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RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985, AS AMENDED – SECTIONS 27A AND 20C

REFERENCE: LON/OOAW/LSC/2010/0010

Property: **Flat 46C Penywern Road, London, SW5 9SX**

Applicant: **Mr G B Gabbini**

Respondent: **Iron Fort Ltd.**

Appearances: **Mr G B Gabbini**

For the Applicant

Mr C Brewen of Counsel
Mr S Lum, Brandenbergh Management Ltd
Mr V Vadivilu, Brandenbergh Management Ltd.

For the Respondent

Date of hearing: **11 March 2010**

Date of Tribunal's Decision: **24 March 2010**

Members of the Tribunal **Mrs J S L Goulden JP**
Mrs S F Redmond BSc (Econ) MRICS

REFERENCE: LON/00AW/LSC/2010/0010

PROPERTY: 46C PENYWERN ROAD, LONDON SW5 9SX

Background

1.The Tribunal was dealing with the following applications dated 5 January 2010 which were received by the Tribunal on the same date.

(a) an application under S27A of the Landlord and Tenant Act 1985, as amended ("the Act") 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

(b) an application for limitation of landlord's costs of proceedings before the Tribunal under S20C of the Act.

2. The application relates to two adjacent houses, 46 and 48 Penywern Road London SW5 9SX ("the property"). In the Respondent's statement of case it was stated that the property was Victorian and had been converted at some time into 53 units between the two houses forming the property. The property had two separate entrances and the Applicant accessed his flat through the entrance to No.48. The parties did not consider that an inspection of the property would be of assistance to the Tribunal and the Tribunal was of the view that this would be a disproportionate burden on the public purse.

3.The Tribunal was advised that there were three long lessees at the property, with two in No.46 (being the garden and basement flats) and one in No,48 (being the basement flat). The remainder of the property comprised studio flats let on Assured Shorthold tenancies, with 24 in No.46 and 25 in No. 48. In addition, there was one protected tenant in No.48. There were also ten shared shower rooms with five in each building and one shared laundry room (comprising two washing machines and two dryers) on the first floor of No.48. In addition there was a waste or bin room, also in No.48

4.The Applicant is the lessee of Flat 46C at the property. His lease, a copy of which was provided to the Tribunal is dated 27 October 2006 and made between the Respondent (1) and the Applicant (2) and is for a term of 125 years from 15 March 2006 at the rents and subject to the terms and conditions therein contained. The Tribunal was advised that the three residential leases were in essentially the same form. The Respondent is Iron Fort Ltd and its managing agents are Brandenbergh Management Ltd.

5. The service charge year runs from 1 April to 31 March in each year. The service charge years in dispute are 2007, 2008 and 2009.

Hearing

6. The hearing took place on 11 March 2010. The Applicant, Mr G B Gabbini appeared in person and was unrepresented. The Respondent company, Iron Fort Ltd., was represented by Mr C Brewen of Counsel. Evidence for the Respondent was provided by Mr S Lum ACA, Financial Controller, and Mr V Vadivilu, Property Manager, both of Brandenbergh Management Ltd., the Respondent's managing agents.

7.The Applicant was advised that the Tribunal has no jurisdiction in respect of ground rent, an issue which was raised in the application. It was also explained that the Applicant's complaint as to his apportionment was not covered in the S27A application at present before the Tribunal.

8. . The issues in dispute which remain to be determined by the Tribunal are as follows:-

- S20B of the Act
- Communal cleaning (including cleaning materials)
- Rubbish collection
- Limitation of landlord's costs of proceedings
- Reimbursement of fees

9. The burden is on the Applicant to prove his case with such relevant evidence as is sufficient to persuade the Tribunal of the merits of his arguments. The Tribunal is not permitted to take into account the personal circumstances of the parties when making its decision. It should also be pointed out that the absence of invoices in themselves is no bar to the Tribunal finding that costs had been reasonably incurred.

10. The contract between the parties is the lease between them and both sides are bound by the contractual terms contained therein.

11. The salient points of the evidence presented, and the Tribunal's determination, is given under each head, but the Tribunal considers that it might be helpful to the parties if it sets out the basis on which its considerations are made.

12.The Tribunal has to decide not whether the cost of any particular service charge item is necessarily the cheapest available or the most reasonable, but whether the charge that was made was **"reasonably incurred"** by the landlord i.e. was the action taken in incurring the costs and also the amount of those costs both reasonable.

13.The difference in the words "reasonable" and "reasonably incurred" was set out in the Lands Tribunal case of **Forcelux Ltd -v- Sweetman and Parker (8 May 2001)** in which it was stated, inter alia,

> *"....there are, in my judgment, two distinctly separate matters I have to consider. Firstly the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged*

was reasonable in the light of that evidence. This second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market. It has to be a question of degree...."

S20B of the Act

14. Mr Gabbini said that he should not be liable for service charges prior to February 2008 and in his statement of case, he said *"the first I saw of any invoice relating to the service charge was when they arrived with the solicitors letter dated 14 July 2009. I believe this was the first time the invoices had been issued. This is based on:-*
(a) There is no proof of any delivery on an earlier date.
(b) The Respondent has demonstrated the same lack of timing with regard to invoices and notices for ground rent none of which have been issued for the years in question. If the Respondent cannot raise invoices on time for ground rent, then why would they for the service charge"

15.S20B of the Act states:-

"If any of the relevant costs taken into account in determining the amount of any service charges were incurred more than 18 months before a demand for payment of the service charge is served on the tenant then (subject to sub section (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred

(2) Sub section (1) shall not apply if within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his Lease to contribute to them by the payment of a service charge"

16.The Tribunal also considered the definitions set out in S 18 which provides as follows:-

"(1) In the following provisions of this Act "service charge" means an amount payable by the tenant of a dwelling as part of or in addition to the rent

- **(a) which is payable, directly or indirectly, for services, repairs, maintenance or improvements or insurance or the landlord's cost of management, and**
- **(b) the whole or part of which varies or may vary according to the relevant costs.**

(2)The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3)For this purpose –
(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or an earlier or later period"

17.Costs are incurred when the liability arises. The letter of 14 July 2009 from Teacher Stern, the Respondent's solicitors had referred to records kept by the managing agents showing the amount outstanding *"despite demand for payment having been made"*. Although correspondence was submitted on behalf of the Respondent in support, neither Mr Lum nor Mr Vadivilu had brought their working files to the hearing and no evidence was produced to the Tribunal that previous demands had been made. On the other hand, the Tribunal has had sight of an email from Mr Gabbini to the Respondent's solicitors dated 24 July 2009. This stated inter alia *"I am totally surprised by this letter as I have never received any previous correspondence or invoices relating to these charges.....such a bill coming totally out of the blue needs some consideration"*

18. The Tribunal has not been persuaded by the Respondent's arguments under this head and determines that, for the service charge year 1 April to 31 March 2007, this is caught under S20B of the Act and no service charges are payable by the Applicant for that year since they are out of time.

Communal cleaning (including cleaning materials)

19. The global sums under this head were £7,669.21 (2007) £9,504.75 (2008) and £12,346.28 (2009). As stated above, the 2007 service charge has been disallowed and will not be considered further by the Tribunal. In respect of cleaning materials (which were included within the global sums for the two years under consideration) that for the year 2007/2008 was £503.73 and for the year 2008/2009 was £1072.21.

20. The Applicant's challenge was that there had been a 75% increase in two years which was unreasonable, and he had not been provided with a cleaning specification in order for him to understand what duties were to be carried out. There had been no justification for the increase of cleaning to 6 hours a day 6 days a week ie from 25 to 36 hours per week. He suggested a reduction of 40-50%. He also considered that the receipts indicated a lack of cost control.

21.Evidence for the Respondent was provided by Mr S Lum, Financial Controller, Brandenbergh Management Ltd. He said that the building was now being cleaned 6 hours every day (3 hours for each part of the property). There was no cleaning contract and the cleaners were employees of the managing agents. In 2007, cleaning was for 5 hours per day 5 hours a week, and this increased to 6 days a week in 2008. Mr Lumm said that 2 to 2 ½ hours was spent removing rubbish and rubbish bags from the common parts to the waste/bin room and cleaning the room, 2 hours was spent cleaning and vacuuming the hallways, staircases and entrances and basements and 1½ to 2 hours was spent cleaning other communal areas, including the laundry room and the communal shower rooms/wcs.

22.Evidence for the Respondent was also provided by Mr V Vadivilu, Property Manager, Brandenbergh Management Ltd. for whom he was employed, although he worked from home. He said that there had been a rise in cleaning costs and there had

been rodent infestation affecting the whole street. The council had refused to go into the bin room due to the infestation and now the cleaners had to take the bins out to the street for them. The areas now had to be washed and disinfected more often. In addition the cost of cleaning items had increased. Mr Vadivilu set out the duties carried out by the cleaners. Any complaints as to cleaning were to be made to the cleaning supervisor, but he could not say how often the supervisor checked the cleaning.Mr Vadivilu said that he purchased cleaning items as and when the cleaners indicated that they were required.

23.The property is a house in multiple occupation ("HMO"). The cleaning of such a property, with communal areas such as ten shared shower rooms and a laundry room is considered to be more onerous than that normally associated with a property converted into self contained flats on long leases. More people generate more rubbish. There are only three long lessees in this building. During evidence on the receipts for cleaning materials, Mr Lum suggested that the studio flats were cleaned when tenants left, although this was denied by Mr Vadivilu. Subsequently, Mr Lum confirmed that cleaning of empty flats is included in maintenance fees charged to the landlord.

24.Although, as stated in paragraph 9 above, absence of invoices do not necessarily mean that costs have been unreasonably incurred, the Tribunal has considered the invoices produced. Some of these do not appear to be limited to the cleaning of common parts for which the Applicant is liable to contribute eg bathroom and kitchen cleaners, oven cleaner, expanding foam filler, pan scourers, steel wool and a mattress for a double bed.

25.In the circumstances of this case and in view of the paucity of evidence produced on behalf of the Respondent the Tribunal, in using a broad brush approach, reduces the amounts claimed for cleaning materials by one third and determines that, in respect of cleaning materials, the sums of £332.46 (2008) and £707.66 (2009) are relevant and reasonably incurred and properly chargeable to the service charge account.

26. In respect of the charges for cleaning, in the view of the Tribunal, even allowing for the need to keep the shared shower rooms clean and dealing with the rubbish for this number of tenants, an allowance of 5 hours per day in 2008 and 6 hours per day in 2009 for 6 days a week is considered to be excessive. Prior to the rodent infestation, the building was cleaned for 5 hours per day 5 days per week. The Tribunal finds the full additional day to deal with rubbish clearance is unreasonable. The Tribunal reduces the standard daily cleaning hours to 4 hours per day to include the additional rubbish clearance and allos an additional hour for rubbish clearance on day 6. Accordingly 21 hours in total are allowed per week. Again, due to the lack of detailed evidence on behalf of the Respondent, the Tribunal used a broad brush approach and applying the resulting pro rata reduction of 21/30 in 2008 and 21/36 in 2009, the Tribunal determines that, in respect of cleaning, the sum of £6,653.33 (2008) and £8,642.40 (2009) are relevant and reasonably incurred and properly chargeable to the service charge account.

Rubbish collection

27.The global sums under this head were £2,979.02 (2007) £2,594.24 (2008, net of cleaning materials) and £2,174.67 (2009, net of cleaning materials). As stated above, the 2007 service charge has been disallowed and will not be considered further by the Tribunal.

28.The Applicant's challenge was that he saw no reason why he should be expected to contribute to the cost of a contract for refuse collection when this should be covered by council tax. In addition, he had not been notified of this and had not agreed to the same.

29. In Mr Vadivilu's statement, he said *"rubbish bags are placed by the residents in the building and the cleaners into the waste collection room regularly. The local council provides 2 free rubbish collections from the building each week, 4 additional collections are required which are provided by the council at an additional cost..... ....I have been notified by other properties located nearby to the building that some of these properties have suffered from pest control issues which is a problem in the area. Without these additional collections there is a concern that the accumulation of rubbish would not only make the building appear untidy but may also contribute towards attracting pests to the building. Therefore the additional collections are to avoid pest control issues and excessive accumulation of rubbish which may lead to a smell of rubbish at the building which is undesirable".*

30. The landlord does not have to discuss or obtain agreement from tenants in respect of rubbish collection in these circumstances. The Tribunal accepts that the number of units at the property may well mean that two rubbish collections a week may not suffice.

31.The Tribunal determines that, in respect of rubbish collection, the sums of £2,594.24 (2008) and £2,174.67 (2009) are relevant and reasonable incurred and properly chargeable to the service charge account.

Limitation of landlord's costs of proceedings

32.Mr Gabbini said that he had sent numerous letters and it had been difficult to obtain answers to his queries. It had taken him a long time to get to this point and no invoices had been received until 2009. He said *"if they had given me the information we wouldn't be here. I tried to reach a compromise, but I thought what they were asking was unreasonable"*

33.Mr Brewin handed to the Tribunal a schedule of costs to be placed on the service charge account and said that these were solicitors' and counsel's fees. Such fees totalled £3,755.30. Mr Brewin referred to the clause in the lease on which he intended to rely and said that the Respondent had tried to resolve the matter and explain details which had been troubling the Applicant. He handed in a clip of correspondence in support. He said that the costs were reasonable and no managing agents' fees had been included.

34.S20C of the Act states:-

"(1) 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, or the Lands Tribunal, or in connection with arbitration proceedings, 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.

(2) The application shall be made;

- **(a) in the case of court proceedings, to the court before the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;**
- **(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;**
- **(c) in the case of proceedings before the Lands Tribunal, to the tribunal.**
- **(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.**

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

35.Mr Brewin had relied on Clause 6 (g) (ii) of the lease which stated:

"to employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building and the recovery of Ground Rents Insurance Premiums and any Service or other Charge"

36.In the view of this Tribunal, the clause referred to above is wide enough to include legal costs in connection with proceedings before the Tribunal. The question for the Tribunal is whether it is reasonable to allow the Respondent to do so.

37.In applications of this nature, the Tribunal endeavours to view the matter as a whole including, but not limited to, the degree of success, the conduct of the parties and as to whether, in the Tribunal's opinion, resolution could or might have been possible with goodwill on both sides.

38.The Respondent has, in the main, been unsuccessful. The Tribunal does not feel that the Applicant should be burdened with the consequence of that lack of success.

39.The Tribunal determines that it is just and equitable that the costs incurred by the Applicant in connection with proceedings before this Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable.

Reimbursement of application and/or hearing fees

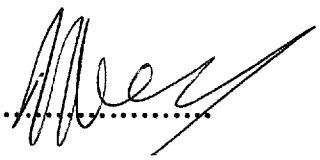
40.Mr Gabbini requested that the Tribunal consider making an order for the Respondent to reimburse to him the application fee of £100 and the hearing fee of £150. The arguments from both sides were as for the application under S20C of the Act.

41.The Tribunal considered whether to exercise its discretion under Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003.

42.The Tribunal acknowledges that both sides may have incurred costs which are irrecoverable. However, it is felt that, in the particular circumstances of this case, to make an order for the Respondent to reimburse any part of the application and/or hearing fees would be punitive.

43.The Tribunal does not intend to exercise its discretion under this head and declines to make an order for reimbursement by the Respondent to the Applicant of the application and/or hearing fees or any part thereof.

The Tribunal's determinations as to service charges are binding on the parties and may be enforced through the county courts if service charges determined as payable remain unpaid.

CHAIRMAN..... 

DATE.....**24 ...March.....2010**.....