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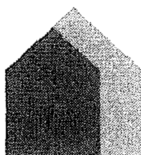

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/OOAJ/LSC/2010/0222

Premises at: Flats 1 and 2, Marcourt Lawns, 14 Hillcrest Road London W5 IHN.

AN APPLICATION UNDER SECTION 27A and SECTION 20C of the LANDLORD AND TENANT ACT 1985 ('the Act')

Applicants	Longmint Limited (landlords)
Representation	Ms E Thompson, solicitor
Respondent	Mr M Glowacki (leaseholder of the two flats)
Representation	Mr E Glowacki (Acting under a power of attorney) (neither he nor the leaseholder attended the hearing)
Hearing Date	26, 27 and 28 July 2010
Inspection Date	No inspection
The Tribunal	James Driscoll, LLM, LLB solicitor (Lawyer chair), Christopher Kane FRICS and Laurelie Walters MA
Decision Date	8 September 2010

THE DECISIONS SUMMARISED

Note: The figures in this summary are based on the respondent owning the leases of two flats in the building with a combined service charge contribution of 11%. These determinations relate to service charges for the years 2001 - 9. The following figures are our determinations for the amounts owing under the two leases held by the respondent.

Major repairs
£52,851.64
Surveyor's charges
£3,907.00
Insurance
£9,717.26
Management fees
£4065.94
Costs of the caretaker
£2,844.46
Office costs
£316.87
Water charges
£297.90
Electricity charges
£1,454.88
Minor repairs
£2,096.95
Cleaning and gardening
£4,473.20
Accountants
£318.06
Miscellaneous charges
£82.06
Excess payment under an insurance claim
£55

TOTAL PAYABLE: £82,481.21 (less £6.62 interest) = £82,474.59

COSTS

1. **No order is made under section 20C of the Act.**
2. **The respondent is to reimburse the applicants in the sum of £500 in respect of the application and hearing fees.**

Introduction

1. In these applications determinations are sought as to the payability of service charges for the years 2001 to 2009. They are made under section 27A of the Act. The applicants are the owners of the freehold and the landlords under the long leases of the 19 flats in the building. We will refer to the applicants as the 'landlords'. The respondent to this application owns two leases in the building at numbers 1 and 2. His interests in this are represented by his father who produced a copy of a power of attorney which he showed the tribunal and the landlord's solicitor at the pre-trial review held earlier this year. We will refer to the respondent as the 'leaseholder'.

2. Another application was made by the landlords under section 168 of the Commonhold and Leasehold Reform Act 2002 seeking a determination that the leaseholder had broken his lease by taking over an area which is between the two flats and treating it as part of his demise. At the pre-trial review the leaseholder's father produced a document which was copied to the landlord's solicitor. This shows that in fact the leaseholder had permission to use that area. The application made under the 2002 Act has been withdrawn. We understand that flats 1 and 2 are used as one set of premises although there are separate leases for the two flats. Under each lease the respondent pays 5.5% of the landlord's costs in managing the building. Putting it another way the leaseholder pays 11% of the landlord's costs in managing, repairing and insuring the building.

3. It is common ground between the parties that the leaseholder has not paid any service charges for the years in question. As a result, and according the landlord's service charge demands, he owes the sum of £83,757.19.

4. The landlord acquired the freehold to the premises in 1995. The premises consists of a block of 19 flats which was constructed in the 1960s. Although it is one block, under one freehold title, there are two separate entrances to two sections of the block and two lifts. There is a covered parking area and separate garages. Each leaseholder has a parking space as part of the demise of their flats. The building has gardens or grounds which are in the common use of the leaseholders. The rear of the building overlooks parkland. On the second day of the hearing we were shown a number of photographs of the building. We did not consider it necessary to carry out an inspection.

5. It was originally the case that one of the 19 flats was occupied by a resident caretaker. But that flat was sold in to Lucy Cummings, a director of the landlord company, in 1995. She allowed the caretaker to continue to use it as a residence for the better performance of his duties. Later (after the caretaker died) it was used as an office during major works to the building which took place between 2002 and 2004. Ms Cummings has since sold the flat. Before doing so, she agreed a variation of the lease with the landlord with the result that the lease of flat 11 now has terms requiring the

leaseholder to contribute to the costs incurred by the landlord in insuring, repairing and managing the premises. But when the lease of flat 11 was originally granted it had no service charge provisions. At that stage the leaseholder was not required to pay towards the landlord's costs as a service charge (as it was occupied by the caretaker). Under the varied lease, the leaseholder of flat 11 has to contribute 4.8% of the total costs. This results in the landlord receiving more than 100% of the costs. No doubt in due course the other leases will be varied to reflect this. (In the absence of agreement an application can be made under Part 3 of the Landlord and Tenant Act 1987 to vary the leases).

The hearing: preliminary

6. The pre-trial review was held on 28 April 2010 when directions were given. Three days were set aside for the hearing and the deliberations of the tribunal. In accordance with these directions the landlord produced, in two volumes, a bundle of documents, containing, amongst other things, a statement of case produced by Ms Thompson, a solicitor employed by the landlord, witness statements (with exhibits) signed by Ms Cummings, a director of the landlord and one signed by Ms Ruth Perry who works for South East Property Services who were recently appointed managing agents for the whole of the landlords portfolio of properties, which we were told numbers some 200 developments.

7. Also included in the bundle was a copy of the lease of flat 1, various office copy entries issued by the Land Registry, various receipts, invoices, accountants certificates, numerous documents relating to the major works, documents also relating to the insurance of the building and a Scott Schedule setting out the details of the sums that make up the charges with columns for the leaseholder's comments and any replies to such comments by the landlords.

8. Unfortunately no documents were filed on behalf of the leaseholder. As a result we have no statement of his case, no witness statements, no comments on the items in the Scott Schedule and, above all else, no explanation as to why he has failed to pay any service charges. We note that at the pre-trial review the leaseholder's father attended and stated that his son was not happy with the way the premises were managed. He also claimed that High Court proceedings have been in existence for many years. That apart he did not offer any explanation for the non-payment of the service charges over such a long period. In particular, neither he or his son, make any specific challenges to the charges. No points have been taken by them on the service of notices, the consultation that preceded the major works, the size of any of the costs of the standard of repairs and maintenance of the building, the car parking or the grounds. Nor has there been any complaint about the quality or the costs of the services.

9. In this context we should record that the leaseholder's father made a written application for an adjournment a week before the start of the hearing. In these letters dated 18 and 20 July 2010, he stated that he had been in negotiations with the landlord and was confident that the matter would soon be settled and suggesting an adjournment of the

scheduled hearing.. His application was rejected by a procedural chair. He was notified of this decision in a letter sent by the case officer. In a later letter which was passed to us before the hearing started he made it clear that he would not attend the hearing. The case officer telephoned him before the hearing started on 26 July 2010 and he said he was not going to attend and that he had already said so in his letter. He said he has received too many papers from Juliet Bellis, it was going to take him a long time to go through them all, and he was not prepared for the hearing. We decided that we had no alternative but to continue the hearing. The landlord was represented by the landlord's in-house solicitor Ms Thompson. Also present on behalf of the landlord was Ms Cummings, a director of the landlord company and Ms Perry who now manages the property.

10. As will be seen none of these representatives were able to produce able to produce all of the receipts for surveyor's fees. By the end of the hearing we assumed that all documents, statements or other submissions had been made. Those advising the landlord did not inform us of any further documents or submissions that they proposed to send. In an unsolicited letter sent by fax and DX dated 12 August 2010 the landlord's solicitors sent the tribunal an invoice for certain fees incurred by the surveyor. (It does not appear that copies were sent to the respondent). However, as the tribunal had already considered and had reached their decisions on this and all the other matters in dispute it could not (and did not) consider this additional material. We should also record that the tribunal received a number of hand-written letters and statements from the respondent's father on 27 August 2010. As these papers were not received until several weeks after the hearing (and after we had considered and reached our decisions) we have not consider this material. We repeat the point that at the pre-trial review the respondent's father told the tribunal that no service charges have been paid. We decided that we should not take account of papers or submissions made by the parties after the conclusion of the hearing (and our deliberations) which had not been considered or tested at the hearing.

11. When we first read the papers we were surprised to find that the leaseholder appears never to have paid a service charge. He has always paid the ground rent, but not the service charges, which at the date of the applications to this tribunal amounted to tens of thousands of pounds. Neither Ms Thompson or Ms Cummings were able to give us any explanation why action has not been taken in relation to these arrears, other than to complain that the former managing agents were at fault in not dealing with these very substantial arrears. We were told that this was one of the factors that led the landlord terminating their contract in 2009 and appointing the new managing agents.

12. Their problems with the former managing agents also affected the hearing of these applications. Ms Thompson and Ms Cummings told us that the previous agents, RMG, had failed to hand over all of the documents relating to the management of this building and the remainder of the landlord's portfolio. This failure has led the landlord to bringing proceedings in the High Court seeking return of the outstanding documents. An interlocutory hearing was scheduled in the High Court for 30 July 2010 and the final

hearing has been listed for November 2010. As a result the following documents are missing and not available at the hearing of these applications to the tribunal:

- the service charge demands served between 2001 and 2009
- the consultation documents that were used in connection with the major works
- other miscellaneous documents

13. We were surprised to be told that there was no written contract between the landlord and RMG. As we pointed out, the RICS Service Charge Residential Management Code (2nd edition, 2009) (and approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993) the opening words in paragraph 2 states that a management contract should be in writing and should state the basis on which the charges are made. The tribunal notes that the 2009 RICS Code became effective on 6th April 2009 and therefore with the exception of the disputed charges in 2009 is not relevant for the previous years. However, the 1997 1st Edition of the Code was effective for the remaining relevant periods and the Tribunal notes that paragraphs 2.5 (duties included within the basic management fee) and 2.6 ("menu of charges outside the scope of the basic fee") mirror the distinctions made in the current Code. No explanation was offered for this omission.

The hearing

14. It was against this background that we started the hearing. We were firmly against the suggestion made by the leaseholder's attorney by letter that the hearing should be adjourned. The landlord was perfectly justified in making these applications where no service charge has been paid for several years with little or no explanation by the leaseholder for the non-payment. As the company solicitor for the past two years, Ms Thompson told us that all the other leaseholders have paid their charges. Ms Cummings confirmed this in her witness statement and in her oral evidence that for the most part the other leaseholders have always paid their service charges. She added that the landlord has to meet the shortfall (some tens of thousands of pounds).

15. Nevertheless, we have found it no easy matter to consider the application in the absence of any specific challenges to service charges by or on behalf of the leaseholder and in the absence also of many documents which according to the landlords are being unlawfully withheld by RMG, the former managing agents.

16. After her opening submissions Ms Thompson called Ms Cummings to give her evidence. She told us that she is a director of the landlord company and that in 1995 she purchased the lease of flat 11 from the company. An oral contract was also concluded at the time of the sale of that flat under which she agreed to allow the then caretaker to continue to reside in the flat. In return she was paid a rent by the landlord representing the rent she would have obtained if the flat was empty and available for rent in the open market. Ms Cummings made enquiries to see what rent she might have obtained and then discounted it to reflect the fact that the caretaker occupied

under a service occupancy. She told us that the landlord was advised to enter into these leasing arrangements for tax reasons.

17. When sadly the caretaker died she did not take up occupation and later she agreed to allow the flat to be used as a work office during the major works programme that later took place. She told us that after consulting the other leaseholders it was agreed that the caretaker would not be replaced. Instead his cleaning and other duties were undertaken by a number of contractors.

The major works

18. She also told us that by in the early 2000s it had become apparent that major works were needed; the flat roof needed attention, as did the concrete pillars, the external balconies and related works. In addition to this, the leaseholders wanted a new security system fitted, and also a new method of receiving television to replace the satellite dishes that individual leaseholders had fitted.

19. Ms Cummings then gave evidence about an agreement which the landlord signed in 2003 with Marcourt Lawns Limited, the residents association and herself. A copy of this agreement was exhibited to her witness statement. The agreement is quite complex and a good deal of this complexity is not relevant to our determinations and so it is unnecessary to cover it fully in this decision. In summary, under that agreement, the landlord, with the support of the leaseholders, agreed to apply for planning permission for the building of two apartments at the top of the building. The profits from the sale of these new apartments would be shared between the parties and would help fund the other major works. On completion Marcourt Lawns Limited, a company, whose members are the leaseholders participating in the venture, would have the right to acquire the freehold to the building.

20. However, the application for planning permission failed and this project could not proceed. It was then decided that the major works should be commissioned. In this connection the landlord engaged the services of Nash Associates, chartered surveyors, to plan the works and to arrange the necessary statutory consultation required by section 20 of the Act (and the regulations made under that measure). She referred us to the detailed specification of the proposed works (copied in the bundle).

21. The consultation took place, she told us, but regrettably the consultation documents are not available as, she says, they are part of the documents which RGM refuse to hand over. She told us that she recalls being consulted and points out that the leaseholders between them nominated three firms from which quotations for the works could be obtained. That point, she argues, supports her contention that the landlord fully observed the statutory consultation procedures. She added that the proposed works had the overwhelming support of the leaseholders.

31. As a result we determine that surveyors fees of £34695.86 (inclusive of VAT) are recoverable. The leaseholder's contribution for the two flats he owns is the sum of £3,907.00.

Insurance costs

32. On the insurance, Ms Thompson told us that Hanover Park the landlord's insurance brokers had arranged insurance for the whole of the landlord's property portfolio. These have now been replaced by a company called Cadogan Keelan Westall. The brokers earn commission for arranging the insurance and dealing with claims. She does not have any more details of the commission. We calculate that the total premiums payable for the years 2001 - 9 is £88,338.73. The cost of the insurance has increased steadily over this period. Ms Thompson suggested that this is the result of the number of claims that have been made.

33. It is generally considered that in law a landlord cannot be required to 'shop around' to obtain the lowest insurance cost available and we accept this view. However, on the basis of our knowledge and experience we consider that the costs of the insurance for these premises is very high indeed. If the leaseholder had produced evidence that adequate cover could be obtained from a different company at a more competitive cost we would have had little hesitation in reducing this item. In the absence of such evidence, and despite our misgivings on the high cost of the insurance cover, we have no rational basis on which to reduce this item. We therefore with reluctance determine that the charges for the insurance are recoverable in full. The leaseholder's share of this for the two flats is the sum of £9,717.26. Ms Perry told us that the managing agents will review the costs of the insurance as part of their role as the recently appointed new managing agents.

Managing agents fees

34. As was noted earlier in this decision the oral contract between the landlord and RMG was terminated in 2009. Various reasons for this were given to us by Ms Cummings and Ms Thompson. They told us that complaints had been received from the leaseholders that RMG were unresponsive when they raised day-to-day matters with them. RMG had also been very slow to deal with the non-payment by this leaseholder of very substantial arrears of service charges. Ms Thompson told us that the company may have suffered as a result of major changes in the corporate group to which it belonged and that there were major changes to the staffing.

35. As is usual in this industry RMG charge on the basis of a charge per unit. It started in 2001 with a unit charge of £200 per flat. This rose steadily to £300 by 2007. The new managing agents, in contrast, charge £200 per unit, the same as RMG did some nine years ago. Having regard to the failure by RMG to attend to the service charge arrears in a timely fashion, the fact that the landlord decided to terminate their contract in 2009 because of their dissatisfaction with their performance, and the fact that the new agents fees are far more competitive, we have decided to reduce the fees for the period up to

2008 by 25%. This produces a figure (inclusive of VAT) of £32,733.11. The leaseholder's share of this for his two flats is the sum of £3,600.64. For 2009 the fee allowed is £4230 of which the leaseholder's share is £465.30 making a total of £4065.94

Costs of the caretaker service

36. Of the issues we had to consider it was the costs of employing a caretaker that appeared to be the most complex. We described the circumstances under which Ms Cummings purchased a lease of flat 11 in paragraphs above. Providing a caretaker is a responsibility of the landlord under clause 3(v) of the lease and the caretaker may be resident or otherwise.

37. Clearly the primary responsibility is to provide a caretaker; the landlord has a discretion whether to arrange for a resident caretaker. In this case the landlord provided a resident caretaker who lived in flat 11. The arrangements changed when a long lease of this flat was granted in consideration of a premium to Ms Cummings in 1995. We described the circumstances in which this lease was granted in paragraphs above.

38. The costs of providing this service are set out in the Scott Schedule. To begin with the costs claimed for renting the flat looked complex. There have been a number of court and tribunal decisions on the issue of what the landlord can charge. One starts with the provisions in the lease. In this case paragraph 2 of the schedule to the lease provides that the costs payable in respect of the caretaker's accommodation are recoverable as service charges.

39. We do not think that this clause would allow a landlord to charge a notional rent, that is the market rent the landlord has lost by not renting the flat. However, we are persuaded that the landlord can include the costs it paid to Ms Cummings for allowing the caretaker to occupy the flat. This is different to a case where the landlord owns the flat and allows the caretaker to occupy it rent free. Here the landlord has sold the flat on a long lease and Ms Cummings has been paid for allowing the caretaker to remain in occupation. This formed part of the costs of providing a caretaker service along with his wages and other payments. We conclude that in principle the costs to the landlord of paying Ms Cummings a sum by way of a rent is a recoverable cost.

40. Such costs must have been reasonably incurred. In the absence of any evidence from the leaseholder we do not think that we can find the rent paid, some £170 per week for a two bed-roomed flat in Ealing, London unreasonable. Nor do the wages paid to the caretaker appear to be unreasonably high. Again we were told that no other leaseholder has questioned these charges. Nor has the respondent leaseholder made specific challenges to these charges. We find that the charges claimed for providing the caretaking services of £2844.46 to be recoverable.

41. Similarly and for the same reasons we have concluded that the costs claimed for using this flat as an office during the period of the major works were reasonably incurred.

Water and electricity charges

42. The leaseholder has made no challenges to the level of these charges. According to Ms Thompson all the other leaseholders have paid them without complaint. Further on the basis of our knowledge we do not consider these charges to be too high. Accordingly the water charges levelled at £297.90 the electricity charges levied at £1,454.88 were reasonably incurred and recoverable in full from the leaseholder.

Minor repairs

43. Minor repairs charges of £2,096.95 were incurred. Having examined the invoices and again in the absence of any challenges and on the basis on our knowledge and experience we consider these charges to be reasonable.

Cleaning and gardening

44. The landlords claim £4,473.20 for these items. As noted earlier in this decision, after consultation with the leaseholders, it was decided that the caretaker would not be replaced. Instead contractors have been employed. These include contractors for the provision of cleaning and gardening services. On the basis of the statements made by Ms Thompson, the invoices, the absence of any challenges to these item we do not consider that these charges are unreasonable.

Accountants

45. We consider that the charges of £318.06 for accountancy services are reasonable.

Miscellaneous charges

46. We do not consider these charges for miscellaneous items charged at £82.06 and £55 for an excess payment under an insurance claim to be excessive.

47. We deal finally with costs. The jurisdiction this tribunal has on costs is very limited. We are sometimes referred to as a 'no-costs' jurisdiction as each party must bear their own costs. To this principle there are two exceptions that are relevant to these applications. First, we have jurisdiction under section 20C of the Act to direct that any costs incurred by the landlord should not be included as a service charge in future service charges. Having found substantively in favour of the landlord and, again, in the absence of any objections made by or on behalf of the leaseholder, we can see no basis on which it would be just and equitable to prevent the landlord from recovering its professional costs as a future service charge. In reaching this conclusion we make no determination as to whether the landlord is entitled to recover legal or other professional costs under the terms of the lease. Further, should the landlord decide to include any

costs occasioned by these applications, such costs must be reasonable and have been reasonably incurred.

48. For the same reasons, and given also the size of the service charge arrears, we determine that the respondent leaseholder should reimburse the landlord for the fee of £500 to the tribunal in making this application and for the hearing.

Signed: ....

James Driscoll LLM, LLB Solicitor (Lawyer Chair)

8 September 2010