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MAN/00BR/LIS/2010/0007

LEASEHOLD VALUATION TRIBUNAL
OF THE
NORTHERN RENT ASSESSMENT PANEL

REASONED DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985
SECTION 27A (3)

Property: 69, Ellesmere Green, Monton, Eccles, Manchester M30 9EZ
Applicant: Richmond Park (Monton) Management Company Limited
Respondent: Lisa Dawn Lawton
Tribunal members: Mrs.C.Wood (Chairman)
Mr.T. Vincent
Mr.L.Bottomley
Date of decision: 5 November 2010

DECISION

The Tribunal determines as follows:

1. That the lease dated 22 November 2007 made between Rowland Homes Limited (1), Richmond Park Management Company Limited (2) and the Respondent (3) ("the Lease") provides that "each Apartment shall pay one fifty eighth (1/58th) of the Apartment Service Charge for each account period" and that, in the absence of a variation of the Lease, the Applicant is not permitted to differentiate in the amount payable by way of Service Charge as between the leaseholders of apartments in blocks with lifts and those without.
2. That the definition of "Expenses" in clause 1 and Schedule 6 Part III included all of the items listed in the Applicant's Projections, Expenditure Statements and the 2008 and the 2009 Accounts
3. That the Applicant has failed to comply with the requirements of the Lease in relation to the service of Initial Service Charge and Service Charge Certificates, and in relation to the provision of audited accounts.

4. That, in respect of the following Account Periods (as defined in the Lease), the Service Charge for the Property is as follows:

(i) 2008: £544 (including reserve fund provision of £50)

calculated as follows:

1. Landscaping:	£ 3631
2. Cleaning:	£ 3849
3. Companies House/sundries:	£ 39
4. Window cleaning:	£ 3781
5. Insurance:	£ 3907
6. Management:	£ 4450
7. Electricity:	£ 2753
8. Bank charges:	£ 97
9. Repairs/maintenance:	£ 3500
10. Accountants:	£ 219
11. Telephone:	£ 404
12. Lift repair:	£ 2023
TOTAL:	<u>£ 28653</u>

Service charge per flat : **£494**

Service charge per flat including reserve fund provision of £50 per flat: **£544**

(ii) 2009: £826 (including reserve fund provision of £50)

calculated as follows:

1. Landscaping:	£ 2147
2. Cleaning:	£ 6122
3. Companies House/sundries:	£ 122
4. Window cleaning:	£ 1288
5. Insurance:	£ 3388
6. Management:	£ 5700
7. Electricity:	£ 2033
8. Bank charges:	£ 192
9. Repairs:	£20646
10. Accountants:	£ 285
11. Telephone:	£ 275
12. Lift repair:	£ 1980
13. Professional fees:	£ 624
14. Fire Alarm Service:	<u>£ 218</u>
TOTAL:	<u>£45020</u>

Service charge per flat: **£776**

Service charge per flat including reserve fund provision of £50 per flat: **£826**

5. That, notwithstanding the Applicant's assertion regarding the agreement with Greenfingers, none of the agreements with contractors for Services at the

Development are qualifying long term agreements to which section 20 of the Act applies.

6. That it was unreasonable to incur the legal fees of £575 plus VAT, and, where separately charged, the amounts in respect of court fees, and such sums are not recoverable as service charge accordingly.
7. That the Applicant has failed to comply with its obligations under the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 (" the Service Charge Regulations") and its obligations under the Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007 (" the Administration Charges") in respect of the service charges and administration charges the subject of the application, and that accordingly any of the Tenants may withhold payment of such service charges and/or administration charges until compliance is made.
8. That the Applicant has failed to comply with its obligations under sections 42 and 42A of the Landlord and Tenant Act 1987 to hold sums standing to the credit of a trust fund under section 42 in an account designated as such under section 42A.

REASONS FOR DECISION

Background

1. The Applicant, Richmond Park (Monton) Management Company Limited, is the management company for the development known as Richmond Park ("the Development"), which comprises 80 units, of which 22 are houses and the remaining 58 are flats.
2. By an application to the Leasehold Valuation Tribunal dated 21 January 2010, the Applicant sought a determination under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") in respect of the service charge payable under the Lease for the years 2008 and 2009.
3. The Applicant had obtained judgment in default against the Respondent by order dated 9 January 2009 in the sum of £989.25 (being £929.25 in respect of arrears of service charge and £60 court fee) which amount was paid by the Respondent's Building Society in July 2009. The Applicant produced copies of correspondence from the Respondent in which she claims that she is not the lawful lessee of the Property notwithstanding her registration as the registered proprietor at the Land Registry. The Respondent has not acknowledged the Application or complied with the Directions or Further Directions referred to in paragraph 4 below.
4. Directions dated 19 February 2010 were issued to the parties stating that a paper determination would be made unless either party requested a hearing by no later

than 4 March 2010. Neither party made such a request and the Tribunal convened on 21 May 2010 to inspect the communal areas at the Development and, if appropriate, to make a paper determination. On inspection, it became apparent to the Tribunal that there was insufficient information upon which to make such determination and Further Directions dated 28 May 2010 were issued.

5. The Applicant acting through its solicitors Ascroft Whiteside responded to the Further Directions by letter dated 3 August 2010 and was not therefore compliant with the obligation to respond within 14 days of their date.

Inspection

6. The Tribunal made an external inspection of the Property and of the external common parts and internal communal areas in the blocks of flats on 21 May 2010. Nos. 1 - 31 are flats in 2-storey blocks with no lifts. Nos. 44 - 57 and Nos. 58 - 71 are also flats but are sited in 2 4-storey blocks, both of which have lifts. The Property is situated on the 3rd floor of Block A.

The Lease

7. By Part I of Schedule 6 of the Lease the Tenant covenants with the Management Company to pay the Service Charge when due, (paragraph 1) and the Initial Service Charge "...in advance by one yearly payment on the 1st January in each year", (paragraph 2).
8. Paragraph 4 obliges the Management Company to produce to each Apartment Buyer a Service Charge Certificate "as soon as reasonably possible after an Account Date". The information to be set out in a Service Charge Certificate is set out in the definition of "Service Charge Certificate" in clause 1 of the Lease.
9. "Service Charge" is defined as "...one fifty eighth...of the Apartment Service Charge for each account period", (clause 1). "Initial Service Charge" (other than for the first Account Period) is defined as "...a sum equal to the Service Charge for the preceding Account Period or such other sum on account of the Service Charge as the Management Company shall deem reasonable". "Account Dates" is defined as 31 December in each year , and "Account Period(s)" as the period or periods between two consecutive Account Dates.
10. "Expenses" are defined as "the payments to be made by the Management Company in fulfilling the Services of performing the Management Company's Covenants details of which are set out in Schedule 6 Part II [U]nder the heading "Services".
11. Paragraph 4 of Schedule 6 Part I requires the Applicant to "...keep proper account books showing all costs and expenses incurred in providing the Services and will have them properly audited...at the end of each Account Period. The Management Company will then produce to each Apartment Buyer as soon as reasonably

possible after an Account Date a Service Charge Certificate for the Account Period ending on and including the day preceding the previous Account Date.”

12. The Property is described in the Particulars of the Lease as Apartment 68, Richmond Park, Monton Road, Eccles, Postal address: 69, Ellesmere Green, Monton, Eccles, Manchester M30 9EZ as shown edged red and parking space edged red (if any) on the attached Plan and is more particularly described in Schedule 1. There is no colour on the plan and it is not possible to see the plot as delineated and the parking space.

The service charges

13. By the Application, the Applicant seeks a determination of the liability to pay and reasonableness of the service charges for the Property in respect of the years 2008 and 2009. The Application states that “the service charges payable by the Respondent are now substantially in arrears”.

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. In *Veena SA v 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].
18. The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 (“the Service Charge Regulations”) and the Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007 (“the Administration Charge Regulations”) provide that, in respect of a demand for payment of a service charge, and an administration charge, respectively, made on or after 1 October 2007, such demand should be accompanied by a summary of rights and obligations, in the form and containing the information as set out in the Service Charge Regulations and in the Administration Charge Regulations, as the case may be. In each case, the respective Regulations provide that until compliance is made with their requirements, a tenant may withhold payment of the service charge, or, as the case may be, administration charge.

The submissions:

19. The Respondent has not acknowledged the Application, complied with the Directions and/or Further Directions, or submitted any evidence to the Tribunal in connection with the Application.
20. The Applicant had submitted documentary evidence in response to the Directions dated 19 February 2010 which included copies of statements sent to the

Respondent itemizing service charge due (pages 1 – 19 inclusive), invoices for various “Services” covering the Account Periods in question (pages 58 – 253 inclusive), the unaudited accounts for the year ended 31 December 2008 (pages 256 – 265), an account entitled “Projections” (page 283), and itemized expenditure for the two Account Periods (pages 284 – 297).

21. In their letter dated 3 August 2010, the Applicant’s solicitors:
- (i) confirmed that the Applicant has not complied with the provisions of the Lease in relation to the provision of Initial Service Charge Certificates and Service Charge Certificates but that reliance had been placed on the unaudited accounts;
 - (ii) enclosed a copy of the unaudited accounts for the year ended 31 December 2009;
 - (iii) stated that, so far as the Applicant is aware, it had complied with the provisions of the Service Charge Regulations and enclosed copies of two sheets entitled “Service Charges – Summary of Tenant’s Rights and Obligations” and “Administration Charges – Summary of Tenant’s Rights and Obligations” respectively which were referred to as “...the Applicant’s standard information sheets in relation to service charges and administration charges which are sent out to each leaseholder with every demand for payment of service charges”;
 - (iv) stated that the only contractor on a 12 month contract was Greenfingers (the gardening contractor) and that the accounts for the year ended 31 December 2009 disclosed that none of the contractors’ charges for the period exceeded £100 per flat (£5800);
 - (v) enclosed copies of two accounts in the Applicant’s name with Barclays Bank plc showing balances as at 8 December 2009 of £15009.28 on the Business Saver Account, and £11664.91 as at 8 January 2010 on the Business Current Account;
 - (vi) confirmed that the Lease contains no specific reference to the lifts located in blocks A and B of the Development but that there was a mutual understanding between the Applicant and all of the owners of the flats “...that maintenance and repair of the lifts was an appropriate item to be included in the Service Charge”, and further that reliance would be placed on the definition of “Common Parts” in clause 1 of the Lease (and, in particular, the words “...the corridors and all other areas not let by the Landlord to Apartment Buyers or which are used in common with the Landlord and the Apartment Buyers and any equipment the benefit of which is for the Apartment Buyers”, and in Schedule 6 Part II, clauses 1.1 and 1.6;
 - (vii) stated that, as evidenced in the sheet entitled “Projections” and as a matter of practice, flat owners in blocks without lifts paid less by way of Service Charge than those in blocks with lifts although it is also acknowledged that “ [T]he Lease does not contain any provision to enable the Applicant to differentiate between the blocks with and without the facility of a lift”; and,
 - (viii) again by reference to the Projections, identified the apportionment of service charge as between the flats and the houses at the Development.

The Tribunal's Conclusions

22. The Tribunal must apply a three stage test to the application under section 27A:
- (1) Are the service charges recoverable under the terms of the Lease? This depends on common principles of construction and interpretation of the lease.
 - (2) Are the service charges reasonably incurred and/or services of a reasonable standard under section 19 of the 1985 Act?
 - (3) Are there other statutory limitations on recoverability, for example consultation requirements of the 1985 Act as amended?
23. That the Lease provides for all of the items included in the Projections, (page 283 of the Applicant's Bundle Pack B), the itemized Expenditure lists (pages 284 – 297) (“ the Expenditure Statements”), and the Applicant's accounts for the years ended 31 December 2008 (pages 256 – 265) (“ the 2008 Accounts”), and 31 December 2009 (enclosed in the letter from the Applicant's solicitors dated 3 August 2010) (“the 2009 Accounts”), to be included within the Service Charge. The Tribunal noted that in the Projections the Applicant has made certain apportionments of expenses as between the Apartments and the houses at the Development but no information has been provided as to the basis upon which this apportionment has been made..
24. The Tribunal noted the Applicant's failure to comply with the provisions of the Lease in relation to the service of a Service Charge Certificate as set out in paragraph 4 of Schedule 6 Part I.
25. (i) That there are discrepancies between the aggregate amounts for individual expenditure items in the Expenditure Statements and for the same items in the Accounts (which in some cases may relate to items of expenditure having been included in the Accounts for a particular year but not in the Expenditure Statement for the same period, and vice versa). In the letter dated 3 August 2010 from the Applicant's solicitors it is stated that the Applicant “...has relied on the un-audited accounts which have been prepared by its Chartered Accountants annually”.
- (ii) The Accounts and the Expenditure Statements cover the same periods but the Expenditure Statements are supported by invoices, although it is assumed that reference was made to the same invoices in the preparation of the Accounts. In making their determinations as to the reasonableness of the charges and/or whether the charges have been reasonably incurred, the Tribunal has referred both to the Accounts and to the Expenditure Statements and to an extensive review of the invoices supplied, and has, where appropriate, made deductions in respect of amounts incurred solely in respect of the houses at the Development and has also

made apportionments as between the houses and flats at the Development in respect of certain charges incurred.

- (iii) The Tribunal noted that, although the 2009 Accounts included a figure for reserves as at 31 December 2009 of £18846, there was no item in the Expenditure Statements or in the P&L Account in the 2009 Accounts in respect of a “reserve” or “sinking fund”. However the Projections included a sum of £50 per flat for such a fund and the inclusion of this amount as a service charge item is regarded as reasonable by the Tribunal.

The Tribunal therefore determined that the Service Charges for the following Account Periods are as follows:

2008: £544 (including a Reserve Fund provision of £50);

2009: £826 (including a Reserve Fund provision of £50).

The detailed breakdown of the Service Charge amounts is set out in paragraph 4 of this Decision.

26. It was noted by the Tribunal that the Management Company is required, under paragraph 3 of Schedule 6 Part 1, to “...balance the amount of the costs and expenses of providing the Services from Account Period to Account Period so far as it is reasonable and practicable to do so”. In view of the significant increase in the Service Charge for 2009 over that for 2008 as determined by the Tribunal (being an increase of c57%), the Tribunal determined that the Management Company should consider applying some of the reserves of £18,846 as at 31 December 2009 in order to fulfil its obligation under paragraph 3, Schedule 6, Part 1.
27. That, in view of the Applicant’s failure of compliance as noted in paragraph 3 of this Decision, and the difficulties in reconciling the Accounts and the Expenditure Statements in ascertaining the amounts to be charged by way of service charge, it was unreasonable to incur the legal fees of £575 plus VAT, and, where separately charged, the amounts in respect of court fees, and such sums are not recoverable as service charge accordingly.
28. Having regard to the evidence, the Tribunal determined that, on the balance of probabilities, the Applicant was not compliant with the Service Charge Regulations, and/or the Administrative Charges Regulations. The Tribunal further noted that until compliance had been made with the Regulations any Tenant could withhold payment of the service charge and/or the administrative charges.
29. The Tribunal noted that, although the 2009 Accounts stated that there were reserves as at 31 December 2009 of £18,846, there was no evidence of the establishment of a trust fund for the receipt and retention of monies collected as service charge as required under sections 42 and 42A of the Landlord and Tenant Act 1987. Such an account should be established and reserves which represent

service charge monies collected, but unexpended, should be paid into it.

Catherine Wood.

Catherine Wood

Chairman

Dated 5 November 2010