5509

Residential
Property
TRIBUNAL SERVICE

Case Reference: LON/00AW/LSC/2010/0658

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL for the LONDON RENT ASSESSMENT PANEL

ON AN APPLICATION MADE UNDER SECTIONS 27A & 20C OF THE LANDLORD AND TENANT ACT 1985 (AS AMENDED) AND AN APPLICATION FOR DISSMISSAL OF THAT APPLICATION UNDER PARAGRAPH 11 OF THE LEASEHOLD TRIBUNAL (PROCEDURE) (ENGLAND) REGULATIONS 2003

Property:	192 Cromwell Road, London SW5 0SN
Applicants:	Ms J Thomas (Rear Garden Flat), Ms A Vuckovic (Ground Floor Rear Flat) and Mr J Uribe (Flat 3)
Respondent:	CH Chesterford Limited
In attendance:	Ms J Thomas Ms A Vuckovic Mr J Uribe Mr D Dovar of 33 Bedford Row Chambers, Counsel for Respondent Mr A Tilsiter, director of Respondent company
Date of Hearing:	24th November 2010
Tribunal:	Mr P Korn (Chairman) Mr C Gowman BSc MCIEH MCMI

3.14

Background

1. On 1st October 2010 the Tribunal received an application under section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") for a determination of payability of service charges and an ancillary application under section 20C of the 1985 Act for an order limiting the landlord's costs incurred in connection with the proceedings. Initially the application was just from Ms Vuckovic, the leaseholder of the Ground Floor Rear Flat, but Ms J Thomas (Rear Garden Flat) and Mr J Uribe (Flat 3) were joined as co-applicants on 11th October 2010.

2. The issue for determination raised in the application was whether the Applicants were obliged to contribute towards any costs relating to the communal boiler in the Property in respect of the 2010 service charge year or future years.

3. On 6th October 2010 the Respondent's solicitor wrote to the Tribunal asserting that the Leasehold Valuation Tribunal had already made a determination on the same or essentially the same issue as the one that forms the basis of this application in a previous decision given on 16th August 2010 (case reference number LON/00AW/LSC/2010/0203). Consequently, so it was argued by the Respondent's solicitor, the application should be dismissed as *"frivolous or vexatious or otherwise an abuse of the process of the tribunal"* pursuant to Paragraph 11 of the Leasehold Tribunal (Procedure) (England) Regulations 2003 ("**the 2003 Regulations**").

4. Notice of the possibility that the application might be dismissed was served on the Applicants in accordance with sub-paragraph 11(3) of the 2003 Regulations and a hearing took place on 24th November 2010.

5. At the hearing it was agreed between the parties that the Tribunal could, and would, consider not only the application for dismissal but also the Applicants' substantive application, on the basis that the Tribunal would only make a **decision** on the substantive application if it decided not to **dismiss** that application under Paragraph 11 of the 2003 Regulations.

6. It was noted that the previous decision referred to in paragraph 3 above was an application by the Respondent in this case (i.e. the landlord) for a variation of the leases of each of the units within the Property under section 37 of the Landlord and Tenant Act 1987. There was some discussion as to whether all of the Applicants had been parties to that case but Ms Vuckovic conceded on behalf of (and with the tacit agreement of) the other Applicants that they were all parties to that case and Mr Dovar for the Respondent accepted that concession.

Applicants' case

7. Ms Vuckovic explained that there were 10 units in total, 8 of which paid one-twelfth of the service charge and 2 of which (being larger) paid two-twelfths. She and Ms Thomas had acquired their leases about 21 years ago and Mr Uribe had acquired his lease about 10 years ago. The Respondent was not the original landlord, but the original landlord had installed individual boilers in the Applicants' flats, in each case before they acquired them.

8. Although the leases appeared to oblige the tenants to pay towards the costs associated with the communal boiler, Ms Vuckovic argued that (i) the original landlord had never envisaged the Applicants contributing towards this cost as it

had taken the initiative to install individual boilers in the Applicants' flats, (ii) the original landlord had not at any point sought to charge the Applicants in respect of the communal boiler and (iii) the Respondent had continued not to charge the Applicants and then had applied to the Leasehold Valuation Tribunal to vary all of the leases in order to formalise the lack of obligation on the part of the Applicants to pay towards the communal boiler and to spread the cost amongst those leaseholders who (or whose tenants) did benefit from the communal boiler. Only now that the Respondent's application has been unsuccessful was the Respondent attempting to charge the Applicants for a proportion of the costs associated with the communal boiler.

9. Ms Vuckovic submitted that the leases were defective in a number of ways. For example, they referred to the existence of a lift even though there was no lift.

10. The crux of Ms Vuckovic's argument, as the Tribunal understands it, was that although it was arguable that the leases obliged the Applicants to pay for the service of a communal boiler the Respondent was simply not providing that service, in the sense that although the boiler existed the Applicants were not obtaining any benefit from it. This situation was known by the Respondent and was set up by the Respondent's predecessor in title.

11. As regards documentary proof of the arrangements, Ms Vuckovic produced copies of service charge statements received by Ms Thomas in respect of the 1988 to 1990 service charge years. These contained figures for expenditure on "gas-plant / boilers etc" but showed a nil charge to Ms Thomas in each case for her share. This demonstrated, according to Ms Vuckovic, that it was accepted by the then landlord that Ms Thomas was not obliged to contribute towards these costs, and Ms Vuckovic also stated that this was what the then landlord has agreed orally.

Respondent's case

12. Mr Dovar for the Respondent took the Tribunal through the relevant provisions of the Applicants' leases. He referred to the obligation contained in Ms Thomas's and Ms Vuckovic's respective leases to pay one-twelfth of the service charge (in the case of Ms Thomas and Ms Vuckovic) or two-twelfths (in the case of Mr Uribe). He also referred to the definition of the service charge payable by each tenant as being a proportion of the total expenditure incurred by the landlord in carrying out its obligations under clause 5(5) of the relevant lease.

13. In each lease, the landlord's obligations in clause 5(5) included an obligation (put briefly) to maintain/renew the central heating and hot water apparatus in the Property. Mr Dovar submitted that there was no reason why the Applicants should not be obliged to contribute towards the performance of that obligation, whether or not they regarded it as useful to them personally, given that it was one of the obligations falling within the definition of the total expenditure on which the service charge was based. Mr Dovar offered the analogy of a lift, the cost of maintenance of which is often shared by ground floor tenants even though they derive little or no benefit from it.

14. In the case of Mr Uribe, his lease explicitly referred to payment towards these costs, as the definition of Tenant's Share Of Total Expenditure is *"16.666% excluding boiler and gas supply expenses and 22.50% boiler and gas supply expenses (subject to the provisions for variation hereinafter contained)"*.

15. In relation to Ms Thomas's and Ms Vuckovic's leases, if it had been intended that they should not be obliged to contribute towards the cost of boiler maintenance then their leases would have made this clear, and indeed this is precisely what had happened in the other leases described by the previous Tribunal as the 'softer' leases. For example, the lease of Lower Ground Floor Flat (Front) in favour of Mr K Sharma contained in clause 7(5) a specific exemption from the obligation to contribute towards costs associated with the central heating and hot water apparatus.

16. Mr Dovar responded to a point by Mr Uribe about the clause in his lease (clause 7.6) which allows for a variation of the service charge percentage in circumstances where (for example) some event occurs which renders the tenant's share of the service charge no longer fair or appropriate. Mr Dovar noted that the opening words of that clause were: *"If at any time during the Term ..."*, and he submitted that for this clause to be invoked there would have to be a change of circumstances **during the Term**, i.e. after the grant of the lease. However, the change in circumstances – namely the installation of an individual boiler in the flat – occurred **before** the grant of the lease.

17. In response to a point made by Ms Vuckovic regarding clause 5(5)(h) of her lease, Mr Dovar disagreed with her interpretation of it. The clause obliges the landlord *"to maintain at all reasonable hours through any system existing at the date hereof for the supply of hot water from a central system but not otherwise an adequate supply of hot water to the Building and ... to provide sufficient and adequate heat to the radiators (if any) for the time being fixed in the Demised Premises or in any other part of the Building unless the Lessors shall be unable to perform this covenant by reason of the act neglect or default of the Tenant ..."*. Ms Vuckovic's argument was that the Respondent was simply not providing this service and therefore the Applicants should not have to pay for it. Mr Dovar argued in response that the Respondent was maintaining the system, and that it was servicing the 'Building' and that the system was available to service the Applicants' premises if they wanted to use it.

18. Regarding the Respondent's own application for dismissal of the Applicants' substantive application, this was based on the principle of 'issue estoppel', namely that a party is precluded from contending the contrary of any point which has already been determined against him in a final judicial decision between the same parties and their privies, and he referred in support to *Halsburys Laws of England Volume 16(2) paragraph 980* and the case of *Hoystead and others v Commissioner of Taxation (1926) AC 155.* In his submission, having established that the Applicants were all parties to the previous Tribunal case (ON/00AW/LSC/2010/0203), the previous Tribunal had made a finding of fact that the Applicants were obliged to contribute towards the boiler costs under the terms of their respective leases.

No inspection

19. The Tribunal members did not inspect the Property. Neither party requested an inspection, and the Tribunal's view was that an inspection was not necessary in order for it to make a determination in the circumstances of the particular issue in dispute.

The law

20.

A. 2003 REGULATIONS

Paragraph 11 of the 2003 Regulations provides as follows:-

"(1) Subject to paragraph (2), where–
(a) it appears to a tribunal that an application is frivolous or vexatious or otherwise an abuse of process of the tribunal; or
(b) the respondent to an application makes a request to the tribunal to dismiss an application as frivolous or vexatious or otherwise an abuse of the process of the tribunal,
the tribunal may dismiss the application, in whole or in part.
(2) Before dismissing an application under paragraph (1) the tribunal shall give notice to the applicant in accordance with paragraph (3).
(3) Any notice under paragraph (2) shall state–
(a) that the tribunal is minded to dismiss the application;
(b) the grounds on which it is minded to dismiss the application;
(c) the date (being not less than 21 days after the date that the notice was sent) before which the applicant may request to appear before and be heard by the tribunal on the question whether the application should be dismissed.
(4) An application may not be dismissed unless–
(a) the applicant makes no request to the tribunal before the date mentioned in paragraph (3)(c); or
(b) where the applicant makes such a request, the tribunal has heard the applicant and the respondent, or such of them as attend the hearing, on the question of the dismissal of the application."

B. THE 1985 ACT

Section 19 of the 1985 Act provides as follows:-

"(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard and the amount shall be limited accordingly.
(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

"Relevant costs" are defined in Section 18(2) of the 1985 Act as *"the costs or estimated costs incurred or to be incurred by or on behalf of the landlord...in connection with the matters for which the service charge is payable"* and "service charge" is defined in Section 18(1) of the 1985 Act as: *"an amount payable by a tenant of a dwelling as part of or in addition to the rent (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements, or insurance or the landlord's cost of management, and (b) the whole or part of which varies or may vary according to the relevant costs."*

Application of law to facts

21. It is appropriate to deal first with the Respondent's application for dismissal of the substantive application. The Tribunal notes the arguments made by Mr Dovar on behalf of the Respondent. However, whilst it is accepted that there is indeed a doctrine of 'issue estoppel' the Tribunal is not persuaded that the circumstances of this case are analogous to those considered by the Privy Council in the *Hoystead* case.

22. The following passage in *Hoystead* is considered to be particularly relevant to the present case: *"Very numerous authorities were referred to. In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances."*

23. In the Tribunal's view, the present case is not one in which the Applicants are (for example) entertaining new views of the law. In the previous case, the Applicants were **supporting** the Respondent's case and therefore it is perfectly natural that they would have been limiting their submissions to those points which supported the Respondent's application for a variation of the leases. There seems no sensible basis for assuming that at the hearing of the lease variation application the current Applicants (in their role supportive of the current Respondent) would or should have presented all relevant arguments supportive of a later **possible** case **against** the current Respondent in order to demonstrate that they were not obliged to pay towards the cost of their boiler under the terms of their leases. Indeed it is arguable that it was not a point that was strictly relevant (or at least not central) to the application for a variation of all of the leases. This is therefore not a case in which the Applicants are embarking on litigation because of new views that they entertain as to the law or the facts.

24. Therefore, in the Tribunal's view, the doctrine of 'issue estoppel' should not be applied in this case, this case being distinguishable from *Hoystead*, and the Tribunal is therefore not minded to dismiss the Applicants' application.

25. In passing, the Tribunal would just briefly comment on Mr Dovar's assertion that the previous Tribunal clearly decided that the Applicants were all legally obligated to contribute towards the cost of the communal boiler. The Tribunal is not persuaded that the position is as clear-cut as he suggests. It is true that there are passages in the previous Tribunal's decision that might indicate that this was the underlying assumption and therefore on the balance of probabilities the Tribunal agrees that this was what the previous Tribunal considered the position to be, but the position is considered to be less clear than Mr Dovar is suggesting.

26. Regarding the substantive application, the Tribunal notes the Applicants' concerns and accepts that they feel that they are being asked to pay for a service that is not available to them. There is some evidence to suggest that there was some informal agreement between the Applicants and the previous landlord, under which they did not in practice have to contribute towards the cost of the

boiler. This arrangement, it seems, was continued informally by the Respondent, or at the very least the Respondent was trying to engineer a situation in which the Applicants would not be obliged to pay, as is evident from its application to vary the leases.

27. However, the application to vary the leases was unsuccessful and the Respondent now wishes to start charging the Applicants. In its submission, it is (and has always been) entitled to do so under the leases and not to do so would leave it with a shortfall.

28. The Tribunal accepts that Mr Uribe's lease contains express wording obliging Mr Uribe to contribute towards the cost of the boiler (as referred to earlier). In relation to Ms Thomas's and Ms Vuckovic's leases, there is not the same express formulation but neither is it excluded (unlike in the so-called 'softer' leases). The landlord in each case covenants to provide the service and the relevant tenant covenants to pay towards it. Ms Vuckovic argues that the Respondent does not actually provide the service and has effectively agreed (outside the terms of the lease) that Ms Thomas and Ms Vuckovic are not obliged to pay for it.

29. Having considered the matter carefully, the Tribunal is of the view that the Applicants are obliged to contribute towards the boiler costs according to the percentages set out in their respective leases. It does appear that the previous landlord was prepared not to charge these amounts over a long period of time, but there is no evidence that the previous landlord or the Respondent ever entered into a legally binding obligation (for example a formal variation of the leases or a contractual agreement supported by 'consideration') not to do so. It might be arguable that the previous landlord and possibly even the Respondent waived the obligation to pay on a temporary basis, but there is no real evidence of any permanent binding waiver.

30. As regards the construction of the leases, the position is clearer in respect of Mr Uribe's lease (because of the express wording in the definition of Tenant's Share Of Total Expenditure), but the Tribunal also considers that Ms Thomas's and Ms Vuckovic's leases oblige them to contribute towards communal boiler costs.

31. It is not really disputed by the Applicants that the Respondent maintains and renews when required any existing central heating and hot water apparatus in the Building (as it covenants to do in, for example, sub-clause 5(5)(g) of Ms Vuckovic's lease). In relation to sub-clause 5(5)(h) of that lease, whilst Ms Vuckovic and the other Applicants do not receive heating or hot water from the communal boiler, it appears that the Respondent nevertheless maintains the system and the system is available for the Applicants to connect into. Mr Tilsiter confirmed at the hearing that the Respondent was happy to arrange this. Whilst it is arguable that this would not be of any use to the Applicants given that they have their own systems, nevertheless it seems to the Tribunal that the Respondent is complying or is willing to comply with its obligations under the relevant leases (albeit arguably for reasons of self-interest) and that the Applicants have an obligation – which has not been legally varied or removed in some other legally binding way – to contribute towards the cost.

32. The Tribunal agrees with Mr Dovar's interpretation of clause 7.6 of Mr Uribe's lease and agrees, therefore, that this clause cannot be invoked by Mr Uribe to demand a variation.

33. Amongst the various arguments advanced by Mr Dovar, he offered the analogy of ground floor tenants paying towards the cost of maintaining a lift. The Tribunal does not find this analogy particularly helpful; a better analogy might be if a landlord installed a separate lift for the use of particular tenants, did not charge them for the cost of maintenance of the main lift on the basis that they did not derive any benefit from it, but then later changed its mind and starting invoicing those tenants for a proportion of the cost of the main lift. The point of addressing this analogy is to emphasise that the Tribunal has sympathy with the position in which the Applicants find themselves. Nevertheless, and with some regret, the Tribunal considers, for the reasons already given and on the basis of the information that has been provided, that the Applicants have a legal obligation to contribute towards the communal boiler costs.

34. No compelling evidence was provided by the Applicants that the boiler was unfit for purpose or that the available service was substandard, and nor was any evidence brought to indicate that the amount being charged was unreasonable. In any event, quality of service and reasonableness of the cost of the service were not the stated bases for the application.

35. The Applicants' argument that the leases were defective in that, for example, they referred to a non-existent lift is not considered relevant to the issue which is central to the application.

36. Accordingly, the Tribunal is of the view that the Applicants' contribution towards the boiler costs is payable in full for the 2010 service charge year and – in principle – for future years, subject to any question arising in later years as to whether the **actual charges** are reasonable for the service supplied in the relevant year.

Determination

37. The Respondent's application for the substantive application to be dismissed under paragraph 11 of the 2003 Regulations is refused.

38. The substantive application has therefore been considered by the Tribunal, and the Tribunal determines that the Applicants' contribution towards the boiler costs (as referred to in their application) is payable in full in respect of the 2010 year. In respect of future years, the contribution is payable in principle, subject to the possibility of a challenge to the actual amount in any given year if there are grounds for making such challenge.

39. The Applicants have applied for an order under Section 20C of the 1985 Act that none of the costs incurred by the Respondent in connection with these proceedings should be recoverable as service charge. The Respondent has been successful in defending the application, and given the nature of the issue it is considered reasonable for the Respondent to have employed a barrister. Whilst the Respondent's request for the application to be dismissed outright was refused, the Tribunal considers the request to have been a perfectly proper one in the circumstances, and there is no suggestion that the Respondent's conduct in the run-up to the hearing or at the hearing itself has been unreasonable. Therefore, it seems to the Tribunal that it would not be appropriate to penalise the Respondent by making a Section 20C order against it. The Applicants' application for a Section 20C order is therefore refused.

40. As regards recovery of costs under the terms of the leases, Mr Dovar referred the Tribunal to the relevant part of each lease and the Tribunal confirms that it agrees that the Respondent's **reasonable** legal costs incurred in connection with these proceedings are recoverable as service charge as a matter of construction of each lease.

41. No other cost applications were made.

Chairman .....
Mr P Korn

Date: 30th November 2010