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RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL



S.27A & S.20C Landlord & Tenant Act 1985 (As Amended)
Schedule 12 Para. 10 Commonhold & Leasehold Reform Act 2002
Regulation 9(1) The Leasehold Valuation Tribunal's (Fees)(England)
Regulations 2003

DECISION, REASONS AND ORDER

Case Number: LON/00AY/LSC/2005/0370

Property: 6 Dryden Court
Renfrew Road
London SE11 4NH

Applicant: Dryden Court (Freehold) Limited

Respondent: Paul Anthony Swift

Date of Application: Transfer from Lambeth County Court by Order of District
Judge Zimmels dated 7 December 2005

Date of Hearing: 13 April 2006

Venue: 10 Alfred Place, London WC1E 7LR

Appearances: For the Applicant: Mrs I Sabic (Counsel)
For the Respondent: Mr Swift represented himself

Also in Attendance: Mr E Brown, Director of Wood Management Trustees Ltd
(Witness)
Mr P Kent BSc MRICS, Phillip Kent & Associates (Witness)
Mr P Hnatiuk, Senior Property Manager, Wood Management
Ltd (Witness)

Tribunal Members: Mr B H R Simms FRICS MCI Arb (Chairman)
Mrs J E Davies FRICS (Valuer Member)
Mrs G V Barrett JP (Lay Member)

Date of Decision: 26 May 2006

Summary of Decision

The Respondent is to pay the agreed amount of £1,099.57 regarding insurance, general repairs and maintenance, lighting and cleaning. The amount payable in respect of the reserve fund is reduced to £1,151.79. The relevant percentage is fixed at 1.15%. An Order is made under S.20C preventing the recovery of landlord's costs incurred in connection with these proceedings by way of the service charge. No Order is made in respect of costs pursuant to Schedule 12, Para. 10 C.L.R. Act 2002. No Order is made in respect of reimbursement of the hearing fee.

BACKGROUND

1. This is an application transferred to the Leasehold Valuation Tribunal by way of an Order of District Judge Zimmels in the Lambeth County Court dated 7 December 2005. The Order follows a claim dated 11 October 2005 to recover service charges, insurance and contributions to the reserve fund in the total sum of £2,545.89.
2. Directions were issued in the London Rent Assessment Panel dated 31 January 2006.
3. The Applicant supplied a bundle of documents to be used by the Tribunal. Further documents including a copy of the maintenance fund accounts for the year ended 31 March 2005 were supplied at the hearing.
4. By a letter dated 11 February 2006, addressed to the Tribunal, the Respondent confirmed his agreement to pay the insurance cost, general repairs and maintenance, lighting and cleaning. Mr Swift identifies the cost of insurance as £660.17 which is the total of three amounts in the claim. He then says that together the insurance costs and the other items would total £1,200. The actual total is £1,099.57 and this amount is agreed between the parties as payable and is not in dispute before the Tribunal. It should be noted that Mr Swift had made two payments each of £500 on 15 November 2004 and 4 July 2005 and these amounts have been used to reduce the liability for the general service charges and insurance, leaving the agreed balance of £1,099.57.
5. It is agreed that the outstanding amount due is £1,446.32 which relates to charges for contributions towards the reserve fund in the amount of £309.58 for the period 25 March 2004 to 28 September 2004, £509.58 for the period 29 September 2004 to 24 March 2005 and £627.16 for the period 25 March 2005 to 28 September 2005.
6. In addition to the amount owed, Mr Swift disputes the method of apportionment of the service charge which is not a proportion fixed by the terms of the lease.

RELEVANT LAW

7. The Tribunal's jurisdiction derives from the Landlord & Tenant Act 1985 as amended.
8. S.18 defines the meaning of a service charge as being "*an amount payable by a tenant ... in addition to the rent – (a) which is payable directly or indirectly, for services, repairs, maintenance, 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*".
9. S.19 limits the relevant costs to be taken into account in determining the amount of service charge only to the extent that they are reasonably incurred and only if the services or works are of a reasonable standard.

10. S.27A provides that a Leasehold Valuation Tribunal may determine whether a service charge is payable and if it is, the Tribunal may also determine the person by whom it is payable, the person to whom it is payable, the amount which is payable, the date at or by which it is payable and the manner in which it is payable. These determinations can (with certain exceptions) be made for current or previous years and also for service charges payable in the future.
11. S.20C provides that the Tribunal may make an order that all or any of the costs incurred or to be incurred by the landlord in connection with proceedings before it 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. The order may be made if the Tribunal considers it just and equitable in the circumstances to do so
12. In addition paragraph 10 of Schedule 12 of the Commonhold & Leasehold Reform Act 2002 states:
- "(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).*
- (2) The circumstances are where –*
- (a) he has made an application... which is dismissed..., or*
- (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.*
- (3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed –*
- (a) £500.*
- (b) such other amount as may be specified in procedure regulations."*
(No such Regulations have been made.)
13. The Leasehold Valuation Tribunal's (Fees)(England) Regulations 2003 provides Regulation 9(1) that 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.

LEASE

14. The lease of flat unit 6 is dated 30 September 1998 and is between Kennington Property Company Limited and the Respondent. It is for a term of 99 years from 1 April 1998. In dealing with this application, the Tribunal has had regard to the entire lease but in particular the following covenants were directly relevant to the proceedings.
15. Clause 3.3 provides for the tenant to pay *"by way of further rent such sum as to be ascertained and paid from time to time as or on account of the service charge pursuant to clause 7 hereof"*.

16. Clause 7 sets out the general procedure for dealing with the service charge. A certificate is to be produced by the landlord after the end of each financial year setting out the landlord's expenses (7.1).
17. Clause 7.2 provides that the landlord's expenses shall include not only the expenses actually paid or incurred by the landlord during the year in question but also "*... such reasonable part of all such costs and expenditure ... as is of a periodically recurring nature ... including a sum or sums of money by way of reasonable provision for anticipated expenditure ... as the landlord's surveyor may in his discretion allocate to the financial year in question as being fair and reasonable in the circumstances ...*".
18. The relevant percentage of the landlord's expenses paid by the tenant is not an amount fixed by the lease. Clause 7.4 sets out the method of calculating the relevant percentage as follows, "*The amount of the Service Charge payable by the Tenant in respect of any Financial Year shall be the relevant percentage of the Landlord's Expenses shown by the certificate issued as aforesaid after the end of the relevant Financial Year or in the case of any unusual or exceptional item of expenditure such proportion as the Landlord's Surveyor shall consider to be fair and reasonable which may be a different proportion in respect of different items of the Landlord's Expenses depending on (inter alia) the floor area rateable value cubic content size and use of the demised premises compared with other premises benefiting from the Landlord's Expenses in question but such proportion shall not exceed the proportion that is shown for the Premises in the accounts submitted by the Maintenance Trustee to the Landlord on which the accounts referred to in this Clause 7 are based.*".
19. As will be seen, the landlord has chosen to use floor area as the method of calculating the apportionment but Clause 7.4 allows any appropriate method or combination of methods to be used. The Respondent is disputing the method chosen as being unreasonable.
20. The third schedule in the lease sets out the expenses that the landlord may charge to the service charge account and it is written in general terms as follows, "*The services referred to in the definition of the expression "the Landlord's Expenses" are the maintenance repair amendment renewal replacement cleansing lighting painting decoration and keeping in good and tenantable repair and condition from time to time as the Landlord and the Maintenance Trustee may in its reasonable discretion think necessary or desirable of the parts of the Building and Dryden Court and the common parts belonging thereto including the said boundary walls and foundations roof access road used by the Tenant in common with others as authorised*".

RESPONDENT'S DISPUTED ITEMS

Contribution to the Reserve Fund

21. During the opening of the hearing the Applicant identified an estimated reserve fund of £60,000 for the relevant year. Mr Brown identified the relevant percentage for the apportionment of the reserve fund at 1.6986% and this gave rise to a half yearly charge of £509.58, which was one of the figures shown in the accounts.

22. The other figure of £309.58 could not be identified or calculated and it may have been a clerical error. However, the Applicant did not wish to amend the amount. Mr Brown advised the Tribunal that the reserve for the year ending 2005 was subsequently reduced to £45,620 and a credit in Mr Swift's account is shown at £322.27 on 2 September 2005, identified as reserve fund credit – 2005.
23. For the year ending 2006, the reserve fund budget is £80,000 and the percentage charged is changed to 1.5679%, giving rise to a full year's charge of £1,254.32 and a half yearly charge shown in the relevant account at £627.16.
24. Mr Swift is concerned that too large an amount has been reserved for future expenditure. He disputes the amount on the grounds that the works for which a reserve is made would include replacement of all the windows, redecoration, a gated area and various other alterations. He believes these to be works of upgrading and redevelopment rather than maintenance as provided for in the lease.
25. Mr Swift believes that the substantial service charges he has had to pay increasing from £600 per annum payable when he moved in, to the current figure, which he has to pay on top of his mortgage payments, council tax and ground rent, is a life changing amount and is excessive.
26. When Mr Swift was referred to the planned maintenance programme attached to Mr Kent's report from which the reserve estimates had been derived, he could not refer to any particular item which he felt was a work of improvement or refurbishment.
27. Mr Swift considers that the Applicant's frustration of the level of charge by reference to other service charges collected in other apartment blocks is misleading. The other buildings are different and are of a much higher grade and specification. Mr Swift was concerned that the Applicant was attempting to upgrade the development and disguise this upgrading as maintenance and requiring the tenants to pay for it.
28. Mr Brown for the Applicant explained that in the past there had been an under allowance for reserves and this had resulted in some difficulties. There was an intention to try to catch up so that in the future there would be no serious deficit which would need to be recovered from the tenants during a single year. A gradual increase in the reserve would allow for this. Professional advice had been taken and Mr Kent had prepared a detailed report on the likely future expenditure. This had been used when calculating the estimated reserve fund.
29. Mr Kent presented his detailed report which the Tribunal had had an opportunity of reading. Mr Kent admitted that some of the works identified in the planned maintenance programme might be regarded as improvements. For example, the timber cladding to the gable had been replaced with plastic boarding. This would produce a much lower maintenance figure in the future because no redecoration was required. Similarly other replacements were envisaged in order to reduce recurring maintenance costs and a reduction in repairs caused by damage.

30. Mr Hnatiuk confirmed his written witness statement which identified the amounts agreed to be paid and outstanding. He referred to a detailed report dealing with the budget for the year ending March 2007, prepared by Alan Scudder, the Trustee. This report shows details of the expenditure made and explains in detail how the budgets have been calculated. The reserve fund shows an audited figure for 2005 of £45,620 and a budgeted figure for 2006 of £75,000.
31. Mr Hnatiuk confirms that demands were made in respect of the various charges and for the reserve fund in accordance with the terms of the lease.

Calculation of the Relevant Percentage

32. Mr Swift pointed out that he had a one bedroomed flat with a basement area. Because of the apportionment made on the basis of floor area only, he has one of the largest percentage charges on the estate. The basement area in his flat can only be used for storage and it is quite reasonable to calculate the service charge on square footage alone. A large three bedroomed flat on the estate pays a similar amount in service charge to his one bedroomed flat.
33. Mr Brown for the Trustee agreed that there may be an anomaly with the method of calculating the relevant percentage. Great care had been taken in this and three different surveyors had been asked to measure the floor areas of the estate. It is the lowest figure for the one bedroomed flats that had been used. Mr Swift's flat is split-level and although the lower level is described as a basement, it does have direct access to the ground floor at the rear because of the contours of the site. Several adjoining occupiers have made use of the lower space for living accommodation. The issue of floor area calculation had been explored about two or three years ago and only now is Mr Swift objecting.
34. Mr Kent explained that he had taken measurements of the floor area on a gross internal basis and although some adjustment had been made for a service duct, he had not adjusted for any reduced head height. He thought his measurements were fair and reasonable and thought that it was a fair approach to use floor area in order to apportion the service charge. He agreed under questioning from the Tribunal that he had not been asked to report on a fair and reasonable method of apportioning the service charge, he had only been asked to carry out measurements of floor area.
35. Mr Brown submitted a schedule showing the annual maintenance provision payable in respect of each flat for 2006/2007. Different percentages for each flat were used depending upon the benefit of various services received. For example, those flats (including flat 6) which did not have the benefit of the communal heating system, did not contribute directly to those costs. Flat 6 was highlighted showing a floor area of 956 ft² and a reserve fund percentage of 1.58%. Flat 19 was identified having a floor area of 750 ft², this was a three bedroomed flat, having a reserve fund percentage of 1.24%. A larger three bedroomed flat, number 81, was identified having a floor area of 952 ft² and a reserve fund percentage of 1.57%.
36. Mr Brown explained that the one bedroomed flats had been converted from their original use as shop premises. The lower ground floor areas had originally been the delivery and storage areas for the shops.

INSPECTION

37. Following the hearing the Tribunal inspected the property in company with the Respondent and the Applicant's representatives.
38. Dryden Court comprises a development of self-contained, purpose built flats developed about forty years ago with blocks varying between three and five storeys. The elevations are principally of brick with roofs of a shallow pitch covered with bitumen felt.
39. There is a central paved courtyard surrounded by the blocks of flats. The upper floors have open balcony access. The subject premises are on the ground floor, which was originally designed as a shopping precinct. A large number of the shops have been converted into residential flats, including the subject flat, although there are a few shops remaining. Some of the shop premises are currently undergoing conversion.
40. The Tribunal inspected flat 6, which has an entrance directly from the courtyard. There is a lounge, inner hall, bathroom, kitchen and rear bedroom on this level. From the bedroom, steps lead down to a lower area with a cupboard housing the boiler, and a rear room which has no natural light. The tenant was using this area as a music room and the Tribunal noted that there was a bed in this area. Although there were service ducts at ceiling level, the head room in the centre was not particularly restrictive.
41. The Tribunal was then allowed to inspect flat 19 which was located on one of the upper floors, and comprised an entrance hall, living room, kitchen, three bedrooms and bathroom with WC. By comparison to flat 6, this flat was larger and light and airy.
42. The Tribunal then inspected flat 81, which was a larger flat with accommodation arranged on two floors. At entrance level there was a hall, kitchen and living room with a staircase leading from the hall to the upper level where there was a bathroom with separate WC and three bedrooms.

CONSIDERATION

43. Although Mr Swift argues that the reserve fund is being taken to facilitate upgrading and redevelopment rather than maintenance, he was unable to identify any items in the planned maintenance programme in support of his assertion. The Trustee, in his report, refers to insufficient reserves in past years and in particular 2003 where only £736 was retained. This was insufficient to maintain Dryden Court in a reasonable condition. Tenants had enjoyed a lower service charge payment in return for a less well maintained environment. Mr Swift had benefited from these lower charges during his tenure.
44. We are satisfied that the increase in reserves is necessary and reasonable for the continued maintenance of the development. The Applicant has taken care to seek professional advice on the levels of funding required and has applied the advice received to the calculation of the reserves.

45. With regard to the calculation of the relevant percentage to be used for apportioning the reserve fund, there does seem to be an anomaly. The use of floor area to apportion the charge has given rise to an unreasonable calculation. In his evidence, Mr Brown admits this but confirms that although three surveyors were approached, they were only asked to re-measure and confirm the floor areas of the premises. No surveyor has been asked to consider whether floor area is the appropriate method of apportionment. Mr Brown seems to be relying upon the Tribunal's decision in this case to assist him with the true apportionment.
46. Clause 7.4 in the lease does not restrict the method of calculating the relevant percentage to floor areas. Several other suggestions are made including rateable value, cubic content, size and use, although this list is not exhaustive.
47. We considered whether it might be reasonable for a small one bedroomed flat to be required to pay the same percentage as a three bedroomed flat. Although the lower floor in flat 6 is rather more than a basement, it certainly cannot be classed as additional living accommodation. The room has no natural light or ventilation and would therefore not comply with building regulations for use as a habitable room. A three bedroomed flat would have a larger amount of external area which would increase the cost of redecoration and repair. Although the gross floor area of flat 6 compared to flat 81 was similar, the Tribunal concluded that it was unreasonable that each tenant would incur the same percentage of the reserve fund.
48. The Respondent had not assisted the Tribunal by providing a suggested alternative method of calculating the relevant percentage. The Applicant had relied upon floor area and made no suggestion as to an alternative method. The Tribunal could not be expected to carry out a detailed inspection and survey in order to come to a conclusion on the correct, relevant percentage. However, we were satisfied that the current arrangement was unreasonable.
49. We were told that the converted shops were those where there was a lower floor with a restricted use and from the schedule we were given, this applies to flats 2 to 6 inclusive. Each of these has a floor area quoted at 956 ft² and a reserve fund relevant percentage of 1.58%. We also inspected flat 19, which is a three bedroomed flat having a quoted floor area of 750 ft² and a reserve fund relevant percentage of 1.24%. In our opinion the share paid by flat 6 should be less than for this flat, bearing in mind the accommodation and use.
50. Flat 81 did not assist us in the final calculation other than to confirm that the relevant percentage was higher than flat 19, and this seemed reasonable bearing in mind the difference in floor area and in accommodation.
51. Having carefully considered the relationship between the various types of flat, we came to the conclusion that an apportionment of the reserve fund for flat 6 at 1.15% would be a reasonable application of Clause 7.4 in the lease.

52. The relevant percentage changes from year to year depending upon the number of contributors and the total floor area allocated in the apportionment. We do not have sufficient evidence before us in order to calculate a varied amount and therefore we apply our new relevant percentage of 1.15% for the years ended March 2005 and March 2006.
53. For the year ended March 2005, within the amount claimed, Mr Swift has contributed £819.16 towards the reserve (£309.58 plus £509.58). The audited reserve amount is £45,620 which at 1.15% is a contribution of £524.63. The amount overpaid is £294.53.
54. With regard to 2006, the estimated reserve amount is £80,000 and within the amount claimed Mr Swift has made a contribution of one amount being a half year at £627.16. The correct 1.15% contribution for a half year is £460 and £167.16 has been overpaid.

DECISION

55. The parties have agreed by exchange of documents and in evidence at the hearing that the amounts forming part of the claim relating to insurance, general repairs and maintenance, lighting and cleaning, in the sum of £1,099.57, is payable and Mr Swift must pay to the Applicant this amount within 28 days of the date of this Decision.
56. The relevant percentage of the landlord's expenses to be used in the calculation of the contribution to the reserve fund is amended to 1.15% for the accounting years ended 31 March 2005 and 31 March 2006.
57. The balance claimed by the Applicant relating to the reserve fund in the amount of £1,446.32 is reduced to £1,151.79 in respect of the year ended 31 March 2005 and the first payment for six months in the year ending 31 March 2006. On the assumption that no part of this amount has already been paid, this sum is to be paid by the Respondent to the Applicant within 28 days of the date of this Decision.

S.20C

58. Mr Swift confirmed that he wished to make an application to the Tribunal for an Order that all or any of the costs incurred or to be incurred by the landlord in connection with these 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 Respondent.
59. Mrs Sabic for the Applicant submitted a letter dated 7 April 2006 written by her instructing solicitors, setting out the Claimant's statement of costs in relation to the hearing, and a copy of this had been served on the Respondent. The total claim was for an amount of £3,832.41. The claim was stated to be in respect of this hearing only but included disbursements relating to the court proceedings.

60. Mrs Sabic was satisfied that the landlord should be able to recover these costs by way of the service charge but the Tribunal is not required to make a decision on this issue. She considered that the landlord had no alternative but to recover the amount owed and as the court had transferred the matter to the Tribunal, the costs were reasonably incurred. The dispute had to be defended.
61. From the evidence before it, the Tribunal is satisfied that the Applicant was aware of the anomaly regarding the relevant percentage of the reserve fund to be charged to the Respondent but had failed to adjust the figure. Mr Brown made it clear in his evidence that he was relying on the Tribunal to make a decision in order to remove the anomaly.
62. The Tribunal's decision has amended the relevant percentage. It therefore seems unreasonable that the tenants should be asked to pay the cost of resolving an anomaly which the Applicant clearly identified as requiring a solution. We therefore consider that it is just and equitable in the circumstances to make an Order under S.20C.

COSTS PURSUANT TO SCHEDULE 12, PARA. 10 C.L.R. ACT 2002

63. The Applicant submits that it had no alternative but to attempt to pursue the Respondent for the outstanding amounts. Mrs Sabic did not, however, identify why she felt it was unreasonable for the case to be defended.
64. The Tribunal has amended and reduced the amount payable.
65. The Respondent has not acted in a manner specifically described in Para. 10 or otherwise unreasonably in connection with the proceedings.
66. The Tribunal therefore makes no determination for the recovery of costs.

REIMBURSEMENT OF FEES

67. The Applicant seeks reimbursement of the fee of £150 paid as a hearing fee in this case.
68. The Tribunal could find no reason to order reimbursement in this case as the Respondent has in part succeeded in reducing the service charge payable and it was therefore reasonable for him to require a hearing.

LATE EVIDENCE

69. Following the conclusion of the hearing Mr Brown provided additional documents by way of a letter received on 19 April 2006. This letter and documents were forwarded to the Tribunal Members on 2 May 2006. The Tribunal made its decision on the day of the hearing and these additional documents were not taken into account or requested by the Tribunal.

ORDER

70. It is ordered that the Applicant is prevented from recovering all or any of the costs incurred or to be incurred in connection with proceedings before this Tribunal as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant.

Dated 26 May 2006

Brandon H R Simms FRICS MCI Arb
Chairman