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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTIONS 27A & 20C OF THE LANDLORD AND TENANT ACT 1985 & SCHEDULE 11 TO THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Case References: **LON/00BE/LSC/2011/0395 & 0515**

Premises: **Flat 9.04 South Central, Steedman Street, SE17 3BA**

Applicant: **South Central East Management Limited**

Respondent: **Mrs Catherine Rees**

Date of hearing: **28 February 2012**

Appearance for Applicant: **Mr Southam FRICS**
Mrs C Duncan (Accounts Manager, Chainbow)
Miss S Simpson (Debt Recovery Manager)

Appearance for Respondent: **Mrs Rees (Respondent)**
Mr Rees (Respondent's husband)

Leasehold Valuation Tribunal: **Mr M Martynski (Solicitor)**
Mr K M Cartwright JP FRICS
Mr J E Francis QPM

Date of decision:

Decision summary

In respect of the County Court proceedings

1. The balancing charge for the year ending 2007 of £712.25 is not currently payable by the Respondent.

2. The demand on account for the year ending 2008 in the total sum of £2662.42 is not payable.

3. The demand on account for the year ending 2009 in the total sum of £3739.38 is payable.

4. The demand on account for the year ending 2010 in the total sum of £3578.04 is payable.

In respect of the Respondent's application

5. Porterage and staff costs for the years ending 2007 to 2010 inclusive are payable.

6. Administration fees for wages charged by Chainbow for the years ending 2009 (£4,909.00) and 2010 (£5,394.00) are not payable.

7. VAT on wages for the year ending 2009 is payable.

8. Management fees for the years ending 2007 to 2010 are payable.

9. Electricity charges in the accounts for the year ending 2008 are payable.

10. Chainbow's fee for insurance discount for the year ending 2010 in the sum of £3248.95 is reasonable and payable.

11. Chainbow's fee for accountant's fees discount for the year ending 2010 in the sum of £581.75 is not payable.

12. Administration fees of £58.75 and £117.50 are payable.

In respect of all proceedings before the Tribunal

13. No order is made regarding the refund of fees paid to the Tribunal by either party.

14. An order is made pursuant to section 20C Landlord and Tenant Act that none of the costs incurred by the Applicant in connection with these proceedings before the Tribunal can be put on the service charge.

Background

15. This decision should be read in conjunction with the Tribunal's earlier decision in this matter dated 1 November 2011. This decision covers both the proceedings between the parties in the County Court under Claim Number 0QZ43468 and the application made directly to the Tribunal by the Respondent dated 21 July 2011[1].

16. After the decisions made by the Tribunal in its last decision (on interpretation of the service charge provisions in the lease) and following the Respondent's husband's inspection of some accounts and documents, the Respondent filed a further statement of case setting out all the issues that she wished to raise and the Applicant responded to that in its further statement of case. This decision now deals with all those remaining issues.

The issues and the Tribunal's decisions

The balancing charge for the year ending 2007 of £712.25

17. In its previous decision, the Tribunal decided that this charge was not payable at that time as, in order for a balancing charge to be payable, there had to be finalised and certified accounts produced for the year in question. As at the date of the second hearing, there were no such accounts. In the circumstances, Mr Southam on behalf of the Applicant confirmed that these charges were not being pursued.

The demand on account for the year ending 2008 in the total sum of £2662.42

18. This demand is not payable as no demands for this sum or amounts totalling this sum were made in accordance with the terms of the Respondent's lease. In order for a sum on account to be demanded, an estimate of future expenditure needs to have been served on a leaseholder first [paragraphs 3 & 4 of the Sixth Schedule]. The Applicant did not have a record of such an estimate having been sent.

The demands on account for the years ending 2009 & 2010 in the respective sums of £3739.38 & £3578.04

19. Unlike the demands for 2008, these demands were made in accordance with the terms of the Respondent's lease and are therefore payable, those

[1]Paragraph 5 of the Tribunal's earlier decision contains mistakes as follows: the administration fees should amount to £176.25 and the interest should amount to £1021.25

demands being of a reasonable amount being based on a reasonable estimate of future expenditure.

Porterage and staff costs for the years ending 2007 to 2010

20. The Respondent was unhappy that her husband had not been able to see all the documents that he had demanded in respect of this service charge item. For example, he had wanted to see the contracts of employment for the various staff. However, the Respondent did accept that there did not appear to be any obvious anomalies in the sums paid for porterage and staff, did not allege that unreasonable sums were spent on these items and did not complain about the service she received in respect of these items. Her concern was that her husband did not have the full documentation in order to carry out a detailed check on the expenditure.

21. The Tribunal heard evidence from Mr Robinson, the Applicant's accountant who had also made a witness statement. He told the Tribunal about the checks that had been made on the payrolls and pay slips in respect of this service charge item. He was confident, in the circumstances of not having full documentation over all the years in question, that the figures in the accounts were accurate and properly reflected the sums spent.

22. In the circumstances, the Tribunal accepts Mr Robinson's evidence and finds that the costs for porterage and staff costs were reasonably incurred and are payable by the Respondent.

Administration fees for wages charged by Chainbow for the years ending 2009 (£4,909.00) and 2010 (£5,394.00)

23. The Tribunal had available to it the management contract between the Applicant and its managing agents Chainbow. The contract set out the various duties that Chainbow would perform for its fee. Under the section headed 'Management Services" it stated as follows:-

> 12. engage for and on behalf of the Client, staff, whether part-time or full-time, residential or not, and pay their remuneration, in accordance with agreed terms (withholding of PAYE tax and national insurance contributions) and, where appropriate, dismissal payment or redundancy pay;

24. In the year ending 2009, Chainbow employed staff at the building. In the year ending 2010, the Applicant employed the staff direct. According to Mr Southam, he had agreed a fee in addition to the standard management fee for the administration of wages of 5% of those wages. Despite being on full notice that this item was being queried by the Respondent, Mr Southam was not able to produce any evidence of such an agreement nor was there any explanation as to why the charge of 5% would be payable even if staff were not employed directly by Chainbow. Further, it appeared from the plain wording of the management agreement that these services were, in any event, provided

within the ordinary management services provided by Chainbow without any extra charge.

25. In the circumstances, if there were no evidence of an enforceable agreement in respect of this charge and if the terms of the management agreement appeared to include this service within Chainbow's standard fee, it was not a charge that was reasonably incurred and so is not payable by the Respondent.

VAT on wages for the year ending 2009

26. Mr Southam told the Tribunal that for the year ending 2009, the Applicant had decided that it wanted Chainbow to employ the staff working at the building. One of the reasons for this was to put on to Chainbow the risks of such employment. Chainbow employed staff via a wholly owned subsidiary company. The result of the Applicant not employing staff directly was that it paid VAT to Chainbow's subsidiary on the salaries paid to staff. For the year ending 2010, the Applicant decided to save the money spent on VAT and to employ the staff directly.

27. The Respondent objected to the VAT being paid on the salaries for the 2009 year.

28. The Tribunal did not consider that the decision made in 2009 and the reverse decision made in 2010 regarding employment of staff was unreasonable. It was on the one hand reasonable to effectively pay (via VAT) for employment risks to be transferred and on the other, as a cost cutting exercise to employ staff in house and to save the VAT.

Management fees for the years ending 2007 to 2010

29. The Respondent was very unhappy about the management fees paid to the original managing agents Parkgate Aspen and to Chainbow.

30. As to Parkgate Aspen, it was accepted by all the parties to the proceedings that they had not properly handed over accounts and documents when Chainbow took over management. There was no clear evidence before the Tribunal that it was apparent during Parkgate Aspen's tenure that there were significant problems with their management. At the time therefore, it was reasonable for their fees to be incurred and paid by the Applicant.

31. As to Chainbow, the Tribunal did have some concern that had this company dealt with the Applicant and her husband in a more open manner, the dispute between the Applicant and the Respondent may not have reached the courts or this Tribunal. The Respondent raised valid questions regarding the certification of the accounts, these concerns were met with replies that were misleading and plainly wrong where they stated that the accounts had been certified and filed with Companies House when they plainly had not. The

Tribunal was also concerned with the lack of disclosure over employment contracts to enable the Respondent's husband to carry out a check on the accounts. The Tribunal does not accept the reason given by Mr Southam for not providing these documents which was that they were confidential. If this were the case, the confidential parts of those contracts could have been suitably redacted prior to being passed to Mr Rees.

32. Having said this, the management fee charged by Chainbow is well within reasonable market norms and it is clear that for this fee, Chainbow provides a basic service in what are difficult circumstances. For that reason, the Tribunal finds that Chainbow's management fees are reasonable and that the service has, overall, been provided to a reasonable standard and that the fees are accordingly payable.

Electricity charges in the accounts for the year ending 2008

33. The Respondent's objection in respect of these charges was that some of these charges were not incurred in that service charge year.

34. The Applicant's explanation for this matter was that there were problems in getting information from the energy company concerned and that the costs information had to be chased and was not available in the service year in which that cost was actually incurred.

35. There was no challenge to this item on the basis that the charges were not incurred or were not reasonable. The Applicant has plainly reasonably incurred the costs in question and would be out of pocket if those costs were not reimbursed by leaseholders. The Applicant is put in an impossible position if there is a delay in getting information regarding costs with the effect that costs incurred in an earlier year have to be accounted for in a later year and if it cannot then recover those charges from leaseholders.

36. The clear overall intention of the lease, so far as Service Charges are concerned, is set out at paragraph 1.1 of the Sixth Schedule the relevant part of which states:-

> The Tenant shall pay to the Company a Service Charge .....the purpose of which is to enable the Company to recover from the Tenant the Tenant's due proportion of all expenditure overheads and liabilities which the Company may incur.....

37. Accordingly, in accordance with that overall intention, the Tribunal finds that the sums claimed for electricity are payable within the terms of the lease.

Payments to Chainbow for insurance discount for the year ending 2010 in the sum of £3248.95

38. In contrast to the position in relation to fees charged by Chainbow on the administration of salaries, there was a clear supplemental written agreement between Chainbow and the Applicant regarding these fees. The agreement in question is headed 'ADDENDUM TO SERVICES AGREEMENT BETWEEN...'. It clearly sets out that Chainbow is to be paid a bonus of 50% of savings made in the first year. The agreement envisages insurance payments to be one of the savings that could be made and which would be subject to the agreement.

39. Quite clearly, within the first year of management, Chainbow arranged a reduced buildings insurance premium for the Applicant for the renewal of the policy and was therefore entitled under the terms of the agreement to the bonus in question. The sum is therefore reasonable and payable.

Payments to Chainbow for account's fees discount for the year ending 2010 in the sum of £581.75

40. This item relates to the agreement for bonus payments discussed above. As well as envisaging savings on insurance, the agreement envisages savings on accountancy fees. However in this case, what actually happened was that the accountant's invoice was rendered. Due to concerns over the quality of the information provided by the accountants, there were discussions between Chainbow and the accountants as to their fee. This resulted in the accountants reducing their fee. It is clear from the agreement discussed above that the savings envisaged are savings on new contracts entered into, not on the reduction of invoices already rendered.

41. Accordingly, as the sum in question does not come within the terms of the agreement between the Applicant and Chainbow, it is not reasonably incurred or payable by the Respondent.

Administration fees of £58.75 and £117.50

42. These fees were for a letter before action sent to the Respondent regarding her non-payment of service charges (£58.75) and the costs of drafting and issuing the claim at court (£117.50).

43. The Tribunal finds that the cost of the letter before action is in line with market norms. It is a standard fee charged to reflect not just the letter itself but the work that has gone into debt recovery up to that point. The cost of the issuing of the claim is again in line with the market and the work done on the claim justifies the fee. Further, the Tribunal considers that both fees were reasonably incurred, whilst the Respondent was right in some of her objections to her service charge, her refusal to pay *any* charge was and is unjustified.

(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.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
   (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
   (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
   (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
   (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
   (a) specified in his lease, nor
   (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
   (a) in a particular manner, or
   (b) on particular evidence,
   of any question which may be the subject matter of an application under sub-paragraph (1).