

5028



Residential
Property
TRIBUNAL SERVICE

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL
LANDLORD AND TENANT ACT 1985**

LON/00AW/LSC/2010/0094

Premises: Flat 3, 10 Lennox Gardens,
London SW1X 0DG

Applicant: 10 Lennox Gardens Ltd

Represented by: Mr H Smith, counsel
Benson Mazure solicitors

Respondents: Mr F Masri
Mrs S Masri

Tribunal: Mr NK Nicol
Ms S Coughlin MCIEH
Mr E Goss

Date of Hearing: 05/05/10

Date of Decision: 05/05/10

REASONS FOR DETERMINATION

1. The Applicant company is the freeholder of 10 Lennox Gardens, London SW1 and is owned by the lessees of all but one of the flats within that building. The Respondent is the lessee of the remaining flat. In this application, the Applicant has applied for a determination as to the payability of service charges for the year ended 25th December 2009.

Respondent's application to recuse

2. Although technically separate, this application is a continuation of a dispute between the parties on which the Tribunal first gave a decision on 3rd July 2009 under application number LON/00AW/LSC/2009/0123. As well as a number of procedural decisions and orders, the Tribunal has issued the following substantive decisions:-

- (i) On 3rd July 2009 the Tribunal held that service charges arising in the previous year were reasonable and payable, save for one item of roof repairs disallowed for lack of consultation.
- (ii) On 10th February 2010 the Tribunal dismissed the Respondent's claim for a set-off.
- (iii) On 23rd February 2010 the Tribunal held estimated service charges for the year ended 25th December 2009 to be reasonable and payable.

3. The Respondent strongly objected to the Tribunal's decision of 3rd July 2009 and, in particular, the manner in and the procedure by which it was reached. He was refused permission to appeal to the Lands Tribunal and on 1st March 2010 issued an application for judicial review. The Administrative Court's decision on the papers as to whether permission should be granted is still awaited. Arising from the same issues, the Respondent made a further oral application at the start of the hearing on 5th May 2010 for the Tribunal to recuse itself. He supported his application with a number of points:-

- (a) He relied on the fact that there are extant judicial review proceedings complaining about the Tribunal's conduct of the case determined on 3rd July 2009. He pointed out that the current application is "dominated" by one

item, namely a bill for legal costs incurred principally in relation to the decision of 3rd July 2009 and subsequent related matters.

- (b) The Tribunal's decision of 3rd July 2009 made a number of "attacks" on the Respondent's demeanour and behaviour, which are exemplified in paragraphs 8a, 8c and 35-37 of the written determination and which are the subject of the judicial review application.
 - (c) He was concerned that there would be a conflict of interest and/or bias, including apparent bias, if the same Tribunal were to hear the current application in the light of the above matters. He submitted that the Tribunal would effectively be sitting in judgment on itself when considering the reasonableness and payability of the legal costs.
4. The Tribunal rejected the Respondent's application and, as explained at the hearing on 5th May 2010, gives its reasons in this written decision.
 5. As matters stand, the Tribunal's decisions in these proceedings are valid and in force. The possibility that they may be reduced or overturned by a superior court at some point in the future does not affect this. The Tribunal is unaware of the specific grounds for the Respondent's application for judicial review because he did not provide a copy of any of the relevant documents from those proceedings. However, the Tribunal is satisfied that there are no grounds to impugn its previous decisions, on the basis of some alleged unfairness or otherwise. Further, there is no conflict of interest because the Tribunal has no interest in the outcome of the proceedings.
 6. The claim in respect of bias appears to amount to no more than an allegation that deciding in favour of one party rather than the other establishes at least an appearance of bias, therefore precluding the Tribunal and its individual members from adjudicating on any further disputes between the same parties. Apparent bias is established by considering the circumstances from the viewpoint of a reasonable bystander who knows the relevant circumstances (rather than the bystander who has no such knowledge as the Respondent suggested). The Tribunal is satisfied that no such bystander would consider that the Tribunal's conduct of the various hearings or its decisions give any appearance of bias.

7. Further, the reasonableness and payability of the relevant legal costs is determined by reference to the Applicant's behaviour, not that of the Tribunal. If the Applicant's behaviour resulted in additional or extended hearings, that would be relevant. However, if the Tribunal could be said to have increased costs unreasonably by one of its decisions, the Respondent's remedy is to appeal that decision, not to attack the reasonableness of the Applicant's costs in responding to that decision. Therefore, the Tribunal would not be sitting in judgment on itself when considering the legal costs.
8. When the Tribunal informed the Respondent that his application would be dismissed, he decided to leave and so not contest the Applicant's case. The Tribunal tried to persuade him that it would be in his best interests to stay and put his case but he said that he could not continue in front of a Tribunal which appeared to be biased. In the circumstances, the Tribunal had no choice but to continue in the Respondent's absence.

Service charges

9. The Applicant asserted that the following expenses were incurred in the year ended 25th December 2009 (with the estimated charges already determined by the Tribunal as reasonable in the final column):

	<i>Actual</i>	<i>Estimated</i>
Fire extinguishers	173	150
Water hygiene	1,242	1,000
Entryphone	146	150
Repairs & maintenance	1,724	6,000
Pest control	0	750
Management fee	1,380	1,410
Insurance	5,939.40	4,690.40
Cleaning	4,169	4,260
Electricity	1,006	300
Professional fees	1,072	---

Accountants fees (inc VAT)	1,058	---
Legal costs	47,823	---
Total	£65,732.40	£18,710.40

10. According to his lease, the Respondent's share of the expenditure is 14.09%, amounting to £9,261.69. The Respondent set out his objections in handwritten representations. According to the pagination, there were a number of pages missing. Before he left, the Respondent confirmed that he had submitted the relevant documents in that form because he had yet to complete them. He declined the opportunity to supplement them or otherwise fill in the gaps.

Legal costs

11. By far the single largest item in the service charge accounts is for legal costs. The Tribunal's previous decisions from 3rd July 2009 onwards provide full details of the proceedings which will not be repeated here. The Applicant provided copies of Benson Mazure's invoices and printouts from their practice management software. They showed that the overwhelming majority of the work at Benson Mazure, some 977 units (equating to 97.7 hours or 12.2 8-hour days) was carried out by Mr Zuckerman, who is a partner at the firm. A further 2.7 hours' work was carried out by two other partners. Mr Zuckerman frequently consulted Mr Smith of counsel who also drafted the statements of case and represented the Applicant at all hearings.
12. In 2006 the Applicant's predecessor, the Wellcome Trust, claimed £38,390.59 in legal costs in relation to a previous dispute with the Respondent. The Tribunal decided that only £8,225 was reasonable and payable (both sums are inclusive of VAT). The Tribunal's reasoning was as follows:-

17. The tenant's primary case in relation to the landlord's proposal to place the whole of its costs on the service charge is that the landlord's costs were not reasonably incurred because it achieved its success before the tribunal through the dishonesty of its solicitors, counsel and surveyors. We have read his statement on these issues and can find no basis whatsoever for these allegations. Indeed, most of them are clearly absurd and, again, none of them he chose to pursue at the hearing.

18. Apparently the works ... have cost about £14,470, of which the tenant's share would have been a little over £2,000. ... on any view the costs which the landlord incurred in the preparation and presentation of the case before the tribunal very greatly exceeded the amount at stake.

19. ... we have no doubt that the work was done and that the charging rates are reasonable for a City firm of solicitors and very experienced counsel and surveyors. We have no quarrel with the right of a major landlord to instruct the solicitors, counsel and surveyors of their choice and to pay them for very thorough preparation, even of a relatively straightforward ... case ... However, that does not necessarily mean that the landlord is entitled to recover all its costs from the leaseholders.

20. In our view it can very rarely be reasonable for the legal and other costs of proceedings greatly to exceed the amount at stake. ...

21. ... The ... work done and its costs ... appear more appropriate to a complex commercial dispute involving many thousands of pounds or an important issue of principle.

22. We have borne in mind that the tenant is clearly a difficult and tenacious litigant, and that the dispute involved points of law and the interpretation of a lease (although the issues appear to have been relatively run-of-the-mill for this jurisdiction) ... Nevertheless we are quite satisfied that the landlord's costs greatly exceeded what was reasonable in the circumstances.

13. The Respondent relied on these words as applying to the current application. Mr Smith, on behalf of the Applicant, submitted that there were a number of features which distinguished the two proceedings:-

- (a) He submitted that the landlord was now constituted by all the other lessees rather than a separate organisation. The previous Tribunal was concerned with how far the landlord could shift the burden of his legal costs onto third parties unconnected to the litigation. In the present case, it is the other lessees who have to bear the burden of any costs not recovered. However, the Tribunal would respond that, in this case, the other lessees had control over their legal expenditure whereas the Respondent did not. It was said that the other lessees do not object to the size of their legal bill. That is their

choice. They were not obliged to make that choice. This is the Respondent's only opportunity to object to that choice.

(b) Mr Smith further submitted that the Respondent caused the costs to be substantially higher than they could or should have been. The Tribunal agrees. As well as having lost his case comprehensively, he often delayed producing his documents and then those documents were lengthy, repetitive and difficult to follow. His allegations were numerous, sometimes abusive and often clearly without any merit. Adjournments were incurred unnecessarily. The Tribunal reflected its view of such matters by making costs orders to the maximum of its powers. However, these points cut both ways. While the Applicant may reasonably be expected to address each and every issue, the time spent should be proportionate to the apparent merits, i.e. the Applicant should have limited their consideration to what each of the Respondent's points actually deserved.

(c) The Applicant alleged that the Respondent was following a deliberate strategy of building up costs to try to oblige the Applicant to give in or concede some part of their charges. The evidence strongly supports this submission and the Tribunal should certainly try not to encourage such behaviour. However, that is not a justification for running up disproportionate costs.

14. The Tribunal is satisfied that the words of the previous Tribunal, set out in paragraph 12 above, apply equally here, including the reference to the Respondent's absurd allegations of dishonesty. A very senior solicitor did all the work but still felt it necessary to consult counsel on numerous occasions. Both attended every hearing. Whatever view is taken of the Respondent's behaviour, it did not require such a high-powered legal team to deal with it. The Respondent's conduct of proceedings caused the costs to rise substantially and there can be no doubt that reasonable costs in this case would significantly exceed what would be reasonable in most other service charge cases heard by the Tribunal. However, the Applicant was at all times subject to a duty to ensure that the costs were not permitted to rise to a level which was disproportionate to the amounts in dispute.

15. It would be absurd for the Tribunal to attempt to re-calculate the time spent by the Applicant's legal advisers over the course of this case. The Tribunal must look at

the issue in the round and in the light of all the circumstances of the case. On that basis, the Tribunal determines that reasonable legal costs should not have exceeded £30,000.

Cleaning

16. The Respondent objected to a number of points in relation to cleaning. The Applicant conceded that a £250 invoice had been wrongly included when it related to the preceding year. There was also a note on one of the invoices suggesting a reduction of £120 but this turned out only to be a proposal which the cleaners did not accept and the Applicant did not press further.
17. The Respondent's main point, as it had been previously, was that the cleaners were more expensive than could be obtained elsewhere. He relied on four quotes but, when the Applicant went to the same cleaning firms, they provided quotes at a much higher price and coincidentally very close to the amount being levied as part of the service charge. This strongly suggests that the Respondent sought quotes on the same terms, in particular with shorter hours, as he previously unsuccessfully claimed should apply. The Tribunal is satisfied that the cleaning charges remain reasonable.

Repairs & maintenance

18. The Respondent objected to a number of points in relation to repairs & maintenance. The Applicant explained that an apparent discrepancy of £250 between the total of relevant invoices and the amount in the service charge accounts arose from an insurance excess. The Applicant had met the cost of £900 incurred by one of the lessees in remedying damage but only recovered £650 from the insurers due to a standard excess. The Tribunal is satisfied that this was correctly put on the service charge.
19. The repairs & maintenance charge was supported in part by an invoice from Addison Lee couriers. Part of the charge was explained by the delivery of fire extinguishers, for which it was cheaper to use Addison Lee, but the Applicant could not explain a charge of £12.94 for an apparent drop from the managing agents to the solicitors and conceded it.

20. The Respondent objected to a charge in relation to the communal aerial/dish on the basis that it did not come within his lease. Clause 1(a) of the Third Schedule contains the lessor's covenant to maintain fixtures and fittings to the Mansion, whenever fitted, and the Tribunal is satisfied that this covers the relevant charge.
21. The Tribunal could not find any other discrepancies and is satisfied that the repairs & maintenance element is payable, subject to the deduction of £12.94.

Electricity

22. The Applicant conceded that the electricity charge looked high and was high. This was due to the fact that EDF Energy, the electricity supplier, had estimated the bills and, in the Applicant's opinion, had over-estimated them. The Applicant provided their own readings but EDF have refused to accept them. If and when EDF manage to overcome access difficulties caused by the sitting tenant, the Applicant expects there to be a credit. In the meantime, Mr Smith submitted, and the Tribunal accepts, that there is a genuine liability which is correctly included in the service charge.

Noisy pump

23. As he had done previously, the Respondent complained that there was a noisy pump in Flat 4 for which he was entitled to damages, to be set off against his service charge liability, for his distress and inconvenience. However, none of his submissions even begin to explain why the Applicant should be liable. It is clear that any cause of action should in the first place be against the owner and/or occupier of Flat 4 but it is not clear how that liability could be said to extend to the Applicant.

Conclusion

24. The Tribunal has not sought to deal with every point raised by the Respondent in his written submissions. Some of these submissions were raised in identical form in relation to the previous year's charges and there is no point in repeating the conclusions set out in the Tribunal's decision of 3rd July 2009. Also, without the Respondent's assistance in person at the hearing, it was not possible to understand all the points being made.

25. Therefore, for the reasons set out above, the Tribunal has determined that the service charges sought by the Applicant for the year ended 25th December 2009 are reasonable and payable subject to:-

- (a) A maximum of £30,000 in relation to legal costs.
- (b) A deduction of £12.94 in relation to repairs & maintenance.

Chairman.....*N. K. N. N.*

Date 5th May 2010