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THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT
ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985 (as amended) Section 27A

Ref: LON/00BK/LIS/2006/0001

Premises: FLAT 22, 33 to 35 BRYANSTON SQUARE, LONDON W1H 2DZ

Applicant: 33 to 35 BRYANSTON SQUARE LIMITED

Respondent: HERCULES MARINE S.A.

Appearances: Miss A Chute, of Counsel,
Instructed by Messrs. Neilson & Co, Solicitors

The Respondent did not attend and was not
represented at the hearing

Members of the Leasehold Valuation Tribunal:

Miss A Seifert FCI Arb
Mr F Coffey FRICS
Mrs S Baum J.P.

Date of Decision: 10th October 2006

THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT
ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985 (as amended) SECTION 27A

Re: Flat 22, 35 Bryanston Square, London W1H 2DZ

Ref: LON/00BK/LIS/2006/0001

THE TRIBUNAL'S DECISION

1. The Applicant, 33 to 35 Bryanston Square Limited, applied to the Tribunal by an Application dated 6th December 2005 for a determination of the reasonableness and payability of service charges in respect of a lease of flat 22, 35 Bryanston Square, London, W1H 2DZ. The service charge years in issue in the Application were 1999/2000, 2000/2001, 2001/2002, 2002/2003, 2003/2004, 2004/2005 and 2005/2006. The service charge year runs from 1st May in one year until 30th April in the following year.
2. The Applicant is the leasehold owner of the three blocks comprising 33 to 35 Bryanston Square ("the building"), under a lease dated 24th June 1992 for the term of 125 years less 10 days from 29th September 1959. The Applicant was incorporated on 5th April 1991 as a private limited company and its main objects are the ownership and management of private residential property.
3. The Respondent, Hercules Marine S.A., is the owner of the penthouse flat 22 in 35 Bryanston Square under a lease dated 14th February 1964 for a term of 125 years less 15 days from 29th September 1959 ("the Lease") made between Mertoun Development Co Limited and Kathleen Doris Moyse. A Deed of Variation was entered into between Mertoun Development Company Limited and the Respondent dated 4th May 1982.
4. The building consists of three blocks comprising basement, ground floor, six upper floors and a penthouse flat on the top floor (7th floor) in each of the blocks. There are 22 flats in each block making a total of 66 flats all held on long leases. The building was designed and built in the 1950's.
5. The managing agents for the building since about May 1999 have been Capital Property Management. Before that, various managing agents managed the building.
6. A hearing was held on 12th July 2006. Miss Andrea Chute, of Counsel, instructed by Messrs. Neilson & Co. Solicitors, represented the Applicant. The Respondent did not attend and was not represented. By a letter sent by fax and dated 12th July 2006 addressed to the Tribunal, Messrs. Rochman Landau, then Solicitors for the Respondent, informed the Tribunal that the Respondent would not be attending the

hearing, that they were anxious to limit costs and that their client agreed to pay the full amount of the Applicant's claim "...albeit under protest".

7. The Applicant's Solicitors served on the Respondent a notice under section 166 of the Commonhold and Leasehold Reform Act 2002 on 19th September 2005. The notice was not complied with and further arrears had accrued.
8. Paragraph 15 of the Applicant's statement of case sets out a breakdown of service charges alleged due for the service charge years in issue:

Service Charge Year ending 30.4.2000	£ 5,081.45
Service Charge Year ending 30.4.2001	£ 1,312.95
Service Charge Year ending 30.4.2002	£(1,273.28)
Service Charge Year ending 30.4.2003	£ 2,492.72
Service Charge Year ending 30.4.2004	£ 7,838.73
Service Charge Year ending 30.4.2005	£ 8,313.83
Service Charge Year ending 30.4.2006	<u>£ 2,591.00</u>
	£ 26,356.90

9. A breakdown of how the above arrears were made up was included in the statement of case. This showed that in each quarter a reserve fund contribution was charged in advance in addition to an on account service charge contribution.
10. Miss Chute confirmed that the Applicant agreed that the Tribunal had no jurisdiction in respect of any ground rent arrears.
11. The Respondent served a response dated 6th March 2006 to the Applicant's statement of case ("the response"). In the response the Respondent admitted that it had failed to pay all the service charges demanded by the Applicant, but was unable to state the precise sum outstanding.
12. The response included the following contentions by the Respondent:
 - (1) By paragraph 14 of the response it was contended that: "...the reason why the Respondent has not paid the service charges in full is because there has been a failure in the building's heating system continuing for a number of years, and since at least 1999. This failure has left the flat without heating during this time and the occupiers of the flat have had to use electric fires..." and "...By reason of this failure on the part of the Applicant, the Respondent contends that any service charges which the Applicant attempts to recover from it for the cost of heating are unreasonable...".
 - (2) The failure in the building's heating system was a breach of clause 5(vii) of the lease as varied by the Deed of Variation.

Clause 5(vii) contains the following covenant by the lessor:

"To maintain at all times a reasonable and adequate supply of hot water for domestic purposes to the demised premises and in the cold season between dates to be determined at the discretion of the Lessors to provide reasonable

and adequate heat to the radiators in the demised premises provided that the Lessors shall not be liable in damages or in any other manner in the event of any cessation or interruption of such services arising out of matters or events over which it has no control"

The Building is defined in the Lease as varied by the Deed of Variation as 'numbers 33, 34 and 35 Bryanston Square'.

- (3) Recovery of the service charge arrears claimed before 1st January 2000 was statute barred under the Limitation Act 1980.
 - (4) The Respondent's liability to pay was dependant (a) on evidence that the amount payable had first been determined by the Applicant's surveyor and certified in accordance with the Lease and (b) that proper accounts of the service charge are to be kept and rendered to the Respondent in an audited statement of yearly costs.
13. At the hearing the Tribunal raised the further question namely whether contributions to the reserve fund, which the Applicant had included in the service charge, were recoverable under the Lease.
 14. The Applicant prepared the hearing bundle. It contained the Applicant's evidence in addition to correspondence between the parties. The Respondent submitted no evidence in support of its case and as stated above, was not represented at the hearing for reasons referred to in the above letter from its Solicitors dated 11th July.
 15. At the conclusion of the hearing, following further directions of the Tribunal, the Applicant submitted written closing submissions on 2nd August 2006. The Tribunal reconvened to decide this case on 8th September 2006. On that date the Applicant's Solicitors informed the Tribunal that the Respondent had made no payments in respect of the Applicant's claim. By a letter dated 21st September 2006 the Applicant's Solicitors informed the Tribunal that they had received notice from Messrs. Rochman Landau that the Respondent was now acting in person.

The alleged failure or the heating system

16. Mr Richard McGuire C.Eng.MCIBSE, of Messrs. Waterfield Odam and Associates, Consulting Engineers, the Applicant's heating expert, produced a report dated March 2006 called "Assessment as to the Provision of Reasonable and Adequate Heat to Penthouse Flat 22". Mr McGuire took issue with the Respondent's contention that:
 - (a) there had been a complete failure in the building's heating system and/or
 - (b) that the occupiers had been left without heat.
17. Miss Chute submitted that the Respondent had put no evidence before the Tribunal to support its allegations. She submitted that Mr McGuire had reached the following conclusions at the end of his report:
 - (1) The heating system is being adequately maintained and the lessor had in place a more than satisfactory maintenance regime and the Lessor had fully complied

with its obligation to 'maintain' the heating and hot water services to the building.

- (2) The shortfall in heating output was a combination of:
 - (a) partial air locking of heat emitters
 - (b) possible defective heat emitter valves, and
 - (c) under sizing of emitters within two of the four bedrooms.

Mr McGuire also told the Tribunal that there had never been a complete failure of the heating system he pointed out that:

- (3) It was the Lessee's responsibility under clause 2(vi) of the Lease to maintain the radiators in working order to include the maintenance of the automatic vents. It was the tenant's responsibility to bleed the radiators.

Clause 2(vi) contains a covenant by the lessee as follows:

"That the Lessee will from time to time and at all times during the term hereby granted well and substantially repair uphold maintain cleanse amend and keep the interior of the demised premises and every part thereof in good and substantial repair and condition (structural and other repairs referred in Clause 5(vi) hereof and damage by fire and other risks insured against by the Lessors always excepted"

- (4) The kitchen radiator had its air vent painted over and this was the lessee's responsibility under clause 2(vi) of the Lease.
by fire and other risks insured against by the Lessors always excepted"
- (5) The dressing room had a defective valve and that this again was the lessee's responsibility under clause 2(vi).
- (6) In the sitting room the heaters were up to temperature.
- (7) The dining room heaters worked well but needed the support of the skirting hearers. These did not appear to be there, which was not the Applicant's fault.
- (8) It was doubtful that the 'radiators' in the bathroom were ever meant to be radiators when the building was designed, given that they were simply heated towel rails. This was supported by the fact that the heating for the towel rails was on a different pipe system entirely from the hot water system.

Mr McGuire also raised the issue of cultural expectation in respect of heat requirements and mentioned the fact that because of the way in which the heating system worked, that the temperature in the radiators would go down as the outside temperature went up, which may not be something the Respondent necessarily realised.

18. Mr Simon Vanya Benjamin, of the managing agents, gave evidence in accordance with his witness statement dated 12th June 2006 and gave additional oral evidence. He explained that two years ago the Applicant had installed automatic air vents in flat 22 and had paid for these. Previously residents contacted the caretaker to arrange venting of the radiators. Two out of the three penthouses in the building had installed independent heating systems because the owners wanted control over when the heating was on and off. He accepted that there was a need for the radiators to be bled.

19. Mr Stanley Roberts, leaseholder of Flat 21 Bryanston Square, who is a director of the Applicant and was Secretary to the Applicant until April 2004, gave evidence at the hearing in accordance with his witness statement dated 16th February 2006 and additional oral evidence.
20. Mr Roberts told the Tribunal that he had read the correspondence between the Respondent and the managing agents and was aware about the Respondent's contention in respect of the supply of heating to flat 22, and that the Respondent had sought to rely on this for not paying the service charges. He also told the Tribunal that the Respondent had not complained about any other aspect of the service charge other than heating. Work had been carried out at the request of the Respondent in about February 2004 at the expense of the Applicant to improve the efficient operation of the radiators in flat 22. Metro Heating & Air Conditioning Services Limited, the contractors who have maintained and serviced the central heating systems in the blocks, undertook the work, which consisted of draining the system, removing the old air eliminators fitted to the existing radiators and supply and fitting fully automatic air release devices with individual isolating valves to each radiator in the flat 22. The radiators were then vented and tested. The replacement air vents fitted to each radiator were designed to improve the efficient operation of the radiators. Mr Roberts said that unfortunately the Respondent still continued to withhold payments since February 2004. He told the Tribunal that since the work was carried out there had been no reports or complaints received from the Respondent with regard to the operation of the radiators and the inspections carried out by Metro Heating Engineers reported that all radiators were operating satisfactorily. The Respondent's tenants had not complained about insufficient heat.
21. In respect of the heating issue, Miss Chute submitted that none of the reasons for the shortfall in the heating system identified by Mr McGuire were the fault of the Applicant. It was the Respondent's responsibility under the Lease to maintain the radiators in working order. The Applicant's obligation was to provide reasonable and adequate heat to the radiators. She submitted that the Applicant had complied with that obligation. Mr McGuire's evidence had been that at no time did the data logger drop below the temperatures required of a 1960's specification. No other leaseholders had failed to pay. She pointed out that if the Respondent's dispute was only with the heating element of the service charge, there was no explanation of why it had failed to pay the balance of the arrears.

The Tribunal's decision – heating system

22. The Tribunal, on the evidence presented finds that there was no failure of the heating system such as is alleged in the response. The supply of heating was of a reasonable standard and the cost reasonably incurred. No reduction is made to the service charges in respect of this allegation.

Whether the reserve fund is a legitimate charge under the service charge

23. Mr Roberts told the Tribunal that the service charges claimed for the service charge years in issue, included sums for a reserve fund for the following year. He told the Tribunal that the precise amount of the reserve fund for any year is the subject of

discussion and then approval at the Applicant's Annual General Meeting. The service charge is not a fixed amount for each year but is adjusted to reflect anticipated expenditure.

24. Miss Chute referred to the provisions of sections 18 and 19 of the Landlord and Tenant Act 1985 as amended. She also referred to various clauses in the Lease including Clause 2(III):
- "That the Lessee will pay in advance by equal quarterly instalments to be paid on the First day of May the First day of August the First day of November and the First day of February in each year during the term hereby granted 2.31 per cent of the estimated costs expenses and outgoings incurred by the Lessors in any year or part of year in respect of the items of expenditure set out in the Second Schedule hereto for the purpose of management and supply of services for the building and the liability accruing in respect of such expenditure (to be certified in accordance with the provisions of the Second Schedule) shall be determined from time to time by the Lessors' Surveyor whose decision shall be final the first payment being a proportionate part of a quarter having been made on or before the execution of these presents the next Quarterly payment shall be made on the First day of May next and each such Quarterly payment or part of such Quarterly payment shall be recoverable as rent in arrear PROVIDED that nothing contained in these presents shall render the Lessee liable to contribute any moneys towards the cost of rebuilding or reinstating the building or any part or parts thereof in the event of the same being destroyed or damaged by fire tempest lightning aircraft and things dropped therefrom storms riots civil commotions malicious damage explosion impact bursting and overflowing of water tanks or pipes and apparatus and earthquake or by any cause or event against which the Lessors shall have insured under the covenant in that behalf hereinafter contained."
25. Miss Chute submitted:
- (1) The Applicant's primary contention was that the reserve fund is a legitimate charge under the service charge.
 - (2) In law service charge amounts can include variable sums for services, repairs, maintenance, improvements, insurance, and landlord's costs of management (1985 Act section 18(1)).
 - (3) The Lease provides at Clause 2(III) that the Lessee will pay in advance 2.31% of the estimated costs and expenses outgoings incurred by the Lessors in any year or part year in respect of items set out in the Second Schedule (expenses and outgoings of which the Lessee is to contribute) for the purposes of management and supply of services to the Building and the liability accruing in respect of such expenditure shall be determined by the Lessors' Surveyor whose decision shall be final.
 - (4) It is clear from Clause 2(III) that such monies are to be paid towards the costs of rebuilding or reinstating the building or any part thereof in circumstances other than where the building is destroyed or damaged by fire tempest etc.

- (5) Paragraph 1(c) of the Second Schedule provides that costs referred to Clause 2(III) include such costs as are necessary or usual in the case of residential flats etc. of the nature of those comprised in the building.
- (6) Clause 5(iv) obliges the Lessors to paint and clean the Stonework on the outside of the building at lease every three years.
- (7) Clause 5(v) provides that the Lessors shall paint and paper etc. the inside of the building at lease every seven years.
- (8) Clause 5(vi) provides that the Lessors are obliged to maintain cleanse repair and renew the gutters and all external parts, including gas wiring electrics etc. the common parts lifts main structure roof etc.
- (9) In all the circumstances and given the above obligations of the Lessors, coupled with the exclusions set out in Clause 2(III), the words in paragraph 2 (c) of the Second Schedule should be read so as to include contributions to the reserve fund. This is especially so given that Clause 2(III) states that the service charge payment can be for estimated costs and expenses and outgoings incurred in any year or part year in respect of items set out in the Second Schedule and charged in advance. To the extent that the reserve fund contributions are not spent in one year, the wording of the Lease (incurred in any year or part year) permits such funds to be reallocated to the following year. Miss Chute submitted that this must also be the Respondent's understanding as he had not sought to defend the case on the basis that the reserve fund is not chargeable as part of the service charge. The Respondent had never taken issue with the reserve fund being charged on this basis. It was open for the Respondent to do so as each year's accounts are approved at the AGM by all the leaseholders. Further the Respondent had made payments to the Applicant on this basis.
- (10) Miss Chute pointed out that Mr Benjamin produced as a witness statement the service charge accounts for all the relevant years. She submitted that these accounts are properly audited accounts, certified by chartered accountants to be a fair summary of relevant costs. Each of the accounts included details of amounts set aside for future maintenance and renewal. Each shows a balance in the reserve fund at the beginning of the year, the contribution towards the reserve fund levied and the amount that was spent in the year on major works expenditure and the balance left at the end of the year.

The Tribunal's decision – reserve fund

26. Although contributions to a reserve fund are not normally payable unless a lease makes specific provision for a reserve fund, the Tribunal is persuaded by the arguments put forward by Miss Chute that contributions to a reserve fund are payable by the Respondent as part of the service charge in this case.
27. This decision is made against the background of the circumstances of this case and in particular that the Respondent has not, either in correspondence or in its response, challenged the recoverability of the contributions to the reserve fund. It

is possible that a different view might have been taken of the construction of the Lease if this point had been taken and fully argued on both sides.

Limitation

28. In the response it was alleged that the amounts claimed before 1st January 1999 are not recoverable.
29. Miss Chute submitted that the appropriate limitation period was 12 years because the Lease was executed under seal and was a specialty. She relied on the provisions of section 8 of the Limitation Act 1980 which states:

Section 8(1): An action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued.

However under section 8(2): Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

By section 19 of the Limitation Act 1980: No action shall be brought, or distress made, to recover rent, or damages in respect of arrears of rent, after the expiration of six years from the date on which the arrears became due.

Under the provisions of Clause 2(III) of the Lease the payments were recoverable as rent in arrear. Accordingly the limitation period of six years in section 19 applies.

30. Miss Chute submitted that there is nothing in any statute or regulation which expressly governs the Leasehold Valuation Tribunal in respect of limitation, nor is there any provision which expressly restricts the period into which a Leasehold Valuation Tribunal can enquire when determining whether service charges are payable under section 27A of the Act.
31. The Tribunal agrees with Miss Chute's submission in paragraph 27 above and finds that it is entitled to make a determination under section 27A of the 1985 Act in respect of all the arrears service charges claimed. However, it remains open to the Respondent to rely upon any arguments it may have regarding limitation in any future proceedings for a money judgment for arrears.

Costs

32. The Applicant applied for an order for costs. Miss Chute asked the Tribunal to make a finding that the Respondent has behaved unreasonably in the conduct of these proceedings under the Commonhold and Leasehold Reform Act 2002 Schedule 12 paragraph 10 ("the 2002 Act"). Miss Chute submitted that the circumstances of this case are exceptional in that the Respondent's conduct has been unreasonable. She relied on the following:
- (i) The Respondent withdrew from the hearing at the last moment.
 - (ii) It had previously applied for an adjournment of the hearing against the wishes of the Applicant, based on matters to do with its own convenience, bolstered by what has turned out to be an incorrect statement that it would be calling witnesses to the hearing.

- (iii) In addition, the Respondent told the Tribunal that the case had been settled and the Respondent agreed to pay the full amount of the Applicant's claim, but failed to do so. She submitted that the Respondent had shown a complete contempt through out towards the Applicant, Tribunal and proceedings and its behaviour has resulted in the Applicant incurring considerable costs. In addition the Respondent has caused the Applicant to incur very considerable legal costs by submitting issues which the Applicant had to address causing the Applicant to engage an expensive heating engineer to meet these extravagant allegations only to find that the Respondent put in no expert evidence to contradict the Applicant's expert and failed to call any evidence at all to support the allegations in respect of heating.

The Tribunal's decision - costs

33. Under Schedule 12 paragraph 10 of the 2002 Act :

(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).....

(b) He has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

Under sub-paragraph (3), The amount that a party can be ordered to pay is limited to £500.

34. The Tribunal accepts the submissions off Miss Chute and determines under paragraph 10 of Schedule 12 that the Respondent has acted unreasonably in the course of these proceedings. The Tribunal orders the Respondent to pay to the Applicant costs under paragraph 10 in the sum of £500.

The Tribunal decision - reimbursement of fees

35. The Applicant applied for an order for reimbursement of fees paid by the Applicant in these proceedings of £350 and £150.

36. Under the provisions of paragraph 9 of the Leasehold Valuation Tribunal (Fees) (England) Regulations 2003, in relation to any proceedings in respect of which a fee is payable under those 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.

37. The Tribunal considers that it is reasonable in this case to order re-imburement by the Respondent to the Applicant. The Tribunal orders the Respondent to reimburse the Applicant of the fees of £350 and £150 making a total of £500.

Summary of decision

38. It follows from the above decision that:
- (1) The Tribunal finds that the sum of £26,356.90 for the service charge years in issue was reasonable and reasonably incurred.
 - (2) The Respondent to pay the Applicant £500 costs under paragraph 10 of Schedule 12 of the 2002 Act.
 - (3) The Respondent to reimburse the Applicant £500 fees under the LVT (Fees) (England) Regulations 2003.

CHAIRMAN.....*Anne Seifert*

DATE: 20th October 2006

Members of the Leasehold Valuation Tribunal

Miss A Seifert FCI Arb
Mr F Coffey FRICS
Mrs SE Baum JP