HM Courts & Tribunals Service

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Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

Case Reference:	LON/00AU/LSC/2011/0744
Premises:	29 St John's Lane, London EC1M 4NA
Applicants:	Mr A Elias (The Penthouse) Mr & Mrs Bagge (Flat 2) Mr & Mrs Hatfield (Flat 1)
Representative:	Mr JD Thornton, Hurford Salvi Carr
Respondent:	CYZ Ltd
Date of hearing:	2nd April 2012
Appearance for Applicants:	Mr JD Thornton
Appearance for Respondent:	Mr C James, Finance Manager Mr P Cook, Senior Technical Manager Mr P Zecevic, Managing Director
Leasehold Valuation Tribunal:	Mr NK Nicol Mr D Banfield
Date of decision:	3rd April 2012

Decisions of the Tribunal

(1) The Respondent's managing agents' letter of 23rd March 2006 complied with s.20B of the Landlord and Tenant Act 1985 but did not limit the recoverable service charge expenditure for the year ended 29th September 2005 to the amount of £14,900.39 referred to in the attachment to the letter.

(2) The benefit of the credit applied to the service charge accounts for the year ended 29th September 2005 was properly passed on to the lessees so that the deficit which appeared on the account had been correctly calculated.

(3) The absence of a Certificate for the service charge accounts for the year ended 30th September 2006, although contrary to the provisions of the Seventh Schedule to the lease, is not fatal to the recoverability of expenditure for that year.

(4) On the basis of the above findings, the Tribunal determines that, for the service charge accounts for the year ended 30th September 2010, there is a surplus of £6,183.72 to the credit of the lessees.

(5) The Tribunal has decided not to make an order under s.20C of the Landlord and Tenant Act 1985.

(6) The reasonableness and payability of Mr Thornton's fees in relation to these proceedings are not determinable within these proceedings. If the parties cannot reach agreement, such issues may be the subject of a separate application.

The application

1. The Applicants are the lessees of three of the four flats in the subject property. The other flat, Flat 3, has been retained by the Respondent lessor.

2. The Respondent's managing agents used to be Hamptons, who were taken over by County Estate Management in around 2004. On 1st April 2006, Gross Fine were appointed in their place.

3. The Applicants were not happy with the service provided by the managing agents and applied to the Tribunal for a manager to be appointed in their place (LON/00AU/LAM/2009/0005). Amongst other matters, they complained of the lack of accounts for the years 2004-5 and 2005-6 and raised concerns that service charge monies had not been accounted for. They proposed Mr JD Thornton of Hurford Salvi Carr as the management appointee. When he appeared before the Tribunal, Mr Thornton confirmed that he would be doing his best to resolve the problems with the accounts for 2004 onwards.

4. By a determination dated 14th July 2009, the Tribunal decided to appoint Mr Thornton as manager for a period of two years and made a detailed order as to his rights and responsibilities. On 13th July 2011 the appointment was extended for a further year.

5. True to his word, Mr Thornton attempted to resolve issues relating to the previous years' accounts. For the two years for which it was understood there were no accounts, namely the two years to 30th September 2006, he attempted to reconstruct the missing accounts with the help of K+H accountants. He asked the Respondent for various documents but was not satisfied with what he received, particularly in relation to the period when County Estate Management were the agents. In the event, he produced three sets of alternative figures:-

   a) Based on the figures asserted by the Respondent, by the end of the year 2009-10 there would be a surplus on the service charge account to the credit of the lessees in the sum of £6,183.72. The Respondent accepted this as a correct calculation of their position.

   b) Mr Thornton disagreed with the Respondent's figures for the year 2004-5 and, on his calculation, the surplus at the end of 2009-10 should be £20,816.40.

   c) Mr Thornton pursued a compromise which produced a surplus at the end of 2009-10 in the sum of £7,846.83. He was able to persuade the Applicants and the commercial lessee to accept this, which allowed the commercial lessee to bring their service charge account up-to-date. However, the Respondent refused to accept it. It was not just a matter of the difference between £6,183.72 and £7,846.83. Both parties understood there to be a further sum of over £5,000 in relation to insurance and cleaning expenditure which Mr Thornton refused to bring into his calculation but which the Respondent asserted should be included.

6. In the absence of a compromise, the Applicants brought the current application for a determination under s.27A of the Landlord and Tenant Act 1985 as to the payability of the service charges for the year ended 30th September 2006. Although the application and the Tribunal's directions order of 16th November 2011 implied that only the year 2005-6 was in dispute, it was clear that the issues encompassed 2004-5 as well.

7. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

8. The Tribunal held a hearing on 2nd April 2012. Those attending are listed on the frontsheet to this determination. The Applicants themselves did not attend.

9. The Tribunal wishes to express concern at Mr Thornton's role in these proceedings. He is involved in the subject property as the statutory appointee of the Tribunal, in which role he does not represent, and is entirely neutral between, the lessees and lessor, even though the appointment was made at

the instigation of one of them. In many cases, the success of such an appointment will depend on the appointee maintaining strict neutrality. For reasons which are unclear, Mr Thornton has abandoned that neutrality and has represented the Applicants in these proceedings. It is one thing to do his best to sort out the accounts for years prior to his appointment, but it is quite another to represent one side in Tribunal proceedings in a dispute arising from those accounts. The Tribunal did not identify any current conflict of interest but Mr Thornton's dual role as appointee of the Tribunal and representative of the Applicants carries a substantial risk of undermining one or both roles significantly.

10. In any event, during his opening presentation at the hearing, and in response to questioning from the Tribunal, Mr Thornton clarified that there were the following four issues:-

a) By letter dated 23rd March 2006 the then managing agents, County Estate Management, sent each lessee a summary of the service charge expenditure for the year ending 28th September 2005. The summary listed the various heads of expenditure which totalled £14,900.39 but the letter warned that these figures may be subject to amendment following completion of the year-end audit. The letter further stated that its purpose was to comply with s.20B of the Landlord and Tenant Act 1985 which prohibits the recovery of expenditure after 18 months unless such a notification is provided. In the event, the expenditure actually totalled £15,482.01. Mr Thornton queried whether the purported s.20B notice was sufficient to allow the recovery of the additional amount of £581.62.

b) The Respondent's figures incorporated a credit on the service charge account for 2004-5 of £17,445.06, turning what would have been a surplus into a deficit. The Applicants claimed not to have received any credit notes and the Respondent was unable to produce any on disclosure. Mr Thornton asserted, therefore, that the credit should be removed from the figures.

c) The Seventh Schedule to the lease provides that the Respondent or their agents should certify service charge expenditure each year. There was no evidence of any relevant certificate for the year 2005-6. Mr Thornton asserted that this meant that none of the service charge expenditure for that year, agreed at £9,307.26, was recoverable.

d) The Applicants sought an order under s.20C of the Landlord and Tenant Act 1985 that the Respondent may not recover their costs in these proceedings through the service charge.

S.20B Notice

11. This issue may be dealt with shortly. S.20B does not specify that any notice under subsection (2) must specify the precise amount in question. Presumably such a requirement would defeat the object of such a notice in many cases. The letter warned that the figures may be subject to amendment and they were adjusted in the end by a relatively small amount. The letter did not limit

the amount the Respondent could recover in due course to the figure given in the attached summary.

Credit

12. As mentioned above, when the appointment of manager application was made, it was understood that there were no accounts for the year 2004-5. In fact, there were audited accounts which the Respondent first mentioned in September 2009. Mr Thornton did not pick up on this and did not actually see the audited accounts until recently.

13. The Applicants appear to have been suspicious of the audited accounts due to the contradiction with the Respondent's earlier ignorance of them. However, there appears to be no basis for disputing that they are genuine. The fact that they were undated was queried but it appears from earlier accounts that the auditors, Chancellers, did not date any of the accounts which they compiled.

14. Despite the Respondent's urging, Mr Thornton refused to accept the validity of the audited accounts and so refused to accept any of the figures within them. Instead, he continued to rely on his own calculations. The Tribunal cannot see any rationale for his doing so, other than taking on board as his own the Applicants' natural but unfounded suspicions. It may well be that Mr James, on behalf of the Respondent, was right to accuse Mr Thornton of becoming too partisan which underlines the concerns expressed in paragraph 9 above.

15. In any event, the audited accounts recorded a credit to the lessees, referred to as "Service Charges Cancelled" of £17,445.06. The Applicants asserted that they had not received any credit which would match this and so Mr Thornton asserted that it should not be included.

16. However, Mr Thornton's assertion begs the question as to whether the Applicants had paid any more than they should. In this case, all service charges have been paid and the only question is whether the Applicants should recover some money as having been overpaid. Mr Thornton was unable to provide any evidence that any of the Applicants had overpaid anything, let alone their share of £17,445.06.

17. Mr Cook, on behalf of the Respondent, pointed to a workings sheet on which the audited accounts appear to have been partly based and which gave the following figures:-

- Due From Lessees £34,865.06
- Credit Notes £17,445.06
- Paid by Lessees £17,279.48

18. It is notable that Mr Thornton's figures reconstructed from the Respondent's documents put the amount paid by the Applicants at £19,296.83, a figure far

closer to the last of the above three figures than the first. The first figure, the amount said to be due from lessees, is considerably more than anything charged in any other year and the Applicants could have been expected to query it vigorously if they had been presented with any such figure. Both these points and the audited accounts strongly suggest that the Applicants paid a service charge based on figures *after*, not before, the credit had been taken into account.

19. In the circumstances, the Tribunal is satisfied that the Applicants have received the full benefit of the credit so that there is nothing to be put back into the service charge account. The deficit recorded for that year, therefore, was correctly calculated.

20. The parties had been disputing liability for a sum of over £5,000. The Respondent asserted that they had paid this out for insurance and cleaning. Mr Thornton eventually accepted that there had been such expenditure after the relevant receipts/invoices were produced but refused to allow the amount into his figures because there was such a large apparent discrepancy the other way due to the aforementioned credit. The Tribunal was unable to follow this reasoning. The credit was a separate issue, the decision on which is set out above. In any event, the Respondent's position, as referred to in paragraph 5(a) above, already incorporated this sum and so there is no separate issue to be decided.

Certification

21. The Seventh Schedule to the lease shown to the Tribunal provided for payment of the service charge. Paragraph 1.5 defines "the Certificate" as being issued by the Respondent or their agents to certify the actual cost of services in each year. By paragraph 2, the lessee is obliged to pay the Estimated Service Charge in two instalments. By paragraph 3, if the Certificate shows a deficit, the lessee must pay their share of the excess but, if it shows a surplus, that surplus must be credited to the lessee in the following service charge year.

22. Mr Thornton asserted that the lack of evidence of any such Certificate for the year 2005-6 meant that there was none and that the lack of such a Certificate meant that none of the service charge costs were recoverable. He did not provide any legal authority for this proposition. The issue had only occurred to him on the day of the hearing but the Respondent did not take issue with whether he could raise it.

23. For the failure to produce the Certificate to be fatal to liability for any part of the service charge, the Tribunal would expect to see very clear wording. On the contrary, the Certificate is irrelevant to liability for the Estimated Service Charge and so it is difficult to see how the lack of one can eliminate all liability.

24. The consequence of not producing such a Certificate would seem principally to be to complicate matters for the lessor so that they might not be able to prove their entitlement. However, in this case, the Respondent has produced all necessary receipts, invoices, etc. so that Mr Thornton accepts there was actual expenditure of £9,307.26. The Tribunal cannot identify any loss or detriment to the Applicants from the lack of a Certificate. The Tribunal is satisfied that liability has been established and nothing in the lease prevents that liability from arising in the circumstances.

Application under s.20C

25. In the application form and at the hearing, the Applicants applied for an order under s.20C of the Landlord and Tenant Act 1985 that the Respondent may not pass their costs of these proceedings on through the service charge. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal has determined that, although the lease does not appear to provide for the recovery of such costs in any event, it is not just and equitable in the circumstances for an order to be made.

Chairman: N.K.Nicol

NK Nicol

Date: 3rd 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) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.