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LON/00AW/LSC/2005/0324

Residential Property
TRIBUNAL SERVICE

DECISION BY THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE AT THE LEESEHOLD VALUATION TRIBUNAL LONDON RENT ASSESSMENT PANEL
LANDLORD AND TENANT ACT 1985 Section 27A

Property	6 Dalmeny House, 9 Thurloe Place, London, SW7 2RY
Applicant:	Lessees of Flats 4, 6, 7 and 8
Represented by:	Nigel Bown (for the lessees of flats 4, 6 & 7) Lord Gormiston (for the lessee at flat 8)
Respondent:	Abacus (Nominees) Limited and Abacus (CI) Limited
Represented by:	Bircham Dyson Bell Solicitors
The Tribunal:	Mr S E Carrott LLB Dr A M Fox BSc PhD MCIArb Mr F L Coffey FRICS
Date of Hearing:	12th June 2006
Date of Decision:	14th September 2006

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1. **Background**

This is an application under section 27A of the Landlord and Tenant Act 1985 for the determination of the liability to pay and reasonableness of service charges.

2. The subject property is an eight flat mansion block known as Dalmeny House, 9 Thurloe Place, London SW7. The four Applicants are all lessees of flats at the subject property and are Ms Paula Marchesi of 4 Dalmeny House, Mrs Molly Bown of 6 Dalmeny House, Countess Angele de Liederkerke of 7 Dalmeny House, and Mr Jenico Preston of Flat 8 Dalmeny House.

3. The Respondent freehold owners are Abacus (Nominees) Limited and Abacus (CI) Limited.

4. At the hearing of the application, all of the lessees save for Mr Preston were represented by Mr Nigel Bown MSc, LDRCS Eng who is the husband of the lessee of Flat 6 Dalmeny House. His father, Lord Gormiston, represented Mr Preston. Ms Conway of Bircham Dyson Bell Solicitors represented the Respondent.

5. It was common ground between the parties that for the years ending 2003 and 2004 the building was managed by Cluttons. For the year ending 2005 the building was managed by the current managing agents South Kensington Estates.

6. **Issues**

The issues in the application changed as accounting documents and invoices were disclosed to the Applicants. However, the years under challenge remained the same, namely those ending 2003 to 2005. At the outset, there was very little common ground between the parties as to the matters in dispute and indeed, rather than narrowing, the issues appeared to expand until on the first day of the hearing at the specific request of the Tribunal, the parties met in order to answer queries

raised by Mr Bown about certain documents that had been disclosed. The meeting resulted in a concession on the part of the Respondent, put in the form of a Schedule, that certain sums were either not claimable or would not be pursued as part of the present application and also a list of outstanding issues was agreed for the Tribunal to determine.

7. The Schedule was prepared by the combined efforts of Ms Strange of Cluttons, the Respondents' Solicitor, Ms Conway, and Mr Bown on behalf of the Applicants. Ms Strange and Mr Bown signed the Schedule. A number of items specified in the accounts over the years were agreed between the parties not to have been chargeable under the terms of the lease. To that extent therefore the overall amount which was initially demanded from the Applicants by way of service charge had been reduced.

8. With regard to the list of issues, the matters which the Tribunal was asked to were as follows -

(1) For what period is interest payable on the arrears of service charge?

(2) Is the charge for removal of asbestos in the store reasonably payable by the Applicants?

(3) Who currently holds the sinking fund and to whom does it belong?

(4) Are the costs of clearing the communal storage area reasonably payable by the Applicants?

(5) Are the charges in respect of Value Added Tax reasonably payable by the Applicants?

(6) Are the costs incurred in the Planned Preventative Maintenance programme reasonably payable by the Applicants?

(7) Are the porterage costs being charged at 100% to the Applicants?

(8) Are the statutory notices issued in respect of both works and services?

(9) Should the Applicants have been shown copies of the Oakleaf Boiler Maintenance and Crown Lifts Service Contracts?

(10) Is the External Painting balancing charge of £1,122.14 payable by the Applicants?

9. **Agreement on Part of the Issues**

The parties were able to reach agreement on some of the above issues on the second day of the hearing. Issue (4) was not proceeded with on the understanding that it was not a service charge issue and would not appear in the accounts. Likewise the Tribunal was informed that issue (5) which related to Value Added Tax would no longer be proceeded with.

10. **Evidence**

In respect of the outstanding issues the Tribunal heard evidence from Mr Tobias Alexander Campbell Anstruther, the Director of South Kensington Estates and Ms Strange of Cluttons on behalf of the Respondent and Mr Bown on behalf of the tenant Applicants.

11. **Interest**

Mr Anstruther told the Tribunal that each of the Applicants was invoiced on account with amounts in accordance with the budget for the anticipated expenditure for the year ended 2005. Where the Applicants had failed to pay the on account sums he contended that it was reasonable for the landlord to charge interest in accordance with rates set out in the leases. He accepted that where a credit was made to an Applicant's account because the budgeted amount had not actually been spent, he would not expect to charge interest on that credited amount. He considered, however, that it was right and proper to charge interest on each and every item of expenditure which was incurred by the landlord and which was reasonably payable by the tenants from the point that the total funds demanded on account exceeded the eventual total value of reasonable costs. In 2005 this point was reached in September. The accounts relied upon include interest at the rate

specified in the leases on any sums demanded but not received from the date of the demand up to this crossover date.

12. He said that there was no reason why the Applicants should not have paid an amount, which they considered reasonable in the circumstances. If, then, the Tribunal considered that they had made an overpayment interest would in return have been payable to them.

13. Mr Bown did not dispute that interest was payable under the terms of the lease. The whole tenor of his argument related to the lack of transparency and mistakes made in the accounts and their late disclosure. The view of the Applicants was that where the landlord had failed to make proper disclosure in the accounts, payment of interest was not reasonable.

14. The Tribunal considered that there was no real dispute between the parties as to the terms of the lease, which made provision for the payment of interest on late service charge payments. The real issue was whether or not in the present circumstances. Although sympathising with some of the arguments advanced by Mr Bown, the Tribunal determined that the Applicants were liable to pay interest because at the end of the day they remained indebted to the landlord, even after the determination of the dispute between them. Thus, interest should be added, on the reasonable sum they were liable to pay. In the case of each Applicant these sums would not be substantial but nevertheless payable since the Respondent legitimately and reasonably sought interest under the terms of the lease. Given the history of the matter and in particular the fact that concessions had been made by the Respondent, the Tribunal concluded that it would be reasonable to add interest from 1 October 2005.

15. **The Sinking Fund**

The details of the sinking fund of £25,171 appeared on page 4 of the accounts. It was being held by Cluttons on behalf of the landlord and

on trust for the benefit of the Applicants. The provision of this information in evidence resolved this issue.

16. **Cost of Removal of Abestos**

This sum did not in fact appear in the accounts and neither was it being pursued. There was no invoice in respect of this sum and it simply appeared in a note from Cluttons and was put at £778 plus VAT. Since the Respondent was not pursuing the sum there was nothing for the Tribunal to determine on this issue and the cost was therefore not recoverable.

17. **Cost of Clearing the Communal Storage Area**

Although this was listed as an issue between the parties, the Respondent made clear that the item did not appear in the 2005 accounts. There was therefore there was nothing for the Tribunal to determine.

18. **Porterage Costs**

Mr Anstruther explained to the Tribunal that porterage services had been provided to the subject property by Mr James 'Skip' Hayes for many years at a cost to the Applicants of some £5000 per annum, which fell well below the market rate. Unfortunately, Mr Hayes was unable to continue and as an interim measure the Respondent arranged for FMR Limited to provide the service, until a permanent contract could be entered into. Mr Anstruther explained that although the lease made provision for the eight flats to pay 85% of the porterage costs they were only being charged 80%.

19. Mr Bown's position on this issue was unclear to the Tribunal although he appeared to be challenging the reasonableness of the costs.

20. The Tribunal considered that the conduct of the Respondent in the circumstances in seeking an interim solution to the problem was reasonable. Although there was an increase in the amount being paid,

that increase was understandable in the light of the fact that the previous service provider was being remunerated at a rate well below market levels. The Respondent was not in fact charging all that it was entitled to charge under the terms of the lease and in the circumstances the porterage costs of £5671.48 for the year ending 2005 were reasonable. In the Tribunal's experience this sum remained well below market cost.

21. **Statutory Notices**

Under this issue there was no general challenge about adherence to the provisions of Section 20 of the Landlord and Tenant Act 1985. The issue appeared only whether or not such a S20 notice should be served in respect of works and services. The Respondent's explained that the provision of such a notice applied to both works and services depending upon their value in accordance with the 1985 Act. There was therefore nothing for the Tribunal to determine since the Applicants did not seek to challenge any particular item on the basis of non-compliance with the statutory provisions.

22. **Oakleaf and Crown Lift Contracts**

Mr Bown raised a question, which did not appear in his original application or in the statement of case which he submitted in May 2006. Mr Anstruther confirmed that if a lessee wished to see these contracts, then the Respondent was happy to provide them. There was a maintenance book in the lift, which was readily available for the Applicants. The Tribunal noted that there was no challenge to the costs of these contracts, save for the boiler maintenance which in the end was not pursued and there was nothing therefore for the Tribunal to determine.

23. **External Painting Balancing Charge**

This item was dated 14 October 2002. It was not included in the accounts for the year ending 24 December 2005 and was not pursued. Therefore, there was nothing for the Tribunal to determine.

24. **Planned Preventative Maintenance**

It is common ground between the parties that when South Kensington Estates took over the management of the subject property they commissioned Cluttons, the former management agents, to undertake a planned preventative maintenance survey of the property at a cost of £2850 in order to identify what works would be necessary to the property in the foreseeable future. The survey was carried out by two of Ms Strange's experienced colleagues, one being a partner in the firm.

25. Mr Bown objected to this survey on the grounds that Cluttons should have in any case provided the same information when handing over to South Kensington Estates. In any event he considered that the costs were unreasonable.

26. Mr Anstruther considered that the complexity of the building and a number of issues in the past made it necessary to have some idea of the likely future expenditure on the building and how best that could be budgeted for.

27. The Tribunal having inspected the building, considered that it was not a straight forward development and that it was important that the Respondent and its new managing agent were aware of what the costs were going to be over the next few years. The sum involved was not an unreasonable figure for the work actually carried out and the seniority and expertise of the persons engaged. Accordingly the Tribunal considered that the costs were reasonable.

28. **Section 20C Landlord and Tenant Act 1985**

Ms Conway argued that the Respondent's costs of this application had exceeded £10,000 although no costs schedule was formally produced to the Tribunal. She argued that costs in that scale had arisen because Mr Bown' case remained unclear to the very end, notwithstanding the information provided by the Respondent. She took the Tribunal through

the extensive correspondence between the parties, the failure of Mr Bown to make clear that a document that he had served in May 2006 was in fact his statement of case and the inconvenience to which the Respondent had been put.

29. Mr Bown argued that there was the late provision of accounts and that, even then, the information provided by the Respondent was unclear. Lord Gormistan concurred and spoke of the difficulties in understanding the basis of the accounts and the sums being claimed.

30. The Tribunal considered that there was merit in the submissions made by both parties. On the one hand, the initial information had been insufficient and indeed it had been necessary for the Applicants through Mr Brown to request more. However, the Tribunal noted that it had been asked to deal a very different set of issues from those originally raised and that some were not in reality questions appropriate at all for these proceedings. The parties themselves during the hearing had achieved much and it is likely that discussions between the parties in the first instance would have resolved many of the issues.

31. The issue for the Tribunal was not whether the Applicants had succeeded and the Respondent had failed or indeed whether the Respondent had succeeded in the application. The issue was whether it was just and equitable to make the order sought at the request of the Applicants.

32. The Tribunal considered that, in the circumstances, the costs should be added to the service charge account but that a reasonable sum would be limited to 40% and should not in any event exceed £4000. Such an order would ensure justice between both parties.

33. **Decision**

Accordingly the Tribunal determined -

(1) The Respondent is entitled to charge interest on the arrears of service charge in accordance with the terms of the lease as from 1 September 2005.

(2) Details of the calculation of the interest shall be provided to each Applicant within 21 days from the date of communication of this decision and the Applicants shall (within 28 days thereafter) have liberty to apply as to that calculation in the event of further dispute.

(3) The total costs of porterage being £5671.48 are reasonable and payable by the Applicants in their respective proportions.

(4) The costs of the planned preventative maintenance survey being £2850 are reasonable and payable by the Applicants.

(5) The Respondents are entitled to add 40% of the costs incurred by them for this application to the service charge account. Such costs should not in any event exceed £4000. Details of the calculation of the Respondents costs shall be provided to each Applicant within 21 days of the date of communication of this decision and the Applicants shall have liberty to apply (within 28 days thereafter) as to the calculation of those costs in the event of further dispute.

Chairman ..... SECCOMBE

Dated 14/9/06