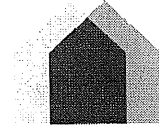




HM Courts
& Tribunals
Service

8737



Residential
Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

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

Case Reference: LON/00AE/LLC/2012/0009

Premises: Flat 51 and Flat 62 Creswell House, Hirst
Crescent, Wembley, Middx HA9 7HJ

Applicant(s): Mr A S Choudry and Mrs R K Choudry, but in fact
only Mrs Ravinder Kaur Choudry is the tenant

Representative: Mr A S Choudry

**Respondent
management company:** Willow Court (Wembley) Management Co Ltd

Representative: Mr N Choudhury of counsel, instructed by
Brethertons LLP, solicitors

Date of directions: 18th December 2012

Date of decision: 15th January 2013

**Leasehold Valuation
Tribunal:** Mr Adrian Jack, Mr Neil Maloney FRICS

Procedural

1. By an application received by the Tribunal on 13th November 2012 the tenant sought determination of her liability for costs in respect of an earlier determination of the Tribunal on 13th December 2011 ("the 2011 decision"), to which we refer for the history of and background to this matter.
2. The application form used was that appropriate for the seeking of relief under section 20C of the Landlord and Tenant Act 1985, but in fact the claim is in respect of one aspect of service charges said to be payable by the tenant, namely costs in respect of the application which lead to the 2011 decision. Jurisdiction is thus given by section 27A of the 1985 Act.
3. Directions were given by Mr Leighton on 18th December 2012. These were complied with late. The Tribunal held a hearing on 10th January 2013. Neither party requested an inspection and none was held.

Facts, law and discussion

4. Under reference LON/00AE/LSC/2011/0212, the tenant applied in relation to both flats for determination of her liability for service charges in respect of the service charge years 2008-09, 2009-10 and the budgeted figures for 2010-11. By a decision dated 13th December 2011 the Tribunal (Mrs T I Rabin JP, Mrs S Coughlin MCIEH and Mrs S Justice) determined the service charges payable. At the conclusion of its decision, the Tribunal considered the tenant's application for an order under section 20C of the Landlord and Tenant Act 1985.
5. The Tribunal's conclusion at paragraph 57 was that:

"their findings indicate some failings in the management of the estate by the Respondent and also that of the Applicant had not shown that the majority of the costs were unreasonable. It seems that the most equitable manner to deal with the issue is for the Tribunal to make an order under Section 20C that 50% of the costs of these proceedings are not to be regarded as appropriate costs to be included in the service charges and accordingly make such an order."
6. The costs incurred by the landlord in dealing with these two flats comprised five fee notes raised by Tucker Turner Kingsley Wood LLP, the landlord's solicitors, as follows:

31.3.11	First interim	£1,095.00
31.3.11	Second interim	1,053.00
2.8.11	Third interim	3,606.00
30.9.11	Fourth interim	3,090.00
26.10.11	Fifth final	1,200.00
		<hr/>
		£10,044.00

7. Not all of these fee notes concerned the Tribunal proceedings. There had been two actions commenced in the County Court under action numbers 1UC18897 and 1UC18856. Judgments had been obtained in those actions on 23rd March 2011 and 8th April 2011 respectively, but these judgments were both set aside on 14th July 2011 and the actions then went to sleep. The tenant was ordered to pay the landlord's costs of the application to set aside summarily assessed in the sum of £944.36. The first two fee notes appeared to relate to these actions, not the Tribunal proceedings. The liability had been determined by the County Court in summarily assessing the costs. In consequence counsel for the landlord conceded that the first two fee notes were not recoverable in the current application. The sums of £1,095 and £1,053 are accordingly disallowed.
8. As regards the balance, counsel made a number of points. Firstly, he argued that the 2011 decision determined that the tenant was obliged to pay the balance of the landlord's costs, subject only to the Tribunal's determination of the reasonableness of the costs. Secondly, he argued that the landlord in any event was entitled to recover the costs of the Tribunal proceedings directly from the tenant. He relied primarily on clause 4.9.2 of the leases and secondarily on clauses 5.1 and 4.7. Thirdly, he argued that the landlord was entitled to put the costs on the service charge account. Although he did not initially put his case on this third aspect in this way, after discussion with the Tribunal he put the management company's claim on the basis of clauses 6.2 and 1.11, which in turn applied paragraph 15 and the proviso after paragraph 16 of Schedule 4 to the leases.
9. As regards the first point, we note that Mr Leighton, the very experienced chairman who gave directions in this matter, commented that the Tribunal in the 2011 decision "decided that it was appropriate under section 20C of the Act to deprive the landlord of half the costs which he might be entitled to recover under the terms of the lease. The Tribunal did not decide whether the lease permitted the recovery of costs but merely such costs as were recoverable should be reduced by 50%."
10. We have of course considered the matter afresh in the light of counsel's submissions, but we respectfully agree with Mr Leighton. The Tribunal

when making the 2011 decision did not have before it any issue as to whether costs were recoverable as a matter of principle. The only matters before it were the service charges for 2008-09 to 2010-11 (which did not include these legal costs, because they post-date those years) and the tenant's application for a section 20C order. The Tribunal could not and did not determine whether the legal costs were recoverable (either in fact or in principle) under the terms of the lease. All it could and did determine was that, if costs were otherwise recoverable, they were limited to 50%. Accordingly we reject counsel's submission that the matter is res judicata (already judicially determined).

11. As regards the second point, clause 4.9.2 in both leases contains a covenant by the tenant with the landlord and with management company:

“to be responsible for and to keep the Landlord and the Management Company fully indemnified against all damage damages losses costs expenses actions demands proceedings claims and liabilities made against or suffered or incurred by the Landlord or the Management Company arising directly or indirectly out of:... 4.9.2 any breach or non-observance by the Tenant of the covenants conditions or other provisions of this Lease.”
12. The landlord's difficulty in relying on this clause is that the 2011 Tribunal proceedings were begun by the tenant. She wanted a determination of the amount she owed the landlord. Bringing an application to the Tribunal involves no breach or non-observance of any covenant etc in the leases. It is true that she was in fact in arrears with her service charges, but she could have brought the Tribunal application even if she was fully up-to-date with her service charges. There is no causative connection between the Tribunal application and any breach of the terms of the leases. Accordingly in our judgment the landlord cannot rely on clause 4.9.2 to recover these costs directly against the tenant.
13. We would add that clause 4.9.2 more naturally relates to matters such as nuisances caused by a tenant, but in the light of our conclusion in the previous paragraph we do not need to consider this point further.
14. Clause 5.1 is simply a covenant on the tenant's behalf to pay the service charge. In our judgment it adds nothing to the management company's case. Clause 4.7 is a covenant to pay the landlord's costs of section 146 proceedings. The costs here are incurred by the management company, so the clause has no application to the costs currently in issue. Neither gives a separate basis for the recovery direct of the legal costs in issue.
15. As regards the third point, the management company is able to recover the cost of providing the “services” specified in Schedule 4 (see clauses 6.2 and 1.11). Paragraph 15 and the proviso after paragraph 16 provide for the management company:

“15. To take reasonable steps to enforce a proper contribution to the Management Company’s expenses by all persons required to contribute...”

PROVIDED ALWAYS that the Management Company so far as is permitted by law shall be entitled to delegate such obligations or employ such contractors or as it think fit for the proper performance of the covenants contained in this Schedule and discharge all proper fees and expenses payable to such contractors or agents...”

16. This wording is in our judgment sufficient to permit the management company to employ solicitors to enforce the payment obligations of tenants. The tenant, however, sought to argue that there was authority binding on the Tribunal to the contrary. In Sella House Ltd v Mears [1989] 1 EGLR 65, cited in Greening v Castelnau Mansions Ltd [2011] UKUT 326 (LC), Lord Justice Taylor said that on the landlord’s argument in relation to very different lease terms:

“a tenant, paying his rent and service charge regularly, would be liable via the service charge to subsidise the landlord’s legal costs of suing his co-tenants, if they were all defaulters. For my part, I should require to see a clause in clear and unambiguous terms before being persuaded that the result was intended by the parties.”

The tenant submitted that this principle should be applied to the construction of paragraph 15 and the proviso, so that the absence of any express reference to legal costs or solicitors’ costs was fatal to the landlord’s ability to recover such costs under the terms of the leases.

17. In our judgment it is important to note that the management company is (as was envisaged in the lease: see clause 2) a tenant-owned management company. This takes away a large amount of the force of Lord Justice Taylor’s remarks, because a tenant will have to pay for the costs of enforcement against a co-tenant one way or the other, either in the tenant’s capacity as a shareholder in the management company or as a lessee liable under the terms of the leases. Accordingly we hold that the legal costs incurred in the 2011 application are payable as part of the service charge.
18. The result is that the tenant is obliged to pay her share of the costs as part of her service charge. The percentage in respect of each flat is 2.75 per cent. In the light of the 2011 decision to refuse recovery of 50 per cent, the tenant is liable to pay 1.875 per cent in respect of each of her two flats.
19. The legal costs, after deduction of the two interim fee notes for £1,095 and £1,053 from £10,044, amounted to £7,896. The tenant submitted that this sum was unreasonably high, but did not put forward any detailed criticism of the amounts. In these circumstances we disallow nothing further.

20. The tenant raised the point that the landlord had not raised demands which complied with section 47 and 48 of the Landlord and Tenant Act 1987. There were in the bundle no demands complying with the sections, but this is a matter which the landlord can rectify. However, until the landlord does rectify the deficiency in our judgment nothing is owed in respect of the legal costs.

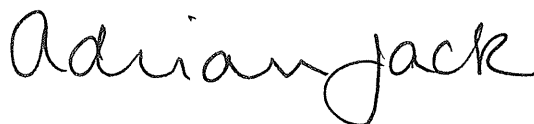
Costs

21. In terms of the amounts claimed and the amount which the management company has recovered as due, the tenant has won overall. Accordingly it is right in the exercise of our discretion to order the management company to reimburse her the hearing fee of £150.
22. For the same reason it would not be just and equitable to permit the management company to recover the costs of the current application through the service charge against the tenant. The Tribunal accordingly, in the exercise of its discretion, makes an order under section 20C of the 1985 Act.

DECISION

The Tribunal accordingly determines

- (1) that, upon service of demands complying with section 47 and 48 of the Landlord and Tenant Act 1987, in respect of each of the two flats the tenant is obliged to pay the management company 1.875 per cent of £7,896;**
- (2) that the management company do pay the tenant £150 in respect of the fees payable to the Tribunal;**
- (3) that pursuant to section 20C of the Landlord and Tenant Act 1985 the management company be debarred from recovering the costs of and in the current application to the Tribunal from the tenant.**



Adrian Jack, Chairman 15th January 2013

ANNEX: The law

The Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and the

Commonhold and Leasehold Reform Act 2002 provides as follows:

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, improvement 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 of 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 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 provision 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 20B

- (1) If any of the relevant costs taken into account in determining the amount of any service charges 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 charges 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 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 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.”

Sections 47 and 48 of the Landlord and Tenant Act 1987 require a landlord to give his name and address and to give an address for the service of notices by the tenant on him. The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 requires a landlord to serve a summary of tenants' rights and obligations with any demand for service charges on pain of irrecoverability of the service charges demanded.