

**Leasehold Valuation Tribunal: reasons****Landlord and Tenant Act 1985 sections 27A and 20C****Address of Premises**

Flats 1, 2 and 3,  
51 Shakespeare Road,  
Herne Hill, London SE24 0LA

**The Committee members were**

Mr Adrian Jack  
Mr K Cartwright  
Mr O Miller

**The Landlord:****Assethold Ltd****The Tenants:****Mr C Bell (Flat 1); Ms A Baker (Flat 2); Mr M Rose (Flat 3)****Procedural**

1. By an application dated 22<sup>nd</sup> September 2009 the tenants sought determination of their liability to pay service charges from 14<sup>th</sup> January 2008.
2. Originally there was also an application to determine issues as to the tenants' right to manage through an RTM company, but the day before the hearing the landlord dropped its objection to the RTM company taking over the management of the premises. At the hearing itself the parties agreed a handover date of 18<sup>th</sup> May 2010, so the RTM application was fully resolved without the Tribunal needing to make any determination.
3. The Tribunal issued directions on 20<sup>th</sup> October 2009 and these were substantially complied with. The Tribunal originally considered that this matter could be determined on paper without a hearing, but on consideration of the papers lodged by the parties, it decided that the issue whether or not the statutory summary of tenants' rights and obligations had been served could not be determined without oral evidence. Accordingly a hearing was held on 18<sup>th</sup> March 2010.
4. The landlord was represented by Mr J Gurvits, of the managing agents, Eagerstates Ltd. Mr Bell and Mr Rose appeared on their own behalf and on behalf of Ms Baker, the other tenant. No party requested an inspection and the Tribunal did not consider that one was necessary. In consequence none was held.

**The law**

5. The Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002 provides as follows:

**Section 18**

- (1) In the following provisions of this Act "service charge" means an amount payable

by a tenant of a dwelling as part of or in addition to the rent-

- (a) which is payable directly or indirectly for services, repairs, maintenance, improvement 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
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord or a superior landlord in connection with the matters of which the service charge is payable.
- (3) for this purpose
- (a) costs includes overheads and
  - (b) costs are relevant costs in relation to a service charge whether they are incurred or to be incurred in the period for which the service charge is payable or in an earlier period

### **Section 19**

- (1) Relevant costs shall be taken into 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) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

### **Section 27A**

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-

- (a) the person by whom it is payable,
  - (b) the person to whom it is payable,
  - (c) the amount which is payable,
  - (d) the date at or by which it is payable, and
  - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to a leasehold valuation tribunal for a determination whether costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and if it would, as to---
- (a) the person by whom it would be payable,
  - (b) the person to whom it would be payable,
  - (c) the amount which would be payable,
  - (d) the date at or by which it would be payable, and
  - (e) the manner in which it would be payable."

10. The only issues for the Tribunal were therefore insurance and the management fee.

### **Insurance**

11. The block in question consists of a semi-detached Victorian house converted into four flats in 2006. The tenants obtained two quotations, one from Adrian Flux for £1,200.00, the other from Towergate Insurance for £1,123.75. This contrasted with the Axa policy in fact taken out by Eagerstates where the premium was £2,379.30.
12. The Axa policy had a rebuilding value attached to the building of £1,545,000, whereas the tenants' quotes were both for £750,000 (although Towergate automatically increased that by 35 per cent to £1,012,500).
13. Mr Gurvits explained that the £1,545,000 was misleading, because (similarly to Towergate) Axa automatically increased the building valuation by 50 per cent. The rebuilding cost he had taken from the policy taken out by the previous managing agents, which he had rounded up to £1,030,000. He said that Axa was a good company because it did not attach any conditions to the types of sub-lettings which were permissible. Many companies, he said, banned welfare benefit tenants and students from being occupiers. It was unclear whether the companies who quoted for the tenants were subjecting the policies to that type of onerous condition.
14. In the Tribunal's judgment a large amount of the difference in premium will be due to the rebuilding cost agreed. A premium of £2,379.30 for £1,545,000 gives a rate of £1.54 per thousand, which is actually lower than the tenant's quote of £1,200 for £750,000, which works out as £1.60 per thousand. The tenant's preferred quote from Towergate is only slightly lower at £1.50 per thousand. Even if one takes (as one probably should) the declared value of £1,030,000, the Axa premium is still only £2.31 per thousand.
15. It is well established that a landlord is not obliged to take the cheapest quote available. Issues of solvency and the standard of claims handling are still very relevant matters for a landlord to consider. The tenants have not shown that the two quotations they have obtained are properly comparable (and especially have not shown that DSS and student occupiers would be covered). The managing agents acted reasonably in taking over the valuation figure from the previous policy. In circumstances where an agent must put insurance in place rapidly, the managing agent would face severe criticism if he put in a rebuilding figure which proved too low.
16. In the estimated service charge demand the landlord has merely increased the existing premium by 5 per cent. The tenants conceded that this was a reasonable approach. Applying the 5 per cent uplift to £2,379.30 gives a figure for the estimated charge of £2,498.27.
17. In our judgment the premiums claimed by the landlord are reasonable and are recoverable.

### Management fees

18. The management fees comprise the 10 per cent added to the insurance and the annual flat rate.
19. The leases in this matter were all granted in 2006 in identical form (save for the share of the service charge). Ms Baker was the original lessee of her flat, but Mr Bell and Mr Rose both bought their flats subsequently. The landlord purchased the freehold in 2008. None of the parties at the hearing were able to give us any information regarding the “factual matrix” behind the making of the leases, so the Tribunal construes the leases without regard to any special factors which would have been known to the original lessor and lessees.
20. The ground rent payable on each flat (including flat 2) was £300 per annum. The clauses relied on by the landlord to justify the recoverability of the agent’s fee in connection with insurance and the ordinary management fees were clauses 3(1)(b), 5(5)(c) and 5(5)(h). (It was common ground between the parties that the word “in” needed to be inserted in clause 3(1)(b).) These clauses read:
  - 3(1)(b) To pay the Lessors... a proportionate part of the expenses and outgoings incurred by the Lessors [in] repair maintenance renewal and insurance of the Building and the provision of services therein and the other heads of expenditure as the same are set out in Clause 5(4) and (5)...”
  - 5(5)(c) To insure and keep insured the Building... against loss or damage by [named hazards] in some insurance office of repute in the full replacement value thereof including an amount to cover professional fees and other incidental expenses in connection with the rebuilding reinstating thereof..
  - 5(5)(h) Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors may be considered necessary or advisable for the proper maintenance safety amenity and administration of the Building
21. It is noticeable that, unusually for a modern lease, there is no express provision for the landlord to appoint managing agents. At the same time the ground rent is quite high for flats of the current description. This is not a case in which it is necessary for business efficacy or the like to imply a term that the tenants will pay for a managing agent.
22. So far as insurance is concerned, it is clear to us (and was eventually conceded by Mr Gurvits) that clause 3(1)(b) is subject to clause 5(5)(c). In other words the expression “expenses and outgoings” in clause 3(1)(b) is not a free-standing charging provision, because clause 3(1)(b) makes clear that the expenditure and outgoings are “as the same are set out in Clause 5(4) and (5).” The charging provision is clause 5(5)(c).
23. In our judgment, what is recoverable under clause 5(5)(c) is the premium demanded by the insurer. The 10 per cent fee charged by Eagerstates is not a cost of insuring; it is an incidental expense. Accordingly in our judgment that fee is not recoverable under the terms of the lease.

24. We turn now to clause 5(5)(h). It is a "wrap-up" term at the very end of a long list of detailed matters for which the landlord can charge. It would be surprising if a wrap-up clause permitted recoverability of what is generally a major head of charge which is subject to detailed and express terms.
25. However, the paragraph still has to be construed in accordance with its terms. There are various elements in the clause. Firstly, it allows the landlord "to do or cause to be done all... works installations acts matters and things." The employing of a managing agent does not fall very happily in this list. The only remotely plausible candidate is "acts".
26. Secondly, the act must be one which the landlord considers "necessary or advisable". The appointment of a managing agent on the facts of this case is not "necessary", because the landlord could perfectly well manage the building on its own. For the same reason it is doubtful whether it is "advisable" to appoint a managing agent.
27. Thirdly the matters must be "for the proper maintenance safety amenity and administration of the Building." Here the first three words are all matters concerning the physical state of the building. In our judgment the fourth word "administration" should be construed *ejusdem generis* ("of the same kind"). In other words, if the landlord carries out some work for "maintenance safety [or] amenity", then it can also recover the cost of administering that work. It is that type of administration which is caught by the clause.
28. In our judgment this last consideration is decisive. The work of a managing agent in collecting rent, demanding service charges and arranging insurance is not "administration" for the purposes of clause 5(5)(h), because it is unrelated to "maintenance safety [and] amenity." We are reinforced in this conclusion by the other two considerations which are consistent with the exclusion of ordinary managing agents' fees from the scope of the paragraph.
29. It may be that the managing agent could charge a modest fee for instructing a surveyor to make an asbestos report, but the landlord in our judgment cannot use this sweep-up clause to give a general right to employ a managing agent. The management fees, both the flat rate and the 10 per cent fee on the insurance in our judgment are irrecoverable under the terms of the lease.

#### Costs

30. The Tribunal has a discretion as to who should pay the fees payable to the Tribunal. In the current case, the landlord has won on the insurance but lost on the management fees and had to agree a reduction in the cost of the asbestos survey. However, it has to be remembered that there was initially an issue as to whether any service charges were recoverable at all by reason of the alleged failure of the landlord to serve the summary of tenants' rights and obligations.
31. Because it was relevant to costs, we heard evidence on this point. Mr Gurvits' evidence was that in his office there were large piles of the statutory summary. He has three staff who stuffed envelopes and indeed, if there was a rush on, he assisted with the envelope stuffing. The staff were instructed to include the summary in every demand for rent or

service charge. He was sure that the summaries had been included in the usual way.

32. Mr Bell and Mr Rose gave evidence denying that there was an summary with the service charge demands. Both of them and Ms Baker had made statutory declarations to the same effect, so that they left themselves open to perjury if they made a false statement. Both Mr Bell and Mr Rose are solicitors of the Senior Courts.
33. In addition they produced what they said was one of the original bundle of documents served by the landlord. This consisted of the documents which appear at tab 7 of the hearing bundle. The originals were held together by a plastic slide. It was common ground between them and Mr Gurvits that Eagerstates did bind service charge demands in that way.
34. Now of course it is possible to remove documents like the summary of tenants' rights and obligations from such binding, but it is our judgment it is unlikely that applicants such as Mr Bell and Mr Rose would do such a thing in order to gain such a modest forensic advantage when the professional penalties for lying were so great. We do not doubt that Mr Gurvits was giving evidence to best of his belief, but he was giving evidence of office practice, not evidence from his own knowledge of what was posted to the tenants.
35. We have no hesitation in finding on the balance of probabilities that there was some misfortune in the office on the day the rent demands were sent to these tenants and that by some mischance the summary of tenants' rights and obligations was not included in the envelopes.
36. It follows that, when the tenants issued their application, they had a complete defence to the landlord's demands for service charge. The resolution of that issue required there to be an oral hearing, for which the tenants had to pay £150 in fees. In addition the tenants paid £200 for the making of the application.
37. In these circumstances we consider that the landlord should pay the hearing fee and half the application fee, so that the total amount to be paid by the landlord is £250..
38. The tenants requested that we make an order under section 20C of the Landlord and Tenant Act 1985 so as to prevent the landlord recovering the cost of the current proceedings against the tenants through the service charge account. Mr Gurvits indicated that he intended to charge £500 plus VAT for his attendance at the hearing and £500 plus VAT for preparation.
39. For the reasons we have set out above in relation to management charges, in our judgment there is no provision under the lease permitting the landlord to recover such costs under the service charge. Accordingly there is no need for a section 20C order and we make no such order.

## **DECISION**

**The Tribunal accordingly determines:**

- a. that in the final account for January to March 2009 the sum of £2,379.30 is recoverable;
- b. that in the estimated account for March 2009 to March 2009 the sums of £2,498.27 and £400 are recoverable;
- c. that Mr Bell is liable for two sevenths of those sums, Ms Baker for one seventh and Mr Rose for two sevenths;
- d. that the landlord shall pay the tenants £250 in respect of the fees payable to the Tribunal.

*Adrian Jack*

Adrian Jack, chairman

23<sup>rd</sup> March 2010