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Ref: LON/00AN/LSC/2010/0379

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER ss 27 AND 20C OF THE LANDLORD AND TENANT ACT 1985

Applicant: Mr R Kapoor

Represented by: Mr P Bush of Counsel

Respondents: Daejan Properties Limited (1)
The Freshwater Group of Companies (2)
Rendall & Rittner (Managing Agents) (3)

Represented by: Mr C Fain of Counsel
Instructed by Radcliffes Lebrasseur, Solicitors

Premises: 63, Romney Court, Shepherds Bush Green, London W12 8PY

Hearing date: 11 October 2010

Members of the Leasehold Valuation Tribunal: Mrs F R Burton LLB LLM MA
Mr S Mason BSc FRICS FCIArb
Mr D J Wills ACIB

Date of Tribunal's decision: 3 December 2010

LON/00AN/LSC/2010/0379

63 ROMNEY COURT, LONDON W2 8PY

BACKGROUND

1. This was an application dated 2 June 2010 by the sub-Lessee of the subject flat for determination, pursuant to s 27A of the Landlord and Tenant Act 1985, ("the Act") of liability to pay service charges for the period 25 March 2008 to 25 March 2010, in relation to the subject property, held on an underlease dated 18 January 1961 by which the Respondent's predecessors in title had demised the subject property to the Applicant's predecessors in title. The Applicant holds the subject flat, an apartment in a mansion block of approximately 70 flats and 3 shops, as sub-Lessee under this Lease and under a supplemental Lease dated 25 January 2008, of which the First Respondent (Daejan Properties Limited – "Daejan" - a member of the Freshwater Group of Companies, the Second Respondent) is the (Head) Lessee. The Applicant Lessee also sought an order under s 20C preventing the Lessor (in this case the Head Lessee) from charging any costs of the Tribunal proceedings to the sub-Lessee's service charge account.

2. The original Lease had been for a term of 51 years commencing 29 September 1960, and the term was extended by the supplemental Lease to a term of 141 years from the commencement date of 18 January 1961. By clause 2(2) of the Lease the Applicant sub-Lessee covenanted to pay "1.47% or such other percentage as the Lessor shall reasonably specify from time to time, of the costs and expenses outgoings and matters mentioned in the Fourth Schedule"... "The amount of such contribution ... ascertained and certified by the Lessor's Managing Agents acting as experts not as arbitrators once a year on the sixth day of April in each year" or "...as soon thereafter as may be possible. The sub-Lessee also covenanted to pay " interest at the rate of 4 per centum above the base rate of Barclays Bank plc from time to time on any sums payable ...that are not paid within fourteen days of the due date".

3. The sub-Lessee, having purchased his interest in the subject flat from the

estate of the previous sub-Lessee who had owed some arrears of service charge, had nevertheless not paid the service charges demanded of him, nor the arrears, as a result of which the actual (Head) Lessee (Daejan) had eventually sued in the West London County Court for the principal sum of £3,632.69 and contractual interest, together with statutory interest and costs and court fees. The matter then came before the LVT on 11 October 2010, the Applicant having made a separate application to the Tribunal, which had set the application down for hearing pursuant to Directions dated 29 June 2010, following a PTR on the same date. The Applicant challenged all the service charges demanded during the two relevant years since his purchase, and in particular the arrears which had been added to his account as historically outstanding when he had purchased although he considered that any liability of the previous sub-Lessee had been settled on his taking over the flat.

THE HEARING

4. At the hearing the Applicant Lessee was represented by Mr P Bush of Counsel, instructed by Mr V Mehrotra of Solicitors-in-Law, and the Respondent Landlord (ie the Head Lessee, Daejan, not the *freehold* owner, Treeview Trading Limited) by Mr C Fain of Counsel, instructed by Radcliffes LeBrasseur, Solicitors. The Manager appointed by the LVT, Mr Rittner of Rendall and Rittner, Managing Agents, appeared as a Respondent to the application through his firm, Rendall & Rittner, which had been joined as Third Respondent. Prior to Mr Rittner's appointment the service charges which are the subject of the case were demanded by his predecessor, County Estates.

THE CASE FOR THE APPLICANT LESSEE

5. It was alleged for the Applicant Lessee that the Lessor had not, pursuant to s 21 of the Act, provided any written summaries of the costs incurred for which service charges could be demanded, that the Lessor was in breach of s 21A of the Act as amended by s 153 of the Commonhold and Leasehold Reform Act 2002 in failing to serve summaries of the Lessee's rights and obligations, also in breach of s 22 of the Act in that the Lessor (ie the Head Lessee and/or his managing agents) had not afforded the Lessee the opportunity to inspect accounts, receipts and other documents

supporting the service charge demanded, in respect of which failures the Lessor had committed an offence to which they would be liable to a fine. The Applicant sub-Lessee also contended that the Lessor had also not served demands within 18 months of their being incurred and that any works or services included in the service charges might not be necessary, adequate or appropriately costed.

6. The Applicant sub-Lessee had been provided with the service charge accounts for the years ending 31 March 2009 and 31 March 2010. There was before the Tribunal a voluminous correspondence from the Applicant's solicitor, Mr Mehotra of Solicitors-in-Law, to the Respondent Lessor, the Freshwater Group of Companies and Daejan, from which it appeared that there was no understanding of the relationship of the Lessor as Head Lessee and the sub-Lessee on the one hand and the freeholder on the other, and of the place in the hierarchy of Freshwater Group of Companies and Daejan (on whose behalf the Freshwater Group credit control department sought to collect ground rents and service charges). As a result of this it appeared to the Tribunal that a great deal of time had been wasted in such fruitless correspondence. However it appeared from the Witness Statement of Mrs Vicky Hawkins of the Freshwater Credit Control Department that the requisite notices had been given, interim service charge demands had been duly based on budget estimates, and that the service charges had been demanded in time as between Daejan and the sub-Lessee, Mr Kapoor.

7. Subject to some credits and clarification as to whether the arrears alleged to have been left unpaid by the estate of the previous sub-Lessee from whom the Applicant had bought the subject flat, it appeared that the outstanding service charges had been explained to the sub- Lessee's solicitor repeatedly and in some detail, and that confusion had arisen from the fact that the sub-Lessee's Landlord (Daejan Properties) which had no involvement in management of the building, duly paid their service charges when these were demanded by the Managing Agents, whereupon they then billed the sub-Lessee, all in accordance with the terms of the sub-Lessee's Lease and the Lessor's intermediate Lease held directly of the freeholder.

8. The Tribunal then called Mr Rittner to answer questions in relation to the service charges demanded. Mr Rittner had prepared a Witness Statement dated 7

October 2010 in which he stated that he had prepared the budget estimate for 2010 which he considered appropriate for the age and condition of the building, although it had contained one unusual item, a historic gas bill for £125, 649.09 as the previous agents had only been paying a small standing order of £340 per month, so he had to provide for this although he had negotiated the bill down to £45,000 which was the source of a substantial credit on the Applicant's account as it was a saving of over £80,000. He told us that he had produced accounts soon after he had been appointed Manager by the LVT in February 2009. He had based his budget estimates on his own assessment and on the estimates of his predecessor managing agents, County Estates Management. He added that it had taken a very long time to obtain the information he needed and any documents from County Estates. He had been appointed the LVT's manager on the application of Mrs Lorenzo of Flat 39. The property was a beautiful art deco building and he had set about managing it appropriately and eventually he had obtained a box of invoices some of which related to the subject property. and some relating to others which had been inadvertently paid. He had found invoicing errors amounting to about £10,000 but intended to pursue Treeview Trading in respect of these discrepancies. He added that there had been accusations of fraud but he had not found any such evidence, merely errors cause by "sloppy" accounting.

9. Mr Rittner did not consider that County Estates had done a very good job, he had found unanswered letters as well as overdue tasks and he had not yet turned round the building. He said he was now half way through a 3 year appointment and really needed a budget of approximately £1m (since for example neither internal nor external decorations had been done for at least 10 years) but some Lessees were not at all cooperative. He had been able to do some roof works, and had replaced the boiler but the windows really needed replacing as the existing Crittall fenestration was worn out beyond repair. These were in his opinion a safety risk as well as impacting adversely on the visual impact of the building as the communal windows were the full height of the property. He added that the fire officer had concerns about the necessity for smoke alarms and fire doors, and other fire risks which had required anti smoke paint and closing of gaps, and was concerned about some features which were not compatible with current regulations. He was attempting to achieve a good job by inviting cooperation from the Lessees as there were no adequate funds, such as a

reserve. Mostly the Lessees were not wealthy so that funds were needed since the building had been neglected and had decayed.

10. Mr Rittner continued that the arrears complained of by the Applicant had been brought forward from the previous managing agents, County Estates, who had not done a very good job in relation to the service charges, for example not reading the gas meter for 4 years which was why they had set up an inadequate monthly standing order but it was impossible to check the figures. When he had had the bill for over £140,000 he had not had funds to pay it although it had not been correctly made out and there was no facility to borrow money so that the Lessees had to fund all bills. Eventually he had established that he could not justify the invoice which had been complicated by a change of meter. He had had to take the debt owed into account when he had settled his first budget so had over estimated, but some Lessees were not paying so that had been an additional problem, and as the Applicant had claimed the service charge had fallen in 2010 which was because he had negotiated down the gas bill.

11. Mr Rittner said that he had not yet sued for any unpaid service charges as he had felt it wrong to put pressure on Lessees in hardship until the building had been sorted out. He added that there were no big figures in the budget except insurance and management fees. He had a broker who had taken over the insurance and the freeholder had no involvement. Unfortunately there had been an adverse claims history as there had been a gas explosion and a fire, but the situation was now improving, although pipework would soon have to be replaced. He explained that the management charge was £375 per unit despite there being a lot of work needed and still to do. In answer to questions from the Tribunal Mr Rittner said there was a caretaker, who occupied a service flat, and that he had been in post for 28 or 29 years, being about 63 years of age, so that he knew the block well. He added that what was really needed was a sinking fund so that there was money to upgrade a neglected building. For example, the windows in the common parts needed replacing but this had not been done due to cost and Lessee opposition.

12. Mr Bush then cross examined Mr Rittner about the service charge demands.

Kapoor, were not issued to him in time nor with the appropriate statutory notices, and that the legal costs which were charged as administration charges were also outside the period when they should have been demanded and/or were outside the terms of the Lease. He also queried Freshwater's accounting, stating that there was on page 120 of the hearing bundle a list of various demands that had been made but which had been reduced for various reasons on page 217, which purported to state the up to date position, although the credit was not sufficiently explained. His client had also received a further document on page 122 purporting to show a liability of £3999.79.

THE CASE FOR THE RESPONDENT LESSOR (HEAD LESSEE) AND MANAGING AGENTS

14.. Mr Fain, for the Respondents, submitted that despite giving lengthy evidence, so far the Applicant had not yet shown any prima facie case and, on the basis of what he had seen so far, that he seriously doubted whether it would be proportionate to go into a second day of hearing if the hearing was not finished during the day allocated. He pointed to an invoice from the Freshwater Group of Companies dated 25 September 2009 which specifically referred to the Statutory Summaries of Tenants' Rights and Obligations enclosed and established from Mr Rittner that other invoices had been sent, for example for fire doors in August 2010. Mr Rittner also explained that where a reserve or surplus existed those monies would be used rather than demanding Lessees' further payments, although he also pointed out that it was the Lessees who funded any surplus or reserve as well. He added that he had finally paid a large electricity bill late in 2009 and that this had been certified by the accountant in the accounts.

15. Mr Fain then called Mrs Hawkins, Credit Control Manager of the Freshwater Group of Companies for the area office dealing with Daejan's service charges, who had made a witness statement dated 16 September 2010 in which she described the mechanism for Daejan's claim for service charges from the Applicant sub-Lessee, and produced screen shots showing the original date of issue of the service charge demands, the appropriate service of which Mr Bush had doubted. She also was able to confirm that the statutory notice went out with demands, and that these might be accompanied by any budget figures which were current. Cross

examining her, Mr Bush asked why items from 2007 appeared in the screen shots when his client had not owned the flat then, to which she replied that this was the property record, not necessarily Mr Kapoor's own account. She said that she wrote her own letters and that automatic demands went out from Head Office 3-4 weeks before a payment was due. She pointed to page 123 in the bundle which was a copy of a statement sent to Mr Kapoor at his request and to page 122 which tied up with other items in the bundle, all connecting with the invoice of 25 September 2009 already referred to.

16. Mr Fain pointed to his response to the Applicant's challenge to the service charges, in which he had referred to the terms of the sub-Leases which required the Applicant to pay service charges to Daejan, and reiterated that the service charges were demanded by the managing agents for the freeholder from Daejain who in turn rebilled them to the Applicant as sub-Lessee. He went through the figures which had been demanded and which had represented the appropriate proportion of 1.47% of the total budget estimate, in 2009 of £130,000 and in 2010 of £274, 157. Since the end of the service charge year 2010 on 31 March 2010 2 further quarter's payments had fallen due and had been appropriately billed. In accordance with the Tribunal's Directions notes had been served on the Applicant explaining the calculations of the service charges demanded, including explaining the saga of the excessive gas contract and that the bill as demanded might have to be paid in 2010 (whereas in fact it had been negotiated down as explained by Mr Rittner). The other service charge items were similarly explained under each detailed heading. Mr Fain confirmed that budgeted water rates were £250 for that year not £250,000 as the Applicant had apparently understood. In summary he submitted that the charges were all in accordance with the Lease and reasonable in themselves, while no particularised challenge had been made.

17. Mr Fain said that the Applicant's solicitor's statement was confused and impossible for the First Respondent, Daejan, to respond to, in particular the Applicant's solicitor was mistaken that the service charge demands had not complied with s 21A of the 1985 Act, thus entitling him to with hold service charges, since that provision was not in force save for the making of regulations, which had not been made pursuant to that section, since s 152 of the Commonhold and Leasehold Reform

Act 2002 was not in force. The demands sent had complied with s 21B and all relevant information had been sent to the Applicant. Credits had been given where appropriate, such as in relation to the gas bill estimate when this was settled for a lower sum, and the sums now demanded were accurate, credit having been given for the arrears. He added that the Applicant had chosen to file an irrelevant Defence and Counterclaim in the County Court to Daejan's claim for payment of the outstanding service charges, and had instead applied to the LVT, having then obtained a stay of the County Court proceedings by the parties' agreement while the LVT proceedings took place. He said that it was clear from Mrs Hawkins' evidence that systems were in place for appropriate demand of service charges, and the only slight complication was that as the Applicant was a sub-Lessee the interim service charges demanded by the Managing Agents half yearly had to be replicated by Daejan as Head Lessee in their demands to Mr Kapoor which were sent quarterly. The systems showed that the demands were sent out by Daejan and it was more likely than not that they had been received, but in any event Mr Mehotra had no proof that they had not been received, although it was appreciated that the Applicant did not live at the subject property. Daejan owned a large number of properties and it was therefore unlikely that they would not have suitable systems. He also submitted that it was clear that the demands had been received if one read the correspondence, as the Applicant had admitted they had been but demanded more explanations. He submitted that the appropriate rubric was on the demands but if it was seriously contended that it had not been these could alwaysbe sent again. He added that Rendall and Rittner were now demanding a reserve fund contribution from Daejan but Daejan was not yet demanding that from the sub-Lessee. He therefore sought a determination that the service charges were duly payable, were reasonable and reasonably incurred.

18. In relation to costs, Mr Fain said that his Respondent clients intended to seek their costs not through s 20C of the Act but through clause 2(6) of the Lease as an administration charge. He submitted that Daejan had in fact not done anything wrongly in demanding their service charges and Mr Rittner's evidence had made clear how the service charge system worked in relation to the sub-Lessee.

FINAL SUBMISSIONS

19. Mr Fain said that he had no further final submissions to make as he had covered his client's case in his earlier evidence and submissions.

20. Mr Bush submitted that the Applicant had been obliged to come to the LVT as he had received a service charge bill for over £7,000 with no explanations despite corresponding with Freshwater and Rendall & Rittner. He claimed that the Applicant had been charged service charges "on the whim of the Landlord" and after Rendall & Rittner had been appointed it appeared that any requests for information were disappearing into a black hole. Credits had been applied at a very late stage, and no one had come forward earlier to explain. He submitted that the documentation that had been produced at the hearing had only been provided at this late stage because of the litigation.

DECISION

21. The Tribunal determines that the up to date invoice at page 217 of the hearing bundle reflects the true position of the Applicant sub-Lessee's statement of account, in accordance with the calculations on pages 203 to 205 of the hearing bundle, subject to the deletion of the legal costs of £1,550.31 agreed by the Respondents and the gas refund of £2,115.92. This makes a total of £3,503.54. On account quarterly interim charges for the year 2010, based on the 2010-2011 budget estimates showed all relevant credits and a figure owed as of the date of the hearing of £3,503,54 with the credits set out above, and a further 2 quarters to pay up to 31 March 2011. Nevertheless, although this may be explained by the immediate past history of the block, all the demands for the years to March 2009 and March 2010 have been based on estimated figures and no adjustments have been made for actual expenditure in these years. Moreover the unaudited accounts for 2010 were only signed on 23 September 2010. Page 26 of the hearing bundle (blue covered file) gives the estimated figures at the top and the actual costs at the bottom making clear that the adjustments will need to be made. Further, there is no record of any calculation for the gas refund of £2,115.92.

22. It does not surprise the Tribunal that the Applicant sub-Lessee had difficulty

in understanding the demands without the explanation and calculations on pages 203 to 205 of the hearing bundle it would have been difficult if not impossible. Nor has it been suggested, either in the bundles or at the hearing, that such a detailed explanation had previously been supplied to the Applicant sub-Lessee. Indeed, the Respondents, in particular Daejan and Freshwater who deal with their service charge demands, have not been very helpful in this somewhat complicated situation although it is hoped that now Mr Rittner is managing the block, (now he has assessed its needs and has begun to produce his own budget estimates based on his findings, and including the resolution of the previously neglected gas liability) that both management and accounting will improve.

23. The Tribunal determines that the service charges as demanded for the 2 years in dispute are reasonable and reasonably incurred subject to the adjustments noted.

Chairman.....

Date.....3 December 2010