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Residential
Property
TRIBUNAL SERVICE

REF: LON/00BE/LSC/2007/0313

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

LANDLORD & TENANT ACT 1985 SECTIONS 27A AND 20C

PROPERTY:	**FLAT 6, 3, BETHWIN ROAD, LONDON SE5 OYJ**
APPLICANTS:	**(1) MR PETER HOLLAND** **(2) MRS CAROLE HOLLAND**
RESPONDENT	**ABBOTT MANAGEMENT LIMITED**
DATE OF HEARING:	**14th NOVEMBER 2007**
DATE OF DECISION:	**22nd November 2007**
MEMBERS OF TRIBUNAL	**MR S. SHAW LLB (HONS) MCI Arb** **Mr D.D. Banfield FRICS** **Mr D. WILSON**

DECISION

Background

1. This case involves an application for determination of the liability to pay service charges pursuant to Section 27A of the Landlord & Tenant Act 1985 ("the Act"). The application is made by Mr Peter and Mrs Carol Holland ("the Applicants") and is in respect of Flat 6, 3 Bethwin Road, London SE5 OYJ ("the property"). The property is a one bedroom flat in a block of 14 flats, which block was built in 2003. The block was initially owned by the developers (HWD Property Company) and the developers from the outset had engaged the services of the Respondent company as managing agents. However, in approximately February 2004 Abbott Management ("the Respondent") purchased the freehold from the developers and the Respondent is thus the freehold owner and landlord for present purposes. The Applicants purchased the long lease in May 2003 and, so the Tribunal was informed, all the flats in this block are investment properties let out to tenants by the various owners.

2. By application dated 30 July 2007, the Applicants have challenged the service charges for the years 2004, 2005 and 2006. The specific items challenged relate to the quality and degree of cleaning services provided, and matters of security and hygiene. It became clear however during the course of the Hearing, which took place on 14 November 2007, that these specific issues were aspects of alleged management deficiencies. Although the Tribunal will consider these

specific issues to some degree below, it is in essence in the context of management that these issues arise because the actual figures claimed for these services were, in the main, relatively low. The main thrust of the Applicants' case was, in general terms, that the Respondent had failed to respond promptly to complaints raised by them about issues at the property and has generally acted in a dilatory fashion in looking after the property and the legitimate concerns relating to services on the part of the Applicants.

3. Before dealing with the specific complaints, it is appropriate that the Tribunal sets out the position concerning the ownership and management of this property. The hearing on 14 November 2007 was attended by the Applicants in person and Mr Mark Belcher on behalf of the Respondent. The Respondent, so Mr Belcher informed the Tribunal, is the registered freehold owner of this property. It purchased the property, as indicated above, in about February 2004. Mr Belcher is the sole director of that company. Save for one share, which he believes is owned by his wife, he owns the entire shareholding of the company. The Respondent company manages some 40 or so properties and owns the freehold on about 4 of those properties. The Respondent employs 3 people, of whom Mr Belcher is one.

The Hearing

4. The Applicants had prepared a full bundle of documents running to some 226 pages, for the assistance of the Tribunal during the hearing. They explained that they had purchased this flat as an investment, and that although they had lived in the property for a short period of time, it had been let to tenants ever since.

5. Their first item of complaint was that soon after purchase, it became apparent that the lock at the front entrance of the block was inappropriate for the front door. The front door is a heavy oak construction and the lock originally affixed to it was a standard Yale lock or something similar, which would not support the weight of the door and moreover, and perhaps more importantly, enabled the door easily to be kicked in and vandalised by vandals and delinquents in the area. It was also fixed with a closing mechanism which allowed the door to be closed slowly after it had been opened, and which afforded ample opportunity for intruders to enter the building.

6. These matters were raised initially with the developer (see the e-mail of 3rd February 2004 at page 225 in the bundle) and then taken up orally with the Respondent company. However, it was the Applicants' case that nothing was done about this state of affairs until about March 2005, when a better locking system and security mechanism was affixed to the door. In the meantime, the lock was repeatedly repaired but with the same inadequate lock, as a result of

which undesirables repeatedly entered the building, vandalised and left rubbish in the common parts, and generally were a disincentive to anyone considering renting or living in the building.

7. Mr Belcher's response to this allegation was that the Respondent had indeed carried out repairs promptly. He considered there was an issue as to whether or not a better locking device on the door would amount to an improvement rather than a repair and he therefore commissioned a repair to take place some 8 to 10 times, each time installing a similar lock to that which had previously been kicked in by vandals. After about the tenth time he did indeed upgrade the locking system, since when there has been no further complaints from the Applicants.

8. A further complaint of the Applicants was that from approximately August 2005 (see the invoice at page 29 in the bundle) the Respondent had been aware of the presence of cockroaches in one of the flats. The Respondent had indeed commissioned pest control services to deal with that problem but, argued the Applicants, had done so on a piecemeal localised basis. This, so they contended, was inappropriate because eradicating the cockroaches from one flat at a time was only a short term remedy, because the cockroaches would simply move to another flat or other part of the building. The building had to be treated in its entirety. Mr Holland had the Applicants' own flat treated privately, and wrote by letter dated 20 February 2006 to Mr Belcher explaining that they had been advised that it was

futile to deal with the building other than in its entirety. However no action was at that stage taken.

9. By letter dated 24th April 2006, the Respondent was advised by contractors that a full monitoring programme should be carried out in respect of all of the flats in the building. That letter (see page 23 confirms that the company had been engaged to do work at the property at the end of 2005). The Applicants' case was that the full scale treatment (which was apparently effective) did not take place until August 2006. They contended that there had been unnecessary delay between about August 2005 until August 2006 in dealing with this issue. The result of this from their point of view was that they lost a very good tenant in their flat and, although there was no void period, they had, for a period of time, to take a slightly reduced rent because of the conditions.

10. Mr Belcher's response to these allegations was that he is himself not an expert on pest control. The evidence shows that he did indeed respond by engaging contractors and he acted on their advice. The advice to carry out a full monitoring programme did not take place until April 2006 (see page 23). When he received this advice it took a little while to obtain a quotation and he then instructed the works to go ahead, which took place in August 2006.

11. A third specific item of complaint was that cleaning services at the property were of poor standard. Mrs Holland told the Tribunal that whenever she visited the property she would have to take her own cleaner and a vacuum cleaner to assist her in cleaning the common parts which were, so she said, filthy. The carpets were dusty, there were marks on the doors and walls and generally the standard of cleaning was inadequate. She said the position is better now but these matters, together with rubbish in the shrubs outside the building, were all poorly dealt with during the service charge years in dispute. She said that the service provided was worth about one third of what they were paying.

12. Mr Belcher, once again on behalf of the Respondent, said that there is considerable traffic in this building. All the flats are let out and many of the flats have students (perhaps 2 or 3 students per flat) as tenants. This means there is a great deal of wear and tear and ideally he would liked to have cleaners at the property 7 days a week. However he did not think that the cost incurred would be accepted by the owners generally, and therefore in the first year he had commenced with cleaning services 1 day a week. He had increased this to 2 days a week in the second year and then 3 days a week for the last service charge year.

13. He therefore contended that the Respondent had dealt with the position adequately, had not over-charged, and had responded to the needs as and when they arose. In fact, it was unfortunately the case that he had not brought with him

any of the invoices submitted to the Respondent for cleaning services. In 2004 the charge made was £1,753.48, in 2005 £2,400 and in 2006 £2,400. He was not able to explain why, given the apparent increase in services as suggested above, that this had not been reflected in the level of charges, other than to say that presumably the cleaners had not put up their charges, for reasons he could not explain. It is unfortunate that the primary documentation was not available, given that it was directed to be available in the context of the Directions Order given by the Tribunal on 3rd October 2007.

14. In a sense, as mentioned above, all of these allegations sound more appropriately in the context of the management fees charged. The reason for this was that the actual sums for cleaning and general repairs were not, in the scheme of things, especially high. No real purpose would be served by recounting all these charges on a year to year basis in the context of this decision because that issue was not seriously challenged by the Applicants. Their main argument, as mentioned above, was that although matters were eventually remedied in respect of the particular complaints mentioned, each time it took too long and during the delay the property was poorly looked after in the specific respects referred to.

The Findings of the Tribunal

15. The starting point in considering the rights and obligations of the parties generally is of course the lease. In most cases it will prove no more than a formality to

check the provisions of the lease to ensure that, as a preliminary point, the sums being charged are indeed recoverable in principle as a service charge within the context of the lease. In this particular case, the check has proved to be more than a formality, and it is appropriate that the Tribunal sets out the relevant provisions in the lease.

16. At clause 4(4) of the lease (page 44 in the bundle) in the context of the lessee's covenants, it is provided that the lessee will:

> *"Pay the interim charge and the service charge at the time and in the manner provided in the Fourth Schedule hereto ...."*

At clause 5 (also page 44) the lessor covenants with the lessee, amongst other matters:

> *"(J)(i) To employ at the lessor's discretion a firm of managing agents to manage the property and discharge all proper fees salaries charges and expenses payable to such agents or other person who may be managing the property including the cost of computing and collecting the rents in respect of the property or any parts thereof."*

17. In the Fourth Schedule to the lease, which is the schedule dealing with the service charge, various expressions relating to service charge are defined, one of which, namely "Total Expenditure" is defined in the following way,

> *"... means the aggregate of the expenditure incurred and the sums of money set aside (including VAT if any or other tax payable thereon) by the lessor in any accounting period in carrying out its obligations under clause 5(1) and any other costs and expenses reasonably and properly incurred in connection with the building or the property including without prejudice to the generality of the foregoing:*

(a) the cost of employing managing agents surveyors and solicitors;"

18. It will be recalled that clause 5(1) was the clause setting out the lessor's covenants in relation to the building and in the context of which the lessor was entitled to employ at its discretion, a firm of managing agents to manage the property.

19. Reverting to clause 5(1)(J)(i) of the lease (page 47 of the bundle) the lessor accordingly covenants with the lessee to deal with certain matters in relation to the building, the cost of which obligations can be recouped from the lessee in the context of the service charge provision. The provision entitles the lessor to employ, at its discretion, *"a firm of managing agents to manage the property and discharge all proper fees, salaries, charges and expenses payable to such agents or other persons who may be managing the property ..."*

20. In this case there is no firm of managing agents which has been employed to manage the property. The management is carried out by the freeholder owner itself, that is to say the Respondent. The Tribunal was presented with no evidence of any charge actually incurred or fee or expense payable to any such firm at all. All that would appear to have happened in this case is that the Respondent has raised a *"Management Fee, including VAT"* during each service charge year, presumably in some way intended to reflect the time spent by itself on managing the property.

21. However, it does not seem to the Tribunal that this is an entitlement which springs from the lease. The lease entitles the lessor to recoup by way of service charge *"....all proper fees, salaries, charges and expenses payable to such agents or other person as the lessor may in its discretion appoint to deal with the management."* There is no other provision entitling the lessor to make some sort of charge for its own services, if it chooses not to engage such a firm. Moreover, there has in fact, so far as the evidence before the Tribunal is concerned, been no fee, salary, charge or expense paid to anyone (much less a fee upon which VAT could be claimable) in this case.

22. The matter was ventilated with Mr Belcher on behalf of the Respondent. He initially indicated that there was very little he could say about the position other than that there was no prohibition in the lease preventing the raising of such a charge. However it seems to the Tribunal that the mere lack of a prohibition is not sufficient to entitle the charge to be made. As is indicated at paragraph 7.170 of the current edition of Woodfall on Landlord and Tenant:

> *"As a general rule the cost of employing managing agents will not be recoverable by way of service charge unless the lease expressly so provides."*

There are other cases cited in Woodfall where, on an arm's length transaction, a separate entity has been created to carry out the management services in such a way as to enable the cost to be recovered within the terms of the lease. In this case, there are no such two entities, and the Tribunal has concluded that the terms of the lease specifically provide for the recovery of fees, salaries, charges and expenses payable to agents appointed, but not in other circumstances.

23. In a sense, this is therefore both the start and the end of the claim in relation to management charges because, for the reasons indicated, the Tribunal has concluded that the management fee, including VAT, raised for each of these service charge years is not recoverable within the terms of the lease. However, in case it should be necessary to do so, the Tribunal will express, albeit shortly, its view on the evidence, had it been the position contrary to the above finding, that such a fee were indeed recoverable.

24. So far as the allegations of undue delay in dealing with the cockroach infestation are concerned, the Tribunal accepts the evidence of Mr Belcher that he could do no more than act on the advice of specialist contractors engaged to deal with the problem. His evidence was that it was not until receipt of the letter of 24 April 2006 (page 23) that he was advised that wholesale treatment of the building should be carried out and thereafter he acted promptly. The evidence is that the problem was not previously ignored and that contractors were indeed engaged on each occasion to deal with the infestation in the separate flats. Looking at the matter with hindsight, it might have been preferable to carry out a full monitoring programme either immediately or shortly after the problem was discovered in several flats, but on balance the Tribunal does not consider that this alone would merit any particular adjustment to the management fee.

25. The Tribunal has more sympathy with the Applicants in respect of the complaints concerning the inadequate lock at the front entrance. It seems to the Tribunal that any

reasonable managing agent would have concluded, after the lock had been broken on two or three occasions, that some alternative course was necessary. To have allowed the position to continue to the extent of changing the locks 8 to 10 times with either the precisely the same or a similar locking system, would appear to be unreasonable. During that time the property was indeed maltreated by vandals and this could have been avoided.

26. Equally, it would have been fair to allow a certain introductory period for the Respondent to gauge the extent to which cleaning services were required. However this experimentation could have taken place over a much shorter period of time than the 3 years it has taken to establish an adequate level. In the meantime, although the level of charges made has been relatively low, an inadequate service in general terms has been supplied – and once again this could have been avoided with more effective management and speedier action.

27. This having been said, it is clear from the service charge accounts that many other matters have been perfectly adequately dealt with by the Respondent (insurance, general repairs, supply of water, plant maintenance etc). Further, the level of fee charged per unit, in the most recent year ending August 2006 has been some £258.86 inclusive of VAT. This is within the range to be expected for a property of this kind, albeit perhaps marginally higher than the average. All in all, had the fee been recoverable under the terms of the lease, which the Tribunal has concluded it is not, the Tribunal would have

reduced the fee in each year by 25% which, on the figures before the Tribunal, would have amounted to a reduction totalling £141.28.

28. However, for the reasons indicated above, the Tribunal has concluded that the fee is not recoverable under the terms of the lease. The total charge for management fees for these 3 years amounts to £10,369.38. The Applicants' proportionate part of that fee is 5.45% which totals £565.13. The Tribunal therefore concludes that credit should be given to the Applicants in this sum in respect of the three service charge years referred to.

29. The only other matter arising was that the Applicants requested the Tribunal to make a direction under Section 20C of the Act to the effect that none of the costs incurred by the Respondent in the context of this application should be recoverable from them by way of service charge claim in the future. Mr Belcher very fairly indicated that he had no intention of seeking to make such recovery and, for the avoidance of doubt, the Tribunal makes such direction. No other applications for costs were made by either party.

Legal Chairman: S. Shaw S.Shaw.

Dated: 22nd November 2007