LRX/153/2006

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – lease provisions relating to payment of service charges varied by verbal agreement – one tenant insisting on reverting to strict lease provisions – whether legal costs incurred by landlord in pursuing two tenants for unpaid service charges reasonably incurred – appeal successful in part – applications under section 20(C) – Landlord and Tenant Act 1985 section 27A

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **JULIAN FERNANDEZ** **Appellant**

and

SHANTERTON SECOND MANAGEMENT COMPANY LIMITED **Respondent**

Re: 123A Gloucester Terrace
London
W2 3HB

Before: N J Rose FRICS

Sitting at Procession House, 110 New Bridge Street, London, EC4V 6JL
on 9 October 2007

Appellant in person
Mr Dermot Strangeways-Booth FCIS for the Respondent with permission of the Tribunal

DECISION

1. This is an appeal by the tenant, Mr Julian Fernandez, against the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel, determining service charges payable in respect of a flat known as 123A Gloucester Terrace, London, W2 3HB for the years 1999 to 2004 in accordance with section 27A of the Landlord and Tenant Act 1985. Permission to appeal was granted by the President on 27 April 2007, limited to the issues of legal fees and the associated secretarial expenses and the LVT's order under section 20(C).

2. The appeal, which was by way of rehearing, was conducted under the Tribunal's simplified procedure. Mr Fernandez appeared in person. The respondent, Shanterton Second Management Company Limited, was represented by Mr D R Strangeways-Booth FCIS, of C K Corporate Services Limited, a company which provides the respondent with company secretarial and accounting services.

3. The relevant sums determined by the LVT were as follows:

		£
1999	Legal fees	705.18
	Company secretary	86.16
2001	Legal fees	318.00
	EGM including secretarial fee	247.00
2002	Legal fees	359.00
2003	Legal fees	530.00

Facts

4. In the light of the documents presented to me and the evidence I find the following facts. 123 Gloucester Terrace is a house which has been divided into six self-contained flats. In March 1990 Mr Fernandez purchased an underlease in flat 123A on the lower ground floor. The underlease provided for a ground rent of £100 per annum payable in advance on the usual quarter days and a further rent equal to the tenant's proportion of the service charge. The Third Schedule to the lease contained the tenants' covenants, including the following:

> "2. To pay to the Management Company a sum equivalent to £22 per centum of the cost incurred by the Management Company in carrying out its obligations set out in the Fifth Schedule hereto (herein called 'the Service Charge') and on account of such liability to pay quarterly sums of £44 on the days hereinbefore appointed for payment of the rent as hereinbefore reserved.
>
> 3. Within 21 days after service on the Tenant of a notice in writing stating the sum due from him certified in accordance with the provisions of Clause 8 of the Fifth Schedule hereto to pay such sum to the Management Company credit being given for the amounts paid by the Tenant under the last Clause hereof."

5. Clauses 7 and 8 of the Fifth Schedule provided that the total amount of the service charge was to be certified by a professional accountant who was to "prepare and keep all necessary and proper books of account and to take an annual account thereof".

6. In about 1970 it became clear that it was not practicable for payments for services to be paid in full only after the necessary work had been done and the accounts certified. All the underlessees in the building therefore agreed that their service charges would in future be paid by monthly standing order, at a rate agreed each year in the light of anticipated expenditure, and including a sinking fund contribution. This agreement is still being implemented by the underlessees of the other five flats. It was an informal agreement and no deeds, formalising the de facto variations of the underlease terms, were entered into.

7. On 12 July 1990 Mr Strangeways-Booth wrote to Mr Fernandez. He drew his attention to "the fact that a monthly service charge of £113.43" was due to the respondent in respect of flat 123A and asked him to arrange for his bank to pay this amount by standing order. Mr Fernandez agreed to do so, and the monthly payments were subsequently increased from time to time.

8. Following a series of disagreements between Mr Fernandez and the other underlessees, Mr Fernandez studied the terms of his underlease in detail for the first time and realised that his monthly service charge payments were at variance with the provisions of the underlease. He stopped his monthly standing order and the respondent subsequently instructed solicitors to demand that the monthly payments continue. Mr Fernandez wrote to Mr Strangeways-Booth on 1 October 1999. He said:

> "I have drawn your attention to my contracting quarterly service charge payments and have not received reply from you concerning my objections to your demanding they be paid monthly. It is noted you engaged a solicitor to enforce your demands. I have paid my account as a gesture of goodwill but I am still awaiting your explanation."

9. On 3 April 2000 the respondent's solicitors, Lee and Pembertons, in a letter to Mr Fernandez, said:

> "We understand that, in breach of the terms of your lease and despite the payment of £499.08 received on 26 August 1999, arrears of service charge amount to £978.16 (due for the period 1 July 1999 to 1 April 2000)".

10. In February 2001 a statutory demand, made on behalf of the respondent, was served on Mr Fernandez in the sum of £1,351.09. This related to the balance of service charges payable for the years ending 30 June 1999, 30 June 2000 and for the period July 2000 to January 2001. In a letter to Mr Fernandez dated 22 February 2001 the respondent's then solicitors, Messrs Lightfoots, said:

> "We confirm that the demand has been issued due to your failure to pay service charges in accordance with the signed lease agreement between our client and

yourself. These charges are due to our client in accordance with the lease and should now be paid."

11. On 28 February 2001 Mr Fernandez wrote to Mr Strangeways-Booth, enclosing a cheque for the balance of the service charges then outstanding plus an additional £149.74 allegedly due on 1 February 2001. He made it clear that these payments were made without prejudice to his contention that the monies claimed were not properly due.

12. An annual general meeting of the respondent took place on 18 December 2001. The minutes of that meeting included the following paragraph:

> "SERVICE CHARGE ARREARS
>
> Mr Strangeways-Booth having tabled a report of service charge arrear balances, from which it was noted, inter alia, that arrears on 123A Gloucester Terrace totalled £1,597.29 at 30 November 2001, it was agreed after discussion that the proposal of the Directors, as stated in the notice of the meeting, that the Directors be empowered to surcharge members not paying their service charges by monthly standing order in advance by 50% of the service charges due until appropriate standing orders were in place, be accepted".

13. In 2002 the respondent instituted proceedings in the county court to recover service charges which it alleged were due from Mr Fernandez. The hearing took place on 20 November 2002. The court held that the surcharge of 50% was unenforceable and ordered that the remaining service charge issues be referred to the LVT. On 3 January 2003 Mr Strangeways-Booth wrote to the LVT, advising that the respondent had decided to withdraw its action. Mr Fernandez was told that, in future, the respondent would demand service charge payments from him strictly in accordance with the terms of the lease.

14. In a letter to Mr Strangeways-Booth dated 26 June 2003 Mr Fernandez said:

> "I required and instructed you last year to have the accounts externally audited. Please take this as formal instruction for the external audit of the company's accounts until such time as I instruct to contrary."

15. The respondent instructed CB Heslop & Co, chartered accountants, to audit its accounts for the year ended 30 June 2004. Draft accounts were prepared. Following representations by Mr Fernandez the draft accounts were amended and approved by the respondent at an extraordinary general meeting on 4 April 2005. The final accounts included a credit to Mr Fernandez of £2,907 in respect of the sinking fund element of the charges from 1995 to 2001, plus £575.83 for further prior year charges which the respondent had agreed should be written off – a total of £3,482.83.

16. Mr Fernandez was not satisfied. He considered that he should also be credited with overpayments made between 1990 and 1995. He refused to pay further service charges until what he considered to be the outstanding errors had been corrected.

17. In a letter to Ms Louise Baner, a director of the respondent, dated 24 May 2005, Mr Fernandez said:

> "Had the service account been set out correctly I would have paid but it is not possible to proceed without explanation and correction. By way of example there is no break down of how the service charge for year ending 30 June 2004 of £2,742.69 has been deduced (and is clearly incorrect). How does the secretary calculate 'common parts expenditure'? Where is the agreed removal of the cost of replacing the house door locks shown? The list goes on. I would like to pay my service charges and have been prevented from doing so as a result of the company's failure to present correct accounts. I have been prevented from knowing my liabilities and the opportunity of budgeting for them.
>
> Given the company has been falsely accounting for 9 years (and more) it is not acceptable to instruct legal action some 5 weeks after presenting the account, particularly as errors have been brought to your attention and explanation has been requested. I strongly recommend you halt the inappropriate 'legal' action and contact me asap so that we can identify the 'undisputed' sums in order that I can pay these. In the meantime I shall deduce what I regard due to the company and without prejudice to my contentions shall instruct payment accordingly. I shall advise you of my calculations in order that we at least are clear."

18. The respondent instituted further proceedings in the county court for unpaid service charges in respect of the years ending 30 June 1999 to 2004. The particulars of claim, sent in June 2005, showed a total outstanding of £2,371.90 after crediting the sum of £3,482.83 previously advised.

19. In a letter to Mr Fernandez dated 9 September 2005, a director of the respondent, Mr Peter Harris, said:

> "... I have been instructed to write to you on behalf of the directors and the Company Secretaries.
>
> We are pleased that you are in agreement to moving the dispute to the Leasehold Valuation Tribunal and we hope that this will mitigate costs. We have contacted the Court and the claim can be held over until a decision is given by the LVT. This will not prejudice your Defence and Counterclaim ...
>
> You repeatedly assert that the company has made erroneous demands for service charges, this again is not correct and all the leaseholders have agreed to vary the lease and pay the service charges in advance. The service charges had been collected in the same way since 1970 and possibly before that; however when you made your request, three years ago, for your charges to be collected entirely in accordance with the lease

we sought advice and agreed to revert back to the lease for the calculation of your contributions. We do not believe that there is any obligation upon the company to reimburse the sums collected over the previous years, provided for within the agreed accounts, as these have been made independently by you outside of your lease provisions. The directors have agreed to make this contribution as a gesture of goodwill in order to resolve this longstanding dispute. We will rely upon the LVT and ultimately the Court to decide upon the most appropriate action as you do not agree with the approach that has been adopted."

20. At the LVT hearing the respondent produced a schedule which showed that it had agreed not to press for certain items of expenditure – which Mr Fernandez had disputed – to be included in the service charge. It also produced an analysis of the expenditure on repairs and maintenance in the period 2000/2004. In the light of this breakdown Mr Fernandez was able to agree these items. The LVT's conclusions on the outstanding issues, dated 24 July 2006, were summarised in the following schedule:

ACCOUNT YEAR	ITEM	AMOUNT IN DISPUTE	DETERMINED BY THE LVT	
		£		£
1999	Door lock and other repairs	135.13	Other repairs	135.13
	Legal plus sec. Fee	1,597.00	Legal Fees	705.18
			Company Secretary	86.16
2000	Door locks	99.88		99.88
	Extinguishers	300.29		300.29
	Legal	351.00		0.00
2001	Extinguishers	95.00		95.50
	Legal	318.00		318.00
	EGM inc. sec fee	247.00		247.00
2002	Repairs and Maintenance	1303.00		1,303.00
	Extinguishers	249.83		249.83
	Legal	359.00		359.00
2003	Repair water tank	781.50		781.50
	Legal	530.00		530.00
2004	Repair water tank	1,716.25		1,000.00
	External decorating	12,467.00		1,000.00
	Extinguishers	185.76		185.76
Total		**20,736.14**		**7,398.23**

21. The LVT also ordered, pursuant to section 20C of the 1985 Act, that the costs incurred by the respondent in connection with the hearing should be taken into account in determining the service charge payable, but limited to the sum of £250. For the avoidance of doubt, the

LVT confirmed that, in accordance with the terms of underlease, Mr Fernandez was responsible for 22% of the sums determined.

The disputed costs

22. At the LVT hearing the respondent claimed a total of £1,597.00 for legal costs and exceptional secretarial fees incurred in 1999. The LVT disallowed the proportion of those costs which related to the resolution of a dispute between various lessees in the building. It allowed the balance of £705.18 legal and £86.16 secretarial fees, incurred in connection with the recovery of service charges from another lessee (not Mr Fernandez). That balance forms part of the subject matter of the present appeal.

23. The fees allowed by the LVT for 2001, and which are now disputed, were £318.00 legal and £247.00 secretarial. They related to the statutory demand served on Mr Fernandez in respect of service charges allegedly outstanding on 31 January 2001.

24. The LVT allowed legal costs of £359.00 for 2002, in respect of the county court hearing on 20 November 2002. This sum in fact related to the charges of CK Corporate Services Ltd in respect of Mr Strangeways-Booth's attendance at court; the respondent was not legally represented at the hearing.

25. For 2003 the LVT allowed legal costs of £530.00. Again this figure did not relate to legal advice, but to exceptional accountancy work done by Mr Strangeways-Booth, after the county court hearing, in calculating service charge credits due to Mr Fernandez.

The parties' submissions

26. In short, Mr Fernandez's case is this. The costs in issue were incurred by the respondent in attempting to recover service charges which were not due because he (Mr Fernandez) was in credit as a result of earlier overpayments. They were therefore not reasonably incurred.

27. Mr Strangeways-Booth denied that the respondent had acted unreasonably in initiating litigation in respect of the non-payment of service charges. He accepted that certain charges demanded from Mr Fernandez were subsequently amended. At the relevant time, however, those charges appeared to be due. Originally all six flat owners paid the charges in accordance with the basis which was being demanded; five of the six continued to do so. At no time, even after the reductions and write-offs on Mr Fernandez's account, had he ever been in credit in the books of the management company.

28. Mr Strangeways-Booth accepted that the service charge provisions in the various underleases had not been varied formally. He suggested, however, that the payment by the owners of all six flats since about 1970, on the monthly basis in advance which was still in

force for five of them, amounted to a "tacit variation" of the terms of the underlease which was binding under the principle of estoppel, and that he had been so advised by solicitors, although that advice proved to be wrong. He also suggested that it was relevant that the directors of the respondent were under a duty to ensure that all service charges were paid up to date. The other five flat owners were subsidising Mr Fernandez by paying their charges monthly.

29. Mr Strangeways-Booth agreed that he had ignored Mr Fernandez's written request to demand service charges from him strictly in accordance with the terms of the underlease. He pointed out, however, that at the time the matter had not been tested in court. It was not true to state that Mr Fernandez was in credit when the disputed demands were made. His account was credited in 2004 following completion of the external audit. Previous accounts had correctly reflected Mr Fernandez's position at the time, namely that of a debtor to the respondent.

Conclusions

30. In stating my conclusions, I shall deal firstly with the costs incurred by the respondent in pursuing Mr Fernandez for unpaid service charges. I shall then consider the costs it incurred in 1999 in connection with service charges owed by another underlessee in the building.

31. Mr Fernandez argues that the fees paid for actions taken against him in 2001, 2002 and 2003 were incurred unreasonably because, as a result of his previous overpayments, his account had at all material times been in credit. Mr Strangeways-Booth, on the other hand, contends that Mr Fernandez had not been in credit until after the externally audited accounts for the year to 30 March 2004 were finalised. I consider that Mr Fernandez's contention is correct. It is clear that, when the position was fully explained to CB Heslop and Co by Mr Fernandez, they were satisfied that the credits due to Mr Fernandez had been wrongly withheld when accounts were prepared for previous years. If similar external advice had been sought by the respondent at a much earlier stage, it would have been apparent that the amounts owed by the respondent to Mr Fernandez in 2001, 2002 and 2003 exceeded the service charges for those years for which he was liable under the terms of his underlease. It would equally have been clear that the service of the statutory demand in 2001 and the county court proceedings in 2002 were unjustified.

32. Mr Strangeways-Booth says that the respondent incurred fees in making a statutory demand and initiating county court proceedings in the light of legal advice he had received. This advice was to the effect that all the tenants in the building had agreed to vary their leases so that service charges were payable monthly in advance and that, based on the doctrine of estoppel, this agreement was binding on all tenants including Mr Fernandez. It was only after the county court hearing that he realised that the legal advice he had been given was wrong.

33. In my view it would have been reasonable for the respondent to pursue Mr Fernandez for the monthly service charges if such legal advice had been received, even if the advice subsequently proved to be incorrect. On the balance of probabilities, however, I have come to the conclusion that, with the passage of time, Mr Strangeways-Booth's recollection of the

nature of the legal advice he received is inaccurate. It is to be noted that no correspondence containing such advice, or referring to its existence has been produced, despite the fact that Mr Strangeways-Booth said it had been given both formally and informally. No reference to an effective variation in the lease terms by estoppel was made by either Lee and Pembertons or Lightfoots, when they wrote to Mr Fernandez requesting payment of service charges in accordance with the terms of the lease. Moreover, the letter to Mr Fernandez dated 9 September 2005 from Mr Harris, a director of the respondent, suggests that the only advice on the legal position to be received by the respondent resulted in it reverting to the strict provisions of the underlease when calculating the amount of service charge that was due.

34. I find that the respondent decided to pursue Mr Fernandez in 2001 for monthly service charge payments because it did not appreciate the significance of the relevant underlease provisions and because it took the view, not entirely without justification, that monthly payments were desirable in order to secure the smooth running of the building. The legal actions against Mr Fernandez, which resulted in him paying sums which were subsequently refunded, were not based on any professional legal advice to the effect that the respondent was legally entitled to demand service charges monthly.

35. I arrive at a similar conclusion in relation to the costs of the county court hearing in 2002. It was not reasonable for the respondent to pursue the matter to court as it did, without first obtaining legal advice to the effect that it was entitled to the amounts claimed. This conclusion applies with even more force to the 50 per cent surcharge which the respondent arbitrarily imposed at the AGM in December 2001. Mr Strangeways-Booth did not seek to suggest that this aspect of the claim was supported by any legal advice.

36. In 2003 the respondent paid Mr Strangeways-Booth's firm £530.00 for calculating the repayments due to Mr Fernandez in the light of comments made by the Judge at the county court hearing. It was necessary for these calculations to be made in order to regularise the position. Mr Fernandez did not suggest that the fee was disproportionate to the amount of work involved and I find that the fee was reasonably incurred.

37. I now turn to the fees paid by the respondent in 1999 in pursuing another tenant in the building for unpaid service charges. Mr Fernandez suggested that it had not been reasonable to incur these charges, because none of the tenants was liable to pay on the monthly basis that was being demanded. I do not think that is a correct analysis of the position. There is no evidence to suggest that the tenant in question ever queried the respondent's right to collect service charges on the monthly basis which had been adopted by informal agreement for many years. On the contrary it is clear that, with the exception of Mr Fernandez, all the tenants continue to pay monthly. Accordingly, Mr Fernandez has failed to discharge the onus, which rests upon him as appellant, of showing that the LVT's decision to allow those fees was wrong.

38. The appeal therefore succeeds, limited to the extent that the "legal" and other fees allowed by the LVT in respect of the years 2001 and 2002, and totalling £924.00, are disallowed.

39. I do not consider that the resultant reduction in the level of service charges determined by the LVT, from £7,398 to £6,474, is sufficient to justify altering the LVT's order under section

20(C) and I decline to do so. Mr Fernandez made a further application for an order under section 20(C) in connection with the costs incurred by the respondent in this Tribunal. Although his appeal has been allowed in part, the respondent has successfully resisted Mr Fernandez's attempt to set aside contested costs for two out of the four years in question. In those circumstances it seems to me reasonable that any costs in excess of £250.00 incurred by the respondent in connection with the current appeal proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by Mr Fernandez and I so order. Again, for the avoidance of doubt, the effect of this aspect of this decision will be that Mr Fernandez will be responsible for 22% of £250.00 costs in respect of the LVT hearing and an identical sum in respect of the appeal to this Tribunal.

Date 13 November 2007

N J Rose FRICS