:

CAMPDEN HILL DEVELOPMENTS LIMITED

Applicant

-and-

MRS PARVIN AZIMI

Respondent

THE TRIBUNAL'S DECISION

Introduction

1. Unless stated otherwise, the page references are to the pages within the trial bundles.

2. This matter was begun as a claim in the West London County Court by the Applicant against the Respondent for service charge arrears totalling £10,741.18. Essentially, in her Defence to the claim, the Respondent put the Applicant to proof. Pursuant to an Order made by District Judge Nicholson dated 20 February 2007, the claim was transferred to this Tribunal for a determination of the Respondent's liability to pay and/or the reasonableness of the service charges demanded. The Tribunal's determination, therefore, is

made pursuant to section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act").

3. At a pre-trial review on 25 July 2007, the Tribunal identified the issues to be determined in this application as being limited to the Respondent's liability to pay the actual service charges incurred by the Applicant, including a contribution to the reserve fund, in the years 2005 and 2006.

4. Pursuant to the Tribunal's direction, the Respondent served a witness statement made by her husband, Mr Abbas Azimi-Azad, particularising the challenges being made by her in relation to the reserve fund, legal costs and service charges for the relevant years[1]. However, at the hearing Counsel for the Respondent informed the Tribunal that the challenges made in relation to the service charge costs incurred for fire hoses and extinguishers and smoke extractions had been abandoned. Miss Cafferkey, helpfully, set out in bare terms the service charge costs that were still being challenged by the Respondent, which now introduced the issue of the reasonableness of some of the service charges. However, in the written submissions made on behalf of the Respondent by Miss Cafferkey at the conclusion of the hearing, it appears that only submissions on a limited number of issues had been made. Nevertheless, those issues raised at the hearing are considered by the Tribunal in this determination. For the avoidance of doubt, the service charge items of expenditure challenged by the Respondent were the same in relation to both service charge years and they were, therefore, considered together by the Tribunal in turn below.

5. The subject property was originally demised to the Respondent's husband by a lease dated 27 May 1975 for a term of 125 years ("the lease"). In February 2000, it was assigned to the Respondent. It was a matter of common ground between the parties as to how the Respondent's *contractual* liability to pay a service charge contribution under the terms of the lease arose. The relevant

[1] see pages 55-56

provisions can be found in Part A and B of the Fifth Schedule in the lease[2]. It is, therefore, not necessary to set out the detailed service charge provisions in the lease, save to say that the Respondent's contribution is calculated as being 1.38% of the total expenditure incurred by the lessors in carrying out their obligations in Part B and under clause 3(8) and (11) of the lease. Where relevant, any submissions made on behalf of the Respondent as to whether or not the service charge cost in issue is recoverable as service charge expenditure under the terms of the lease is addressed below.

Inspection

6. The Tribunal externally inspected the subject property of 17 December 2007 and was accompanied by Mr. Barnett-Salter, the managing agent, and Miss Cafferkey, Counsel for the Respondent. Kensington Heights is a predominantly residential development built in the mid 1970s. The major part comprises a reinforced concrete frame 8 block of flats built over two floors of largely underground car parking. There are in addition 5 town houses and office space occupied by the managing agents. The approach to the flats and the other open areas to the development are referred to as "podiums" and have been built partly over the garage area. Various concrete planters and external stairways have suffered from corrosion f the steel reinforcing but otherwise the development appears to be in repair and maintained to a high standard including the internal common parts.

Decision

7. The hearing in this matter also commenced on 17 December 2007. Mr. Rosenthal of Counsel appeared for the Applicant. Miss Cafferkey of Counsel appeared for the Respondent.

8. Miss Cafferkey informed the Tribunal that the instructions were limited to making an application to adjourn the hearing on the basis of the ill health of the Respondent's husband, which prevented him from attending the hearing and giving evidence on her behalf. She said that if the application was refused

[2] see pages 118 & 120

then she was instructed to withdrawal from the proceedings. Miss Cafferkey then made her application to adjourn and this was refused by the Tribunal. It is not necessary to set out the submissions made by Miss Cafferkey or the Tribunal's reasons for refusing the application to adjourn, as they are not relevant in the determination of this application. The matter was then adjourned part heard to the following morning when Miss Cafferkey appeared before the Tribunal and said that she was now instructed by the Respondent to defend the proceedings.

9. The Applicant's case essentially relied on the evidence of Mr. Barnet-Salter. The Respondent called no evidence. Her case was limited to putting the Applicant to proof. Pursuant to the Tribunal's direction's given at the end of the hearing, Counsel for both parties filed written closing submissions.

(a) Porters' Wages - Recoverability

10. By clause 3(8) of the lease, the Lessors covenanted to:

> *"For the purpose of performing the covenants on the part of the Lessors herein contained and generally managing the Development to employ on such terms and conditions as the Lessors or the Managing Agents shall think fit such person or persons as the Lessors or the Managing Agents may from time to time considered necessary (herein called "the staff")....... "*

11. The lessors covenants are set out in clause 3(1) to (13) of the lease. It was submitted by Miss Cafferkey that the duties performed by the porters[3] went beyond the functions the lessors had expressly covenanted to perform. Nor could it be said that the porters were carrying out a management function, as the lessor had employed a managing agent and the lease made express provision in this regard.

12. Moreover, Miss Cafferkey further submitted that the porters' wages were not recoverable under clause 3(12), which provided:

[3] see page 464

"Without prejudice to the above to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors or the Managing Agents are necessary or advisable for the proper maintenance safety and administration of the Development."

Miss Cafferkey contended that in ***Jacob Isbicki & Co Ltd v Goulding Bird Ltd*** [1989] 1 EGLR it was held that a similar clause did not allow for the cost of wall cleaning to be recovered by the landlord because the right to vary the services provided was limited to the types of services expressly set out in the lease. Therefore, clause 3 (12) had to be construed within the context of the lease and to the extent that it was an ambiguous clause, it should be construed *contra proferentem.*

13. The Tribunal accepted Mr. Rosenthal's first submission that the duties performed by the porters fell within one or more of the lessor's covenants. In the Tribunal's judgment, the meaning and intention of clause 3(8) of the lease was clear and unambiguous. A proper reading of this clause reveals that it was intended that the Lessors and/or Managing Agents should have a discretion to employ other staff, including the porters, to whom one or more of the lessors obligations under clause 3 generally could be delegated. It is also clear, having regard to the duties performed by the porters, that they do in fact perform at various times one or more of the functions the lessor covenanted to perform including *inter alia*:

    (i) keeping in repair the Buildings, the common parts and the porter's flat.
    (ii) keeping the common parts of the Buildings and the Development clean.
    (iii) carrying out such works required for the proper maintenance, safety and administration of the Development.
    (iv) inspection and maintenance of the lifts.
    (v) disposal of refuse generally and the means of doing so.
    (vi) the maintenance of the door entry system.

14. Whilst it was submitted generally by Miss Cafferkey that the Head Porter's duties and hours of work went beyond those functions the lessor expressly covenanted to perform, she was unable to particularise at all which of those functions fell outside the covenants given by the lessor in clause 3.

15. As to the purported management functions performed by the porters of the Development, the Tribunal also agreed with Mr. Rosenthal's submission that Miss Cafferkey had attributed too literal a meeting to the phrase "managing the Development". The Tribunal has already construed clause 3(8) to allow the lessor and/or the managing agent a discretion to delegate one or more of the functions the lessor expressly covenanted to perform. Again, in the Tribunal's judgment, the exercise of that discretion, either by the lessor and/or the managing agent, also extends to generally managing the Development. If this was not intended by the parties to the lease, such an express provision would not have been included in the lease terms. The further express provision in clause 3(8) for accommodation for any such staff so employed is a clear indication that they should be available to carry out the delegated management duties on site and on a day-to-day basis. The Tribunal also agreed with Mr. Rosenthal's submission that it was envisaged that both the lessor's obligations under clause 3 and the management duties could be delegated specifically to porters. It was for this reason that specific provision was made in paragraphs 2(E) and (A) of Parts B of the Fifth Schedule for the recovery of the direct costs incurred in relation to the porters.

16. Accordingly, the Tribunal found that clause 3 (8) of the lease, as a matter of contract, did allow for the porter's wages to be recovered as relevant service charge expenditure.

17. The Tribunal then considered the meaning and effect of clause 3 (12). This clause was widely drafted and appeared to provide the lessor with an absolute discretion. The Tribunal agreed with Mr. Rosenthal's submission that the phrase "Without prejudice to the foregoing" was material in that this clause was intended to supplement rather than overlap with or override the other

lessor's covenants. The Tribunal also agreed with Mr. Rosenthal's further submission that the discretion afforded by this clause, as a matter of construction of the contractual provisions, was not subject to the imposition of the views of a court or tribunal as to whether or not a landlord's or agents' actions were justified. The correct test to be applied in the exercise of the discretion was whether or not the decision taken was perverse and one which no reasonable landlord or agent could reach in the circumstances.

18. The Tribunal also agreed with Mr. Rosenthal's submission that there was no express provision in clause 3(12) that the exercise of the discretion was limited to acts on an "incremental basis" as opposed to making "long term provision".

19. The Tribunal also found that the case of ***Jacob Isbicki*** had application in this instance. That case concerned works carried out by a landlord that fell outside the express provisions of the lease. In this instance, the Tribunal has already found that both clause 3(8) and/or clause 3(12) expressly provide for the costs of employing porters to be recovered as relevant service charge expenditure. For the reasons stated above, the Tribunal also found that no ambiguity arose on the face of clause 3(12) and, therefore, it was not necessary to construe this clause *contra proferentem* against the Applicant.

(b) Porters' Wages - Reasonableness

20. The apportioned costs relating to the flats in the Development for the years ending 31 December 2005 and 2006 were £128,239 and £139,224 respectively. The duties performed by the porters was largely a matter of common ground and are set out in paragraph 8 of Mr. Barnett-Salter's witness statement[4].

21. It was submitted by Miss Cafferkey that the porters' wages were unreasonable for a number of reasons. The level of staffing was excessive. Furthermore, the installation of a comprehensive CCTV system reduced the need for a physical inspection of the Development. Moreover, part of the porters' duties

[4] see page 451

involved inspecting the garage area in which over half of the CCTV cameras were located. Nevertheless, only 3.7% of the porterage costs were apportioned to the garage area. It was submitted that this apportionment was too low, especially when a larger apportionment was made in relation to the insurance policies. However, no evidence was produced to show for example that in the absence of the garage duties fewer porters would be required to fufil their obligations in respect of the rest of the development. The same submissions were repeated in relation to all of the porters' costs, namely, notional rent, Council Tax, water rates, electricity, gas, telephone, staff attire, repairs and sundries. These other costs are considered by the Tribunal below.

22. Mr. Rosenthal submitted that, given the size of the development and the standards of the 24-hour porterage, the costs were not on reasonable. As to the apportionment of those costs, he submitted that 3.7% was not unreasonable. The Respondent's submission ignored the fact that the garages were an obvious point of entry to the upper parts of the building by an intruder and it was in the interests of the lessees that the garages were kept secure.

23. The Tribunal determined that the porters' wages claimed were reasonably incurred and reasonable as to quantum. The Development was subject to 24-hour porterage by seven porters. Given the extensive level of service provided to the lessees also, the Tribunal did not consider the global sum to be unreasonable. Save for the assertion that the porters' wages were unreasonable, the Respondent adduced no other evidence that they were.

24. As to the apportionment of 3.7% of the total cost to the garage area, there is no express term in the lease to this effect. Nevertheless, this apportionment has been historic and long-standing and not challenged by the Respondent until now. It may well be that an estoppel arises in the circumstances, but this point was not argued on behalf of the Applicant. The Tribunal concluded that, in the circumstances, there was no basis upon which to interfere with the apportionment figure. In reaching this conclusion, the Tribunal had regard to the fact that the Applicant had no contractual obligation to apportion any of these costs to the garage area (it is understood that there is a separate service

charge regime for the garage space lessees) and that the large majority of the duties performed by the porters related to the flats and the Development generally.

(c) Notional Rent for the Porter's Flat - Recoverability

25. For reasons that will become apparent below, it is not necessary to set out the amounts claimed by the Applicant as a notional rent for the porter's flat. The primary issue to be determined by the Tribunal was whether the rent was recoverable as a service charge expenditure under the terms of the lease at all.

26. It was a matter of common ground that clause 3 (8) of the lease contained a covenants on the part of the lessor to:

> *"...... provide accommodation either in the Buildings or elsewhere (free from payment of rent or rates) and any other services are considered necessary by the Lessors or the Managing Agents for him or them whilst such are employed by the Lessors in respect of the Development."*

Pursuant to this clause, it was also matter of common ground that a flat had been provided for the use and benefit of the porters free of rent and for which a notional rent was recharged to the lessees through the service charge account.

27. Mr. Rosenthal, for the Applicant, submitted that the notional rent was recoverable as relevant service charge expenditure. He contended that the issue had been considered by the Court of Appeal in the unreported case of ***Agavil Investments Ltd v Corner*** (CA, 3 October 1975) when it was held that the notional rent for accommodation provided to a caretaker formed part of the expenses that had been reasonably been incurred. That decision appears to have been followed in the Chancery Division case of ***Lloyds Bank Plc v Bowker Oxford*** [1992] 2 EGLR 44 where it was held that the notional rent was *"a cost in the sense of money foregone, as opposed to money spent"*.

28. Miss Cafferkey submitted that, as a matter of construction, under clause 4(3) and paragraph 1(6) of Part A of the Fifth Schedule the Applicant was only entitled to recover as relevant service charge expenditure the actual costs it

had incurred pursuant to the obligations set out in Part B of the Fifth Schedule. In support of the submission, Miss Cafferkey relied on the Court of Appeal decision in ***Gilje & Ors v Charlgrove Securities Ltd*** [2001] 1 EGLR 41 where the two authorities relied on by Mr. Rosenthal were considered and rejected. The Court of Appeal found that a notional rent did not amount to "monies expended" and was, therefore, not recoverable as service charge expenditure.

29. In the present case, the Tribunal felt constrained to follow the decision in ***Gilje***. The present case appeared to be on "all fours" with that decision. The Tribunal agreed with Miss Cafferkey's construction of the service charge provisions as set out above. It is clear that only service charge expenditure actually incurred by the lessor was recoverable. It follows from this that the notional rent charged for the porter's flat was not rent that had actually been incurred by the Applicant and, as such, no entitlement to recover these costs arose. In ***Gilje*** the Court of Appeal considered and rejected the arguments in ***Agavil Investments*** and ***Lloyds Bank*** on the basis that in both of those cases the lease contained in express provision that allowed for the recovery of a notional rent in relation to accommodation provided for a caretaker. In this instance, as set out above, the Tribunal concluded that the lease contained no such express provision for these costs to be recovered as relevant service charge expenditure.

30. Accordingly, the notional rent claimed in relation to the porter's flat for the years 2005 and 2006 is disallowed. It is, therefore, not necessary for the Tribunal to consider the reasonableness of those costs.

(d) Other Porter's Costs

31. For 2005 and 2006 these costs included the following:

- Council Tax
- Water rates
- Porter's flat electricity
- Gas for porter's flat
- Porter's telephone

- Staff attire
- Repairs to porter's accommodation
- Sundry porterage

For both service charge years the various costs are set out in the respective statements of service charge expenditure and are self-evident. For this reason, it is not necessary for the Tribunal to set out the amounts and, in any event, no issue arises as to the factual amount being claimed by the Applicant.

32. The same challenge was repeated on behalf of the Respondent in relation to these costs as had been made in relation to the recoverability and reasonableness of the porters' wages. For the reasons set out above, the Tribunal has already determined that the porters' wages were not only recoverable, but had also been reasonably incurred and were reasonable in quantum. The costs in issue here are a direct consequence of having employed the porters. It must follow, for the same reasons the porters' wages were allowed as being recoverable and reasonably incurred, these direct and consequential costs must also be allowed as being recoverable and reasonably incurred. As to the quantum of the costs generally, the Respondent, again, adduced no evidence that the costs were unreasonable, save for an assertion otherwise. This did not provide a basis upon which the Tribunal could make an alternative finding. In any event, the Applicant was only seeking to recover the expenditure that had actually been incurred by it. The Tribunal was also satisfied that, in many instances, the Respondent's liability was *de minimis*. Accordingly, these costs were allowed as claimed by the Applicant.

(e) Barrier Arm

33. The sums claimed for 2005 and 2006 are £670 and £1,377.24 respectively. Counsel for the Respondent made no direct submissions on these costs. The only challenge articulated in the barest terms was that there was no provision in the lease for the recovery of these costs as relevant service charge expenditure.

34. The Tribunal agreed with Mr. Rosenthal's submission that clause 3 (12), set out above, gave the landlord a discretion to incurred these costs. The evidence of Mr Barnett-Salter[5] at paragraphs 22 to 26 that the installation of the barrier arm was done at the request of the Residents Association to prevent unauthorised vehicular access to the property by third parties. The costs related to the continued maintenance of the barrier. The Tribunal accepted as evidence and found the costs to be reasonably incurred. As the quantum was not challenged by the Respondent, the Tribunal allowed the costs as claimed.

(f) CCTV Costs

35. As the Tribunal understood it, the Respondent's challenge was limited to the CCTV costs, which formed part of the security and access control to the building. It is not known what proportion of the overall costs was attributable to the maintenance and running of the CCTV system. However, for reasons that will become apparent, this is not necessary. The Respondent's challenge appeared to be made in two ways. Firstly, that there was no provision in the lease to recover the costs as service charge expenditure. Secondly, that the costs were too high. Again, Miss Cafferkey made no written submissions on this point.

36. The Tribunal had no difficulty in concluding that the CCTV system formed an integral part of the entryphone system. As such, clause 3(18) of the lease contained in express provision for the recovery of these costs as relevant service charge expenditure. In any event, the Tribunal also considered that these costs could alternatively be recovered under clause 3(12). Although the costs were challenged as being too high, there was no evidence from the Respondent to demonstrate that they were. Accordingly, these costs were allowed as claimed by the Applicant.

(g) Buildings Insurance

37. The buildings insurance premiums claimed for 2005 and 2006(including terrorism, contents and engineering cover) are in total £57,619 and

[5] see page 456

£89,041.90. Again, as the Tribunal understood it, the Respondent's challenge was limited to the reasonableness of the total premiums paid. The Respondent's case was not put on the basis that the premiums were irrecoverable under the terms of the lease. The case advanced on her behalf amounted to no more than a mere assertion that the costs were too high. No evidence was adduced by the Respondent that the premiums paid were unreasonable. In the absence of any such evidence, the Tribunal was bound to conclude that the amounts demanded were reasonable and they were allowed in full.

(h) Reserve Fund

38. The reserve fund contribution demanded for 2005 and 2006 are £301,980 and £337,481.39 respectively. From Miss Cafferkey's written submissions, it is not entirely clear what case is being advanced on behalf of the Respondent. At paragraph 22 of her submissions, it is accepted that the Applicant can demand a reserve fund contribution by way of future provision and any amounts so collected are to be applied to enable the lessor to comply with its obligations under clause 3 of the lease.

39. It is said to on behalf of the Respondent that the reserve fund contribution collected in relation to the proposed podium works have not been expended because the works have been delayed for various reasons. Instead, it is contended that funds from the Reserve Fund were spent in 2006 on roof works, balconies, internal decorations and re-carpeting of the Building. It is submitted that this amounted to a breach of the RICS Code of Practice. The Respondent further complains that there has been no clear accounting for the expenditure paid out of the Reserve Fund and this has led to concerns on the part of the Respondent that large sums are routinely demanded and held for long periods of time with very little to show for them and this is unsatisfactory.

40. The case advanced on behalf of the Respondent appears to be no higher than a complaint against either the Applicant and/or the managing agent. It is not submitted on behalf of the Respondent that the Applicant is not entitled to

collect a Reserve Fund contribution for one or of the purposes set out in clause 3 of the lease. Paragraph 1(5)(c) of Part A of the Fifth Schedule gives the lessor a general discretion to collect such sums by way of reasonable provision as it considers likely to be incurred in the future to comply with one or more of the obligations imposed by clause 3. This provision is not purpose specific and does not, on the face it, impose a time limit in which any funds so collected should be spent. It seems that the lessor has a discretion to meet one or more of its obligations under clause 3 out of the Reserve Fund even though the contribution may have been originally collected for a different purpose. To the extent that this may amount to a breach of the RICS Code of Practice, then it is possibly a management failure and does not accrue to the Applicant. In the Tribunal's view, it does not provide a basis upon which it can make a finding that the reserve fund contribution demanded was unreasonable and should be disallowed in whole or in part. Indeed, the Respondent does not make a submission in those terms. Accordingly, the Tribunal does not interfere with the reserve fund contribution collected or demanded by the Applicant.

(i) Request for an adjournment

41. At paragraph 25 of the written submissions, Miss Cafferkey makes a request that the Tribunal set out its reasons for refusing the Respondent's application to adjourn the hearing on 17 December 2007. That request is not understood by the Tribunal. If the request is made, as possibly being a ground of appeal, the Respondent is reminded that the refusal to adjourn is an administrative decision of the Tribunal and, as such, does not amount to a final decision in this case and cannot form the subject matter of an appeal.

Dated the 4 day of March 2008

CHAIRMAN...

Mr. I. Mohabir LLB (Hons)