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LONDON RENT ASSESSMENT PANEL

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION
UNDER SECTIONS 27A & 20C OF THE LANDLORD AND TENANT ACT 1985**

Case Reference: LON/00AM/LSC/2011/0719

Premises: Flats 3, 5, 6, 7 & 8
181 Stoke Newington High Street
London N16 0LH

Applicant: Mr K Oliver, as LPA Receiver for Mr M Nawaz

Representative: Lupton Fawcett LLP

Respondent: London Development Property Co Ltd

Representative: Barnes & Partners

Date of hearing: 3rd May 2012

Appearance for Applicant: Mr D Robinson, counsel

Appearance for Respondent: Mr G Williams, counsel

Leasehold Valuation Tribunal: Mr NK Nicol
Mr L Jarero BSc FRICS
Mrs L Walter

Date of decision: 16th May 2012

Decisions of the Tribunal

- (1) Of the documents submitted shortly before the hearing by the Respondent, the Respondent's Reply to the Applicant's Second Statement of Case is allowed in but the unsigned witness statement of Sanjeev Dhir is excluded.
- (2) As of the date of the hearing, all demands for payment of service charges which were purported to have been served or which were actually served after 1st October 2007 are not payable due to the Respondent's failure to provide the requisite Summary of Rights and Obligations in accordance with s.21B of the Landlord and Tenant Act 1985 and the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.
- (3) The Tribunal does not accept that the Respondent sent demands for payment of service charges other than by the three letters which the Applicant accepts they received, namely those dated 12th January 2009, 11th May 2010 and 7th February 2012. Therefore, the Tribunal accepts the Applicant's contention that expenditure for the following periods is not recoverable by reason of the 18-month time limit under s.20B of the Landlord and Tenant Act 1985:-
 - a. 29th August 2004-28th August 2005;
 - b. 29th August 2005-28th August 2006;
 - c. 29th August 2006-28th August 2007; and
 - d. 29th August 2009-7th August 2010.
- (4) The service charge accounts for the years in dispute have not yet been prepared and so the expenditure has not yet been incurred. Therefore, there are not yet any service charges payable in respect of the preparation of the accounts.
- (5) Subject to the decisions at paragraphs (2) and (3) above, service charges claimed in respect of management fees, lift maintenance and work invoiced by Ian Fleming are payable.
- (6) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the Respondent's costs of the Tribunal proceedings may be passed to the Applicant through any service charge.
- (7) The Respondent shall pay the Applicant the sum of £500 in respect of his costs in these proceedings in accordance with paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

The application

1. Mr Mohammed Nawaz was the lessee of Flats 1, 3, 4, 5, 6, 7, 8 and 9 at 181 Stoke Newington High Street, London N16 0LH. On 14th June 2007, Mr Nawaz's mortgagees, the Leeds Building Society, appointed Mr Derek Reeves of the Key Partnership as Receiver under the Law of Property Act. He sold Flat 9 in 2007 and Flats 1 and 4 in 2008. Following Mr Reeves's retirement, the Applicant was appointed as his replacement on 4th June 2010.
2. By letter dated 11th May 2010, the Respondent's solicitors wrote to Mr Reeves demanding payment of service charges in the total sum of £51,059.11. The Applicant replied by e-mail dated 15th June 2010 setting out a detailed request for information so that they could determine their potential liability. The Respondent never replied substantively to this e-mail.
3. Eventually, in the absence of the Respondent's co-operation, the Applicant applied to this Tribunal on 14th October 2011 for a determination as to the payability of all service charges for the years 2004-2011 inclusive under s.27A of the Landlord and Tenant Act 1985.
4. The relevant legal provisions are set out in the Appendix to this decision.

The proceedings

5. The Tribunal issued directions for these proceedings on 15th November 2011. The first direction was for the Respondent to provide relevant documents to the Applicant by 5th December 2011. Nothing having been provided in accordance with this direction, the Tribunal issued to the Respondent a Notice to Supply Information on 17th January 2012. Eventually, the Respondent's solicitors provided some other documents by letter dated 8th February 2012.
6. The Applicant had put in a Statement of Case but, having received the disclosure, put in a Second Statement of Case on 16th March 2012. The Respondent failed to comply with any further directions, even after the final hearing was adjourned to allow more time. At around midday on 2nd May 2012, the day before the hearing, the Respondent's solicitors purported to serve on the Applicant's solicitors the Respondent's Reply to the Applicant's Second Statement of Case and an unsigned witness statement of Sanjeev Dhir, a director of the Respondent company.
7. At the hearing on 3rd May 2012, the Applicant objected strenuously to the Respondent's behaviour. The Applicant did not object to the Tribunal seeing the Reply on the basis that it amounted to little more than a position statement by counsel on behalf of the Respondent rather than containing any evidence. However, the Applicant did object to the admission of Mr Dhir's statement on the basis that its late submission was highly prejudicial.

8. Mr Williams, counsel for the Respondent, explained that he had been instructed only a few days earlier and had done his best to present the Respondent's case in the circumstances. He said that Mr Dhir had been in custody pending trial on serious charges and had only been released following his acquittal on 7th March 2012. Further, he had only been able to take instructions on Mr Dhir's return from China a couple of days previously.
9. The Tribunal is not satisfied with Mr Williams's explanation for a number of reasons:-
 - a. Mr Dhir is not the only director of the Respondent company, which also has a company secretary. Mr Williams said that the other director was not "active" but that was as far as his explanation went and he did not mention the company secretary.
 - b. Further, the building containing the subject flats was managed on a day-to-day basis by an employee. It was suggested that his knowledge of the law was insufficient but the Tribunal cannot see why he could not have provided documents requested by the Applicant as long ago as June 2010 and at least some of the instructions required by counsel to prepare the case properly.
 - c. During these proceedings, the Respondent has been represented by Barnes and Partners solicitors. At no point did the solicitors make any attempt to suggest that they had any difficulty with taking instructions from or on behalf of the Respondent. The first the Tribunal knew about Mr Dhir's criminal proceedings was when they were mentioned in the Applicant's witness statement dated 27th April 2012.
 - d. In any event, Mr Dhir's difficulties with the criminal proceedings do not explain the failure to respond to the Applicant's solicitors' e-mail of 15th June 2010 or the lack of action after his acquittal on 7th March 2012. Even if Mr Dhir was the only person who could take action, and even accepting that he had a number of matters to deal with after having his attention diverted for so long, he still had sufficient time to address these proceedings much earlier than the day before the hearing.
10. Further, the Respondent wanted to introduce the witness statement of Mr Dhir in part to produce further disclosure, namely documents attached to the witness statement. However, the Respondent's solicitors purported to provide disclosure, albeit extremely late, on 7th February 2012. There was no explanation as to why this further disclosure had not been included in the original disclosure.
11. It is extremely rare that the Tribunal excludes evidence. The proceedings of the Tribunal are relatively informal compared to those of a court and justice between the parties normally requires that evidence be admitted despite breaches of procedure. Prejudice from late service can often be addressed by adjourning proceedings. However, what has happened in this case is exceptional.

12. The Respondent has had nearly 2 years to provide information to which the Applicant is entitled. The Respondent's conduct of these proceedings could barely be any worse. The service of Mr Dhir's witness statement could hardly be much later nor the explanation for the late service so scant. Allowing the witness statement in and proceeding with the hearing would have been potentially highly prejudicial to the Applicant but so would adjourning the proceedings. In the circumstances, the Tribunal decided that Mr Dhir's witness statement could not be admitted in evidence. This decision was conveyed to the parties as a preliminary ruling early on in the hearing which then continued to consider the substantive issues.

The issues

13. The Applicant's Second Statement of Case identified the following issues:-
- (i) The single most significant issue was whether the Respondent's service charge demands fell foul of the 18-month time limit in s.20B of the Landlord and Tenant Act 1985. The Tribunal also identified a related issue of whether the service charge demands complied with s.21B of the same Act since that provision came into force on 1st October 2007. These issues are considered separately below.
 - (ii) The Applicant challenged the charges for insurance premiums on the basis that they seemed to be too high. The Respondent conceded that this had been due to additional administration charges being imposed which would no longer be pursued. This issue being conceded, the Tribunal makes no ruling on it.
 - (iii) The Applicant pointed out that the lease provided for two different percentages to be applied in relation to two separate categories of service charges but that, in relation to General Maintenance, it appeared the wrong percentage had been applied. The Respondent conceded this issue at the hearing and so, again, the Tribunal made no ruling.
 - (iv) The Applicant pointed out that the Respondent had purported to impose charges for accountancy fees despite not having produced any accounts. Mr Williams informed the Tribunal that the accounts were in progress with the accountancy firm used by the Respondent for all its businesses at a fixed fee agreed in advance. On the evidence available, the Tribunal accepted that Applicant's contention that the accountancy fees had not, in these circumstances, yet been incurred. Therefore, to date, no relevant costs had been incurred in relation to accountancy fees and so the service charges based on them were not payable.
 - (v) The Respondent did not employ managing agents but they did charge a management fee. The Applicant asserted that the Respondent had no power to levy such charges under the lease. However, the Tribunal is satisfied that the relevant wording of clause 4(i)(a) of the lease, "all the costs and expenses

outgoings administrative and management expenses", is more than wide enough to encompass the reasonable expenses of management. The Applicant conceded that the amount of the management fee, c.£200 per unit, was not unreasonable in itself but asserted that the evidence of the lack of communication and the late preparation of accounts indicated that service was poor. In fact, the Applicant had no evidence that the overwhelming majority of services were anything other than satisfactory and so the Tribunal had no basis on which to determine that the management fee was unreasonable in amount. Therefore, subject to the determination in respect of issue (i), the Tribunal determined that the service charges in respect of management fees are payable.

- (vi) The service charges included costs relating to lift maintenance. In 2011, the lift maintenance contract was changed in order to obtain a reduction of around 28% in the price. The Applicant asserted that this demonstrated that the fees for all previous years were 28% too high. However, the mere fact that a better contract price has been obtained is not evidence that previous contract prices were too high. The evidence is far too thin to carry the Applicant's assertion and the Tribunal has determined that, subject to the determination in respect of issue (i), the service charges in respect of lift maintenance are payable.
- (vii) Much general maintenance and other work at the building containing the subject flats were carried out by the same contractor, Ian Fleming. His business address appeared to be the same as that of the Respondent. The Applicant had sought information as to whether the work was tendered competitively on each occasion. However, the sums in question are overwhelmingly of such amounts that they would not justify a full competitive tendering process. The Applicant simply has insufficient evidence to question Mr Fleming's work or the reasonableness of his charges and so the Tribunal determines that, subject to the determination in respect of issue (i), they are payable.
- (viii) The Applicant had queried the difference between amounts claimed as owing to the Respondent and the amounts actually invoiced. Mr Williams explained that the earlier figures were estimates whereas the later figures, which were lower, were actual costs incurred. On that basis, the Respondent only asserted that the lower figures were payable and the Applicant was happy to proceed on that basis. Therefore, the Tribunal did not make ruling on this issue.
- (ix) The Applicant sought an order under s.20C of their Landlord and Tenant Act 1985 and an order for costs against the Respondent. These issues are dealt with at the end of this determination.

LTA ss.20B and 21B

14. The Applicant accepted that he and his predecessor had, between them, received the following service charge demands:-

- a. Letter dated 12th January 2009 enclosing:
 - i) Invoices dated 1st November 2007 in relation to the service charge year ending 28th August 2008; and
 - ii) Invoices dated 9th January 2009 in relation to the service charge year ending 28th August 2009.

 - b. Letter dated 11th May 2010 enclosing:
 - i) Invoices dated 28th August 2005 in relation to the service charge period from March 2005 to 28th August 2005;
 - ii) Invoices dated 28th August 2006 in relation to the service charge year ending the 28th August 2006;
 - iii) Invoices dated 28th August 2007 in relation to the service charge year ending 28th August 2007; and
 - iv) Invoices dated 1st November 2007 in relation to the service charge year ending 28th August 2008.

 - c. Letter dated 7th February 2012 enclosing:
 - i) Invoice dated 6th September 2010 in relation to the service charge year ending 28th August 2010;
 - ii) Invoices dated 5th September 2011 in relation to the service charge year ending 28th August 2011.
15. As far as the Applicant was aware, the Respondent had not demanded service charges other than by the above three letters. The Respondent appeared to accept that the invoices were not actually served on the dates which they bore and the Applicant had not received any other copy letters or invoices from either Mr Nawaz or Mr Reeves. He had taken over a number of cases from Mr Reeves and none of them had involved any problems with the documentation, such as letters being missing. On that basis, it was asserted that large parts of the demanded service charges were not payable because the costs had been incurred more than 18 months prior to the demands, contrary to s.20B of the Landlord and Tenant Act 1985.
16. The Tribunal identified a further problem. None of the invoices had attached to them the Summary of Rights and Obligations required by s.21B of the Landlord and Tenant Act 1985 and the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007. There was not even a suggestion that further disclosure was missing. The Respondent is still able to comply with s.21B by re-serving the demands with the correct Summary attached but, as at the date of the hearing, the Respondent had yet to do so. It follows, therefore, that, as at the date of this decision, no service charges demanded after 1st October 2007, the date when s.21B came into force, are payable.

17. The issue was raised whether "a demand for payment" in s.20B can only be regarded as such if, amongst any other requirements, it complies with s.21B. The view of this Tribunal is that a demand under s.20B probably means a demand which complies with s.21B so that, if the Respondent were now to serve demands which complied with s.21B, costs incurred more than 18 months prior to the new service would not be recoverable under s.20B. However, since no such demands have yet been served, this is a hypothetical question which the Tribunal does not need to determine.
18. The Respondent claimed that further demands for payment of the service charges had been sent to Mr Nawaz by letters dated 9th January 2006 (in relation to the service charge years ending 28th August 2005 and 2006) and 8th January 2007 (in relation to the service charge year ending 28th August 2007). However, the Tribunal does not accept this claim because:-
 - a. These letters were not mentioned, let alone disclosed, before 2nd May 2012, the day before the hearing, despite the fact that they were clearly central to the Applicant's alleged liability.
 - b. No such letters were included in the papers provided by Mr Reeves to the Applicant and there is no reason to think any such documents would have gone astray.
 - c. Although this is of lesser significance, it is worth noting that Mr Nawaz had not forwarded any such letters to either Mr Reeves or the Applicant despite, according to the Applicant, being on notice that he should do so.
19. These findings mean that expenditure in relation to the following periods is not recoverable due to the Respondent's failure to comply with s.20B:-
 - a. 29th August 2004-28th August 2005;
 - b. 29th August 2005-28th August 2006;
 - c. 29th August 2006-28th August 2007; and
 - d. 29th August 2009-7th August 2010.
20. The Applicant did not invite the Tribunal to calculate the precise sum of money involved on the basis that the parties could do it themselves. If the parties cannot agree on the maths, they would be entitled to ask the Tribunal to determine this as well but it is hoped that would not be necessary as it seems to the Tribunal that that would be a waste of time and money.

Application under s.20C and costs

21. In the application form, the statements of case and at the hearing, the Applicant applied for an order under section 20C of the 1985. The Applicant doubted that the lease contained any power for the Respondent to pass the costs of these proceedings through the service charge but, assuming that it did, they alleged that, in the light of the Respondent's behaviour over the last two years as described above, it would be just and equitable for an order to be made prohibiting them from doing so. The Tribunal bears in mind that making

such an order deprives a lessor of a contractual right but, bearing in mind the findings above, the Tribunal is of the opinion that it has no choice but to make the order.

22. For the same reasons, the Tribunal also accedes to the Applicants application for costs of £500 under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. There can be no doubt that the Respondent's behaviour as described above has been vexatious and unreasonable.

Chairman:

NK Nicol

Date:

16th May 2012

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

- (1) In the following provisions of this Act "service charge" means 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 costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the Landlord, or a superior Landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (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 provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable 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.

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 it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the Tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20B

- (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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 Upper 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) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
 - (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
 - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Section 21B

- (1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.
- (2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.
- (3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.
- (4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

Commonhold and Leasehold Reform Act 2002

Schedule 12, paragraph 10

- (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
- (2) The circumstances are where—
 - (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

- (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
- (3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
 - (a) £500, or
 - (b) such other amount as may be specified in procedure regulations.
- (4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.