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REF LON 00ABLSC/2011/0372 and 0456

IN THE LEASEHOLD VALUATION TRIBUNAL

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

AND IN THE MATTER OF 1 Pearlstone Court 61 Whitebarn Lane Dagenham RM10 9LX

Applicants	**Terra Investments (GB) Limited**
Respondent	**Whitebarn Management Company Limited**
And	
Applicants	**Whitebarn Management Company Limited**
Respondent	**Terra Investments GB Limited**

The Tribunal
Mr P Leighton LLB (Hons)
Mr P Tobin FRICS MCI Arb

Date of Decision **30th August 2011**

Introduction

1 By an application dated 31st t may 2011 the applicant in the first application, Terra are investments GB Ltd applied to the Tribunal for a determination of their liability to pay service charges in respect of the property known as flat 1 Pearlstone Court at 61 White Barn Lane Dagenham RM10 9LX ("the property") for the service charge years 2009/10, 2010/11 and 2011/12.

2 Directions were given for the conduct of the proceedings without a pre trial review on 18 June 2011 by Mrs O Sullivan and it was directed at the request of the parties that the application should be heard on the paper track

3 At that stage, proceedings had already been issued by the landlord White Barn Management Ltd for the sum of £4330 plus costs for arrears of service charge covering the period 2009 and 2010. The service charges in question represented an annual service charge of £150 per quarter for each of the two years (i.e. £1200), a sum of £3000 in respect of major works and a further sum of £130 represent

4 The transfer from the County Court was received by the Tribunal on 30th June 2011 and directions were given by Mr Andrew on 6 July 2011 consolidating the two applications on paper track and they came before the Tribunal for determination on 23 August 2011.

The Facts

5 By a lease dated 5th August 2002, Flat 1 Pearlstone Court was demised to Lesley John Morell and Kathleen Susan Prout for a term of 99 years less three days from 25 March 1972.

6 In December 2006 the lease was assigned to Terra Investments (GB) Ltd which was registered at the land Registry on 14th February 2007. It appears that the company paid service charges until March 2009 but since that date has made no payment, save that following the issue of proceedings the lessee paid the outstanding ground rent.

The Lease

7 By clause 1 of the lease the lessee covenanted to pay the service charge together with and as part of the ground rent of the premises. This the obligation was to pay "a proportion of part of the monies expended by the lessor in maintaining the lessor's block of flats and maisonettes described in part 1 of the First Schedule hereto such last mentioned rent to be paid subject as hereinafter mentioned without any deduction on the half yearly day for payment of the rent next ensuing after the expenditure thereof." It was provided that the proportion should be calculated in accordance with the Fifth Schedule of the lease, which provides that the proportion part of the money expended shall be calculated by dividing the total expenditure by twelve.

8 There is no explanation for this figure since it appears that there are 9 (or, according to White Barn, 10) flats in the block

9 At the present time each of the lessees appears to be paying a sum of £150 per quarter but there is no provision for this sum in the lease itself. This figure is estimated to cover the landlord's costs of insurance, minor repairs and maintenance, common lighting and gardening expenses

10 In addition it is provided by clause (VIII) that "an annual maintenance fee paid to the lessor or its appointed agents which shall be equal to (10%) of the monies expended by the lessor (under the previous paragraphs).

The Landlord's Claim

11 The sum of £4330 is made up of two years @ £600 per annum, a sum of £3000 for the cost of major works on the block, and a further sum of £130 for the costs of tracing the lessee in order to serve documents relating to the service charges and the major works.

12 The tenant appears to accept that the sum of £600 per annum for the annual service charge is reasonable but denies that it is payable on the grounds that certified accounts have not been produced in accordance with the lease.

13 In relation to the costs of the major building works the lessee disputes that it is liable to pay this amount on the grounds that the landlord has failed to comply with the

Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003.

14 In addition the company disputes the necessity for incurring additional costs in employing an enquiry agent to discover the director's whereabouts and serve papers, when it was perfectly legitimate for any documents to be served at the company's registered office.

The Tribunal's Decision

15 This case is one in which the Tribunal is of the opinion, would have been more suitable for an oral hearing.as there are clearly disputed issues of fact which cannot easily be resolved on paper. There is always a temptation by the parties to opt for a paper determination to save costs when, in fact, their best interests might be served by conducting an oral hearing. The Tribunal endeavours to identify these cases particularly where an oral pre-trial review-hearing takes place, but sometimes the expressed views of the parties prevail. In the circumstances the Tribunal will endeavour to resolve the issues based on the written representations received.

16 The most significant part of the claim concerns the major works for which the Applicant is being charged £3000. In this respect the Applicant alleges failure to comply with the Service Charge regulations, in that he was not served with the Section 20 notice and was unaware of the works taking place. It also contends that the letters received did not conform to the requirements of a section 20 Notice and the regulations, in that no opportunity was given to nominate an alternative contractor or to make observations on the necessity of the works. In addition the Respondent only obtained one estimate for the work, whereas the regulations require that at least two estimates should be obtained.

17 With some regret the Tribunal concludes that the regulations were not complied with in that, even if the relevant documents were served the letters of 6th October and 10th December 2010 do not constitute proper Section 20 notices and do not offer the opportunity to nominate a contractor. The Respondent only obtained one estimate from a contractor and that, therefore, the Respondent is limited in its claim to £250 instead of the £3000 claimed .No application has been made for dispensation under section 20ZA and it is difficult to see on the facts that dispensation could be granted

since the defects clearly arise from a failure by the Respondent to implement the regulations at all but simply to proceed on what they thought was a fair reasonable and commonsense basis.

18 Unfortunately, such an approach will no longer suffice as the provisions of the regulations are now widely known and applied and are within the knowledge of managing agents. Whilst it is desirable to try to keep down costs, it is sometimes necessary to obtain professional assistance to ensure that the law is complied with and that the monies incurred can be recovered.

19 With regard to the service charge accounts the Tribunal considers that the directors' expenses are not directly recoverable as a service charge unless they constitute a management fee and are then limited to 10% of the total service charge expenditure for the year, as provided in the leases.

20 Directors' expenses as such are not recoverable as a service charge but may be recoverable from each of the shareholders as a company expense, although that is not a matter within the Tribunal's jurisdiction.

21 With regard to the years 2009 and 2010 most of the items on the accounts are recoverable as service charges and there is no issue as to their reasonableness. The amounts calculated to be payable by the Applicant are therefore;

2009 £384.25 based on $^{1}/_{12}$ of £4611.

2010 £352.33 ($^{1}/_{12}$ of £4228) plus £250 for the major works, total **£602.33**.

22 The Tribunal doers not consider that the sum of £130 was reasonably incurred in obtaining the services of an enquiry agent since it was only necessary to carry out a company search to discover the company's registered office where all notices could have been served. The cost of such a company search would have been nominal.

Section 20C Costs

23 The Tribunal sees no reason to disallow the Respondent's costs in dealing with this application even though the Applicant has been successful on a number of the issues raised. It may well be the case, however, that the lease does not make provision for the recovery of legal expenses as the Applicant suggests, although management costs including the costs of preparing for litigation to recover the service charges is recoverable but only up to the 10% limit as stated above.

24 The Respondent's conduct in dealing with this mater has been far from exemplary. He has withheld payment for the last two years even though he concedes that most of the figures in the service charge account are reasonable and it must have been clear to the Applicant, which is essentially a group of resident leaseholders, would need funds to insure the property and provide the services for which he obtained the benefit and was able to sublet his property. He has also received the benefit of the major works which have been paid for by the other leaseholders in the block, who seem to be reasonably happy with the works undertaken.

25 He has made no payment on account even in relation to sums he admits should be due and therefore the Tribunal would not consider it to be just and equitable for the costs not to be added to the service charge account if the lease permits recovery. In this event the Applicant will only be liable for one-ninth of the costs as they will be borne by all the leaseholders. This would certainly appear to be fairer than all the other leaseholders to bear the costs and the Applicant to pay nothing, particularly since they have had to bear much of the Applicant's share of the major works bill.

26 Investor-landlords who withhold payment on technical grounds and offer no payment on account when they have had the benefit of the services provided which are reflected in the rents received from their subtenants are in the view of the Tribunal not to be encouraged.

27 The Tribunal accordingly awards the sums set out above in Paragraph 21 and will report the matter to the County Court who may also deal with the question of the County Court costs.

Chairman Peter Leighton

Date 30th August 2011