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RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL
of the NORTHERN RENT ASSESSMENT PANEL

DECISION AND REASONS

LANDLORD AND TENANT ACT 1985 – SECTIONS 27A & 20C

Property:	96 Langham Court, Mersey Road, Manchester M20 2QA
Applicant:	Ms H O'Brien
Respondent:	Fielden Park Management Limited

THE MEMBERS OF THE TRIBUNAL

Mr J W Holbrook LL.B
Mr M G A Hope BSc FRICS
Mr L P Bottomley M.I.Fire.E., JP

BACKGROUND

1. On 31 May 2007 the Applicant, Ms H O'Brien of 96 Langham Court, Mersey Road, Manchester M20 2QA, applied to the Leasehold Valuation Tribunal ("the Tribunal") under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of her liability to pay service charges in connection with her tenancy of that property. The application related to the service charge period commencing on 1 July 2004 and ending on 30 June 2005 ("the Relevant Period").

2. The Applicant also applied to the Tribunal under section 20C of the 1985 Act for an order preventing the Respondent, Fielden Park Management Limited, from recovering costs incurred in connection with the proceedings before the Tribunal under section 27A as part of the service charge.

3. On 20 June 2007 the Tribunal directed, inter alia, that these applications could proceed by means of a determination without an oral hearing. However, in a letter dated 13 July 2007, the Respondent exercised its right to require an oral

hearing. A hearing therefore took place on 7 September 2007 at the offices of the Northern Rent Assessment Panel, 26 York Street, Manchester M1 4JB. The Applicant appeared in person, and the Respondent was represented by its company secretary: Mr N A Phillips FRICS of W T Gunson & Son, chartered surveyors (currently the managing agents of Langham Court). Both the Applicant and the Respondent had previously made written representations and these had been copied to the parties.

4. The Tribunal did not inspect the property.

OWNERSHIP AND MANAGEMENT OF THE PROPERTY

5. Langham Court is a residential development of 76 flats. The Applicant is the leaseholder of one of those flats, which she holds under a lease ("the Lease") dated 2 December 1983 made between Everbuild Limited (1), the Respondent (2), and the Applicant (3). The Lease was granted for a term of 999 years from 25 March 1979 and reserves a rent of £45.00 per annum. Although the current landlord presumably continues to be entitled to collect the rent, it appears to have no practical involvement in the management of the property, or in the assessment or collection of service charges.

6. The Respondent is a limited company. Each of the leaseholders at Langham Court is a shareholder in the company, and it functions as the management company for the development. It is for this reason that the Respondent is a party to the Lease, and the Eighth Schedule to the Lease contains a number of covenants made by the Respondent in connection with the repair, upkeep and insurance of Langham Court.

7. The Seventh Schedule to the Lease contains covenants entered into by the Applicant, as lessee. These include (at clause 15) a covenant:

> "To keep the Lessor and the [Respondent] indemnified from and against a reasonable proportion of all costs charges and expenses incurred by the Lessor or [Respondent] in carrying out its obligations under the Eighth Schedule hereto and in respect of the management and general expense of the Lessor such proportion to be calculated by reference to the number of Flats erected on the Property."

8. Clauses 16 and 17 of the Seventh Schedule provide a mechanism for making payments in this regard. Clause 16(b) effectively obliges the Applicant to make quarterly payments on account of the costs incurred by the Respondent in complying with the covenants in the Eighth Schedule. The amount of each such payment is expressed as follows:

> "one fourth part of the proportionate amount (as certified in accordance with the provisions of the Eighth Schedule hereto) due from or paid by the

> [Applicant] to the ... [Respondent] ... for the accounting period to which the most recent notice under Clause 12 of the Eighth Schedule relates."

9. Clause 17 then provides for a balancing payment to be made by or to the Applicant in the following terms:

> "Within 21 days after the service by the ... [Respondent] ... on the [Applicant] of a notice in writing stating the proportionate amount (certified in accordance with the provisions of the Eighth Schedule hereto) due from the [Applicant] to the ... [Respondent] ... pursuant to Clause 15 of this Schedule for the accounting period to which the notice relates to pay to the ... [Respondent] ... or to receive from the ... [Respondent] ... the balance by which the said proportionate amount either exceeds or falls short of the total sum paid by the [Applicant] ... during the said period ..."

THE APPLICATION UNDER SECTION 27A OF THE 1985 ACT

10. Section 27A(1) of the 1985 Act provides:

> "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."

11. A "service charge" is defined in section 18 of the 1985 Act as:

> "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 maintenance, and
> (b) the whole or part of which varies or may vary according to the relevant costs."

12. Although clauses 15 to 17 of the Seventh Schedule to the Lease do not describe the payments to be made by the Applicant as "service charges", it is clear that they fall within the meaning of that expression for the purposes of the 1985 Act because they are variable payments which relate to the repair, upkeep and insurance of Langham Court.

13. The Respondent maintains that, in respect of the Relevant Period, the Applicant is liable for the sum of £960.00, being the service charge payable in relation to that period. In contrast, the Applicant seeks a determination that

nothing is payable in this regard, because no sums have become payable in respect of the Relevant Period by virtue of the relevant provisions of the Lease, which have been described above.

14. It is clear from the wording of those provisions that the amounts of the service charge payments which the Applicant is obliged to make, whether under clause 16 or clause 17 of the Seventh Schedule, are those which are "certified in accordance with the provisions of the Eighth Schedule [to the Lease]". It follows that if the amount of a service charge has not been so certified, it is not payable by virtue of those provisions.

15. This application therefore turns on the question of whether the amount claimed by the Respondent as a service charge for the Relevant Period has been properly certified. The Respondent's obligations in this regard are set out in clauses 10, 11 and 12 of the Eighth Schedule to the Lease. Clause 10 requires the Respondent to keep records, and to produce annual accounts of all costs, charges and expenses incurred by it in carrying out its obligations in relation to Langham Court. Clause 11 provides that those accounts are to be audited by a competent chartered accountant who shall:

> "certify the total amount of the said costs charges and expenses (including the audit fee of the said accounts and the provision of what in the opinion of the said Accountant is an adequate reserve fund) for the period to which the account relates and the proportionate amount due from the [Applicant] to the ... [Respondent] pursuant to Clauses 15 and 16 of the Seventh Schedule".

16. Clause 12 requires the Respondent to give written notice to the Applicant within two months of the end of each accounting period of the total amount of the service charge, and of the proportionate amount payable by the Applicant, certified in accordance with clause 11.

17. In evidence, the Respondent produced a copy of its accounts for the Relevant Period. The accounts form part of the "Directors' report and financial statements" of Fielden Park Management Limited for the year ending 30 June 2005. The accounts appear to have been drawn up in order to satisfy the annual reporting requirements of the Companies Acts, and to have been prepared and audited by The Alternative Accountants Limited, a firm of chartered accountants.

18. The Director's report which accompanies the accounts states that the principal activity of the Respondent is "the management and maintenance of the common areas of a block of flats". However, there is no specific mention of Langham Court within the accounts. The accounts do include a list of "administrative expenses", and these comprise items which could reasonably be expected to be included in a service charge. Nevertheless, although it was common ground that the activities of the Respondent were, in fact, limited to the

management of Langham Court, its corporate objects were not so limited at the time in question. Consequently, the items which are included within the accounts of the Respondent company cannot be assumed to relate exclusively to the management of Langham Court in the absence of any express indication of this being the case.

19. There is no accountant's certificate within the accounts of the total amount of the service charge for the Relevant Period, or of the proportionate amount due from each leaseholder. Indeed, it is not possible to discern how the total stated in respect of administrative expenses for this period (£46,694.00) translates into a service charge of £960.00 for each of the 76 leaseholders. Whilst the total service charge can no doubt be explained by, for example, provision for reserve funds as an addition to current expenditure, no explanation is given in the accounts.

20. During the hearing Mr Phillips, on behalf of the Respondent, stated that copies of the company's accounts had been sent to each of the leaseholders of Langham Court (who are also shareholders of the Respondent company) in advance of the Annual General Meeting at which the accounts were approved. The amount of the service charge for the Relevant Period was also confirmed at that meeting. Invoices were then sent out to the individual leaseholders, including the Applicant. Mr Phillips conceded, however, that neither the company's accounts nor the subsequent invoices were accompanied by an accountant's certificate which complied with the provisions of the Eighth Schedule to the Lease. Given this evidence, it is impossible for the Tribunal to reach any conclusion other than that the Respondent failed to comply with those provisions and that, as a consequence, no service charge is payable by the Applicant in respect of the Relevant Period.

21. Although it was not a factor which was relevant to the Tribunal's present determination under section 27A of the 1985 Act, it was noted that the parties to this application had, on two previous occasions, litigated substantially the same issue (in respect of earlier service charge periods), and that on each occasion the Applicant had prevailed. In consequence of those earlier proceedings, the Respondent had taken steps to amend its memorandum and articles of association and to alter its accounting practices. Such changes did not affect the service charge position for the Relevant Period, however. At the hearing, the Tribunal heard evidence from Mr R Wilson, a director of the Respondent and a leaseholder at Langham Court, that he, and other leaseholders at Langham Court, felt a strong sense of injustice that the Applicant was avoiding her financial responsibilities, leaving it to the other leaseholders to shoulder the costs of managing the property. Whilst this view is certainly understandable, it does not detract from the fact that the Applicant is entitled to expect the Respondent to comply with the requirements set out in the Lease – which it has failed to do – and that it is ultimately within the power of the other leaseholders collectively to

require that the management of the property is undertaken in conformity with those requirements.

THE APPLICATION UNDER SECTION 20C OF THE 1985 ACT

22. Subsection (1) of section 20C of the 1985 Act provides:

> "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 or leasehold valuation tribunal ... 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."

23. Section 20C(3) gives the Tribunal power to "make such order on the application as it considers just and equitable in the circumstances".

24. Given that the Tribunal has made the determination which the Applicant sought under section 27A of the 1985 Act, it considers that it would indeed be just and equitable to grant her application under section 20C. There is no reason why the Applicant should effectively be asked to bear a part of the Respondent's costs of unsuccessfully resisting her primary application.

25. Accordingly, the application is granted.

REIMBURSEMENT OF FEES

26. Finally, the Applicant requested that the Tribunal order the reimbursement of the fees which she had paid in respect of these preceedings. Under regulation 9(1) of the Leasehold Valuation Tribunals (Fees)(England) Regulations 2003 the Tribunal has power to require any party to the proccedings to reimburse any other party for the whole or any part of any fees paid by him or her under those Regulations in respect of the proceedings. In the present case the Applicant had paid an initial application fee of £70.00 and an additional hearing fee of £150.00.

27. Although the Tribunal saw no reason to order reimbursement of the initial application fee, it considered it appropriate that the Respondent should reimburse the Applicant for the hearing fee. The Respondent had asked for an oral hearing after the Tribunal had directed that it would be possible to determine the application without one. Having heard the oral submissions of the parties, the Tribunal remained of the view that the matter could have been dealt with justly and expeditiously by means of a consideration of written submissions and documentary evidence alone.

SUMMARY OF DECISION

28. No service charge is payable by the Applicant under her lease of 96 Langham Court in respect of the service charge period commencing on 1 July 2004 and ending on 30 June 2005.

29. The costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs (within the meaning of section 18(2) of the 1985 Act) to be taken into account in determining the amount of any service charge payable by the Applicant.

30. Within 14 days of the date on which this decision is issued to the parties, the Respondent shall reimburse the Applicant for the hearing fee which she has paid in respect of these proceedings in the sum of £150.00.

J W Holbrook

Mr J W Holbrook
Chairman

17 September 2007