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MAN/00BP/LSC/2011/0063

HM COURTS & TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL
OF THE
NORTHERN RENT ASSESSMENT PANEL

REASONED DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

Landlord and Tenant Act 1985 - Section 27A
Commonhold & Leasehold Reform Act 2002 – Schedule 11, Paragraph 5

Properties: Apartments 11,13,21 and 23, The Victory, Union Street, Oldham
OL1 1TD

Applicant: Drake Hall Limited

Respondents: Mr.S.T.McNicholas and Mr.D.T.McNicholas

Tribunal members: Mrs.C.Wood (Chairman)
Mr.M.Hope
Mrs.H.Clayton

Date of decision: 12 February 2012

DECISION

1. The Tribunal determines as follows:
 - 1.1 with the consent of the parties, that the aggregate sum of £19476.32, being service charges and reserve fund charges in respect of the Properties for the service charge years 2009/10, 2010/11 and 2011/12, is reasonable and the Respondents are liable to pay the same subject to the parties' agreement as follows:
 - (i) the sum of £19476.32 is payable by the Respondents in 12 equal monthly instalments commencing February 2012;
 - (ii) the Applicant will forthwith arrange for Transco to attend at The Victory to assess the reason for the disconnection of the gas supply to Apartment 23, and the remedial works necessary to re-establish a supply;
 - (iii) after receipt of the 3rd instalment payment from the Respondents, the Applicant will commission the remedial works as identified by Transco necessary to restore a gas supply to Apartment 23.
- For the avoidance of doubt, the agreement between the parties and the determination of the Tribunal do not, and are not intended to, in any way affect or prejudice the right of the Respondents to pursue their counter-claim in the

- County Court for damages resulting from the loss of the gas supply to Apartment 23;
- 1.2 that none of the administration charges, costs and expenses itemized on the Statements for the Properties each dated 20 January 2012 (see pages 168 - 171 of the Bundle) were incurred "...incidental to any notice required to be given under Sections 146 and 147 of the Law of Property Act 1925..." as required under paragraph 12 of the Fourth Schedule of the leases of the Properties each dated 21 December 2007 and made between Hillstone Developments (Union Street) Limited (1) and the Respondents (2) ("the Leases"), and accordingly were not recoverable from the Respondents.

REASONS FOR DECISION IN PARAGRAPH 1.2 ABOVE

Background

1. The Applicant issued proceedings against the Respondents for recovery of arrears of service charge in respect of each of the Properties between October 2009 and March 2011. The Respondents submitted a defence and/or counterclaim in respect of each claim. By order dated 9 June 2011 of the Oldham County Court, the four claims were consolidated into a single claim and the matter transferred to the Tribunal.
2. Directions dated 4 November 2011 were issued to the parties in pursuance of which the Applicant's Statement of Case was received by letter dated 30 November 2011. No response was received from the Respondents until 2 February 2012 when an e-mail was received enclosing a letter from the Respondents dated 26 January 2012 ("the Respondents' Letter"). Further documentation was also received from the Applicant by e-mail dated 2 February 2012 whilst the hearing bundles were received on the day of the hearing.

Inspection

3. The Tribunal made an external inspection of the Properties and of the internal communal areas on 3 February 2012. Both parties attended the inspection.

The Lease

4. A copy of a lease dated 21 December 2007 made between Hillstone Developments (Union Street) Limited (1) and the Respondents (2) for Apartment 21 was contained in the Applicant's Statement of Case and it was stated by the Applicant that the leases of Apartments 11, 13 and 23 were in the same form and content.
5. Paragraph 12 of the Fourth Schedule (The Tenant's Covenants) of the lease contains an obligation on the Tenant "[T]o pay to the Landlord its costs and expenses (including Solicitors' costs and Surveyors' fees) of and incidental to any notice required to be given under Sections 146 and 147 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court".

The Law

6. Paragraph 1(1) of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the Act") provides:
 - (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)
 - (b)
 - (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.
7. Paragraph 1(3) provides :
 - (3) In this Part of this Schedule "variable administration charge" means an administration charge which is neither-
 - (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease
8. Paragraph 2 provides that "A variable administration charge is payable only to the extent that the amount of the charge is reasonable."
9. Paragraph 5 provides that
 - (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 date at or by which it is payable, and
 - (d) the manner in which it is payable.
 - (2) Subparagraph (1) applies whether or not any payment has been made.
 - (3)
 - (4) No application under subparagraph (1)...may be made in respect of a matter which –
 - (a) has been agreed or admitted by the tenant.....
 - (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
10. In *Veena SA v Cheong* [2003] 1 EGLR 175, Mr. Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word "reasonableness" should be read in its general sense and given a broad common sense meaning [letter K].

The Hearing

11. The Respondents' Letter, of which the Applicant had been sent a copy at the same time as the Tribunal, contained an offer of settlement in respect of the arrears of service charge. The parties confirmed that they wished the hearing to

be adjourned until no later than 2pm on the same day to see if it was possible to reach a settlement. On resumption, the parties confirmed that they had reached a settlement on the service charge and reserve fund arrears (the terms of which are set out in paragraph 1. of this Decision) but that they had been unable to do so in respect of the administrative charges, legal fees and other costs and expenses.

12. Submissions made to the Tribunal by Mr.Coutts of Counsel for the Applicant are summarized as follows:
 - (i) all of the administration costs had been incurred solely as a result of the Respondents' failure to pay the service charge and reserve fund costs;
 - (ii) the problem with the gas supply affected only one of the Properties (Apartment 23) and without making any admission as to the entitlement or otherwise to do so, whilst it might have been understandable for the Respondents to withhold payment of service charge and reserve fund costs in respect of that Property, there was no justification for doing so in respect of the other Properties;
 - (iii) the actions taken by the Applicant in pursuing recovery of the arrears could all be properly regarded as "incidental to any notice required to be given under Sections 146 and 47 Law of Property Act 1925" in accordance with paragraph 12 of the Fourth Schedule to the lease as they were a necessary first step to forfeiture;
 - (iv) a letter dated 11 March 2010 in respect of Apartment 21 and addressed to the Respondents' mortgagor (page 104) referred to the Applicant's intention to serve a section 146 notice once judgment had been obtained;
 - (v) it was acknowledged that no similar reference had been made in correspondence with the Respondents.
13. In response to questions from the Tribunal, Ms.Danielie Twitty provided evidence as follows:
 - (i) as to the actions taken by the Applicant where there were arrears including the sending of reminder letters where service charge was unpaid for 28 days after its due date, the referral to their debt recovery agent of each debt which was more than 28 days in arrears, and on the relationship and agreement with their solicitors and debt recovery agent. In particular, she confirmed that the actions taken in this case were "standard procedure" where there were arrears;
 - (ii) on the action taken by the Applicant when they first became aware of the problem with the gas supply to Apartment 23; and,
 - (iii) that no similar problem had been notified in respect of any of the other flats in the block.
14. Evidence was also provided to the Tribunal in the form of a log from the Applicant's solicitors detailing all work done in relation to the Properties since the matters were first referred to them. It was noted that they had received a telephone call from one of the Respondents on 26 March 2010 notifying them of a dispute between themselves and the Applicant.
15. The Respondents' submissions are summarized as follows:
 - (i) if the Applicant had dealt with the gas problem at the outset, there would not have been any issue between them: the Applicant was first notified of the problem by telephone on 22 December 2009. In January/February 2010, they

- had advised the Applicant that the problem with the gas supply was something which the Landlord needed to remedy ;
- (ii) they had withheld payment of the service charges and reserve fund costs on the Properties in order to try to put pressure upon the Applicant to address the problem with the gas supply to Apartment 23;
 - (ii) that some of the initial correspondence from the Applicant's solicitors had not been sent to the right address which had resulted in a delay in their responding to them;
 - (iii) subsequently they had contacted the Applicant's solicitors on several occasions, and on at least one occasion prior to the issue of proceedings, advising them of the existence of a dispute between themselves and the Applicant and offering to pay the service charge and reserve fund arrears but not the costs.
16. There was a second short adjournment whilst the parties explored the possibility of reaching a settlement regarding the administration costs but this proved not to be possible and, on resumption, both parties requested the Tribunal to make a determination on this issue.

The Tribunal's Conclusions

17. The Tribunal must apply a three stage test to the application under paragraph 5 of Schedule 11 of the Act:
- (1) Are the administration charges recoverable under the terms of the Lease? This depends on common principles of construction and interpretation of the lease.
 - (2) Are the administration charges reasonable?
 - (3) Are there other statutory limitations on recoverability?
18. In reaching its determination as set out in paragraph 1.2 above, the Tribunal was satisfied that none of the charges incurred by the Applicant could reasonably be regarded as "incidental to" the service of a notice under sections 146 and 147 of the Law of Property Act 1925, as required under paragraph 12 of the Fourth Schedule to the lease. In reaching this conclusion, the Tribunal acknowledges that the steps taken by the Applicant which gave rise to the charges may be conditions precedent to the service of such a notice but, nonetheless, that does not mean that they are accurately to be described as "incidental" to such a notice. Aside from the letter referred to in paragraph 12(iv) above (page 104 in the Bundle), there was no evidence that the service of such a notice and/or forfeiture was seriously contemplated. Indeed, the evidence to the Tribunal was that the steps taken were merely the "standard procedure" for the recovery of arrears of service charge. Since a potential outcome to the action taken is that no notice is ever served, the Tribunal considered that it would be peculiar to describe something as "incidental" to something which did not, and might not, ever exist .
19. For information only, had the Tribunal considered that the charges were within the meaning of paragraph 12 of the Fourth Schedule, they would have

determined, in respect of each of the Properties, only the following charges to be reasonable:

- (i) Land Registry fee: £16.45
- (ii) Administration fee: £35.25
- (iii) Legal fee: £176.25.

Catherine Wood.

Catherine Wood
Chairman
Dated 12 February 2012