HM Courts & Tribunals Service

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Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON A MATTER UNDER SECTIONS 27A OF THE LANDLORD AND TENANT ACT 1985

Case Reference:	LON/00AC/LSC/2011/0819
Premises:	9 Hurstwood Court, London NW11 0AP
Applicant (Leaseholder):	Sureworld Ltd.
Respondent (Freeholder):	Hurstwood Court Ltd.
Date of hearing:	27 February 2012
Date of inspection:	27 March 2012
Appearance for Applicant(s):	Mr and Mrs Gurvits (Directors of Applicant company)
Appearance for Respondent(s):	Mrs Berwin MIRPM Premier Management Partners
Leasehold Valuation Tribunal:	Ms F Dickie, Barrister, Chairman Mr P Roberts, DipArch RIBA Ms L Hart
Date of decision:	30 April 2012

Decisions of the Tribunal

1. Interest – no interest has been shown to be due.

2. Management Fee – a fee of 10% of the service charge (excluding the reserve fund) is payable.

3. No insurance commission charged by Philip Phillips is recoverable as a service charge. A 10% commission charged by Premier Management Partners is recoverable as a service charge.

4. Gardening – the amount of £1656 is chargeable to the service charges for the year ending 2011 and an estimated charges of £1760 for the year ending 2012.

5. Accountancy fees of £200 plus VAT are recoverable through the service charge for each of the years in dispute.

6. Professional fees – 50% of the fee of £2100 to Dilaps UK is reasonable and payable.

7. Reasonable reserve fund contributions for the year ending 2011 have been demanded. A contribution per leaseholder for the year ending 2012 is £3500.

8. The tribunal makes an order under s.20C and orders the Respondent to refund to the Applicant the tribunal fees of £250.

The application

9. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable in respect of the service charge years . The relevant legal provisions are set out in the Appendix to this decision. The following service charges were in dispute: Year end March 2011, and estimates for the year ending March 2012.

The background

10. The subject premises are a purpose built block of 16 flats situated on a busy corner site, each with a private ground floor entrance and access to a communal rear garden. There are no internal communal areas. There are rear communal steel stairs to access these gardens. To the front elevation there are demised gardens, access paths to the flat entrances and small flowerbeds adjacent to them. A low boundary wall with adjacent beds and communal paths access lie on the back edge of the pavement . The tribunal carried out an external inspection on the morning of 27 March 2012.

11. The Applicant holds a long lease of the premises, purchased at auction in June 2011, which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. A copy of the lease was produced to the tribunal. The current managing agent is Premier Management Partners, appointed in November 2011 after the resignation of the former agent Philip Phillips. The tribunal issued directions on 2 December 2011.

12. At the hearing, the Applicant abandoned objection to service charge expenditure on repairs and maintenance. The relevant issues for determination are set out under separate headings below.

Evidence and Tribunal's Decision

13. At the hearing Mr Gurvits disputed that the service charge demands had been accompanied by a summary of the tenant's rights and obligations, though acknowledged that this statement had recently been served on him. He had made a general challenge in correspondence to the landlord's compliance with statutory obligations, and he considered his request for a copy of the demands implicitly included a request for the statement of rights. Ms Berwin denied that the statement of rights and obligations had been put in issue in these proceedings, and in any event understood that Philip Philips always sent them and that furthermore they had recently been resent. There was no witness statement from Mr Philips, which Ms Berwin considered she could have obtained if the matter had been challenged earlier.

14. Since the management had been passed to a new agent, it was incumbent on the Applicant clearly to put in issue all disputes on which the Respondent would be required to have obtained evidence from that agent. Whilst Mr Gurvtis raised the lawfulness of the demands, this was not a specific reference to the statement of rights and obligations, which by virtue of section 21B of the Act must accompany the demand, and is not therefore considered to be part of that demand. This issue not having been raised explicitly until the hearing, it was not put in issue and the Applicant has failed to establish a failure to comply with the obligation under s.21B.

Interest

15. The lease provides at Clause 5.5 for the payment of interest on unpaid service charges. Clause 2.7 defines interest at four per cent above base rate. However, the Applicant objected that interest was being calculated incorrectly in that (even if a statement of rights and obligations was served) it was charged on excessive reserve fund contributions.

16. The Respondent could not produce a calculation for the total interest of £41.96 charged to the Applicants, explaining that this was done by Mr Phillips who is out of the country. The Respondent produced no evidence of the National Westminster Bank base rate throughout the relevant period, nor could they produce justification for a revised figure for interest after reserve fund payments were spread over twice the period. It was incumbent on the Respondent to demonstrate the mathematical basis on which interest is sought and it has failed to discharge this burden. It is not for the tribunal to carry out enquiries and detailed calculations in respect of such a modest sum. The tribunal determines that no interest is payable.

Management Fee

17. Mr Phillips had claimed a management fee of £5953.50 in the year ending 24 March 2011. Excluding VAT this amounts to £310 per unit. The estimated service charges for the year ending March 2012 include a management charge of £6144, which amounts to about £320 per unit plus VAT. Mr Gurvits argued that the Respondent was limited to recovery of the management fee specified in the lease, which is 10% of expenditure plus VAT (Third Schedule Part 1). In the year ending March 2011 the actual expenditure excluding

management was £12718, and the management fee should therefore be £1271.80, or £79.50 plus VAT per unit, according to the Applicant.

18. Even without that provision in the lease, in the experience of Mr Gurvits the management fee would be unreasonable for a block of this nature and the limited services provided, and a figure of £100-£150 per unit would be reasonable.

19. It was argued on behalf of the Respondents that the lease (para 4 third Schedule (ii)) allows the management fee to be charged on the total service charge including the reserve fund, and that Mr Phillip's management fee was lower than this. The reserve fund had been mainly saved and carried forward from 2010 – 2011. The Directors had sought quotations for management fees when moving from Mr Phillips, and the current managing agent's fee had been reduced to £225 per unit plus VAT.

20. The lease provides in the Third Schedule – Part 1 – Service Costs:

> 1. "Service Costs" means the amount the Landlord spends in providing the Services and carrying out the obligations imposed by this lease and not reimbursed in any other way and including the costs of borrowing money for that purpose plus 10% (the 10% being a fee for managing the building) plus a sum to be determined conclusively in each year by the Landlord acting reasonably to be paid into the Reserve Fund set out in the Third Schedule Part IV."

21. The tribunal agrees with the Applicant's interpretation of the lease that the management charge is thus limited to 10% of the Service Cost, and that the reserve fund does not form part of the Service Cost to which that percentage may be applied. Paragraph 4(c) of the third Schedule Part IV provides that "after the Completion Date the Landlord estimates the contribution needed by the Reserve Fund each year and that sum is a Service Cost when calculating the Service Charge". However, the tribunal considers that it is only in calculating the Service Charge that the Service Cost includes the reserve fund, and not in calculating the management fee under paragraph 1. Were the reverse to be the case, the interpretation of paragraph 1 would require the payment of a reserve fund contribution within the service cost, and again within the Reserve fund contribution – i.e. it would be payable twice, which clearly cannot be the case.

Insurance Commission

22. Mr Gurvits said he understood that 20% commission was paid on the building insurance – with 10% paid to the freehold company and 10% to the managing agent. When challenged, the directors had admitted to an error and refunded to the service charge account the 10% that had been paid to the freeholder. The managing agent Mr Phillips gave back half of his commission, but retained 5%, but Mr Gurvits objected because this agent had not been FSA registered (though the current managing agent is) and could not therefore legitimately handle claims. The reasonableness of the cost of insurance was not challenged.

23. Mrs Berwin could not explain what Mr Philips did for his 5% commission on the building insurance. She said that Premier Management dealt with all aspects of an insurance claim – taking the claim, submitting forms, making sure the insurance company was put on notice, getting estimates, dealing with the loss adjuster and meeting on site if necessary, choosing a quote with the loss adjuster and overseeing the works, as well as placing the insurance through its panel of 3 brokers.

24. The Respondent conceded that an invoice for £262.50 dated 11 May 2010 was for directors' and officers' insurance and that this should not have been charged to the service charge.

25. RICS Service Charge Residential Management Code in Part 15 makes clear that before carrying out any insurance work the managing agent must ensure that it is authorised to do so. A managing agent may not help customers with insurance products without permission from the FSA or exemption. Philip Philips was not FSA registered and as such unable to handle insurance claims. Therefore no commission was receivable from the insurance and the 5% commission received (in the sum of £187.32 for the period ending March 2011) is not reasonable or chargeable as a service charge. The tribunal finds that the 10% commission received by Premier Management Partners Limited is reasonable for the level of service provided in handling the placing of insurance and claims, and is payable as a service charge.

Gardening

26. The actual gardening charge for the year ending March 2011 was £2070 and the estimate for the year ending March 2012 was £2200. The front garden areas being demised, Mr Gurvits contended that their maintenance should not be charged as a service charge. He said, however, that the gardener cut the grass of all these demised areas, whereas he should only be carrying out sweeping and weed removal to the communal pathways and planting beds, as well as gardening to the rear. Mr Gurvits considered the gardening specification of work produced was unclear. He sought a reduction of approximately a third of the gardening cost, acknowledging that some of the contract cost will represent travelling time. He had been unable to access the communal area to the rear as the gate is locked and the only access is through the flat, which is let.

27. It was not disputed by the Respondent that the gardener does garden everywhere, including the front areas that are demised, and that the total expenditure on those services is charged to the service charge account. Mrs Berwin disputed that 1/3 of the gardener's time was spent on these demised areas, however. There are mature trees and beds to the rear which require maintenance, and Mrs Berwin denied having received a request for a key to the side gate.

28. Not all of the lessees have areas of garden demised to them. It is clear to the tribunal that the cost of maintaining demised areas of garden is not properly recoverable as a service charge, since it is not work to the common parts, which are defined in Clause 2.2 as "the parts of the Building intended for use

by some or all of the tenants and other occupants of the Building". The tribunal has had the benefit of inspecting the property to the front and rear, and has observed the extent of gardening required to all areas demised and communal. The quality of gardening was not in dispute. The Applicant did not dispute the cost charged for the work carried out. The tribunal has therefore based on inspection, the gardening specification, the evidence of the parties and its expert opinion formed a view as to the proportion of gardening time charged to the service charge account that has been spent maintaining the demised areas to the front. It does not agree with Mr Gurvits that a 30% reduction is appropriate and determines that 20% of the gardening charges incurred and estimated in the years in dispute are attributable to the upkeep of demised areas and are not recoverable as a service charge:

Year ending March 2011 – 20% deduction from £2070 = £414

Year ending March 2012 – 20% deduction from £2200 = £440.

Accountancy

29. Mr Gurvits observed that the total charge for accountancy for the year ending 24 March 2011 was £434.75. An invoice for that figure was for accounts for the year ending 31 March 2010 and related to the company's accounts including "Preparation of profit and loss account and balance sheet. Drafting directors' report and notes to the accounts. Produce annual statutory accounts". The invoice from Pollock Accounting for the period ending 31 March 2011 for £240 including VAT again related to the company's accounts. Ms Bradley gave evidence that she personally wrote the cheque of £240 for the company accounts on the Hurstwood company account cheque book.

30. Mr Gurvits did not consider £434 to be an unreasonable amount, but felt that the evidence showed improper handling of the service charge accounts. The tribunal agreed that the evidence of expenditure on accounting was inadequate and it appeared that some costs relating to preparation of the company accounts may have been improperly charged to the service charge account. Based on the limited evidence available, the tribunal determines that the sum of £200 plus VAT for each of the years in dispute is reasonable and payable as a service charge in respect of accountancy fees.

Professional Fees

31. For the year ending March 2011 the actual expenditure on professional fees was £2100, and the estimate for the year ending March 2012 is £3000. Mr Gurvits queried the payment of £2100, which the Respondent explained was to surveyors Dilaps UK Ltd who were commissioned to look at the state of the building and report on what work needs to be done and produce a comprehensive report. That report was not in the evidence produced to the tribunal, and Mr Gurvits considered that the cost therefore could not be considered to be reasonable. The tribunal was told that Dilaps had looked at old surveys and put together a plan for the major works, which was used as the basis for collecting to the reserve fund. The schedule of works they produced was in the hands of Mr Phillips.

32. The landlord said the estimate of £3000 was in connection with issues related to the unextended leases of flats 8 and 11, two cases of legal advice, and service charge arrears. None of this was disputed.

33. The tribunal has no evidence of the quality or content of the Dilaps UK report, and only vague verbal evidence as to its scope and value. However, without having seen the report the tribunal finds it is unable to determine that such expenditure is reasonable and payable as a service charge. The invoice does not record that Dilaps UK are chartered surveyors. It records no evidence of the scope of the works. The evidence produced by the Respondent was inadequate to substantiate this expenditure.

34. The tribunal determines that, on the basis that it accepts that persons considered suitable to provide expert advice were instructed and did peruse the schedules of work and produce some sort of report, a figure of no more than 50% of the part payment of £2100 is reasonable and payable as a service charge. It appears that there is a balance outstanding on the fees of Dilaps UK. Whether that balance of £837.50 is reasonable and payable for the year ending March 2012 depends on what evidence is available of the work carried out by these persons and their professional expertise, at the point in time when any such determination falls to be made.

Reserve Fund

35. For the year ending March 2011 the service charge accounts show a total reserve fund contribution of £47,313.08 (including arrears and transfer of £27,639.98 service charge surplus accrued to March 2010). The tribunal therefore understands that the balance of £19,673.10 includes some arrears, but does not know the level of any such arrears. Even if the arrears are nil, given the condition of the building on inspection, the tribunal would find that a reserve fund contribution of £19,673.10 i.e. £1229.57 per flat is reasonable.

36. For the year ending March 2012 the situation is slightly more difficult. The landlord has substantially increased the reserve fund contributions to £3507.60 per leaseholder. Mr Gurvits considered that many items charged for in the reserve fund contributions are not service charge items – in particular he believed that the windows are the responsibility of the individual flat owners and not the freeholder. Some leaseholders had changed their own windows and he considered they were demised in the leases. The Respondent had not concluded whether this was the correct interpretation of the leases - the survey spelt out everything wrong with the building regardless of whose responsibility it was. A meeting was due to take place in a few weeks to decide what works were the landlord's responsibility.

37. The tribunal considered that it was provided with little evidence that the total reserve fund the landlord wished to accumulate is reasonable. No evidence was produced of the expert opinion and costing on which those figures were based, though it was said to have been produced based on estimated costs produced by Dilaps UK.

38. At a meeting of the two directors held in March 2011 it was agreed that £120K would be demanded in the March 2011 demand. However, the tribunal was told that about August or September 2011 some lessees expressed difficulty in paying this amount, so the directors decided (without professional advice from the surveyor) the payments would be spread over four years (at £60k instead of two at £120k), the service charge accounts were adjusted and fresh demands issued. The landlord had not yet taken advice as to the staging of works, or the scope of their liabilities under the lease. The decision as to the total amount of reserve fund to demand does not therefore appear to have been well informed.

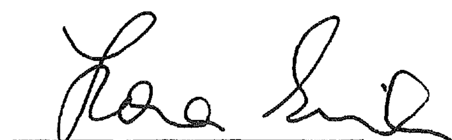
39. The tribunal considers that the approach to the major works taken by the directors to date lacks clarity. It must reach a determination about the reasonable reserve fund contributions, and has had the benefit of an inspection, and its own professional knowledge and experience. The tribunal is satisfied that the proposed works will clearly be of significant cost, and well in excess of the total reserve fund of approximately £105,000 that the existing reserves and payment of the 2012 demands would produce. The works must clearly be planned for, and any deduction by the tribunal in this year's reserve fund will simply result in an adjusted demand in the future, once the landlord is able to refine its judgement based on appropriate professional advice.

40. Based on the available evidence the tribunal concludes that £3500 per leaseholder is a reasonable reserve fund contribution for the year ending 2012. However, this figure cannot thereby be assumed by the landlord to be reasonable for the year ending 2013. Demands for that and any future periods must be based on more transparent predictions and advice about the total cost of the planned building works.

Costs and fees

41. The Applicant made an application under Regulation 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 for a refund of the fees paid. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal orders the Respondents to refund the £250 in fees paid by the Applicant within 28 days of the date of this decision.

42. The leaseholder also made an application under s.20C of the Act in respect of the landlord's costs of the proceedings. In light of the substantial success met by the Applicant in these proceedings, the tribunal determines it appropriate to order that the Respondent is not entitled to recover any costs of these proceedings from the Applicant as a service charge.

Chairman: 

30 April 2012

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means 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 costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the Landlord, or a superior Landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(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 provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable 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.

Section 27A

(1) An application may be made to a Leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,
  (d) the date at or by which it is payable, and
  (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a Leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
   (a) the person by whom it would be payable,
   (b) the person to whom it would be payable,
   (c) the amount which would be payable,
   (d) the date at or by which it would be payable, and
   (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
   (a) has been agreed or admitted by the Tenant,
   (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,
   (c) has been the subject of determination by a court, or
   (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.