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MAN/00BN/LSC/2009/0090

LEASEHOLD VALUATION TRIBUNAL
OF THE
NORTHERN RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985
SECTION 27A (1) AND SECTION 20C

Property: 106 Boxworks, Worsley Street, Manchester M15 4NU

Applicant: Mrs Geetha Jayaram

First Respondent: Boxworks Management Limited

Second Respondent: Urban Splash Limited

Tribunal: Mr G C Freeman
Mr M Hope FRICS
Mrs H Clayton

Date of Hearing: 11 February 2010

DECISION

The service charge for the period 1st April 2007 to 30th September 2009 is reasonable and payable by the Applicant.

The repairs to the floor of the Property, other than repairs to the wooden sub-floor and laminate floor are the responsibility of the First Respondent and are a service charge item.

The late payment fee of £70.00 charged in the year ended 30th September 2007 is not a service charge item.

No order is made under s20C of the Landlord and Tenant Act 1985.

Application

1. By her application dated 7 September 2009 the Applicant seeks a determination of the liability to pay and reasonableness of service charges for the above property where costs have been incurred, or are about to be incurred, for the service charge years between 1st April 2007 to 30th September 2009. The Applicant named the Respondent in her application as her landlord.

2. The Applicant is represented by Mr S A Hairsnape MRICS MBEng. The First Respondent is represented by Mr D Murphy and the Second Respondent is represented by Messrs. Freeth Cartwright, Solicitors.

3. A Procedural Chairman issued directions to the parties dated 11 November 2009 and identified the issues to be decided as follows:-

3.1 Whether the service charge for the periods 1st April 2007 to 30th September 2009 was payable and/or reasonable.

3.2 Whether the repairs to the floor of the Property are a service charge item.

3.3 Whether the late payment fees totalling £70.00 charged in the year ended 30th September 2007 are a service charge item and are reasonable.

Inspection and Hearing

4. The Tribunal inspected the Property on the morning of the hearing. It comprises an apartment in a modern block of self contained apartments ("the development") which has been partially converted from a former factory with additional new build apartments, situated near the centre of Manchester. The development consists of 83 units comprising 78 residential units on six floors and 5 commercial units on the ground floor. The Property itself is on the ground floor and consists of an entrance hall, living room/kitchen, double bedroom and bathroom. There is access via patio doors to a small patio overlooking a canal. Heating is by electric radiators. There is a door entry system and smoke alarm. There is underground car parking available.

5. The floors to the Property consist of laminate wood flooring. It appears that repairs have been carried out to the flooring immediately adjacent to the bathroom which, the Tribunal were informed, was as a result of leakage of water from the bathroom. The Property appeared to be occupied at the time of inspection.

6. A hearing was fixed for 11.15am on 11th February 2010 at the offices of the Tribunal at 5 New York Street, Piccadilly, Manchester, M1 4JB. The Applicant attended in person and was also represented by Mr Hairsnape. The First Respondent was represented by Mr Murphy and the Second Respondent by Miss K Essor, the company secretary of Urban Splash Limited.

Application to Strike Out

7. Shortly before the hearing the Tribunal received an application from the Second Respondent to strike out the application for failure to comply with the Tribunal's directions and also on the basis as set out in section 27A(4)(a) of the Landlord and Tenant Act 1985 ("the Act") which states:-

(4) No application ..... may be made in respect of a matter which –

(a) has been agreed or admitted by the Tenant.

8. When asked by the Tribunal to produce evidence that the Tenant had agreed or admitted the service charge, Miss Essor, on behalf of the Second Respondent, was unable to do so. The Tribunal also considered that it would be unfair to dismiss the application solely on the grounds of failure to comply with the Tribunal's directions. The Tribunal only has power to dismiss an application where it considers it to be frivolous, vexatious or otherwise an abuse of process. None of these elements were present. The Tribunal therefore refused the Second Respondent's application.

The Applicant's Case

9. On behalf of the Applicant Mr Hairsnape stated that the main thrust of the application was against the First Respondent. As a result of poor construction and the failure to comply with building regulations by the Second Respondent, defects had appeared in the Property which had made it uninhabitable. As a result, the Applicant was unable to let the Property and receive an income from it for the period during which it was uninhabitable. The Applicant had pursued the Second Respondent for the defects noted above and had received a sum of money by way of compensation under a Compromise Agreement which was produced to the Tribunal. Mr Hairsnape stated that while the Compromise Agreement settled the Applicant's claims against the Second Respondent for poor workmanship, it did not settle claims against the First Respondent whose responsibility was to maintain the main structure of the development which included the floor of the Property, and liability to pay service charge.

Respondents' Case

10. The Respondents stated that the Applicant has already been compensated both in respect of the repair works to the Property and in respect of the service charge payable. An amount to include service charge was included in the payment made by the Second Respondent. The Respondents therefore consider the matter closed and are confused as to why a further claim should be made against them

The Lease

11. An unverified and uncompleted copy of the Lease was produced to the Tribunal. Both parties agreed that it be used by the Tribunal as an accurate record of the actual Lease. It is dated 23 February 2004 and is made between Urban Splash Limited of the first part, Boxworks Management Limited of the second part and Geetha Jayaram of the third part. It grants a term of 999 years from 1 January 1999 and reserves a rent of one cardboard carton (if demanded) as well as the service charge. Clause 4(2) imposes a duty on the First Respondent :-

"to keep the Main Structure with any improvements ..... in a good state of repair and if and when necessary, improve, replace, rebuild, and reinstate the same".

12. Part 2 of the First Schedule defines the "Main Structure". It states that there shall be included in the Main Structure:-

"(c) any joists and floor slabs and the internal structure (but not any plaster or cladding attached to it) of any load bearing supporting or retaining floor, walls, beams, columns or ceiling of any buildings or facilities at the Development and all other similar structural parts thereof ...."

13 It was agreed by the parties that the floors to the Property consist of a concrete slab on which there are laid wooden joists on top of which there is a thermal insulating layer, wooden sub floor on top of which the wooden laminate floor is laid. It was also agreed by the parties that the concrete sub floor was part of the Main Structure and it was therefore the responsibility of the First Respondent to keep it in repair in return for payment of the service charge. It was also agreed by the parties that the wooden sub-floor above the joists and the laminate flooring was part of the internal structure of the Property and its repair was therefore the responsibility of the Applicant. The parties were unable to agree the responsibility for the wooden joists laid over the concrete sub floor and underneath the wooden sub-floor.

The Law

14. Section 18 of the Landlord and Tenant Act 1985 ("the 1985 Act") provides:

(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, improvements 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 for 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 or later period.

15. Section 19 provides that

(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.

16. Section 27A provides that

(1) 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 date at or by which it is payable, and

   (d) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) ....

(4) No application under subsection (1)...may be made in respect of a matter which –
   (a) has been agreed by the tenant.....

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

17. No guidance is given in the 1985 Act as to the meaning of the words "reasonably incurred". Some assistance can be found in the authorities and decisions of the Courts and the Lands Tribunal.

18. In *Veena S A Cheong* [2003] 1 EGLR 175 Mr Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word "reasonableness" should be read in its general sense and given a broad common sense meaning [letter K].

The Tribunal's Findings

20. The Tribunal consider that this is a dispute about remedial work which has been carried out to the Property. During argument, Mr Hairsnape admitted that he was not querying the amount of service charge for the Property. It was an *"all or nothing payment."* His contention was that because the Property was uninhabitable for a time, service charge should not be payable. He did not dispute individual heads of expenditure as being unreasonable.

21. If the Applicant agrees that the service charge is reasonable then the only remaining matter for consideration by the Tribunal is whether it was payable and by whom it was payable. The Tribunal examined the copy Lease but could find no clause providing for suspension of service charge if the Property was uninhabitable. Clearly services have been provided to the Development by the First Respondent during the period in question. The First Respondent has insured the Property, provided lighting to the common parts, gardening services, window cleaning etc. The First Respondent is entitled to be paid for these services and the Tribunal therefore finds that the service charge for the period in question should be paid by the Applicant.

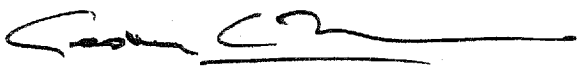
22. Turning to whether the repairs to the floor of the Property are a service charge item it will appear from above that the parties have agreed what is the First Respondent's responsibility, except for wooden joists on which the floor is laid. It seems clear to the Tribunal from the definition of the "Main Structure" in the Lease that these joists are within the definition of the Main Structure and are therefore the First Respondent's responsibility and a service charge item.

23. Finally, the Tribunal considers that the late payment fees totalling £70.00 charged in the year ended 30 September 2007 are not a service charge item under the Lease, since they are not included in the expenditure to be recovered by means of the service charge contained in the Third Schedule. However, the Applicant's attention is drawn to clause 3(16) of the Lease which provides that the Lessee is to pay all expenses ..... incidental to:-

"*(b) the failure by the Purchaser to carry out any of its obligations hereunder or the monitoring or approving of any matters hereunder pertaining to the Property or its use*"

24. Some leases allow a landlord to recover costs incurred in connection with proceedings before the LVT as part of the service charge. The Applicant made an application under section 20C of the 1985 Act to disallow the costs incurred by the Management Company of the application in calculating service charge payable for the Property, subject, of course, to such costs being properly recoverable under the provisions of the Lease.

25. The Tribunal determines that, as it has found that the service charges for the period in question are reasonable, no order should be made under section 20C of the 1985 Act.



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G C Freeman
Dated 17th February 2010