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LEASEHOLD VALUATION TRIBUNAL

In the matter of an application under
Sections 27A and 20C of the Landlord and Tenant Act 1985

Case No. CHI/29UM/LSC/2011/0163

Property: Flat 2, 5 Fonblanque Road
Sheerness
Kent
ME12 2NY

Between: Mrs J Wynn Jones
(the Applicant/Landlord)

and

Mr and Mrs Southgate
(the Respondent/Tenant)

Date of hearing: 26th March 2012
Date of the decision: 29th March 2012

Members of the Tribunal: Mr D. Dovar LLB (Hons)
Mr C. C. Harbridge FRICS

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INTRODUCTION

1. This is an application under section 27A of the Landlord and Tenant Act 1985 ('the Act') for the purpose of determining the amount of the estimated on account service charge payable for the period June 2011 to the end of May 2012. Directions were given for this application on 21st December 2011. There is also an application by the Respondents for an order under section 20C of the Act.
2. The Applicants (being the freeholders and landlords, Delme and Julie Wynn-Jones) and were represented at the hearing by Mrs Wynn Jones. The Respondents were both present at the hearing. Both parties had complied with the directions and therefore the Tribunal had a bundle prepared by the Applicants and a bundle prepared by the Respondents.

THE PROPERTY

3. 5 Fonblanque Road, Sheerness, Kent, ME12 2NY ('the Property') is a residential property consisting of three flats. Flat 2 ('Flat 2'), which is owned on a long lease by the Respondents, is situated on the elevated ground floor of the Property. The Applicants own the other two flats in the building and lease those on short lets.
4. The Tribunal, accompanied by the parties, inspected the communal parts and Flat 2. The communal parts consisted of a small lobby with access to flat 1 with a low rise staircase to a small landing off of which were the entrances to flats 2 and 3. The Tribunal were shown the smoke alarms, both internal and communal. The building appeared to be in good condition and no particular wants of repair were highlighted by the parties.

LEASE PROVISIONS

5. By a lease dated 12th July 2010, Delme and Julie Wynn-Jones demised the Flat to Mr Thomas for a term of 125 years from 1st October 2009. The

benefit of the lease was assigned to the Respondents in about September 2010.

6. Clause 1 (n) provides that 'the Tenant's share' means 33.33%.
7. By clause 6 and part I of the Second Schedule, the tenant covenanted to
 - “(2) To pay the Tenant's share of the expenses incurred by the Landlord in performing its obligations set out in Part I of the Fourth Schedule and of the discretionary expenses and other matters set out in Part II of the Fourth Schedule;
 - “(3) (a) To pay on account of the Tenant's obligations under Paragraph (2) by equal half yearly instalments in advance on the First day of January and the First day of June in every year such sum as the Landlord shall reasonably estimate to be the likely amount of the Tenant's contribution for that year ...
 - “(b) Within 21 days after the service by the Landlord on the Tenant of a notice in writing stating the Tenant's contribution for the year to which the Notice 'relates' (certified in accordance with the Fifth Schedule) to pay to the Landlord the amount by which the certified contribution exceeds the 'said payments on account.'”
8. Part III paragraph (2) of the Second Schedule provides for the tenant to pay the landlord's legal and surveyor's costs in relation to any breach of the lease;
9. Part I of the Fourth Schedule sets out the Landlord's obligations in respect of insurance, repairs, electricity, decoration and accounting.
10. Part II of the Fourth Schedule provides for the recovery by the Landlord of the cost of services which they *may* provide, but are not obligated to. They include:

- a. at paragraph 2 'Employing managing agents for the Building or (if the Landlord does not employ managing agents) to charge a proper sum (not exceeding what would otherwise be payable to managing agents) for expenses and overheads'
 - b. at paragraph 7 'Reasonably incurring expenses in any proceedings or contemplated proceedings or dispute relating to the Building or any part of it with the Tenant or the tenant of the Other Flats to the extent that such expenses are not paid by the other part to such proceedings.
11. The Fifth Schedule provides further details of the Landlord's accounting obligations under the Fourth Schedule and provides for the accounts of landlord expenditure as follows:

"(1) (a) The landlord shall as far as reasonable equalise the amount from year to year of the Landlord's expenses in Parts I and II of the Fourth Schedule by charging against those expenses in each year and carrying to a reserve fund reasonable sums as provision for future expenses liabilities or payments under this lease whether they are certain or contingent, obligatory or discretionary.

"... (c) When a future expense liability or payment for which reserves have been made has been paid by the Landlord the Landlord shall make any adjustment which may be necessary with the Tenant by repayment reduction or subsequent charges or otherwise.

"(2) The Landlord shall keep ... proper books of account of the Landlord's expenses. An account shall be taken on the 30th day of September next and each anniversary of that date during the continuance of this lease of the amount of the Landlord's expenses incurred since the ... date of the last account..."

12. In the Tribunal's view, the lease provides for payment of the service charge in the following manner:

- a. The service charge year runs from 1st October to 30th September;
 - b. An estimate of the yearly expenditure is made prior to 1st January and the tenant will pay their part of that anticipated expenditure in two equal instalments on 1st January and 1st June each year;
 - c. After the 30th September, the landlord will reconcile the amount of estimated expenditure with the actual expenditure and determine whether or not there is a deficit or shortfall (in the case of a shortfall an additional sum can be demanded from the tenant). In addition to that a further amount can be levied at this time in order to 'equalise the amount' of service charge from year to year. This sum will be a sum for anticipated non annual recurring future expenditure and will be held in reserve.
13. It is therefore the Tribunal's view that it is permissible to levy a reserve under the service charge. The Respondent's contended otherwise, but gave no specific argument on that point. Whilst it does, in the Tribunal's view, provide for one, it does so at the time of reconciliation, by permitting a further sum to be demanded in advance.
14. The lease also provides for the reversion to be transferred to the Fonblanque Management Limited ('the Company') once long leases of all the flats in the building have been granted. The Applicants have retained their interests in the other flats through their ownership of the freehold title in possession and therefore the triggering event for transfer of the reversion has not occurred. The management does however appear to be carried out through the Company although it does not yet have any obligations under the lease. The Tribunal has treated the Company as presently acting as managing agent for the Applicants.

THE STATUTORY PROVISIONS

15. Section 18 of the Act defines service charges as those amounts payable by a tenant as part of or in addition to rent, which are payable directly, or indirectly for services, repairs, maintenance or insurance or the landlord's costs of management and the whole or part of which vary or may vary according to the relevant costs. Relevant costs are defined as the costs or estimated costs incurred or to be incurred by the landlord in connection with matters for which the service charge is payable.
16. Section 19 places a statutory limit on service charges by only allowing their recovery to the extent that they are reasonably incurred and where the service or work is to a reasonable standard.
17. Section 27A confers jurisdiction on the Tribunal to determine whether a service charge is payable and if so, (amongst other matters) the amount which is payable and the date at or by which it is payable. The determination can be made whether or not any payment has been made and also in respect of anticipated expenditure.

THE DEMANDS

18. The Company has sent numerous demands to the Respondents. In the bundles prepared by the parties the following demands have been sent:
 - a. a breakdown of half yearly costs for 1st January 2011 to June 2011 detailing £467.01 per annum for insurance and £420 per annum for cleaning and testing the alarm system, which when apportioned over six months and to one third (for the Respondents contribution) amounted to £147.83;
 - b. On 31st January 2011, a further invoice was presented referring to the above breakdown and adding a further £40 in respect of 2 hours administration fee;

- c. On 4th May 2011, a further invoice was presented which in addition to the above costs included: £227.92 in respect of the installation of a new hard wired communal alarm system and lockable electrical socket said to be payable in advance; £80 for administration (4 hours) and £10.40 mileage. The £227.92 was said to be payable immediately and the £90.40 was said to be due on 21st May 2011. That particular invoice had a summary of tenants' rights and obligations attached as per s21B of the Act;
- d. On 26th May 2011, a credit was given for £227.92;
- e. Also on 26th May 2011 a revised breakdown of estimated annual costs for the period 1st July 2011 to 30th June 2012 was given and payment was demanded before 1st June 2011. This set out: insurance £520; annual cleaning of communal area £360; testing of alarm system £120; preparing annual accounts £180; company secretarial fee £180; administration fee £240; and maintenance to communal area £1,500. The annual total was £3,100, the total claimed for the 6 months was a third share of £1,550, being £516.67. In addition £275.40 was claimed as 'underestimated charges specific to flat 2'.
- f. On 13th June 2011, an invoice was sent setting out the sum claimed on 26th May and seeking a further £60 in administration (3 hours) and £5 for an email and £5 for one telephone call;
- g. On 30th June 2011, a further invoice was sent setting out £50 administration (2.5 hours), £10 for two emails and £5 for a telephone call;
- h. On 6th December 2011, the second part of the on account charges of £516.67 were demanded.
- i. Also on 6th December 2011, an invoice for £236.20 was sent for the cost of installing the new communal alarm system. It stated that this

sum was payable immediately and that payment would reduce 'your balance accordingly'.

19. The items set out in this application are the same as those set out in estimated annual costs dated 26th May 2011 and 6th December 2011, save that in addition £403.80 was claimed in the application for charges for breach of lease. Further, the demands were said to be for the period 1st July 2011 to 30th June 2012, whereas the application states that they are for the period June 2011 to end of May 2012. At the hearing Mrs Wynn-Jones clarified that she was claiming those sums for the period June 2011 to the end of May 2012.

ITEMS IN DISPUTE

20. At the outset the Tribunal sought to identify the items remaining in dispute between the parties. Of the items set out in the application (and in the demand for an on account payment) the Respondents clarified that they took issue with:

- a. £403.80 for 'charges incurred for non compliance of lease';
- b. £360 for the cleaning of the communal hallway;
- c. £120 for the testing of communal alarms;
- d. £180 for annual company secretarial services; and
- e. £1,500 by way of sinking fund.

Charges for non compliance of lease - £403.80

21. Mrs Wynn-Jones seemed unclear as to the basis for levying these charges. It was clear that they related to the time spent by Mrs Wynn-Jones in dealing with the Respondents; that she charged £20 per hour or £5 an email or telephone call or mileage at 40p per mile. It was also clear that the

charges were not apportioned, but the full amount was claimed from the Respondents on the basis that they had caused the additional work. These were therefore not estimated amounts, but time actually incurred at a set rate. Mrs Wynn-Jones said she had understood that she was only entitled to levy the on account service charge twice a year, but that she had been advised that these were separate items that could be billed on a monthly basis. The Applicants were only able to show invoices totalling £265.40.

22. The Tribunal did not consider that there was any provision of the lease which entitled the Applicants to levy such a charge solely against the Respondents. Whilst there was provision for 'outgoings' or 'legal and surveyors costs' to be charged solely to a tenant who was in breach of their lease (Second Schedule Part III), there was no such provision for the landlord's time and expense.
23. Therefore if these sums were recoverable it would be on the basis that they fell within paragraph 2 of Part II of the Fourth Schedule and therefore would have to be apportioned as to one third to the Respondents.
24. However, the Tribunal did not consider that these sums were recoverable. Paragraph 2 of Part II of the Fourth Schedule permits recovery of a proper sum not exceeding what would be payable to managing agents. Whilst managing agents do sometimes charge a flat fee and then additional amounts for extra works, the Tribunal considered that the additional charges claimed here would not normally be charged as additions by a managing agent. There were two reasons for this. Firstly, if the matters were because of a breach of covenant, then that would be a charge in relation to the landlord enforcing the covenants and not in managing the building. Secondly, to the extent that they were in relation to management issues, the Tribunal considered that these additional hours should have been encompassed within the administration fee of £80 as part and parcel of what a managing agent would be expected to do.

Cleaning of communal parts - £360

25. The Applicants had based this estimate on one visit a month lasting one and half hours and travel; i.e. £30 a visit.
26. The Respondent challenged this sum on the basis that it was only a small space that needed cleaning and a cleaner could be hired for £8 an hour rather than the £20 per hour plus mileage charged by the Applicants. The Mrs Wynn-Jones stated that it was a difficult area to clean, required tools to be brought to the property and that in addition there were light bulbs that needed changing and mail that needed re directing. She also stated that she had tried to obtain a cleaner but that no one wanted to take the job.
27. The Tribunal considered that this was a reasonable estimate and noted that although this was a small area, it was difficult to access and had no storage space for tools. The Tribunal also considered that the Applicants were entitled to carry out the cleaning themselves in these circumstances, particularly where they had tried to get cleaners. Therefore the Tribunal allows this sum in full.

Testing of communal alarms - £120

28. The Applicants stated that this estimate was based on monthly checks at £10 per month. These checks had been carried out when Mrs Wynn-Jones attended to clean the communal areas and involved pressing a key fob which set off the communal alarms in turn. This procedure had now changed and requires a more involved process and an assistant but only every three months with an annual maintenance.
29. The Tribunal did not consider that the estimate of £120, being based on a monthly visit, was reasonable. Given that the Applicant was already on site for cleaning (and was charging for that and for mileage) there was little additional work required. The Tribunal also considered that this was a sum

that should fall within the administration fee. Therefore the Tribunal disallows this sum in full.

30. However, this does not mean that should a charge be made in the future by an electrician for testing the system, that such a charge would not be allowable as an item of service charge expenditure. This determination is however based on the current estimate contained within the application.

Company Secretarial Fee (Accountants) - £180

31. Mrs Wynn-Jones seemed a little unclear as to what was provided for this fee. She also seemed sceptical as to the cost of this service. It was stated to be for the filing of accounts and forms with Companies House. There was a separate fee for the preparation of accounts which was not challenged by the Respondents. The Tribunal considers that this sum is excessive and therefore not reasonable. Mrs Wynn-Jones candidly accepted that this was on the high side and that she was not happy with this sum. In the Tribunal's view a sum of £20 per annum, representing an hours administration by the applicant manager, more accurately reflects the work involved.

Reserve fund – maintenance to communal areas - £1,500

32. As set out above, the Tribunal considers that the Applicants are permitted to set up a reserve fund. However, the sum for a reserve can only be demanded at the same time that the estimated costs are reconciled with the actual costs after 30th September each year.
33. The sum of £1,500 was demanded as part of the estimated expenditure. If this was not a reserve fund but estimated expenditure for that year on the alarm system then it would be recoverable. Mrs Wynn-Jones stated that it was not simply for the alarm but was intended to cover other contingent items of expenditure.

34. Therefore to the extent that it represented anticipated expenditure to the communal areas for the year, it is recoverable as service charge. £683.76 was included in this sum as the cost of the alarm system. This is recoverable, the balance is not. However, the Applicants are at liberty to add a sum for the reserves after carrying out the year end reconciliation.

CONCLUSION

35. The Tribunal therefore makes the following determination in respect of what is payable for the estimate on account charges for the year June 2011 to end May 2012:

a.	Charges incurred due to non compliance	£0
b.	Annual insurance premium	£520
c.	Annual cleaning of common parts	£360
d.	Testing of alarm	£0
e.	Accounts	£180
f.	Company Secretarial Fee	£20
g.	Maintenance to communal area	£683.76

Total sum payable £1,763.76 (the Respondents are liable to pay 33.33% of this sum)

SECTION 20C

36. The Respondents made an application to limit the Applicants recovering their costs of these proceedings through the service charge. The issue which appears to have driven the parties to the Tribunal was that of the fire alarm system. Sensibly the parties had reached agreement over that issue. However, that dispute had thrown up a number of areas of difficulty in

relation to the management of the Property. The Applicant charges an administration fee and has attempted to charge additional sums for time spent on dealing with the issues that have arisen. However, in the Tribunal's view some of the problems have been caused by the Applicant's failure to properly adhere to the terms of the lease in respect of demanding service charges. The Tribunal therefore has some sympathy with the Respondents in that they were being faced with a number of different demands. The Tribunal also notes that early on the Respondents sought to have a meeting at the property to sort out the issues. Whilst that did occur, it was not until much later than the dates suggested by the Respondents. The Tribunal also takes into account the fact that the yearly estimate has been reduced by a not insignificant amount. For those reasons the Tribunal makes an order under section 20C prohibiting the recovery of the legal costs of these proceedings through the service charge. It follows that the Tribunal refuses to refund the application and hearing fee.

Signed

D Dovar LLB (Hons)
Chairman

[Faint signature]
The Tribunal also notes that

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D Dovar LLB