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Residential Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

DECISION ON AN APPLICATION UNDER SECTION 27A LANDLORD AND TENANT ACT 1985

Ref : LON/00BJ/LSC/2011/0101

Premises:	The Coach House (also known as Flat 1), 346 Cavendish Road, London SW12 0PJ
Applicant:	Mr M Stitt
Respondent:	Homelands Residents Association Limited
Decision date:	4th July 2010
Tribunal:	Mr P Korn (Chairman) Ms S Coughlin

BACKGROUND

1. The Applicant is the lessee of the Premises pursuant to a lease ("**the Lease**") believed to be dated 29th November 1997 and made between the Respondent (1) and the Applicant. The Respondent remains the lessor.

2. The Premises consist of a semi-detached house and are part of a building which has been split into ten flats plus the Premises.

3. The Applicant has made an application for a determination under Section 27A of the Landlord and Tenant Act 1985 (as amended) ("**the 1985 Act**") of liability to pay service charges.

4. An oral pre-trial review was held on 16th March 2011. At the pre-trial review it was established that the issues in dispute were the payability of the management fee for 2011 of £172.50 and the accountant's fees for 2011 of £68.12.

5. The parties have agreed for the matter to be determined by the Tribunal on the basis of the papers alone without an oral hearing and without an inspection of the Premises.

THE APPLICANT'S CASE

6. The Applicant states that the Premises have their own internal and external areas, which he himself manages. In addition he makes a one-eleventh contribution under the terms of the Lease to the cost of maintenance of the communal driveway and garden.

7. Previously he had not been required to pay management fees but has now for the first time received a demand to pay one-eleventh of the Respondent's management fee. He also asserts that the other ten units between them are charged 100% of the cost of management and that if a management charge is levied on the Premises the Respondent will be charging 109.09% of the total cost to leaseholders.

8. The Applicant notes that the Premises consist of a semi-detached house, separate from the other ten units which share a common roof. The Premises are accessed via the parking area, whereas the other units are accessed via the garden area.

9. Under the Lease, the Applicant is responsible for 100% of the cost of matters relating to the Premises themselves and one-eleventh of matters relating to the driveway and gardens.

10. In a further clarification of his case following the pre-trial review the Applicant has also stated that the same principle applies to the accountant's fee to which he has been asked to contribute.

11. The Applicant's understanding of the history is that the original lessee or owner of the Premises agreed with the Respondent that the Premises would not be 'managed' by the Respondent and that, in return, the lessee of the Premises would not pay towards the Respondent's management or accountancy fees but would contribute towards the cost of maintenance of the garden and communal areas. This position was never regularised.

12. The Applicant accepts that he should pay for services received but considers that it is not reasonable for him to have to pay full

management and accountancy fee contributions as the Premises do not receive the benefit of the full management services.

13. Although this is an application for a determination of liability to pay service charges, the Applicant comments in his statement of case that a variation of the Lease may be the correct course of action.

RESPONDENT'S RESPONSE

14. In response, the Respondent states that the Lease requires the lessee to pay for 100% of matters relating to the Premises and to contribute one-eleventh of matters relating to the driveway and gardens. Separately it then goes on to state that the Lease requires the lessee to contribute one-eleventh "to the Estate" and that the lessee being a member of the Respondent Company it "would be only fair" that the lessee contributes one-eleventh to the management of the Estate and the overall costs of managing the Respondent Company.

15. The Respondent goes on to state that any reduction in the service charge contributions from the Premises would mean an increase for the lessees of the other ten units. It also states that the proportion of the communal and estate charges payable by the Premises is "only" one-eleventh and that the Premises do not contribute towards the cost of the maintenance of the main block of flats.

THE LAW

16. Under Section 18 of the 1985 Act "service charge" is defined as *"an amount payable by a tenant ... as part of or in addition to the rent ... payable for services repairs, maintenance, improvements or insurance or the landlord's costs of management, and the whole or part of which varies or may vary according to the relevant costs"*. "Relevant costs" are defined 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"*.

17. Under Section 19(1) of the 1985 Act, *"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 work, only if the service or works are of a reasonable standard"*.

18. Under Section 19(2) of the 1985 Act, *"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"*.

APPLICATION OF LAW TO FACTS

19. Under clause 4(4) of the Lease the lessee covenants to pay the Interim Charge and the Service Charge as provided in the Fifth Schedule. In the Fifth Schedule the 'Interim Charge' is defined as (essentially) a sum to be paid on account of the Service Charge and the 'Service Charge' is defined as *"such percentage of Total Expenditure as is specified in Part I of the Particulars ..."*. Part I of the Particulars defines 'Percentage Service Charge' as *"100% of matters relating to the Coach House and 1/11 of matter relating to The Driveway and Gardens"*. The definition of 'Total Expenditure' includes a reference to *"the cost of employing managing agents"* and *"the cost of any Accountant or Surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder"*.

20. The service charge provisions of the Lease are, in the Tribunal's view, poorly drafted. To include in the 'Percentage Service Charge' definition a reference to 100% of matters relating to the Coach House (i.e. the Premises) is inherently confusing as costs exclusively associated with the Premises themselves are not in the nature of service charges.

21. Therefore, it would appear that the 'Percentage Service Charge' has two elements, one of which is not a service charge at all. The other element is the one-eleventh contribution towards matter *(obviously meaning 'matters')* relating to the Driveway and Gardens.

22. Turning to the management fee, whatever the past informal arrangements may have been, it seems to the Tribunal that on the basis of the extensive description of the lessor's obligations in clause 5(5) of the Lease the Respondent is entitled to charge to the Applicant one-eleventh of the costs of maintaining etc the Driveway and Gardens and that – by virtue of the inclusion of the cost of employing managing agents in the definition of Total Expenditure – it is also entitled to charge to the Applicant one-eleventh of the cost of **managing** these areas.

23. However, nothing within the definition of 'Percentage Service Charge' indicates that the Respondent is entitled also to charge to the Applicant a proportion of the cost of managing the block containing the other ten units, and the Respondent has not sought to argue that the management fee just relates to the Driveway and Gardens.

24. Therefore only a proportion of the management fee charged is properly payable. Looking at the service charge budget, the Tribunal notes that the budgeted cost for 2011 in respect of the external areas to which the Applicant has properly been required to contribute and which are areas requiring 'management' is £1,250; £400 in respect of the bin area and £850 in respect of the gardening. The other areas requiring management but which are not the responsibility of the Applicant are

itemised as 'Flats External' and 'Flats Internal' and the aggregate of the budgeted costs for these areas is £2,930. Therefore the amount properly payable by the Applicant by way of management fee – subject to any proper adjustment when the actual (as opposed to estimated) costs are known – is calculated by aggregating £1,250 and £2,930 (£4,180) and dividing £1,250 into £4,180 (29.90%) to find the percentage of the £172.50 charge actually payable. £172.50 x 29.90% = £51.58.

25. As regards the accountancy fee, the definition of Total Expenditure does envisage the possibility of recovering a proportion of the cost of the cost of employing an accountant or surveyor to determine the amount of service charge payable by the lessee. However, the Respondent has provided no information to explain what the accountant's fee relates to, and so it is a matter of speculation as to how much of it specifically relates to determining the amount of service charge payable by the lessee. More fundamentally, the definition of 'Percentage Service Charge' creates a difficulty for the Respondent. Whilst in relation to the management fee it can reasonably be said that part of the fee is a "matter relating to The Driveway and Gardens" it is much harder to argue that the accountant's fee is a matter relating to The Driveway and Gardens.

26. Although the above analysis may seem harsh to the Respondent, it is an established legal principle that ambiguities within payment obligations in leases are construed in favour of the lessee. It is also noted that the Applicant has argued that if he were to pay management and accountancy fees the Respondent would receive more than 100% of the total cost, and the Respondent has not refuted this point.

27. In conclusion, the Tribunal considers that the Applicant is not under any obligation to make a contribution towards the accountant's fee.

28. Both parties have raised the issue, albeit from a different angle, as to whether the Tribunal can or should order a variation of the Lease and/or of other leases. The application before the Tribunal is for determination of liability to pay specific service charge items. An application for a variation of one or more leases is a completely separate procedure and the Tribunal has no jurisdiction to order a lease variation on an application under Section 27A of the 1985 Act for a determination of liability to pay service charges. Similarly, the Tribunal is not compelled or even able to order a lease variation simply by virtue of having made a decision as to liability to pay particular service charges under a particular lease. However, it is open to either party (or to both parties jointly) to consider whether the service charge provisions contained in the Lease adequately reflect the intention of the parties and – if they do not – whether to apply for a variation of the Lease and whether to apply for a variation of the other leases.

DECISION

29. **The estimated management fee for 2011 of £172.50 is not payable in full. The amount properly payable is £51.58. The estimated accountancy fee for 2011 is not payable at all.**

30. No cost applications have been made.

Chairman:  P Korn

Dated: 4th July 2011