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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/00BJ/LSC/2013/0029

Premises: Apartment 7, 6 Chapel Yard, Wandsworth,
London SW18 4LX

Applicant(s): Norman V. Cooley (leaseholder)

Representative: None

Respondent(s): Notting Hill Housing Trust (landlord)

Representative: None

Date of hearing: 20 March 2013

Appearance for Applicant(s): Norman V. Cooley
Maria Savva (Support)

Appearance for Respondent(s): Ashley Hassell – Property Management Officer
Notting Hill Housing Trust
Jamie Flintoff – Leasehold Manager Notting Hill
Housing Trust

Leasehold Valuation Tribunal: Mrs N Dhanani LLB (Hons)
Mr T Sennett MA FCIEH

Date of decision: 23 April 2013

Decisions of the Tribunal

- (1) The Tribunal determines that the basis of apportionment of the service charge levied from August 2009 to the present day (and future charges) is reasonable.
- (2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the Tribunal proceedings may be passed to the lessees through any service charge.
- (3) The Tribunal determines that the Respondent shall pay the Applicant £250 within 28 days of this Decision, in respect of the reimbursement of the Tribunal fees paid by the Applicant

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the reasonableness of service charge apportionments in respect of the service charge years from 2009 onwards in relation to the Property.
2. The relevant legal provisions are referred to in the decision where appropriate and set out in the Appendix to this decision.

The hearing

3. The Applicant appeared in person at the hearing and the Respondent was represented by the people named on the front of this decision.
4. The Tribunal did not have before it the Respondent's bundle although the Respondent had sent it to the Tribunal by courier on the 12 March 2013. The start of the hearing was delayed while the Tribunal located the Respondent's bundles and considered these new documents.

The background

5. The property which is the subject of this application is a two bedroom loft conversion situate in a block of flats known as Chapel Yard. There are 13 flats in the block.
6. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
7. The Applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a

variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

8. The Lease is dated 20 August 2009 and made between Notting Hill Home Ownership Limited(1) and Norman Cooley(2) ("the Lease")

The issues

9. At the start of the hearing the parties identified the relevant issue for determination to be the reasonableness of service charges for the period from 2009 onwards as the Applicant contends that the Respondent has been using an incorrect figure to apportion the service charge in relation to the property.
10. The application also required a determination as to the liability to pay and the reasonableness of the window cleaning charges. Mr Hassell and Mr Flintoff on behalf of the Respondent confirmed that the Applicant should not have been charged for window cleaning (including any charges for communal window cleaning) and they undertook to ensure that any payments made by the Applicant in respect of window cleaning would be refunded and that the charge would be removed from all future service charge demands. The parties confirmed that this item was no longer in issue.

The Applicant's Case

11. The Applicant relied on his application and the supporting documents in support of his case. In addition the Applicant made oral submissions at the hearing reiterating the points made in his written submissions. The Applicant stated that he purchased the property just over three years ago on the basis of the particulars and the IPUS One Hardwicks – Price List which stated that the property measured 663 sq feet. He stated that he subsequently discovered that the two flats below his flat, Flat 1 and Flat 4 were also listed as having the same square footage as his property, although his property had a sloping ceiling and the flats below did not have a sloping ceiling. He stated that in accordance with property valuation guidance any space below 1.5 metres in height should not be counted when measuring a property for valuation purposes.
12. The Applicant stated that he had engaged a RICS qualified surveyor to measure the property in accordance with RICS Code of Measuring Practice (6th Edition). He produced a copy of the plan produced by the surveyor which shows the property actually measures 727 sq feet in total, and that 63 sq feet of the space is below 1.5 metres. Therefore the actual usable space in the property is 664 sq feet and not 663 sq feet. The Applicant stated that the two flats below his property share the same external walls as his property and do not have a sloping ceiling so he submitted that his property is at least 63 sq feet smaller than these two flats.

13. The Applicant submitted that as the service charge proportions are based on the square footage of each flat, the Respondent is using incorrect square footage figures for at least three if not all the flats within the building.
14. The Applicant referred the Tribunal to the email of the 21 December 2012 from Mr Hassell in which it is admitted that the Respondent does not have reliable sq footage figures for the flats in the building. The Applicant stated that he is of the view that under the current method of apportionment used by the Respondent he is being prejudiced because although his flat is 15% smaller than the two flats below his they are all being charged the same service charge.

The Respondent's Case

15. The Respondent relied on Mr Hassell's letter of the 4th March as its statement of case together with the bundle of supporting documents sent to the Tribunal with a letter dated 12 March. In addition Mr Hassell and Mr Flintoff made oral submissions at the hearing in support of the Respondent's case.
16. Mr Hassell explained that under the terms of the Lease the Applicant covenanted to pay the service charge in accordance with the provisions of Clause 8 of the Lease. The service charge is defined under Clause 8.1.5 as being ".....the Specified Proportion of the Service Provision". The Service Provision is defined under Clause 8.1.4 as being ".....the sum computed in accordance with Clauses 8.3, 8.4, 8.5 and 8.6. The Specified Proportion is defined as "...a fair proportion of the Service Provision to be determined by the Authorised Person taking into account inter alia the degree of benefit received by the Premises from the services."
17. Mr Hassell explained that the Respondent had calculated the service charge using the floor area of an individual flat in relation to the floor area of all the other flats. He submitted that the apportionment of service charge by floor area is an industry recognised method where a lease states that "...a fair proportion" of costs should be billed. He stated that the managing agent Houston Lawrence on behalf the Hardwicks (Wandsworth) Limited management company have apportioned the service charge based on a floor area schedule which was provided to them by the developer. He stated that prior to the purchase of the flat the Applicant would have received an estimated budget for the year accompanied by figures to support the budget.
18. Mr Hassell referred the Tribunal to a list of all the flats in the building and their square footage areas as well as the Houston Lawrence service charge schedule. The service charge proportion applied to Flats 1, 4 and 7 all of which have two bedrooms is 9.1368% each.
19. Mr Hsssell stated that the Respondent's position on the matter is as stated in his email of the 20 December 2012, the relevant parts of which state as follows:

“...You have instructed a surveyor who has calculated the net internal area of your flat to be 664 sq ft whereas the square footage used to calculate your service charge is 652 sq ft. The square footage calculation made by the surveyor is close to the 663 sq ft shown on the sales schedule.

Your property has the same square footage as flats 1 and 4 on the service charge schedule used by Houston Lawrence to apportion the service charge. This contradicts the calculation made by your surveyor who has calculated a reduced NIA for your property.

There are two different square footage schedules which we have seen. There is the Houston Lawrence schedule provided by the developer and used to calculate the service charge and a schedule provided by Notting Hill Home Ownership prior to purchase. Both show different calculations for each property.

We asked Houston Lawrence to provide a justification for their service charge schedule. They have informed us that the schedule was provided by the developer but have been unable to provide further details to justify those figures...We have also asked our sales team to provide a justification for their square footage calculation schedule also. They have not been able to show that the square footage relates to the built square footage of the units in the building. Although the square footage calculation is very close to the figure provided by the surveyor you appointed we cannot be certain that the square footage of the other units is correct. The sales schedule was only intended as a guide to square footage on purchase.....The only way we can be certain of the square footage of the units and the total building is by instructing a RICS accredited surveyor. The cost of instructing a surveyor would be service chargeable as it is a cost incurred in calculating the service charge as per clause 8.5.3. of your lease Although we as not opposed to a revaluation we believe that the cost is far in excess of the benefit to leaseholdersan adjustment of the service charge so that all units are billed as per the sales schedule would mean that your service charge is only slightly altered....Using the currently agreed apportionment you will be billed £1,938.23 (£2.98 per square foot) for 2013. At the revised square footage provided by your surveyor of 663 sq ft you would be billed £1978.72. Therefore you would be asked to pay an additional £40.49. Units 1 and 4 will also be billed £1,938.26 (£2.98 per square foot) for 2013. Their service charge would be increased if they were to pay based on a square foot calculation of 727 sq ft. If that calculation was used they would pay £2,166.46, an additional £228.23 per annum each. The ac of the other flats would then be reduced by a total of £456.46. Dividing that crudely between the other 11 units (by 11 rather than the exact proportion) each of the other flats would receive in the £41.50. Using these figures the overall outcome for you would be that you were 99p better off in 2013 and a similar amount thereafter.....”

20. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows.

The Tribunal's decision

21. The Tribunal's jurisdiction on an application under section 27A relates to an amount payable by a tenant and or costs incurred for services etc as detailed under sections 27A (1) and (3).
22. The Tribunal having considered the evidence and submissions made by the parties determines that the method of apportionment of the service charge is fair and reasonable.

Reasons for the Tribunal's decision

23. The Tribunal considered the provisions of the Lease which provides as follows:
 - (i) Clause 8.1:5 defines the service charge as "the Specified Proportion of the Service Provision".
 - (ii) Clause 8.1:3 defines the "Specified Proportion" as "...a fair proportion of the Service Provision to be determined by the Authorised Person taking into account inter alia the degree of benefit received by the Premises from the services".
 - (iii) Clause 8.1:2 defines an "Authorised Person" as ".....an individual nominated by the Landlord to estimate expenditure in accordance with clause 8.4"
24. The Lease provides that the landlord (i.e the Respondent) is to nominate an individual to apportion and calculate the service charge in accordance with the provisions of Clause 8.4 of the Lease. It is a matter for the landlord to determine which method is used to apportion the service charge as it is the landlord who is obliged under the provisions of the Lease to provide services and manage the building. Whatever method is chosen it must be fair and reasonable.
25. The Tribunal informed the parties during the course of the hearing that there are several methods of apportioning service charge. The question of whether a particular method of apportionment is fair and reasonable must be determined after taking into account all the circumstances in a particular case including the provisions of the Lease. The Applicant alleges that he is being prejudiced by the inaccurate figures used to apportion the service charge
26. The Tribunal notes that it is accepted by the parties that the floor areas of the flats used by the Respondent to apportion the service charge are not accurate. Having considered the evidence and the submissions made by the parties and having regard to its own general knowledge and experience the Tribunal finds that any prejudice suffered by the Applicant as a result of the inaccuracy is so minor that it does not justify the expense that the Respondent would have to

incur in surveying all the flats in the building to ascertain the precise square footage of each flat.

27. The degree of prejudice suffered by the Applicant as a result of the inaccuracy is illustrated by the Respondent's calculations as detailed at paragraph 19 above.
28. The Tribunal did consider the decision of Sir George Bartlett QC, the President of the Upper Tribunal Lands Chamber in the case of Mehra v Citywest Homes Limited [2010] UKUT 311 (LC), in which he commented on the Tribunal's jurisdiction under S.27A of the Act, and stated:

"Under section 27A(1) application may be made to an LVT "for a determination whether a service charge is payable"; and section 18 defines "service charge" is to mean "an amount payable by a tenant..." Thus an application under section 27A(1) can only be made in respect of an amount of money. Under section 27A(3) an application may be made to an LVT for a determination whether "if costs were incurred for services...a service charge would be payable for the costs". So an application under subsection (3) can only be made in relation to costs and for the purpose of gaining a determination as to whether a service charge would be payable for those costs. The purported section 27A application in the present case, however, does not relate to an amount of money payable as a service charge; nor does it relate to costs for which a service charge might be payable. What the application sought was a determination that "in respect of service charges demanded and to be demanded" a calculation in relation to flat 5C was fair and reasonable if calculated on the basis that the service charge represented 5/19ths of the total expenditure on the building. And the decision of the LVT was expressed as a determination that the method of assessing the service charges by applying an allocation of bed spaces was fair and reasonable and that the method resulted in a proper and fair allocation of the service charges between the respondents.

It is clear in the light of this that the decision can have no effect for the purposes of section 27A since it does not determine anything that the LVT had power to determine under that section".

29. The Tribunal is of the view that this case can be distinguished from the case of Mehra in that in this case the Applicant has submitted an application in relation to the amount of service charges payable for the period from 2009 onwards whereas in the Mehra case the application had been brought by the landlord's managing agent seeking a determination as they had changed the method of apportionment applied to ascertain service charges. The application in the Mehra case did not relate to an amount of service charge payable.

Application under s.20C and refund of fees

30. At the end of the hearing, the Applicant made an application under Regulation 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003

for a refund of the fees that he had paid in respect of the application and hearing. Mr Flintoff on behalf of the Respondent agreed to refund the fees to the Applicant. For the avoidance of doubt, the Tribunal nonetheless orders that orders the Respondent to refund any fees paid by the Applicant within 28 days of the date of this decision.

31. In the application form and at the hearing, the Applicant applied for an order under section 20C of the 1985. Although Mr Flintoff on behalf of the Respondent landlord indicated that no costs would be passed through the service charge, for the avoidance of doubt, the Tribunal nonetheless determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

Costs

32. The Applicant applied for an order that the Respondent pays costs of £374.00 to them pursuant to the Tribunal's powers to award costs¹ on the grounds that the Respondent had behaved unreasonably frivolously and vexatiously in connection with the proceedings. The sum of £374.00 is made up of £300 in respect of the survey fees and £74.00 in relation to disbursements incurred in connection with the proceedings. The Applicant stated that the issue in dispute was raised over a year ago and he had tried to negotiate with the Respondent to resolve the matter. He stated that he had sent at least 6 emails to try to get a response from the Respondent. He stated that he had met with representatives of the Respondent and he received an email from Mr Hassell after a three month delay stating that he had discussed the matter with their lawyers and suggesting that the Applicant withdraw his application to the Tribunal.
33. Mr Hassell stated that the Respondent is providing affordable housing and although they accept that there was some delay in responding to the Applicant, they did consider the issues raised by the Applicant and as they did not accept the Applicant's argument they could not compromise their position.
34. The Tribunal is of the view that the issue could have been resolved sooner and without the need for a hearing and as a result the Tribunal has made an award for the reimbursement of the application and hearing fees. The Tribunal does not consider the Respondent's conduct in connection with the proceedings can properly be described as conduct which is frivolous, vexatious, abusive, disruptive or otherwise unreasonable. The Tribunal does not consider the Respondent's conduct in connection with the proceedings warrants an order for costs.

The next steps

¹ Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002

35. The Tribunal does have jurisdiction to vary a lease under the provisions of section 35 Part IV of the Landlord and Tenant Act 1987 on an application by a party to a lease as provided in that section. The Applicant may wish to seek advice on whether in the circumstances he wishes to submit an application to the Tribunal under section 35.

Chairman:

N Dhanani

Date:

23 April 2013

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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

- (1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.
- (2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.
- (3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
 - (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) 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.

- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
- (a) in a particular manner, or
 - (b) on particular evidence,
- of any question which may be the subject matter of an application under sub-paragraph (1).

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.