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LONDON LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/00AP/LSC/2012/0022

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN
APPLICATION UNDER SECTION 27A OF THE LANDLORD & TENANT
ACT 1985**

Applicant: Lorelei House Management Company
Respondent: Mr A Chapple
Property: Flat 3, Lorelei House, 31 Avenue Road, London, N6 5DG
Date of Hearing 10 May 2012

Appearances

Applicant

Mr Figueiredo Company Secretary
Miss H Sampong
Mrs S Mustoe

Respondent

Mr Chapple Leaseholder

Leasehold Valuation Tribunal

Mr I Mohabir LLB (Hons)
Mr T W Sennett MA FCIEH

Introduction

1. The Applicant issued proceedings against the Respondent in the County Court to recover service charge arrears in the sum of £480 for the year ending 2010 and estimates for part of 2011. Subsequently, the proceedings were transferred to the Tribunal to determine the Respondent's liability to pay and/or the reasonableness of the service charges in issue. The Tribunal's determination is made pursuant to section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act").
2. Lorelei House is a block of 8 flats in Highgate in London. In March 1990, the lessees acquired the freehold interest and set up the Applicant company, with each lessee owning a 1/8th share (including the Respondent). It is, in practical terms, a tenant owned company. Since June 2005, the Applicant has managed the property as a cost saving measure.
3. The Respondent was the lessee of Flat 3 in the property pursuant to a lease initially granted on 17 December 1970 for a term of 99 years from 25 March 1970. However, a lease extension granted by the Applicant dated 13 June 2005 for a term of 999 years from 1 January 2004 ("the lease") on the same terms, save for a number of variations. In relation to the service charge terms, the lease varied the original lease by requiring the Respondent to pay in advance and on account a contribution of 1/8th for the estimated service charge expenditure in any given year. This is to be paid by 12 equal instalments on the first day of each calendar month. The service charge year commences on 1 April in each year and ends on 31 March in the following year¹, although it seems in practice that the service charge year had been operating from 1 January to 31 December.. The Applicant is entitled to recover by way of a balancing charge any surplus expenditure incurred.
4. In addition to the monthly service charge contributions, the lease also provided that, should it be necessary for the lessor to make unforeseen expenditure, it shall be entitled to raise a supplemental estimate of such

¹ see clause 4.8(ii) of the lease

expenditure at any time and serve notice on the lessee requiring payment of 1/8th of such expenditure within one calendar month of the said notice having been served.

The Issues

5. The 3 issues in this matter are:
 - (a) a sum of £70 paid by the Respondent in 2010, being the cost of a plumber employed by him to carry out an inspection behind his washing machine for a leak at the behest of the Applicant. However, the Tribunal ruled that it had no jurisdiction to deal with this matter because it was not an item of service charge expenditure incurred by the Applicant. Therefore, it was not a “service charge “ within the meaning of section 18 of the Act and the Tribunal did not have any jurisdiction to make any determination on this sum. It was being claimed by the Respondent by way of a set off. Similarly, the Tribunal had no jurisdiction to deal with any sums claimed in this way. It is, therefore, remitted back to the County Court for determination if it is pursued by the Respondent.
 - (b) the reasonableness of the increased monthly service charge contribution of £300 from July 2011. This issue is limited to the 2011 service charge year because it is only in respect of this year that arrears of the increased contribution were claimed in the County Court proceedings.
 - (c) the Respondent’s liability to pay and/or the reasonableness of an ad hoc charge of £300 made by the Applicant in 2011.

The Law

6. The substantive law in relation to the determination regarding the service charges can be set out as follows:

Section 27A of the Act provides, *inter alia*, that:

"(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."*

Subsection (3) of this section contains the same provisions as subsection (1) in relation to any future liability to pay service charges. Where the reasonableness of service charge costs falls to be considered, the statutory test is set out in section 19 of the Act.

Hearing and Decision

7. The hearing in this matter took place on 10 May 2012. The Applicant was represented by Mr Figueiredo, the Company Secretary, who was accompanied by Miss Sampong and Mrs Mustoe. The Respondent appeared in person.

Increased Monthly Contribution

8. The lessees had historically paid their service charge contributions at a rate of £240 per quarter. In July 2011, this was increased by the Applicant to £300 per quarter. The Tribunal was told that this had been done to fund approximately £50,000 needed to carry out repairs and maintenance to the building. For example, the Applicant had been provided with verbal estimates of £35,000 to carry out repairs for the flat roof, £5,000 for repairs to the retaining wall at the rear of the property and £600 for repairs to windows and tree works. The refurbishment of the entrance hallway would cost approximately £5,000.
9. Mr Figueiredo said that the increased service charge contributions were to be paid in the reserve fund in order that the various items of proposed works could be carried out. This had been agreed by 6 other lessees at a meeting held on 15 June 2011 and minutes made of the agreement. The Respondent was not present at the meeting. When asked by the Tribunal, Mr Figueiredo said that no formal survey report had been obtained setting out the repairs and maintenance required, as this would add to the cost of management. The

shareholders simply decided by majority voting what works were needed and when. Once agreement had been reached, quotes were then obtained for the relevant work.

10. Mr Figueiredo submitted that clause 4.4 of the lease gave the Applicant a discretion to increase the advance monthly service charge contributions to *“such reasonable sum...as shall be estimated by the Lessor”*.
11. The Respondent did not complain about the historical service charge contribution of £240 per quarter. His complaint was that the increased contribution of £300 per quarter was unreasonable because he did not accept the need for any of the proposed works to be carried out, save for the retaining wall at the rear of the property. However, he stated that a specification of works had not been prepared and costs tendered.
12. The Respondent also argued that the additional amount collected by the increased contribution and paid into the sinking fund represented “dead money” and was likely to be misspent. He pointed out that the Applicant had previously obtained surveys for proposed works, which had not been carried out. He did concede that the lease allowed ad hoc payments for unforeseen expenditure could be demanded by the Applicant.
13. On the Applicant’s own case, the increase amount in the service charge contribution from £240 to £300 in 2011 represented a sinking fund contribution. It was conceded by the Applicant at the hearing that the lease did not provide for a sinking fund and for the collection of a contribution in this regard through the service charge account. It follows, therefore, that the Applicant, as a matter of contract, was not entitled to demand, as part of the overall service charge contribution, the increased amount of £300 (from £240) as a sinking fund contribution. It also follows that such a contribution could not be a “reasonable sum” within the meaning of clause 4.4 of the lease. Having found in these terms, it was not necessary for the Tribunal to go on to consider if the increased contribution of £300 was reasonable.

14. The Tribunal appreciated that the Applicant is a tenant owned company that is run for the benefit of the lessees. It is entirely understandable that the wish to minimise the cost of repairing and maintaining the building has led to the “common sense” approach to management, especially by seeking to spread the cost of proposed major works by informally establishing a sinking fund. However, the lease terms and the obligations it creates for both parties cannot be ignored. Under the terms of the lease, if the Applicant wishes to fund repairs and maintenance to the building, it must, at the commencement of the service charge year, estimate those costs and then collect the service charge contributions in the usual way. This may, of course, inevitably result in significantly increased service charge contributions for the Respondent and other lessees in any given year.

Ad Hoc Charge of £300

15. This charge was made in 2011 by the Applicant for the cost of having to rebuild a boundary wall. The Respondent submitted that he was not liable for the entire amount and/or the expenditure had not been reasonably incurred for the following reasons.
16. He, firstly, argued that the Applicant had not carried out statutory consultation under section 20 of the Act prior to the commencement of the work. This challenge was limited to the sum of £300 demanded and not the substantive expenditure in relation to the boundary wall. The failure to consult was conceded by the Applicant.
17. Secondly, and in the alternative, the Respondent argued that the Applicant should have taken legal steps to require the neighbour concerned, at 33 Avenue Road, to contribute towards the cost of repairing the wall. He relied on a letter dated 18 October 2001 written to Mr Figueiredo by Philip Harvey Associates, a firm of civil and structural engineers instructed by the Applicant to advise on this matter, which stated that the wall was *likely* (our emphasis) to be under shared ownership. It went on to recommend that the parties appoint an independent Party Wall Surveyor to resolve the uncertainty.

18. Thirdly, he argued that the money had been spent on the wall around the sub-power station, which had not been required because it is situated on land already owned by the Applicant. This had resulted in greater expenditure, although he was unable to say what that had been.
19. Mr Figueiredo explained that since 2004 the Applicant had been attempting to resolve the issue with ownership of the boundary wall with the neighbour at 33 Avenue Road without success. They had insisted that the wall was owned by the Applicant and it was obliged to maintain it. He referred the Tribunal to a letter dated 8 November 2002 written to him in those terms by Estates Consultancy Services who had been instructed by the neighbour.
20. Mr Figueiredo said that eventually a Party Wall Surveyor, Mr Millea, was instructed by the Applicant, the neighbour at number 33 and EDF, who owned the power sub-station. A party wall agreement was entered into dated 19 June 2010 by all of the parties and the cost of the boundary wall fell on the Applicant. The works commenced in October 2010 and were completed in the following December at a total cost of £43,800. It necessitated the use of an Architect, Structural Engineer and Surveyors. Most of the cost had been met from the reserve fund, however, it became necessary to make a demand for £300 from the lessees to meet the remaining balance. Mr Figueiredo also said that an insurance claim had met the cost of repairing damaged drains. He denied that the boundary wall had been built around the power sub-station and referred the Tribunal to the relevant plans.
21. The Tribunal found that because the Applicant had failed to carry out statutory consultation with the lessees prior to the commencement of the work, as a matter of law, it could not recover a sum greater than £250 from each of them. The Applicant can make an application under section 20ZA of the Act to retrospectively dispense with the requirement to consult. However, unless and until such an application is made and granted, the maximum sum it may recover from each of the lessees is £250.

22. In the event that the Applicant does apply for dispensation, the Tribunal went on to consider the issue of reasonableness of the £300 demanded. The Tribunal concluded that the conduct of the Applicant in relation to the boundary wall cannot be criticised. It had properly instructed the appropriate professionals to resolve the matter of who was obliged to repair and maintain the wall. The advice given was that it was obliged to do so and it acted on that advice. The Tribunal did not accept the Respondent's assertion that a wall had also been built around the power sub-station. It was clear from the plans provided that this had not in fact taken place. Accordingly, the Tribunal found that, save for the section 20 point above, the sum of £300 had been reasonably incurred.

Section 20C & Fees

23. No application had been made by the Respondent under section 20C of the Act.
24. The Applicant made an application for an order for the reimbursement of the fees of £200 it had paid to the Tribunal to have the application issued and heard. It did so on the basis that the Respondent had refused to discuss or negotiate on any of the subject matters of this application. The Tribunal granted the application because it was satisfied that the Applicant had made real efforts to settle this matter and the Respondent, by his conduct, had failed to constructively engage in this process thereby requiring the application to be made.
25. Accordingly, the Tribunal orders that the Respondent to reimburse the Applicant the sum of £200 within 28 days of service of this decision.

Dated the 25 day of June 2012

CHAIRMAN.....

Mr I Mohabir LLB (Hons)