



Ref: LON/00AZ/LSC/2011/0090

LEASEHOLD VALUATION TRIBUNAL

LONDON RENT ASSESSMENT PANEL

**DECISION ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD
AND TENANT ACT 1985 (AS AMENDED)**

Property: Flat 4 Eastdown Court, 1-11 Eastdown Park, London SE13 5HU

Applicant: Mr N Adojutelegan

Respondent: Eastdown Properties Limited

Hearing Date: 14th June 2011

Appearances: Mr Adojutelegan (the Applicant)
Mr B Preko, Associate Partner of Salter Rex, managing agents for
Respondent
Mr A Santos, Surveyor for Salter Rex

Members of Tribunal

Mr P Korn (chairman)
Mr S Mason
Mrs J Hawkins

INTRODUCTION

1. This is an application under Section 27A of the Landlord and Tenant Act 1985 (as amended) (“**the 1985 Act**”) for a determination of liability to pay service charges.
2. The Applicant is the leaseholder of the Property and the Respondent is his landlord. The lease (“**the Lease**”) is dated 5th September 1983 and was originally made between the Respondent (1) Eastdown Court Limited (2) and Miss CA Doyle (3).
3. The issues in dispute, as further clarified during the hearing, were as follows:-
 - (i) Legal fees re late payment of ground rent charged on 15.01.2008 - £88.13
 - (ii) A charge in connection with the reserve fund levied on 10.07.2008 - £80
 - (iii) Legal fees charged on 25.06.2009 - £261.75
 - (iv) Debt collection agency fee charged in January 2011 - £146.88
 - (v) Roof renewal works (£1,710.56) and service charge adjustment (£827.88)
 - (vi) Insurance premium for years 1st April 2006 through to 31st March 2011.

APPLICANT’S CASE

Legal fees re late payment of ground rent

4. The Applicant had already paid this item but queried whether it was payable as a matter of construction of the Lease. He also submitted that the charges were not reasonably incurred as the Respondent did not demand the ground rent prior to incurring this cost.

Charge in connection with reserve fund

5. The Applicant’s position was that the item in question was charged as a reserve fund item but was not in fact part of the reserve fund. Part of the Applicant’s evidence in support of this point was that the contribution to the reserve fund had always previously been £63 and that it was likely that instead the £80 charge represented the Applicant’s proportion of the cost of the works to the roof area described in the quote from Paul Pfiffner dated 13.05.2008.

6. Assuming that the charge did instead relate to work to be carried out to the roof area, it was not reasonably incurred because the Respondent only obtained one quote for the work.

Legal fees charged on 25.06.2009

7. The Applicant said that the background to this element of the dispute was that the Property was flooded on 10th November 2008 due to a burst sewer main which was the responsibility of the Respondent to maintain. The damaged sewer was reported to the Respondent's managing agents, and also the Applicant made an insurance claim for lost rental income from his subtenant. The Respondent failed to organise the carrying out of remedial works to the sewer main or to make good damage to the Property in a timely manner but instead issued a service charge demand, and then on or around 12th June 2009 its managing agents instructed solicitors to recover the sum of £731.88 from the Applicant and as a result incurred – and are seeking to pass on to the Applicant – legal costs of £261.75.
8. Prior to 12th June 2009 (and the Applicant believes as early as April 2009) the building insurers settled the claim for lost rental income from the Applicant's subtenant and paid the relevant sum to the Respondent's managing agents for them to pass on to the Applicant. The Respondent's managing agents then paid this sum over to the Applicant less the sum of £731.88 owing on the service charge account but did not do so until 24th June 2009. The Applicant's submission is that if the Respondent or its managing agents had paid the insurance monies less any outstanding service charges to the Applicant shortly after receiving them (from the building insurers) the situation of arrears needing to be chased up by solicitors would not have arisen. Therefore, the charges were not reasonably incurred.
9. The Applicant did not make any specific submissions as to whether the charges were recoverable as a matter of construction of the Lease itself and said that he was happy for the Tribunal to make its own decision on this point.

Debt collection agency fee

10. The Applicant said that the note for leaseholders in the rent/service charge demand dated 21st December 2010 required the amount due under that invoice to be paid by 22nd January 2011. However, already by 7th January 2011 the Respondent's managing agents had instructed a debt collection agency to recover this sum. The debt collection agency's fee for this service was apparently £146.88 and the Respondent was seeking to recover this sum from the Applicant.

Charge in connection with reserve fund

17. Mr Preko said that it was accepted that the amount charged was not (on reflection) strictly speaking a reserve fund amount but instead related to work to the roof area. Nevertheless, the work referred to in the quote from Paul Pfiffner dated 13.05.2008 referred to above was carried out and the Applicant's proportion of the cost of the work was properly payable. Mr Preko noted that the Applicant did not believe that the work had been carried, but Mr Preko insisted that it had been and referred the Tribunal to some photographic evidence.

Legal fees charged on 25.06.2009

18. Mr Preko said that the charges arose as a result of the Applicant being in arrears between 1st December 2008 and 28th May 2009. The matter was referred to solicitors in June 2009. He acknowledged that at around this time Salter Rex were holding insurance monies on behalf of the Applicant, but the insurance issue was being dealt with by a different department at Salter Rex and there was no reason for the separate departments at Salter Rex to discuss the matter. The Applicant could have explained to the department chasing the arrears that another department was holding insurance monies which could in part be set against the arrears, but he did not do so.
19. Mr Preko did not make any specific submissions as to whether the charges were recoverable as a matter of construction of the Lease itself and said that he was happy for the Tribunal to make its own decision on this point.

Debt collection agency fee

20. Mr Preko submitted that the Respondent and the managing agents had not done anything wrong. The Applicant had received previous demands and therefore he already knew that there were arrears. The managing agents had referred the matter to a debt collection agency as no response to previous demands had been received.
21. Mr Preko did not make any submissions on the construction of the Lease itself.

Roof renewal works and service charge adjustment

22. It was true that the roof works had not yet been carried out but this was because so many leaseholders had not paid their service charges. However it was still intended to carry out the work and the amount was considered reasonable. The consultation procedures had been complied with; notices had been sent out to leaseholders and then re-served on 5th May 2010 to

correct the name of the landlord. This was followed by a 'Stage 2' notice. The chosen contractor was the cheapest one and no representations were received from any leaseholders apart from a couple of letters after Stage 2 raising certain issues and concerns, one of which was responded to by switching contractors.

23. As the regards the balancing adjustment, the Lease did not require 'on account' service charges to be **demanded** on any particular day; they simply had to be **paid** on or before 25th March and 29th September in each year.

Insurance premiums

24. In relation to insurance Mr Preko said that the Applicant had not offered any comparable evidence and therefore was not in a position to assert that the insurance premiums had not been reasonably incurred. In addition, the building had a bad claims history and other insurers had refused to quote. In the light of the claims history Mr Preko considered the premiums to be reasonable.

NO INSPECTION

25. The Tribunal members did not inspect the Property or the estate of which it formed part. Neither party requested an inspection and the Tribunal's view was that an inspection was not necessary in order for it to make a determination in the circumstances of the particular issues in dispute.

THE LAW

26. Section 19 of the 1985 Act provides:

"(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 shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

27. "Relevant costs" are defined in Section 18(2) of the 1985 Act as:

“the costs or estimated costs incurred or to be incurred by or on behalf of the landlord...in connection with the matters for which the service charge is payable.”

and “service charge” is defined in Section 18(1) of the 1985 Act as:

“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 cost of management, and (b) the whole or part of which varies or may vary according to the relevant costs.”

28. Section 27A(1) of the 1985 Act gives a leasehold valuation tribunal jurisdiction to determine (on an application made to it) *“whether a service charge is payable and, if it is, as to...the amount which is payable... ”*.

APPLICATION OF LAW TO FACTS

Legal fees re late payment of ground rent

29. The Applicant has already paid this item but seeks to recover it. The factual evidence on this point is not strong, but Salter Rex have at least provided some evidence which appears to indicate that the ground rent was outstanding at the relevant time. Based on the available evidence, on the balance of probabilities the Tribunal considers that the legal fees have been reasonably incurred.

30. However, the Lease does not contain a provision which allows the landlord or management company to recover from the tenant legal fees incurred in connection with the recovery of arrears. There is a clause relating to recovery of costs in connection with the preparation and service of notices under Sections 146 and Section 147 of the Law of Property Act 1925 and there is a service charge covering costs incurred by the management company in performing services such as keeping the building in good condition. It is established law that any service charge claimed by a landlord or management company must be clearly provided for under the lease and must be apparent to a reasonable tenant and that any ambiguity must be resolved in favour of the tenant.

31. Therefore, in the Tribunal view these fees are not payable as a matter of construction of the Lease.

Charge in connection with reserve fund

32. Having heard and seen both parties’ evidence on this issue the Tribunal is of the view, on balance, that the amount relates to work to the roof area and

that the work was carried out. In the absence of a challenge to the quality of the work the Tribunal considers the amount to be payable, even though the sum in question was inadvertently referred to as a reserve fund amount.

Legal fees charged on 25.06.2009

33. The Applicant's frustration in relation to this issue is understood, but it was open to him to explain the position to the department at Salter Rex which was chasing him for arrears but he failed to do so. Having seemingly not received a response from the Applicant in relation to the non-payment of the arrears it was reasonable for the Respondent to instruct solicitors to recover the debt.
34. However, for the reasons already given in the context of the legal fees for late payment of ground rent (see paragraph 30 above) these fees are not recoverable, and therefore not payable, as a matter of construction of the Lease.

Debt collection agency fee

35. The Tribunal has some sympathy with the Applicant on this point. Whether or not the Respondent or its managing agents read the contents of their own invoices, the demand in question clearly stated the sums demanded were payable by 22nd January 2011 and it was therefore premature to instruct a debt collection agency on or before 7th January 2011 in relation to the collection of some or all of those sums. Therefore the fee was not reasonably incurred and therefore not payable.
36. In addition, for the reasons already given in the context of legal fees, this fee is not recoverable, and therefore not payable, as a matter of construction of the Lease.

Roof renewal works

37. The Tribunal has heard and seen the evidence presented by the parties in relation to consultation and is of the view – based on that evidence – that the Respondent complied with its obligations under Section 20 of the 1985 Act, in that it sent out the relevant notices and had regard to representations made by leaseholders.
38. As regards delaying the work until more leaseholders had paid their service charges, whilst this can sometimes be a cynical excuse for inaction, again on the basis of the evidence provided the Tribunal considers that the managing agents appear to have acted reasonably in delaying the works and that the sums charged are properly payable. Also, there was no real evidence that the delay had led to an increase in cost.

39. As for recoverability under the Lease, whilst it is true that the advance service charge is only payable on (or before) specific dates at half-yearly intervals with a balancing adjustment made once the actual costs are known, this does not mean that the service charge has to be demanded on those specific dates and does not affect the Applicant's obligation to pay service charges which have been reasonably demanded.
40. Therefore, this sum is properly payable.

Service charge adjustment

41. There has been no challenge to the **amount** of the service charge adjustment. This issue is not one that seems to have clearly formed part of the Applicant's application and the Applicant has failed to demonstrate that the adjustment was not made in accordance with the terms of the Lease, which allows for a balancing adjustment to be made in the normal way once the actual service charge costs are known.
42. Therefore this amount is properly payable.

Insurance premiums

43. The Tribunal considers Salter Rex's explanation of the effect on premiums and the difficulty of obtaining alternative quotations in the context of the building's claims history to be plausible. The Applicant has provided no comparable evidence and the Tribunal has insufficient information to be able to conclude that the amount of the premiums is unreasonable.
44. Therefore these amounts are all properly payable.

DETERMINATION

45. The following amounts are not payable:-

Legal fees re late payment of ground rent - £88.13

Legal fees charged on 25.06.2009 - £261.75

Debt collection agency fee - £146.88

46. The £80.00 charge which was incorrectly described as a reserve fund item, the roof renewal works (£1,710.56), the service charge adjustment (£827.88) and the insurance premiums for the years 1st April 2006 through to 31st March 2011 are all payable in full.
47. The Applicant sought an order under Section 20C of the 1985 Act precluding the Respondent from charging through the service charge any

costs incurred by it in connection with these Tribunal proceedings. In view of the fact that the Tribunal has found in favour of the Respondent on the majority of points and on all of the higher value issues it is not considered appropriate to make such an order. However, for the same reasons as are set out in paragraph 30 above, the Tribunal considers that the Respondent is unable to charge its costs incurred in connection with these proceedings through the service charge as a matter of construction of the Lease itself.

48. The Applicant also made an application for reimbursement by the Respondent of his application and hearing fees under paragraph 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003. In the Tribunal's view, whilst the Respondent and its managing agents have made some errors in their dealings with the Applicant, these are not on a scale to justify ordering the Respondent to pay or contribute towards the Applicant's application or hearing fee given that the Respondent has won on the majority of points, and accordingly no such order is made.

CHAIRMAN.....
Mr P Korn

29th July 2011