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Ref: LON/00AL/LSC/2010/0051

LEASEHOLD VALUATION TRIBUNAL
LONDON RENT ASSESSMENT PANEL

DETERMINATION

OF APPLICATION UNDER SECTION 27A OF LANDLORD AND
TENANT ACT 1985

PREMISES: Flat 75B Troughton Road London SE7 7EQ

Applicant: Ms Valbona Sadiku & Mr J Granja [Tenants]

Respondent: Hamilton King Management Ltd [Managers]

Hearing: Thursday 24 June 2010

Representatives: Applicants: Ms Sadiku in person
Respondents: Mr Barry Taylor and Mrs Debby Toson

Tribunal: Dr J T Farrand QC FCI Arb Solicitor [Chairman]
Mr K M Cartwright JP FRICS
Mrs J Dalal

1. The Application considered by the Tribunal, made by Ms Sadiku under s.27A of the 1985 Act and dated 18 January 2010, sought a determination as to the Applicant's liability to make payments to the Respondent in respect of certain sums demanded as service charges in 2008 and 2009. On the basis that he is a joint leaseholder with her, Mr Granja was added as an Applicant at a Pre Trial Review on 17 February 2010.

2. Hamilton King Management Ltd are managing agents for Southern Land Securities Ltd, which acquired the freehold on 12 May 2008. Under the Management Agreement, dated 9 May 2008, Hamilton King were under a duty to demand and collect service charges (clause 3(7)). Consequently, Hamilton King is a landlord for present purposes and properly named as Respondent in the Application to the Tribunal (see s.30 of the 1985 Act).

3. Southern Land Securities Ltd had made a claim against Ms Sadiku for alleged arrears of rent and service charges in Chorley County Court and obtained a default judgment on 18 June 2009. The solicitors acting were instructed by Hamilton King. Subsequently, a misconceived claim for forfeiture and possession was made in Lambeth County Court. However, a Consent Order was made on 3 February 2010 by District Judge Backhouse sitting at Woolwich County Court whereby the proceedings between the parties were stayed until 3 April 2010 to allow the default judgment to be set aside "and, so far as appropriate, the Defendant's Application to the LVT".

4. There has been no transfer of the County Court proceedings to the Tribunal under para.3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. Therefore, the Tribunal has confined its consideration to the items referred to in the Application.

5. The Application was difficult to decipher but at the Hearing the Tribunal established that it related specifically to the following five items, demanded as scheduled by the Respondents on the dates indicated:

28 Aug 2008	interim s charge to 3 Dec 08	187.50
28 Aug 2008	ins prem 9 May 08-23 Dec 08	132.50
25 Dec 2008	interest Charged to 25 Dec 2008	4.83
31 Dec 2008	Excess Service Charge	238.84
1 Jan 2009	Interim S/Charge 1 Jan 2009 to 31 Dec 2009	374.00

6. The Premises consist of a one bed-roomed first floor flat in a two-storey building originally constructed as one dwelling house but converted into two similar flats. Both flats are held on long leases.

7. The Applicants are Tenants of the Premises under a Lease first granted in 2003 for a term of 125 years in consideration of a nominal premium, an escalating rent, service charge and covenants. Apparently, they purchased the leasehold Premises in August 2007 but now sublet under an assured tenancy.

8. Under the Lease of the Premises, the Tenants first covenant to pay, in addition to rent, a service charge "to be assessed and collected in manner as hereinafter referred to" being "a just and fair proportion" of the Landlord's annual costs expended in respect of the building (clause 1(2)). These costs expressly include insurance but not management. The Lease then contains a covenant for the tenants to pay, in addition to rent, the sum of £300 "or such other sum as hereinafter provided as a contribution towards the service charge" (clause 1(3)).

9. On top of these provisions, the Lease also contains (clause 3(2)) the following comprehensive covenants by Lessees [ie Tenants] with the Lessor [ie Landlord]:

- (a) To pay to the Lessor by way of further rent without deduction fifty per centum of the expenses and outgoings incurred by the Lessor in the repair maintenance renewal and insurance of the Building and the provision of services therein and the other heads of expenditure as the same are set out in the Third Schedule hereto (herein called "the service charge items"). The total amount of the service charge items for the period from the First day of January to the 31st day of December in every year being ascertained and certified annually by the Lessor or the Lessor's managing agents for the time being acting as experts and not as arbitrators and a copy of such certificate which certificate shall be conclusive and binding on the parties hereto (save for manifest error) shall be supplied to the Lessee together with copies of all receipts or other vouchers referred to therein and payment of the sum payable by the Lessee shall be made within twenty eight days of the Certificate to the Lessee credit being given for any amount paid by way of interim service charge....
- (c) The Lessee shall pay to the Lessor such reasonable sum in advance and on account of the annual service charge as the Lessor or his managing agents (as the case may be) shall reasonably specify to be a fair and reasonable interim payment such interim payments to be made on the days hereinbefore prescribed for payment of rent the first such interim payment to be made on the execution hereof

10. Para.4 of the Third Schedule to the Lease, which lists service charge items, includes the cost of insuring the building and para.5 of that Schedule specifically includes: “The reasonable fees of the Lessors or the Lessor’s managing agents (if any) for the time being for the general management of the Building”.

11. The Tribunal considered the items listed as challenged in para.5 above in the light of these service charge provisions. Although there is nothing in the Lease that entitled Hamilton King to demand an interim charge on 28 August 2008 when a payment on 1 January 2008 had not been demanded (ie by their predecessors), arguably the Applicants should then have paid an additional sum of £300 together with the rent without any demand. Similarly, there is nothing in the Lease entitling Hamilton King to demand payment of a separate sum on 28 August 2008 in respect of the insurance premium: the cost of insurance is simply a cost to be taken into account in calculating the Lessees’ overall service liability for the year. Nor does the Applicants’ Lease contain any provision for interest to be paid on late payments (if any) of rent or service charges.

12. The so-called ‘Excess Service Charge’ is a different matter. Although not so described in the Lease, it refers to the balance of the Lessees’ service charge liability for the year, after deductions for interim and other payments, according to the Lessor’s certified account. Here, since no interim or other payments of service charges were made in 2008, it refers to the certified total of £852.67. The Applicants would be liable under the Lease to pay their share of 50% or £426.34 to Hamilton King. However, this liability also depends upon whether the items of cost making up the total were reasonably incurred and properly included for 2008.

13. The total of £852.67 in the Accounts for the year ending 31 January 2008 certified by Crawfords Chartered Accountants on 22 January 2009 list only three items of ‘Expenses’:

Accountancy	98.00
Buildings insurance premium	581.50
Management fees	<u>173.17</u>
Total	852.67

14. However, the Tribunal observed that the sum for Accountancy was incurred only in certifying these Accounts. Since the lease did not require certification by Chartered Accountants but only “by the Lessor or the Lessor’s managing agents”, the Tribunal considered that this was not a cost

which had been incurred reasonably as required by s.19 of the 1985 Act, especially for such simple accounts, so that it could not be recovered from the Lessees by means of the service charge. At the Hearing, Mr Taylor expressed agreement.

15. Further, the Tribunal noted that the premium of £581.50 related to buildings insurance for, in substance, 2009 and not 2008. Indeed, the Chartered Accountant's certified statement of service charges stated that that premium had not been paid by 31 December 2008. The insurance premium to be taken into account for 2008 service charges was, evidently, £265, of which 50% or £132.50 had been demanded on 28 August 2008. As the Tribunal understood it, Ms Sadiku did not assert that this buildings insurance premium was too expensive but rather that the premium for 2009 was. The Tribunal was not considering whether this latter premium was reasonably incurred but, in any event, no sufficient comparative evidence was available which might have enabled the Tribunal to find that it was unreasonably expensive.

16. As to the Management fees of £173.17 (including VAT), of which the Lessees' share was 50% or £73.70, Ms Sadiku contended that the managing agents were not needed for the building which comprised only two small flats which Hamilton King only visited once a year and did very little else. The Tribunal agreed that management fees would have been unnecessary if the building had been owner-occupied. However, since the building had been converted into flats subject to leases under which the freeholder, a company, undertook various obligations, some costs of management would necessarily be incurred whether the Lessor employed managing agents or undertook the management 'in-house' itself. In the light of its general knowledge and experience, the Tribunal considers that the amount charged as management fees is below the going rate for such services, albeit minimal, and cannot be found to be unreasonable.

17. Accordingly, the Tribunal has decided that the total amount it will allow as payable by the Applicants as service charges for the year 2008 is £206.20. This sum comprises £132.50 as to building insurance premium plus £73.70 as to management fees.

18. The Application, in addition, queried the sum of £374 demanded on 1 January 2009 as an interim charge for the calendar year 2009. The provisions of the Applicants' Lease do enable Hamilton King to require an interim payment of a reasonable sum in advance on the date when rent is payable (ie 1 January in each year). It follows that the only question the

Tribunal could determine would be whether "no greater amount than is reasonable is so payable" (s.19(2) of the 1985 Act). The Tribunal has not seen a copy of a demand for payment of this sum dated 1 January 2009 or a copy of the Budget on which it was based.

19. However, this has become of historic interest only. The statute also provides that "after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise" (s.19(2) of the 1985 Act). The service charge year 2009 has ended and certified accounts have been prepared. Consequently, the question now no longer concerns the Applicants' liability to make a payment in advance. That question has been overtaken and become instead a question of their liability to pay service charges taking account of actual costs incurred in 2009. This question has been outside the scope of the Application considered by the Tribunal and no determination in respect of it can properly be made.

20. In the result, therefore, the Tribunal has only determined, under s.27A(1) of the 1985 Act, that the Applicants are liable to pay to Hamilton King the amount of £206.20 as a service charge for the year 2008. However, it should be noted that the Applicants will be entitled to withhold payment of this service charge if the demand for payment was not accompanied by the prescribed summary of the rights and obligations of tenants of dwellings in relation to service charges (see s.21B of the 1985 Act, applying from 2007). The Tribunal has seen no reference to or copy of such a summary in the documents provided by Hamilton King.

21. The Tribunal should also make an observation in relation to the Request for Payment dated, 18 May 2010, which was referred to at the Hearing as constituting a schedule of items of costs payable by the Applicants, and which includes numerous items, subsequent to the year 2008, for instructing solicitors. The observation is that liability in respect of these items may not be challengeable as service charges under s.27A of the 1985 Act. Reference should be made to the Lands Tribunal decision in *Havelli Ltd v Glass* (2006) [LRX/22/2005] where the Member took the view (at para.34) that fees for preparation and service of a s.146 notice were "a clearly variable administration charge" within Schedule 11 of the Commonhold and Leasehold Reform Act 2002. Paragraph 5 of that Schedule provides for applications to be made to an LVT to determine liability. In this respect, a recent decision of the Court of Appeal should be noted in which it was held that the costs of pursuing a tenant by correspondence through solicitors were not actually incurred in

contemplation of proceedings under s.146 of the Law of Property Act 1925 and were therefore not recoverable costs within the relevant clause in a lease: see *Agricullo Ltd v Yorkshire Housing Ltd* [2010] EWCA Civ 229.

22. No application has, as yet, been made for an order under s.20C of the 1985 Act for an order precluding, in effect, recovery of the costs of the proceedings as a service charge.

23. However, the Tribunal has jurisdiction of its own motion to require any party to proceedings to reimburse any other party for the whole or part of fees paid in respect of the proceedings: see reg.9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003. These present proceedings were entirely a result of the premature and misconceived court proceedings initiated by the Respondent coupled with a failure to comply with the relevant statutory and Lease provisions. Whether this was deliberate or attributable to incompetence, it would not be just and equitable for the Applicants to bear the cost of establishing the proper position. Accordingly, the Tribunal hereby determines that the Respondent should forthwith reimburse the Applicants for the whole of the fees paid by them in respect of the proceedings. This means that Hamilton King must now pay to the Applicants the sum of £220 (ie £70 for the Application plus £150 for the Hearing).

CHAIRMAN

Justin Forward

DATE

1 July 2010