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RESIDENTIAL PROPERTY TRIBUNAL SERVICE

**LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT
PANEL**

CASE NUMBER: LON/00AZ/LSC/2010/0593

**IN THE MATTER OF SECTION 27A AND SECTION 20C OF THE LANDLORD AND
TENANT ACT 1985**

IN THE MATTER OF 37D SUNDERLAND ROAD LONDON SE23 2PS

Parties:

37D SUNDERLAND ROAD LIMITED

Applicant

MISS S K TOYN

Respondents

Representations:

On behalf of the Applicant:

**Miss J Lee - Counsel;
Mr M Barretto Property Manager H M L Andertons**

For the Respondent:

Miss Toyn in person

**Tribunal Members : Mr A A Dutton (Chairman)
Mr F L Coffey FRICS
Mrs J Clark**

Date of Court Order : 23 August 2010

Date of Hearing : 25 October 2010

Decision Date : 10 November 2010

DECISION

The Tribunal orders that the Respondent Miss Toyn should pay to the Applicants within 14 days the sum of £750 on account of her service charge liability for the period in dispute; and further sum within 28 days of £200 representing her contribution towards the Reserve Fund. Any further sums that may be paid following the implementation of our findings as set out below should be paid by Miss Toyn within 28 days of final figures being produced by the Applicant. There is no Order for costs and Section 20C applies. The administration charges are disallowed.

REASONS

A. BACKGROUND

1. This application was transferred to the Tribunal by Order of the Woolwich County Court dated 23 August 2010. That Order provides that should be no Order for costs in respect of the proceedings commenced in the County Court.
2. Those proceedings related to an application essentially for a Declaration under s81 of the Housing Act 1996 on the basis that the service charges totalling £1,280.78 and an administration fee of £303.75 were outstanding. The claim also sought the recovery of a sum in respect of ground rent of £75 which this Tribunal cannot deal with.
3. On 31 August 2010 Directions were issued by this Tribunal in relation to the transfer of the matter to us and it was noted that our jurisdiction would be limited to the County Court case as set out at paragraph 2 of those Directions. It appears that final accounts have not yet been prepared although draft accounts that were before the Tribunal on 25 October were, we were told, accurate and the Applicants would be prepared to deal with the matter on that basis.
4. Prior to the hearing we had been provided with two bundles of documents. The first contained the County Court proceedings, the Responses filed by the parties and a copy of the Lease. The second bundle included invoices and draft accounts for the period January 2009 to 31 May 2010. We understand this to be the period for which HML Andertons have been managing the property. We were told that the freehold had been acquired by three Lessees, the owners of flats A,B & F and that upon the acquisition of the freehold HML Andertons had been appointed to deal with the management.

B. HEARING:

5. At the commencement of the hearing Miss Toyn asked for some time to discuss the case with Miss Lee and Mr Barretto. That short adjournment of 10 minutes proved successful in that we were told that insofar as the figure shown on the draft accounts ending 31 May 2010 were concerned there was no dispute save in relation to the following matters:

- Directors insurance £313;
- Accountancy fees £920;
- Company secretarial fees £508; and
- Fee for the annual return of £35.

These expenses related to the Limited Company and it was accepted by both parties that they were not properly claimable from Miss Toyn. In fact it was agreed that an element of accountancy should be payable by the Lessees, namely £300 but the deduction of the other items reduced the total liability for service charges from £6504 to £4028. On a straight unit division that would have made Miss Toyn's liability £838 together with an agreed sum payable in respect of the Reserve Fund of £200.

6. Those matters having been agreed we turned then to the main issue in dispute which was the apportionment of the service charge between the Lessees. We were told by Miss Lee that the apportionment had been dealt with on a unit basis, that is to say divisible by the six properties that occupied the block, for some time. We were told Miss Toyn had purchased flat B in the 1990's and that she had disposed of that flat in 2007 and throughout that time had settled her contribution on a 1/6th basis. Flat D had been acquired by her in 2003 and in that time, and until proceedings were commenced against her, she had always paid the service charges on a unit basis. Miss Lee of Counsel suggested that a customary practice had arisen relating to the apportionment of the service charge between the parties on an equal basis and that custom should override the terms of the lease. Miss Lee told us that the objection had only been raised since HML Anderton had taken over the management of property and that if Miss Toyn were allowed to raise this as an objection now, it could have an affect on the block and the other Lessees. We were referred to certain clauses in the lease which we shall set out in due course and it was suggested that there had been some form of estoppel on the part of Miss Toyn in dealing with the matter on a unit basis in the past which now prevented her from seeking to rely upon the terms of the lease.
7. Miss Toyn told us that she had only really looked at the lease when proceedings had been commenced and there was a threat of forfeiture. When asked why she had not challenged previously she said she could not say and that although the split had been dealt with on an equal basis there had always been a view amongst the residents that there was a general overcharge. The focus therefore was on this overcharge rather than the split between the Lessees. This, we were told, caused the Lessees to arrange for the purchase of the freehold which we have referred to above. We were told by Miss Toyn that there are one/two bedroom flats and that the two bedroom flats were, she thought, twice the size of the one bedroom flats. We were directed to the lease plan which showed the sizes of the two properties. She told us that she had no intention of reclaiming any service charges that had been paid in the past on the unit basis and that this was for the future only.
8. Insofar as the administration charges were concerned these related to a claim by a debt collecting agency of £164.50 and two administration charges levied by HML Anderton for demands in respect of late payments. The rate of charges for these was set out in the papers before us. Miss Toyn thought the lease did not make provision for them to make this charge.
9. Miss Lee said that the charges were reasonable and reflected the amount of work that had been caused by the lessee not paying which included the checking of records and writing chasing letter. It was conceded that the invoice from PDC appeared to predate and actions taken by them.
10. Miss Choi and Miss Snape, two of the freeholders, had attended the hearing as observers. However at our invitation they confirmed that they had not wanted to change the manner by which the service charge was apportioned between the Lessees as they perceive that to be fair and did not wish to cause unrest between the Lessees who had not participated, by changing the arrangements.

C. THE LEASE

11. The lease for the subject premises is dated 25 August 1989 and sets out the extent of the demise and other matters. The lease is for a term of 99 years from 25 August 1989 with a rising ground rent. At paragraph 4 are to be found the Lessees covenants and it was to 4(b) that Miss Lee drew our attention which has the following wording:

"To pay all rates taxes assessments and charges impositions and outgoings which may at any time during the said term be assessed charged or imposed upon the premises or the owner or occupier in respect thereof and in the event of any rates taxes assessments charges impositions and outgoings being assessed charged or imposed in respect of the building as a whole to pay the proper proportion of such rates taxes assessments charges impositions and outgoings attributable to the premises and conclusively determined by the Lessors Surveyor from time to time".

The provisions of the lease that set out the service charge arrangements are contained at clause 5 which has further Lessees covenants and at clause 5(ii) the following wording is found:

"Contribute and pay a sum or sums of money equal to the amount calculated on the proportion which the rateable value of the premises bears to rateable values and the aggregate rateable value of the whole of the building (hereinafter called the rateable value proportion) of the costs and expenses mentioned in the fifth schedule hereto all such contributions and payments to be made in the following manner and at the following times".

The clause then goes on to deal with the provision of interim service charges and payment of sums following a certificate issued by the auditors or accountants on behalf of the Company.

D. THE LAW

12. Section 27A of the Landlord & Tenant Act 1985 governs the manner upon which we are required to determine these issues. If we decide that a service charge is payable, then we must also consider by whom it is payable, to whom it is payable, when it should be paid, the amount and the manner of payment. At sub-paragraph (4)(a) no application under sub-section (1) or (3) may be made in respect of a matter which has been agreed or admitted by the tenant, although such admission is not evidenced by reason of the tenant having made a payment. Section 20C of the Act enables us to order that the costs of proceedings should not be recoverable as a service charge if we think it is "just and equitable in the circumstances"

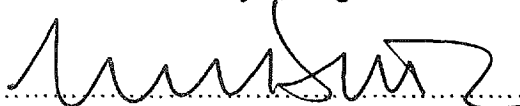
E. FINDINGS:

13. This case hinges upon the interpretation of the lease. There are, we are pleased to say, no disagreements between the parties as to the amounts that the Landlord seeks to recover in respect of the property save as we have mentioned above that those sums relating to the running of the Limited Company need to be borne by the Company itself and are not service charges. That however is not in dispute and it was agreed that the service charges for the period to 31 May 2010 amounted to £5028 of which Miss Toyn's share, on a straight unit cost basis, would be £838. As we set out above Miss Toyn accepted there was a contribution to be made to the Reserve Fund of £200 in respect of this year which was not disputed.

14. We heard all that was said by Miss Lee. We cannot accept that there is any form of estoppel on the part of Miss Toyn. No actions have been taken by the Landlord which

had prejudiced them as a result of anything said or done by Miss Toyn. Indeed the Landlords have only just become the freeholders and this is their first year for which service charges are claimed. Miss Toyn has indicated that she has no intention of going back to the earlier years and we record that in this Decision. The fact that the apportionment may have been dealt with on an equal division between the number of flats does not mean that the terms of the lease should be ignored. We assume that the Draftsman of the lease was contemplating that rateable values were still available when it was prepared. In those circumstances our findings are that the terms of the lease must be adhered to and that no form of customary settlement is binding on Miss Toyn. The matter must therefore be dealt with on the basis of the rateable value attributed to the subject premises and the proportion that has to the total rateable value of the building. We appreciate that rateable values are no longer used but we would anticipate that an enquiry of the Water Authority would show the rateable values for these units. If it transpires that despite the best attempts of the Managing Agents or the Landlords, no rateable values can be found then consideration may need to be given to varying the lease to ensure that 100% of the service charges are recoverable from the Lessees. No doubt the freeholders will be able to take advice on that should the position arise.

15. It follows that as our findings are in favour of Miss Toyn the attempts by the freeholders to recover the service charges from her were incorrect. In those circumstances therefore it seems appropriate for the debt collecting charges and the administration charges of HML Anderton to be disallowed. We, accordingly, do not allow the sum of £303.75 as claimed in the County Court proceedings. We do however order that Miss Toyn should pay to the Applicant the sum of £750 as a part payment of the amounts claimed in respect of service charges. Subject to the Applicant being able to establish the rateable value position a further calculation as to Miss Toyn's contribution in respect of service charges can be undertaken and if it is found that she needs to pay an additional sum to make up the due proportion under the lease then she should do so within 28 days of that sum being conveyed to her in writing.
16. We also order that in addition to the payment of the £750 within 14 days the payment in respect of the Reserve Fund contribution of £200 should be made within 28 days. It may well be that the parties will want to consider whether the Reserve Fund contributions are also dealt with on a rateable value basis or just demanded as being a reasonable payment to be made on an annual basis against future costs.
17. In her final submission Miss Lee had indicated that she did not believe there was provision in the lease for the Landlord to recover their costs. We would agree with that. In any event it seems to us that as a result of our findings it would be inappropriate for the Applicants to recover their costs in this case and we therefore make an order under s20C that it is just and equitable for there to be no recovery of costs against Miss Toyn through the service charge regime.
18. We hope the Applicants will be able to establish the rateable values and that for the future years the matter can be dealt with on that basis. We understand Miss Choi and Miss Snape's wish not to rock the boat upon taking over the freehold. However we hope the residents of 37 Sunderland Road will accept that the matters should be apportioned on the basis of the lease if at all possible and that this will not cause any acrimony amongst the residents.

 Dated 10 November 2010

Chairman