

In the Leasehold Valuation Tribunal
Ref LON/00AM/LIS/2006/0110

Applicant	Ms. Angelina Cowley & Nicholas Platt (flat 1) Mr. Fintan O'Rourke & Rosin Browne (flat 2) Mrs. Sophie Kennedy (flat 3) Ms. Joanna Kidd (flat 4)
Represented by	Mr N. Yell of Counsel Mr M. Barnett, solicitor Comptons Solicitors
In attendance	Ms A. Cowley
Respondent	Assethold Ltd
Represented by	Mr J. Gurvits (Director Eagerstate Ltd)
Premises	flats 1-4, 49 Blackstock Road London N4 2JF

Tribunal

Ms E Samupfonda LLB (Hons)
Mr C Kane FRICS
Mrs J Clark

1. This is an application under section 27A Landlord and Tenant Act 1985 (the Act) for a determination of whether the Applicants are liable under the terms of their leases to pay the Respondent's legal costs incurred in the proceedings in Shoreditch County Court ref SD 205572 and if the costs are recoverable whether they are reasonable and the amount payable. The amounts claimed are: £9,600 +VAT in respect of solicitors' fees, £2,750.68 in respect of managing agent's fees, £260 for court fees, £4,000 counsel's fees and £190.35 private investigator's fees. An application under section 20C of the Act was also made for an order limiting the recovery, through the Service Charge, of the Respondent's costs incurred in these proceedings. The Applicants (other than Sophie Kennedy who sold flat 3 in or about March 2005) are leasehold owners of flats within the premises. The Respondent is the Landlord and Freehold owner. The flats are situated above the ground floor shop.
2. An oral pre trial review was held on 25th September 2006. Mr Yell represented the Applicants. The Respondent did not attend and was not represented. Directions for the future conduct of the case were made. Neither party adhered to the time table set out.
3. The hearing of this application was held on 12th December 2006. Mr Yell represented the Applicants. Mr Barrett and Ms Cowley were also present. The Respondents were represented by Mr Gurvits, Director of Eagerstate Ltd, the Respondent's managing agents. Mr Gurvits initially made an application to adjourn the hearing. He explained that he had only received the Applicants' bundle on Friday 8th December and therefore had not had

an opportunity to seek legal advice. Mr Yell clarified that the bundle largely comprised the application and the respective leases, details of previous proceedings and did not contain any information that had not been previously seen although there were some new documents added. The Tribunal offered Mr Gurvits an opportunity to consider the additional documents but he declined to do so as Mr Yell had explained that he would not refer to the additional documents. Mr Gurvits confirmed that he had 19 years experience in property management and was familiar with the leases and the issues before the Tribunal. Mr Gurvits then agreed to proceed.

4. The parties submitted detailed documentary evidence in support of their case. We have therefore referred to the salient points in this decision.
5. It was agreed that the issues to be determined were two fold. Firstly, whether the Applicants are liable under the terms of their leases to contribute towards the legal costs incurred by the Respondents in the previous proceedings at Shoreditch County Court? Secondly, if they are so liable, have the costs been reasonably incurred? To all intents and purposes the leases under which the Applicants occupy their premises were in standard form and were for terms of 125 years, flat 2 only containing a variation of Paragraph 5 of the Fifth Schedule and that imposed an obligation that "the Landlord will not permit the Ground Floor Premises of the Building or any part thereof to be used for a Use within Class A3 of the Town & Country Planning (Use Classes) Order 1987.
6. Mr Yell gave a detailed account of the background leading up to the County Court proceedings. In essence, he said that the ground floor shop premises were let under a lease dated July 21 2000 between Oakfield Investments Limited and Pine Investments Limited (P.I.L.) The freehold reversion was purchased by the Respondent in around November 2000. On 6th November 2001, P.I.L granted a 12 months licence to Mr Rabah Moani. The licence agreement specified the use of the shop as being for "coffee shop/takeaway". Initially Mr O'Rourke complained about the use of the ground floor on the basis that the use of the ground floor for the cooking or preparation of food for resale was in breach of various provisions of P.I.L's lease, in particular clauses 3.10.2 and 3.11. Eventually, all the Applicants made similar complaints and the Respondent instituted proceedings in October 2002 against P.I.L initially and Mr Moani. After what he said amounted to rather protracted litigation an order was made by His Honour Judge Cotran in December 2003 upon undertakings being given by the parties. The order provided that there should be no order as to costs despite an admission of the breach and a declaration by the Judge that there had been such a breach. The Respondent through the managing agent is now seeking to recover the costs incurred in those proceedings through the Service Charge. Mr Gurvits confirmed that the amounts that the Respondent is seeking to recover are as set out in paragraph 1 above. He did not dispute the chronology of events.

7. Mr Yell contended that the Respondent is not entitled to recover these costs under the terms of the leases. He referred the Tribunal to the Landlord and Tenant's covenants in the leases of flats 1, 3 and 4. The material provisions are Paragraph 2 of Part I of the Fifth Schedule and Part II paragraph 8 of the Sixth Schedule. (Landlord's covenants.)

Paragraph 2 provides "*The Landlord will at the request and cost of the Tenant and upon being indemnified by the Tenant against the costs and upon the Tenant providing such security for costs as the Landlord from time to time reasonably requires take all steps to enforce the covenants on the part of other tenants contained in the leases of the other flats in the Building insofar as such enforcement is reasonably in the interests of the occupiers of the premises,*"

Paragraph 8 of the Sixth Schedule (Items falling within the Service Charge) provides

8 "*The payment of all legal charges incurred by the Landlord:-*

8.1 In the running and management of the Building and the Common Parts and in the enforcement of the covenants conditions and regulations contained in the leases granted of the various Premises in the Building."

The Fifth Schedule in the lease to flat 2 varies in the way set out in paragraph 5 above.

8. He stated that although the Applicants had requested the Respondent takes action against the use of the ground floor as a coffee/takeaway shop, they had not done so pursuant to the provisions set out under paragraph 2. He added that the Respondent could not rely on Paragraph 2 because; in his view this covenant was intended to provide mutual enforceability of covenants between the various residential tenants. Furthermore, he submitted, the shop floor premises did not fall within the words "the various Premises in the Building" The lease of the shop floor is in very different character to the leases of the residential premises. He said that the expenses referred to are those that relate to the residential leases and not to the commercial premises because they come under a very different regime. There are no provisions for the payment of service charges. He considered that there was no apparent reason why the residential tenants should agree to pay the cost of the landlord enforcing the provisions of the commercial premises.
8. Mr Gurvits said that in his view the shop premises fall within the words "various premises in the Building" The Particulars of the leases define the Building as meaning "49 Blackstock Road" and the shop floor contributes 10% towards the service charge with the residents contributing 90%. The whole Building is therefore one unit. He confirmed that the Applicants did not agree to indemnify or provide security for the Respondent's costs. He explained that he obtained legal advice to the effect that the costs would be

recoverable from the Applicants under the leases and on that basis the Respondent decided to institute legal proceedings.

9. Mr Yell submitted that, in taking court proceedings, the Respondent was complying with its obligation under Paragraph 5 of the Fifth Schedule of flat 2 and not acting on behalf of the Applicants. The Landlord was in breach by permitting the use of the ground floor for a use within Class A3. He therefore concluded that it would be unreasonable for the Respondent to recover the costs that it incurred in remedying its own breach. Furthermore, there was no order as to costs and he wondered if the Landlord knew that it would be liable for the cost, it would have agreed to such a settlement. He surmised that the Respondent did not query the costs or ask for a detailed assessment as to costs because it thought, erroneously that it would not be liable for the cost. There was no evidence to show that the Respondent had any regard for the Applicants' interest. There was no good reason why the Respondent did not seek to recover the costs from P.I.L and Mr Moani.
10. Mr Gurvitz said that he was present during the court proceedings. He did not fully understand the legal arguments. He acted on advice from his solicitor and from counsel. He said that the Respondents were acting in the best interest of the Applicants. The Respondent does not derive any benefit from the shop premises, the rent is paid to P.I.L. He confirmed that if he lived on the premises he would have acted exactly in the same way. He said that the Respondent paid the solicitor's fees without question because his view is that services rendered should be paid for. He was not aware that he could negotiate or challenge the costs.
11. Mr Yell's construction of the lease led him to conclude that the legal costs are only recoverable (if they are recoverable at all subject to the reasonableness test) under Paragraph 8 of the Sixth Schedule. Mr Gurvits said that the Respondent relied on this paragraph rather than paragraph 2.
12. Mr Yell challenged the level of the costs incurred which he considered to be on the high side. He said that the proceedings were protracted. Initially the Respondent sought to forfeit the lease only to discover that there are no forfeiture provisions in the lease, the particulars of claim were amended and re-amended. The Respondent was advised to amend the particulars of claim to join Mr Moani when it could have sought an injunction instead. He added that costs were also high because all the work was carried out by a partner in the firm and there was no attempt to delegate. In conclusion he submitted that the costs are irrecoverable or unreasonable. He submitted that the Respondent should therefore not be permitted to recover the cost of these proceedings through the Service Charge. Mr Gurvits said that the Respondent has a valid case and is entitled to recover its costs.

13. Determination

In determining this application we had regard to the law, the lease and the parties' submissions.

In determining the first issue, whether the leases permit the Respondent to recover the legal costs in the circumstances, the Tribunal had to construe the lease as a whole. In particular we had regard to the specific words, their meaning as would be understood by the reasonable man and to give effect to the intention of the parties in the light of the circumstances. In applying these principles, we found that the Applicants are liable to contribute towards the Respondent's legal costs by virtue of Paragraph 8 of the Sixth Schedule. The Building is described in the Particulars as meaning 49 Blackstock Road London N4 and paragraph 1.5 goes onto say that "the Building means the Building stated in the Particulars and being all of the freehold property registered at HM Land Registry under title number EGL387484." We were erroneously provided with copies the register of title for 47 Blackstock London N4, which is also held by the Respondent as confirmed by Mr Gurvits. This, however was of some assistance as it indicated that the Building is similar to the subject premises in that there are 4 residential flats with ground floor shop floor premises. More importantly, the Building is defined as comprising the four flats and the shop premises. In the absence of any contra evidence, we have no reason to believe that the title of 49 would be different. That being the case, it is our view that read as a whole, the intention of the parties was that the Applicants would be liable for "all the legal charges incurred by the landlord". Paragraph 8 is plainly expressed that the legal costs are the costs of "running and managing the Building and Common parts and the enforcement of the covenants conditions and regulations contained in the leases granted of the various premises in the Building"

14 Now we turn to consider the second issue of whether the costs are reasonable or have been reasonably incurred. We have some sympathy with the Applicants in so far as they were not parties to the proceedings, they did not participate and their interests appear not to have been registered. We find no evidence that the Respondent tried to or even considered recovering the costs from the unsuccessful party as would have been expected. We have no reason to doubt Mr Gurvits' evidence that the decision not to recover the costs from the defendants was based on legal advice. Whilst that is regrettable, it does not alter the terms of paragraph 8.

15 The Tribunal's jurisdiction to determine the payability of service charges is set out under section 27A of the Act. Section 19 of the Act limits the amount of costs that are recoverable in that relevant costs are to be taken into account in determining the amount of a service charge payable only to the extent that they are reasonably incurred. The test that we must apply is not whether the work that was carried out could have been carried out more cheaply but whether the costs that have been incurred have been reasonably incurred. £250 per hour was the rate charged by the Respondent's solicitor. The work was carried out by a partner. Whilst this rate was on the high side, from our knowledge and experience it did not seem out of line with

market rates for Grade A fee earners in central London. The Tribunal accepted the contention that some of the work could have been delegated. The Tribunal noted that the bulk of the work appeared to be dealing with correspondence. An analysis of counsel's fees has not been provided. Other than the private investigator, the nature and context of the work that was carried out has not been explicitly identified or the hourly rate charged specified other than the solicitor's. Furthermore there has been no evidence submitted as to the reasonable cost of time. Given the paucity of information, the Tribunal relied upon its own knowledge and experience of such matters to determine the issue. We accept that it would have been reasonable for the solicitor to delegate some of the work. Taking a broad brush approach we have reduced the solicitor's fees by 25% and the managing agent's fee by £250. We have assumed that counsel was instructed throughout the course of proceedings. We therefore determined that his costs are reasonable. We also find that the court and private investigator's fees are reasonable.

16. **Section 20C application**

The Applicants have made an application pursuant to section 20C of the Act for an order that the Respondent's costs incurred in respect of 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 Applicants as tenants. We have already determined in principle that the Respondent is entitled under the terms of the lease to recover through the service charge reasonable legal costs reasonably incurred in connection with the "enforcement of covenants conditions and regulations contained in the leases granted of the various premises in the building" and we find that this extends to cover the costs of these proceedings. Section 20C directs the Tribunal to make *such an order on the application as it considers just and equitable in the circumstances*. The Tribunal considered that these words permitted it to take into account the conduct of the parties in deciding whether it would be appropriate to make such an order.

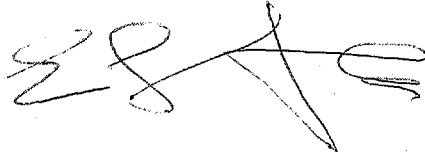
Although the Tribunal has found largely in the Respondent's favour, it considered that the protracted proceedings was a contributory factor in increasing costs and there was insufficient consideration given to the Applicants' interest in deciding not to recover the costs from the unsuccessful defendants. We concluded that it was not unreasonable for the Applicants to bring these proceedings. The Tribunal considers that it would not be just and equitable to allow the Respondent to recover its costs through the service charge.

17. **Decision**

The reasonable costs incurred by the Respondent and payable by the Applicants are a total of £15,307.28, made up of £8,460 solicitors fees inclusive of vat, £2456.93 inclusive of vat in respect of managing agent's

fees, £4,000 counsel's fees, £190.35 private investigators fees and £200 court fees.

Chairman

A handwritten signature in black ink, appearing to be 'S. J. ...', written over a horizontal line.

Dated

27/12/06.