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Residential
Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/00AG/ LSC/2011/0511

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL on an application under Sections 27A and 20C of the Landlord & Tenant Act 1985

Property: 19 Dorney, Adelaide Road, London NW3 3PP

Applicant: Mrs G. K. Morales (Leaseholder)

Represented by: Mr N. Khan (Applicant's husband)

Respondents: London Borough of Camden

Represented by: Ms R. Patel, Court Officer; London Borough of Camden

Also present: Mr C. Martin; Operational Project Manager, Camden
Mr H. Odoi; Consultation and Final Accounts Manager, Camden

Date of Application: 25th July 2011

Date of Hearing: 26th and 27th October 2011

Tribunal: Mr L.W. G. Robson LLB (Hons)
Mr R. A. Potter FRICS
Ms L. L. Hart BA (Hons)

Preliminary

1. By an Application received on 26th July 2011, the Applicant seeks a determination under Section 27A of the LANDLORD AND TENANT ACT 1985 (as amended) as to the liability to pay estimated service charges under a leased dated 26th February 2001 (the Lease) relating to three Major Works contracts as follows:

PFI Works – invoiced 13th April 2007 – estimated cost £23,034.82
M&E Works (Services) – invoiced 15th November 2007 – estimated cost £4,101.73
Lift Works – invoiced 15th November 2007 – estimated cost £3,686.66
No final account has yet been issued in respect of any contract. An application under Section 20C of the Act was also made.

2. Directions were given by the Tribunal on 17th August 2011.The Applicant had submitted a very brief statement of case dated 5th September 2011, which did not comply with the Tribunal's Directions. The Respondent submitted a detailed statement in Reply on 27th September 2011, supported by a witness statement from Mr C. Martin dated 12th October 2011.

Hearing

3. Using the Applicant's statement of case, in discussion with the parties at the start of the hearing, the Tribunal identified the following items as being in dispute:

* PFI Works; no itemised bill, liability to pay cost of works done, payment methods
* M&E Works; no itemised bill, liability to pay cost of works done, reasonableness of costs due to increase in estimate of 70.63%
* Lift Works; liability to pay cost of works
* Reasonableness of Capping methodology used, specifically, the issue of the Lift Works and the M&E Works being separate from the PFI Works
* Historic neglect

The Tribunal informed Mr Khan that in respect of the claim of Historic Neglect, the claim only amounted to a general assertion, and without anything more specific in the Applicant's Statement of Case, it could not allow this issue to be put to the Respondent, as the Respondent had had no proper warning of the issues that the Applicant wished to raise.

4. The Tribunal's decision on each item in dispute appears after the submissions of the parties on that item.

Liability to pay for the works

5. Mr Khan submitted that the Respondent did not dispute that the works done under the PFI agreement were the responsibility of the landlord, but any structural work was the responsibility of the Landlord. The Lease demised the window glass and frames to the tenant, see the 1st Schedule defining the property. It was therefore the Respondent's responsibility to provide the new frames free of charge. In answer to questions from the Tribunal he admitted that he had not read the Lease previously and was unaware of the terms of the 5th Schedule and Clause 4.2.

6. Ms Patel submitted that the Landlord's covenant under Clause 4.2, particularly 4.2.1, was *"to maintain, repair, redecorate renew, amend clean... the structure of the block and in particular... the roofs, foundations, external and internal walls, the window frames..."*. The cost of this work was recoverable from the Tenant according to the definition of the service charge in the Lease. Also the costs recoverable under Schedule 5 included in paragraph 1 *"the expenses of*

maintaining repairing redecorating and renewing (or replacing as appropriate) amending cleaning repointing painting graining varnishing whitening or colouring the Block and all parts thereof including the glass in the windows... and window frames an all the appurtenances... and other things thereto belonging including those items described in clause 4.2". Further, the Applicant had been made aware that the block had structural defects in her Section 125 Notice Appendix C.

7. The Tribunal considered the evidence and submissions. Mr Khan eventually accepted in the hearing that the Lease was clear in respect of each item of major works. Having carefully considered the terms of the Lease, the Tribunal accepted Ms Patel's submission. The Applicant was liable to pay the costs of all of the works in the contracts in dispute, subject to the test of reasonableness.

Billing

8. The Applicant submitted that the Respondent had failed to send an itemised bill or breakdown in respect of any of the major works contracts. The works needed a final certificate. Also it was unclear from the bills he had had that the M&E Works and Lift Works were only estimates. It was highly unsatisfactory. In reply to questions from the Tribunal, the Applicant confirmed that he was not challenging the Section 20 procedure followed by the Respondent.

9. Ms Patel for the Respondent submitted that it had billed in accordance with the legal requirements of Section 20, and all other statutory requirements. It billed normal annual service charge items in accordance with the procedure set out in the Lease, but billed Major Works separately. It had obtained a decision from the LVT under Section 20ZA (LON/00AG/LDC/2004/0038) dated 1st November 2005 granting (partial) dispensation from the statutory consultation procedures for the Works, which were all being carried out under a long term partnering agreement. We were directed to various invoices raised for annual sums of £2,000 in the bundle, and a Notice of Intention to carry out works under a long term agreement (to which was attached a Notice of Estimate), dated 16th March 2006 relating to the PFI Works. Separate invoices both dated 15th November 2007 for the M&E Works and Lift Works following Notices of Intention with attached Notices of Estimate, dated 5th March 2007, and 3rd March 2007 respectively. The Tribunal notes that it required several hours of explanation and questioning of the Council's officers before the Tribunal was able to follow the procedure. The Respondent considered that it was not obliged to follow the procedure set out in the Lease in respect of Major Works, in the light of the LVT dispensation noted above, and the case of *Haringey v Ball,* which interpreted a similar lease provision. No certificate following the Fourth Schedule had been signed relating to the Major Works, (or, apparently the normal Annual Service Charges, although this was not made clear)

10. The Tribunal considered the evidence and submissions at length. The relevant parts of the Fourth Schedule to the Lease provide:

1. " The amount of the Service Charge shall be ascertained and certified by a certificate (hereinafter called " the Certificate") signed by the Landlord's Finance Officer annually and so soon after the end of each Specified Annual

Period as may be practicable and shall relate to such Specified Annual Period and the following provisions shall apply

2. *A copy of the certificate for each such Specified Annual Period shall be supplied by the Landlord to the Tenant on written request and without charge*

3. *The certificate shall contain a summary of the Landlord's expenses and outgoings incurred by the Landlord during the Specified Annual Period to which it relates together with a summary of the relevant details and figures forming the basis of the Service Charge*
4. ...

5. *The expression "the expenses and outgoings incurred by the Landlord" as herein before used shall be deemed to include not only the Items of Expenditure which have been actually disbursed incurred or made by the Landlord during the Specified Annual Period in question but also such reasonable part of all such expenses outgoings and other expenditure herein included with the Items of Expenditure which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed incurred or made and whether prior to the Commencement of the Term or otherwise including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the Landlord may in its discretion subject to statutory restrictions (if any) allocate to the year in question as being fair and reasonable in the circumstances*

6. *As soon as practicable after the signature of the certificate, the Landlord shall furnish to the Tenant an account of the Specified Proportion payable by the Tenant for the Specified Annual Period in question ..... and upon furnishing of such account showing such adjustment as may be appropriate there shall be forthwith paid by the Tenant to the Landlord the amount of the Specified Proportion as aforesaid...."*

7. ..."

The Tribunal decided that the Respondent had not followed the procedures set out in the 4th Schedule to the Lease, in that no Certificate had been signed, nor had a consolidated account for each of the service charge years in question showing the Specified Proportion been sent to the Applicant.

11. The Tribunal also considered *London Borough of Haringey v Ball and Others 6 December 2004 (Unreported),* which the Respondent considered excused its omission to follow the procedure in the Fourth Schedule to the Lease. Ms Patel suggested that the Respondent was not limited to one certificate per year, and also that time was not of the essence in the production of such certificates. It has proved difficult for the Tribunal to locate an official version of the decision in *Haringey v Ball*, and a copy was not offered, although to be fair to the Respondent, the Applicant's statement of case was not clear, and had to be clarified at the start of the hearing. *Haringey v Ball* is a complex case, and dealt with many issues, although Issue 18 of that decision appears to be the one relied upon by the Respondent. In that case a similar, (but clearly less specific) version

of the wording in the Fourth Schedule of the Lease in this application was discussed. The issue in dispute there was not whether the Certificate and accounts had been produced, but whether they complied with the terms of the Fourth Schedule. In fact, Mr Brock (acting for Haringey) accepted that production of the Certificate and the accounts were a condition precedent to the liability to pay. Mr Ashfield (for the Respondents) accepted that the Certificate and the accounts had been furnished. His argument related to the content and form of these documents. No argument was raised on the form and content of these documents by Mr Khan either in written or oral submissions. His complaint related to what he described as the lack of "itemised bills".

12. The Tribunal decided that the three Notices of Estimates relied upon by the Respondent as accounts of the Specified Proportion did not comply with the terms of the Lease They were all undated and too brief. They provided details of the calculation required to arrive at the lessee's apportionment of the cost and then a single figure for the cost of the Works, although supervision and management fees were shown separately. Thus there were no details or summary at all relating to the largest figure on the account. Close inspection and cross-referencing of a large number of other documents and tables sent with the Notices, assisted by Mr Martin and Mr Odoi, eventually yielded the necessary details, but without the assistance of the Council's officers, the Tribunal would have struggled to understand the papers. The Tribunal considered that the accounts were not intelligible to a reasonable lessee, and thus failed the most fundamental test for any set of accounts. However, even if the Tribunal is wrong on this point, the Respondent has conceded that no certificates required by the Fourth Schedule have been signed, even several years after the demands were made. Following *Haringey v Ball*, until the certificates are signed, the legal obligation upon the Applicant to pay has not arisen. The Applicant has chosen to pay the demands raised for payment of her share of the (still estimated) M&E Works and the Lift Works, and has so far paid £6,000 towards the cost of the PFI Works. Fortunately for the Respondent, this lessee has adopted a prudent approach. Others may not do so.

Reasonableness of Increases in the M&E Contract

13. The Applicant referred to the Respondent's letter dated 26th July 2011 advising that the cost of the Works had increased by 70.63% or from £2,358,338.90 to £4,023,980.40. It was still not a final figure. The Tribunal clarified with Mr Khan that the Applicant did not dispute the reasonableness of the work, merely the cost increase.

14. The Respondent submitted that the increase in costs had not been caused by the necessity to do additional works, but the scope of the works originally notified and tendered for had increased. Mr Martin gave evidence and answered questions on this point. Briefly stated, his oral evidence was that the original independent survey report commissioned by the Respondent had not dealt with a number of items in sufficient detail, which had become apparent after the contractor started work. His witness statement dealt with the extra work required for the major components of the increased costs. These were not restricted to a few items, and in answer to questions he listed more than 13 items where the increased cost for that item was over £100,000. The

(independent) Contract Administrator had authorised the additional work. The Respondent was unhappy with several aspects of the original report and was currently in dispute with the author. Further, the escalating cost had not been reported by the Administrator until late in the contract period. Nevertheless, the Respondent accepted that the additional work was reasonably necessary. Mr Martin stated that he personally had sympathy for lessees who were now being asked to pay more than they had expected. Public meetings had been held with lessees over all aspects of the various contracts, and Mr Martin himself had had to explain the reasons for the increase in this contract at such meetings.

15. The Tribunal considered the evidence and submissions. It noted that the Respondent had apparently followed all appropriate procedures with the M&E contract. Once the contractor was on site, and the Contract Administrator had authorised the expenditure, the Respondent was in an invidious position. Whatever the reasons, this was a very large cost overrun, and the Respondent itself had had to fund much of the increased cost. To that extent its interests coincided with those of the Applicant.

16. The Tribunal accepted Mr Martin's evidence that the additional work and cost was reasonable, and reasonably incurred. However the Tribunal also decided that it could not make a decision as to the costs of the original survey as fees were apparently in dispute between the Respondent and the contractor concerned. Also the Tribunal noted that the contract sum had been allowed to escalate, without notice, in a way which appeared below professional standards, and should be reflected in the final fee for supervision etc. As no final fee had been put to the Tribunal it makes no finding on that cost.

Capping

17. This issue requires some prior explanation. Right to Buy Tenants are entitled to have the costs of certain capital works "capped", so that in this case they are not obliged to pay more than £10,000 in any subsequent 3 five year periods towards those works, pursuant to the Social Landlords Mandatory Reduction of Service Charges (England) Directions 1997 (as amended), and the Social Landlords Discretionary Reduction of Service Charges (England) Directions 1997.

18. Mr Khan agreed that the Applicant had had the benefit of Capping for the PFI Works contract. The actual cost attributable to the property was £100,262.69 for the PFI Works but that figure had been capped at £30,000 repayable over 15 years. However he submitted that the costs of all three major Works contracts should have been consolidated for the purposes of capping. The methodology used by the Respondent meant that the Applicant had had to pay extra (estimated) sums of £4,101.73 and £3,686.66. He considered that the total should have been capped at £30,000. He considered that the government grant was for the benefit of the estate, not primarily for the benefit of tenants (as opposed to leaseholders).

19. Mr Martin gave evidence that originally the Respondent had hoped to apply for all the Works to be done under the PFI Contract, which attracted a

government grant to subsidise the work. The Respondent had been informed that the Government was not prepared to fund a project costing the whole amount, and so the Respondent had had to find savings. It had decided to split the contract into three parts. When asked about the reasons for choosing to split off the works concerned in the M&E Works and Lift Works, rather than any other works which would fall exclusively on the Respondent's own budget, Mr Martin stated that that issue had not been considered, the main reason for choosing those elements was that they made the necessary savings. Ms Patel submitted that there were two avenues for capping, one was mandatory, and the other was discretionary. Mandatory capping did not apply to all contracts, only those where the funds came (at least partly) from certain Acts. Money from funds set up by one of those Acts had been used for the PFI Works. The other Works were not so funded, and therefore could not benefit from capping. Although the Respondent was generally reluctant to apply discretionary capping, each case had to be decided upon its own merits. However the five criteria were quite stringent, and particularly required consideration of exceptional hardship for the lessee. A form to apply for discretionary capping had been included in the package sent with the relevant Notices of Intention. The Applicant had not completed and returned the forms, therefore no discretionary capping could be considered. In any event the lawfulness of discretionary reductions decisions was beyond the jurisdiction of the Tribunal. The Applicant's remedy was to apply in the High Court for judicial review.

20. The Tribunal considered that it should firstly refer to the terms of the Lease. Those terms required payment of all sums reasonably incurred, irrespective of any subsidy. There had been no complaint about the standard or cost of the works, or whether they had been done reasonably. The Tribunal started its deliberation by considering whether the uncapped figures were reasonable. The Respondent had obtained competitive estimates for the works concerned, and in the absence of any evidence to the contrary, the Tribunal decided that the uncapped figures were reasonable, thus the lesser capped figure was also reasonable. The capping was effectively a windfall for the Applicant. In the absence of any evidence of double counting, or other forms of favouring certain tenants against others, then the "mandatory" capping method adopted in this case appeared fair. Also the Applicant had been made aware of the defects in the building in the Section 125 Notice attached to the Right to Buy Offer letter in 2000, and an estimate of the likely costs payable by the Applicant had been given, amounting to over £36,000. Increases in building costs have been substantial between that time and 2011. There was no evidence that the Applicant had been unaware of the likely costs. Mr Khan had suggested that it was unfair that the originally estimated work had been calculated without a cap, whereas the cost of the work actually done had included a cap. The Tribunal rejected this submission which seemed to have an element of double counting and decided that in the absence of any evidence that the method of doing the works favoured, or was intended to favour, any particular party that the capping methodology adopted by the Respondent was reasonable. The Tribunal also accepted the Respondent's submission that the exercise of "discretionary" capping was beyond its jurisdiction.

Payment Methods

21. Mr Khan submitted that the Applicant had asked to pay off the outstanding balance of the PFI Works in one payment, rather than by payments of £2,000 per year for 15 years. This had been refused. He acknowledged that a one-off payment of £23,034.82 had been offered in 2007. He submitted that it was unfair for the Respondent to refuse to accept the balance of that sum, giving credit for £6,000 already paid.

22. Mr Martin gave evidence that the figure of £23,034.82 was a discount arrived at by using an assumed annual interest rate of 3.5%. Ms Patel submitted that the Applicant had originally opted for payment by instalments of £2,000 in April 2007. Three payments had been received, and two were currently outstanding. However on 26th October 2010 the Applicant had requested to pay only the balance of the one off payment offered in April 2007. In March 2011 the Respondent had offered to accept £26,000 in full settlement. The Applicant had not accepted that proposal and commenced this Application.

23. The Tribunal considered the evidence and submissions. The Tribunal accepted that the figures put forward by the Respondent in 2007 and 2011, were based on a genuinely calculated discount, rather than plucked from the air. The Applicant appeared unwilling to increase his offer, even though it was being made more than 4 years after the original figure of £23,034.82 had been calculated, thus effectively the Respondent was being asked to ignore the interest chargeable during the period since April 2007. This did not seem reasonable. More fundamentally, the Tribunal decided that the matter was beyond its jurisdiction.

Historic Neglect

24. As noted above, the Tribunal informed the parties at the start of the hearing that without any evidence other than an assertion of historic neglect, it was not prepared to require the Respondent to attempt to reply to this issue. The Applicant had failed to take the opportunity offered by the Tribunal's Directions to make a properly detailed case, or even any case on this point. Parties must heed the warning given at the end of the Directions about the consequences of non-compliance. The Tribunal decided that the allegation of historic neglect could not be proved.

25. The Tribunal notes that the demands for all three Works contracts subject to this application remain estimates. Either party is free to make a further application when the Respondent produces its final accounts.

Costs and Fees

26. The Application included an application for an order under Section 20C, to limit the landlord's costs of the application being added to the service charge. At the end of the hearing Ms Patel formally conceded that the Respondent would not seek to so charge its costs. The Tribunal notes that the Lease can be construed to allow the Respondent to charge its costs, but in the light of the concession made

by the Respondent, the Tribunal decided to make an order limiting such costs to NIL.

27. Mr Khan stated that he wished to apply for reimbursement of the fees the Applicant had paid to the Tribunal totalling £500 (under Paragraph 9 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002). The Respondent resisted this application. Ms Patel submitted that the Applicant had not used the Respondent's own internal complaints system before making the Application, or taken part in the leaseholder consultation exercises. The Respondent could not deal with complaints of which it was unaware.

28. The Tribunal notes that its jurisdiction under paragraph 9 is discretionary. The Tribunal accepted that the Applicant had apparently not taken part in the consultations, or made its complaints sufficiently clear before commencing the application. The Applicant had apparently not read the Lease. Against that, the Respondent's billing methods were opaque and extremely difficult to follow. The Tribunal decided to order the Respondent to pay half of the fees (i.e. £250), on the basis that both parties had obtained some benefit from the application.

Signed: Lancelot Robson
Chairman

Dated: 30th November 2011

Appendix

Landlord & Tenant Act 1985 Section 27A

(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 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. If 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 would be payable, and
e) the manner in which it would be payable

(4) – (7)……..

Section 20C

"(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal, or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application."

(2)……

(3) The court or tribunal to which application is made may make such order on the application as it considers just and equitable in the circumstances."

Commonhold and Leasehold Reform Act 2002
Schedule 12

Paragraph 9

"(1) Procedure regulations may include provision requiring the payment of fees in respect of an application or transfer of proceedings, or oral hearing by, a leasehold valuation tribunal in a case under-

(a) The 1985 Act (service charges and appointment of managers)
(b) – (e) ……

(2) Procedure regulations may empower a leasehold valuation tribunal to require a party to proceedings to reimburse any other party to the proceedings the whole or any part of any fees paid by him

(3) The fees payable fees payable……shall not exceed-
(a) £500…."