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LON/00AW/LSC/2005/0209

Residential Property Tribunal Service
Leasehold Valuation Tribunal for the London Rent Assessment Panel

s.27A Landlord and Tenant Act, 1985

re Flat A, 3, Glendower Place, SW7

Hearing date: 15 December 2005

Applicants: Mr Bruce and Mrs Lucia Montgomery represented by :

Mr J Lightfoot	
Mr A Jamieson	College of Law students
Miss F Sowdagur	

Respondents: C A Daw and Son Ltd represented by:

Mr CJP Lindon	Managing director
Mr A Chandler	Property manager
Mr M Holland	Building surveyor

Members of the Leasehold Valuation Tribunal:

Mrs J McGrandle B Sc MRICS MRTPI
Mr J Power MSc FRICS FCIArb
Mrs G Barrett JP

Date of decision: 31 January 2006

Introduction

1.1 No. 3 Glendower Place SW7 is a 4-storey and basement building where the upper three floors have been converted into 4 self-contained flats. The applicants, Mr and Mrs Bruce Montgomery, are the lessees of Flat A which is on the first floor. The ground floor and basement are occupied by a restaurant. The respondents, CA Daw and Son Ltd., are the head lessees of the whole building. On 31st May 2005 (received 18th July 2005) the applicants applied to the Leasehold Valuation Tribunal ("the Tribunal") for a determination as to the reasonableness of certain service charges and for an order that the cost of the Tribunal proceedings might not be added to the service charges.

1.2 The Tribunal made directions on 7 September 2005 identifying the following issues:

1) Whether the Respondent is entitled to claim charges for accountancy and management fees and electricity under the terms of the lease for the years ending 1998 to 2004 and whether the costs of same are reasonable
2) Reasonableness of the costs of cleaning
3) Whether the sinking fund has been administered properly

1.3 At the hearing the applicants withdrew that part of the application relating to the cost of electricity. The applicants were advised by the Tribunal that health and safety issues mentioned in their statement of case fell outside the Tribunal's jurisdiction. It was also agreed between the parties that there was no need for an inspection by the Tribunal of the property because 1) the respondents did not disagree with the applicants' contention that the common parts were less than clean and 2) the condition of the property was irrelevant to the other matters at issue eg accountants' fees.

1.4 There was an application made at the hearing for re-imbursement of the application fees under Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003.

2.0 The law

2.1 The Tribunal has power to determine only those issues which statute specifically sets out.

2.2 Under s.27A of the Landlord and Tenant Act 1985 ("the Act") (as amended by the Commonhold and Leasehold Reform Act 2002)

"(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 .....
(c) the amount which is payable

2.3 In determining the amount which is payable, the Tribunal must have regard to S.19(1) of the Act which states that

" (1) Relevant costs shall be taken in to 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 provision 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."

2.4 The relevant parts of S.20C of the Act state:

"(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 ..... leasehold valuation tribunal ..... 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....."

3.0 Lease

3.1 The Tribunal were supplied with a copy of the applicants' lease. Under Cl. 2(1) the lessee covenants "(1) To pay the reserved rent at the times and in the manner aforesaid and also to pay by way of rent (if demanded) a reasonable sum quarterly on the usual quarter days such sum as the Lessor's Managing Agents shall deem reasonable on account of service charges." Under Cl. 2 (xi) the lessee covenants to pay "(xi) All other costs expenses and expenditure for the benefit and protection of the Tenants Lessees or occupiers of the buildings and curtilage thereof". Under Cl. 2 (xii) the lessee covenants to pay "(xii) The fees of the Lessor's Managing Agents (which shall not exceed Fifteen per centum of the gross rents collected by them (or such other amount as the lessor may from time to time prescribe) for the collection of rents and service charges of the flats in the said building and for the general management thereof."

4.0 Hearing and Decision

4.1 For the applicants, Mr Lightfoot addressed the Tribunal on the question of the sinking fund, Mr Jamieson on the fees and the cleaning costs, and Miss Sowdagur on the electricity costs, although the latter item was subsequently withdrawn from the application. Mr Lindon, supported by Mr Chandler, appeared for the respondents.

Sinking fund

4.2 In January 2004 all four lessees received a statutory notice from the respondents concerning their intention to carry out external works. The applicants, who up until this point had been regularly paying sums of money into a sinking fund, at this point sought to establish precisely what their balance was in the sinking fund but were unable to do so. The sinking fund accounts which had

been forwarded to them did not reveal the picture because they included for each of the four flats hypothetical sums of money under "amount receivable." Consequently the applicants had been forced to bring the present proceedings and the status of the sinking fund, said Mr Lightfoot, was the substantial issue before the Tribunal.

4.3 Mr Lindon conceded that the accounts were confusing and confirmed that the accounts were presented on the basis that all lessees had paid to date. On cross-examination it emerged that one of the four flats had made no contribution at all to the reserve fund and another was in substantial arrears.

4.4 He stated that the sinking fund contribution was set at a level to cover a 5/6 year cycle for external decorations and a 7/8 year cycle for internal decorations. Although the sum of £30,931 44 was shown as being in the fund, this was a theoretical figure and the actual sum, including interest, was £8,244 77.

4.5 In an effort to resolve the uncertainty, the Tribunal asked the parties to get together over the lunch break to agree a figure representing the applicants' contribution. The Tribunal were subsequently informed that agreement had been reached and that the applicants' contribution to date was £2,403.60 including interest.

4.6 Mr Lightfoot then addressed the Tribunal on his central thesis which was that in any event there was no provision in the lease for the payment into a sinking fund. He referred the Tribunal to *Gilje v Charlgrove Securities Ltd (2001) EWCA 1777* which reviewed the approach to construction of a service charge provision in a residential lease. There had to be, he stated, a clear and unambiguous provision in the lease for the creation of a sinking fund. This included machinery for its operation. Neither criterion was present in the present case. He also referred the Tribunal to a LVT decision (CAM/00KIF/LSC/2004/0006) concerning the provision of a sinking fund.

4.7 Mr Lindon relied on the service charge provisions set out in Cl.2(1) and 2(2) (xi).

Decision

4.8 The Tribunal have concluded that there is no clear and unambiguous provision in the lease for the creation of a sinking fund. The covenants in the lease relied upon by Mr Lindon are far too general. Moreover, there is no machinery governing the ascertaining of appropriate sums, the collection of those sums and the retention of those sums. There is no description of the type of expenditure for which the setting aside of a sinking fund would be appropriate.

4.9 Consequently any payments made by the lessees towards the sinking fund for the years in question are irrecoverable by the respondents and are accordingly are repayable by the respondents to the applicants (and the other lessees).

Management fees

4.10 These were as follows:

Y/e 31.3.99	£1,095.65
Y/e 31.3.00	£806.37
Y/e 31.3.01	£834.67
Y/e 31.3.02	£832.85
Y/e 31.3.03	£824.24
Y/e 31.3.04	£968.71
Y/e 31.3.05	£1,087.86

4.11Mr Jamieson argued that there was no legal basis for the charging of a management fee. Referring to Cl.2(xii) of the lease, he stated that there was a clear intention to provide professional management. The relationship of agency required two separate legal persons *(Finchbourne v Rodrigues. 1976. 3 All ER 581)*. If the landlords were their own agents, they could set their own fee; there was no safeguard if landlord and agent were one and the same. The decision in *Gilje v Charlgrove* required the clause to be read *contra proferentem*. The clause needed to be read restrictively and the ambiguity should be resolved in favour of the applicants.

4.12 Mr Jamieson referred to a table prepared by the applicants showing that the percentage management fee had risen between 1999 and 2004 from 15.2% to 30.8%. The table showed that the 2004 fee was £968.71 or £242 per flat.

4.13 Mr Lindon stated that while the relevant clause made provision for contemplating a third party as agent, it did not preclude the landlord himself managing. His company in fact managed 1,400 residential units, only 18 of which were also owned by his company. They ran a professional department operating mostly in the Chelsea/Kensington area but also around King's Cross.

4.14 The fees for the property in question were calculated on the basis of £135 per flat (£540) plus 10%of costs incurred (£284) plus VAT. ("costs incurred" would extend to major works where the normal fee was 12.5%). This amounted to £968.71 for the y/e 31.3.04 and Mr Lindon stated that this compared very favourably with other agents who had minimum fees of £1,000 per annum per property. Mr Jamieson stated that a nominal fee only would be appropriate although if management were carried out to an acceptable level, then the 15% of ground rent plus costs incurred as set out in Cl.2(xii) of the lease would not be unreasonable.

4.15Following the hearing the Tribunal asked for the parties' observations on the decision in *Skilleter v Charles* (1992) 1 EGLR 73 where it was held that there was

no reason why a landlord could not employ a management company and charge therefore, even if he owned the company.

Decision

4.16The Tribunal accepts the applicants' argument that on a strict construction of the lease there is no basis for the landlords themselves to charge for managing their own property; the lease contemplates the appointment of an agent or third party. The decision in *Skilleter v Charles* can be distinguished because in that case the management company, under the control of the landlord, was a separate legal entity whereas in this case the landlord and manager are one and the same. Therefore the Tribunal determines that the management fees for the years in question be deducted from the service charges and repaid to the applicants (and the other lessees).

Accountancy fees

4.17These were as follows:

Y/e 31.3.99	£300
Y/e 31.3.00	£315
Y/e 31.3.01	£340
Y/e 31.3.02	£355
Y/e 31.3.03	£355
Y/e 31.3.04	£360
Y/e 31.3.05	£360

4.18 Mr Jamieson stated that Cl. 2 (xi) could not be relied upon. Recovery of expenses was limited to those for the protection and benefit of the tenants. This clause would, he contended, not apply to the production of accounts which are a statutory duty of the landlord. If the Tribunal were to find against him, then an appropriate fee would be 50% of that charged which, for the y/e 31.3.05, was £360.

4.19 Mr Lindon stated that within his company all service charge accounts were always certified independently by qualified accountants. The fees were a properly incurred expense recoverable under Cl. 2(2) (xi) of the lease.

Decision

4.20 The Tribunal accepts the applicants' argument that on a restrictive reading of the lease there is no basis for the charging of accountants' fees which are therefore irrecoverable for the years in question and are accordingly repayable by the respondents as before.

Cleaning

4.21 These charges were as follows:

Y/e 31.3.99	£336.60
Y/e 31.3.00	£337.80
Y/e 31.3.01	£337.80
Y/e 31.3.02	£336.00
Y/e 31.3.03	£336.00
Y/e 31.3.04	£336.00
Y/e 31.3.05	£451.00

4.22 It was the applicants' contention that the common parts, consisting of carpets, skirtings and the insides of windows, were never cleaned. In relation to the test of reasonableness, the weekly sum involved should include at least a modicum of cleaning. 50% only of the charges would be reasonable.

4.23 Mr Lindon accepted that the cleaning was not being done properly. He had received a more expensive quotation from a contract cleaning company as far back as June 2004 and had put this to the tenants but had never received a reply from them.

Decision

4.24 It was common ground that the cleaning was unsatisfactory although the Tribunal notes that the tenants did not reply to the landlords' alternative proposals. In the circumstances the Tribunal determines as reasonable and reasonably incurred 50% only of the charges for the years in question, the balance of which to be repayable as before.

S.20C application

4.25 The Tribunal were informed by Mr Lindon that there would be no charge in the accounts for either the preparation of the LVT case or the attendance at the hearing of himself and his two colleagues. On the basis of this undertaking there is therefore no need for the Tribunal to make an order under s. 20C of the Act.

Re-imbursement of fees

4.26 The Tribunal determines that the application fees incurred by the applicants, which appear to be £200, should be reimbursed by the respondents to the applicants.

5.0 **Conclusion**

5.1 The Tribunal have made this determination on all the various issues on a strict construction of the applicants' lease. The landlord respondents are experienced managing agents who have found themselves with a loosely drafted lease, as a result of which some of the expenditure incurred by them in the day to day running of the building has been found by the Tribunal to be irrecoverable, a shortcoming of the lease. Further, the fact remains that it is beneficial for both landlord and tenant for any lease to contain a clause

allowing for advance payment of service charges before works are carried out and it was a shortcoming of the applicants' lease that no such clause was included.

5.2 Therefore the parties should consider varying the leases, or applying to the Tribunal for such a variation, to provide for a sinking fund and for other matters.

5.3 Finally, the applicants would not dispute that there are fees involved in managing the building and seeing that the landlords' covenants are complied with. This is a building in prime central London and the applicants should be aware that in the Tribunal's experience fees charged by third party managing agents are commensurately high. The routine service charges and the demands made upon the management in this case are relatively small and the landlord respondents are experienced managing agents; the applicants should consider carefully whether the appointment of third party agents might not in fact be financially detrimental to them.

CHAIRMAN ..... J. Mulvandhu .....

DATE ..... 31.1.06 .....