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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 Reference:	LON/00BK/LSC/2011/0547
Premises:	50 London House, 7-9 Avenue Road, London NW8 7PX
Applicant:	7/9 Avenue Road, (London House)
Representative:	Mr J McNae of Counsel
Respondent:	Mr J Freedman
Representative:	Ms L McCormick of Counsel
Date of hearing:	9th January 2012
Appearance for Applicant(s):	Mr Ghose, managing agent
Appearance for Respondent(s):	Mr Freedman
Leasehold Valuation Tribunal:	Ms E Samupfonda LLB(Hons) Mr A Lewicki MRICS Mr C Simons
Date of decision:	13th February 2012

Decisions of the Tribunal

(1) The Tribunal makes the determinations as set out under the various headings in this Decision.

(2) The Tribunal orders that the parties submit written representations on the application under section 20C of the Landlord and Tenant Act 1985 within 14 days from the date of receipt of this Decision.

The application

1.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 by the Respondent. The Applicant is the freehold owner of the premises and the respondent is the lessee of flat 50 who acquired the leasehold interest in July 2007.

2. The application was transferred to the leasehold valuation tribunal from the county court. An oral pre trial review via telephone was held on 7th September 2011. It was identified and agreed that the matters to be determined by the tribunal were

Whether the applicant has complied with the consultation requirements under section 20 and 20B of the Act.

Whether the applicant is entitled under the terms of the lease to demand £480 contribution towards the reserve fund.

Whether the sums held in the reserve fund should be applied to the service charge so as to extinguish the respondent's liability. The respondent believes that there are sums in the fund that maybe apportioned to him.

Whether the lease entitles the applicant to build a sinking fund.

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

The hearing

1. The Applicant was represented by Mr J McNae of Counsel at the hearing and the Respondent was represented by Ms L McCormick of Counsel.

2. Immediately prior to the hearing the parties handed in further documents, namely their skeleton arguments. The start of the hearing was delayed while the Tribunal considered these new documents.

The background

3. London House was constructed in the mid 1960's and comprises 53 flats, including the concierge flat.

4. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

5. The Respondent holds a long lease of flat 50, which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

6. At the start of the hearing the parties identified the relevant issues for determination as follows:

   (i) Whether the management fees are recoverable under paragraph 5 Schedule 2 the lease.

   (ii) Whether the Applicant has failed to comply with the consultation requirements in respect of the repair work carried out to the lifts in 2010.

   (iii) Whether the Applicant has complied with section 20B of the Act in respect of the demand for payment for the major works carried out in 2007-2009.

   (iv) Whether the lease entitles the Applicant to build a sinking and reserve funds.

7. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows.

Service charge issue and the Tribunal's decision

8. (i) Management fees are recoverable under paragraph 5 of Schedule 2 to the lease.

(ii) The Applicant has failed to comply with the consultation requirements in respect of the works carried out to the lifts. The Respondent is liable to pay £202.28.

(iii) S20B of the Act is not applicable to the costs incurred in respect of the major works carried out in 2007-2009.

(iv) The provisions of paragraph 11 Schedule 2 to the lease are sufficiently wide enough to permit the Applicant to set up a reserve fund.

Reasons for the Tribunal's decision

Management fees

9. In determining whether or not the management fees are recoverable, the tribunal considered paragraph 5 of Schedule 2 of the lease. This sets out the lessor's expenses and outgoings and other heads of expenditure in respect of which the lessee has to pay a proportionate part by way of service charge. Paragraph 5 requires the lessor to employ only a chartered practitioner to manage the building. It states ....."so that in the employment of any Agent to manage the building on is behalf the lessor shall employ only a Chartered Practitioner". Chartered Practitioner is not a term of art that the tribunal is familiar with and neither party was able to assist the tribunal. The tribunal heard from Mr Ghose the managing agent and accepted his evidence. It was clear that he exercised the day-to-day management functions and that neither he nor his members of his staff are Chartered Practitioners. He explained that at all material times, Regency has retained the services of a chartered surveyor. From the documentary evidence provided, the tribunal saw that Regency retained the services of a consultant named M.P.I Gaussen FRICS and then T Firrell FRICS. During cross-examination, Mr Ghose accepted that there was a period when he was not aware that Mr Gaussen had resigned his membership but as soon as he became aware he retained the services of Mr Firrell. The tribunal rejected the respondent's argument that management fees to Regency were not recoverable as the lease specifically and exclusively uses the term "employ" and as such retaining the services of a consultant was not sufficient. There was no suggestion that this was a sham arrangement or that the surveyor did not provide advice as and when required. Whilst the tribunal was not told of the extent of the surveyor's involvement, there was no evidence to show that he was not involved on the basis set out by Mr Ghose. In the circumstances the tribunal concluded that the applicant had complied with paragraph 5 of Schedule 2 and that the costs incurred for management fees were recoverable and payable by the respondent.

The Lift Repairs

10. It was common ground that the applicant did not carry out any consultation with regards to the lift repairs. The tribunal was informed that following an independent inspection in February 2009, works of repair were carried out to four lifts the total cost of which was £12,648.88. The applicant's primary case was that these works maybe split or subdivided so that "each job of work on

each discreet lift constitutes a different scheme of works and as such none of the works were qualifying works." Mr McNae submitted that this was a common sense approach applied in Martin v Maryland Estates [1999] L & TR 541 (CA). He confirmed that he did not make an application to dispense with the consultation requirements under s20ZA (1) of the Act. Mr Ghose explained how the work was carried out and the process adopted. He confirmed that the work was not carried out for a year after the report was received, that the repairs were carried out sequentially and that four separate invoices were sent out. For the respondent, it was argued that this was an "ingenious" approach, which can be taken in relation to any works. Ms McCormick submitted that the correspondence sent out by the applicant considered the work as one entity, estimates were sought for the works as one whole and the work done to each lift overlapped so that a scheme was devised to repair the lifts in a manner that minimized disruption for the residents. The tribunal considered all the correspondence in relation to the lift work. The report dated 22nd February 2009 detailed all the repairs necessary for each lift individually. The letter dated 25th March 2010 gave a breakdown of the cost of the repairs to each lift. By a letter dated 10th May 2010 the residents and lessees were notified that "works will be carried out on the two passenger lifts and the two goods lifts during the month of June. The works are being undertaken on the advice of our Lift Engineers Langham Lifts..." From this, the tribunal concluded that the repairs to the lift constituted one entity albeit broken into four separate components. It was not reasonable to view the work as four separate jobs as suggested by Mr McNae because it was clear from the correspondence that the applicant considered them as one entity as it referred to "the works." Martin v Maryland did not assist the applicant as in that case there was a distinction between the original works set out in a notice served under section 20 and the additional works that were identified during the course of the original works. Furthermore, the works in this case can be regarded as one job because they were tendered as one job. The tribunal was of the view that purpose for now seeking to split the repairs into individual jobs was to avoid the provisions of s20ZA. No explanation was given for failing to consult and the works could not have been considered urgent or emergency as they were carried out a year after the report was produced. In the circumstances the tribunal finds that the works to the lifts were qualifying works and the applicant failed to comply with the consultation requirement under s20ZA of the Act. The respondent's contribution towards the total costs of the works is 1.6% of £12,648.88, being £202.38. As it is below the statutory cap of £250 this does not reduce the amount that is payable by the respondent.

Major internal decorations and external works 2007-2009.

11. Ms McCormick explained that these works were completed in the summer of 2009 and contractors paid in full from the reserve fund. No demand for payment of the service charge has been served on the respondent nor has any notification of the costs been given. She submitted that as more than 18 months have now passed without a demand or notification, the payments are not now recoverable and the effect of this was that any sums payable by the respondent towards these works ought to be set off against his present service charge liability. Mr McNae did not engage with this submission as he

submitted that the points made fell outside the scope of these proceedings. However he submitted that there are no demands for payment and the respondent was notified of the expenditure in the service charge accounts for the year ending 30 September 2009.The tribunal considered s20B of the Act and Ms McCormack's submissions. This section prevents the lessor from recovering the costs incurred if more than 18 months have passed before a demand for payment has been served on the tenant. In this case no demand for payment has been served on the tenant as the costs incurred were paid for from the reserve fund within 18 months of them being incurred. The respondent is not now liable to pay for these works. The tribunal is of the view that in those circumstances s20B cannot be engaged in order to allow any sums which were payable by the respondent towards these works to be set off against his present service charge liability.

Reserve Fund

12. It was common ground that there are no express provisions within the lease for the maintenance of a reserve fund and that the respondent has made two payments of £600 each into the fund. Mr McNae submitted that paragraph 11 of the Second Schedule to the lease was sufficiently wide enough to permit a reserve fund. He added that the lessees as shareholders agreed at a board meeting in 1990 and 2011 to continue to operate a reserve fund. He submitted that the real question is what is to be done with the sums in the Fund. He contended that if the lease cannot be construed as providing for a reserve fund then s42 (1) –(3) of the Landlord and Tenant Act 1987 cannot apply because s42 applies to payments required under the terms of the lease. He added that if the fund is not a trust under s42, then all payments were voluntary contributions, which could potentially be demanded to be returned by the contributor beneficiary and as such this tribunal does not have jurisdiction, therefore this issue should be remitted back to the county court. He concluded that the respondent is not entitled to any payments made into the Fund by his predecessor in title. He accepted that the respondent maybe entitled to the return of £1200 that he paid subject to any arguments about waiver, estoppel and dissipation and these were matters for the county court. Ms McCormack submitted paragraph 11 of the Second Schedule was not sufficiently wide enough to allow the lessor to create a reserve fund and in the absence of an express provision the fund cannot be set up. She relied **on Brown v Southwark [2007] EWCA Civ 164.** She contended that the Fund should be distributed to the lessees according to their percentage contribution to the service charge giving the respondent a 1.6% share. In the alternative she submitted that the sums paid by the respondent personally are held on trust and should be returned whether s42 applies or not. The tribunal accepted that there were no provisions in the lease that expressly mentioned reserve fund. It also accepted that the lease was proffered by the Applicant and that it falls to be construed contra proferentem and that in order for the landlord to recover monies form the tenant there must on ordinary principles be clear terms in the lease. Paragraph 11 of the Second Schedule is central to this issue. It contains a covenant that the Lessor can recover " the cost of providing or maintaining any other service matter or thing which the Lessor may in its absolute discretion decide shall be proper and reasonable to be provided, done or carried out for the benefit of the building or the occupiers...." Also

Clause 1 (c) is relevant in that it provides that the Lessee should contribute 1.6% of the expenses and outgoings incurred by the Lessor. It also goes on to provide that the Lessee will contribute to " the other heads of expenditure as the same as are set out in the Second Schedule." Generally, the provision of a reserve fund is beneficial to Lessees as its purpose is to provide the funds necessary for future repairs which can be considerable thus a fund eases their financial burden. In this case, the tribunal took note of the fact that all the Lessees, including the respondent fully consented to establishing a reserve fund. The respondent made two payments into that fund. They all benefited from the accumulation of the fund as this paid for the major works carried out in 2007 -2009. The tribunal was of the view that in the light of this relevant background and on a fair construction of paragraph 11 of the Second Schedule and read together with all the provisions of clause 1 (c) of the lease, Paragraph 11 of the Second Schedule was wide enough to permit the Lessor to set up a reserve fund. The tribunal found that s42 of the 1987 Act applies and the sums are held on trust in accordance with s42 (3) "for the persons who are the contributing tenants for the time being...."

Application under s.20C and refund of fees

At the end of the hearing, the parties wished to rely on without prejudice correspondence and thus it was agreed that within 14 days of the receipt of the tribunal's decision they would submit their written representations on this.

Chairman: _____

Evis Samupfonda

Date: 13th February 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.

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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).