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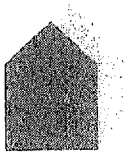

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

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

REF: LON/00AW/LSC/2010/0351

PROPERTY: FLAT 5, 1 LADBROOK SQUARE, LONDON W11 3LX.

Appellant	MRS HONOR KAUFMANN	
Respondents	(1)	ONE LADBROOK SQUARE LIMITED (also Cross-Applicant)
	(2)	MR MILES THOMAS (Flat 1)
	(3)	MS MARCELLA CASATI (Flat 2)
	(4)	MR GUY HARRISON (Flat 3)
	(5)	MS ANN FORSYTH (Flat 4)
	(6)	MRS. H. KAUFMANN (Flat 5)

Appearances

Mrs H. Kaufmann
Miss Reeve (Assistant to Mrs Kaufmann)

For the Appellant

Mr. M. Anastasis (Symon Smith & Partners – Managing Agents)
Mr M. Thomas (Flat 1)

For the Respondent

Date of Application	17th April 2010
Date of Cross Application	24th June 2010
Date of Pre-Trial Review and Directions	16th June 2010
Date of Hearing	13th September 2010
Date of Decision	29th October 2010

Members of Tribunal Mr S Shaw LLB (Hons) MCI Arb
M. Cartwright JP FRICS
L. Packer

DECISION

Introduction

1. This case involves an application by Mrs Honor Kaufmann ("The Applicant") in respect of Flat 5, 1 Ladbrook Square, London W11 3LX ("the Property"). The application is for a determination of the liability to pay and reasonableness of certain service charges levied in respect of the Property. In fact, the application is not so much to challenge specific service charges in terms of their value for money or standard of work. The real issue in this case is as to whether or not the basis upon which the service charges are calculated is itself reasonable and in compliance with the terms of the governing lease.

2. The Property forms part of an Edwardian house which has been converted into five flats. There is a children's nursery on the ground and first floor, which is not directly relevant to this application. The freehold is owned by One Ladbrook Square Limited, a company of which the five leaseholders are shareholders. Also at different times different leaseholders have acted as directors of the Respondent. As a result of the desire, (in the light of the nature of the application) to have all parties who might be affected by the order, participating in this matter, the freehold owning company, One Ladbrook Square Limited ("the Respondent") has also issued a cross-application, essentially asking for the same matter to be determined and joining each of the leaseholders as Respondents. For ease of reference, Mrs Kaufmann will be referred to as "the Applicant" and the landlord company as "the Respondent".

The Applicant's Case

3. The thrust of the Applicant's case, and her evidence before the Tribunal, is that she has lived at the property for 17 years. Until 2008, the service charges had always been calculated on the basis that charges other than for insurance and external repairs were distributed equally between the five flat-owners. Insurance and external repairs were distributed on the basis of the internal square footage of each flat, which resulted in an apportionment of 14, 19, 16, 18 and 34% for Flats 1 to 5 respectively.

4. That arrangement changed in 2008 when a decision was taken by the Respondents that from 2009 onwards, all service charges would be apportioned in the same way as the insurance and external repairs and in the percentages referred to above. The result of that decision was that from having to pay one fifth or 20% of the other service charges, the Applicant's contribution moved up to 34%. Although she has a larger flat than the other owners, she contends that the size of her flat is irrelevant to the benefit she gets from cleaning and works carried out to the communal parts, and that these other charges should be apportioned on an equal basis, given that the benefit derived is not referable to the size of the respective flats. She describes the change as "grossly unfair". She told the Tribunal that she felt that four people were benefiting from this change and one was being penalised – that is to say herself. She says that the pre-existing arrangements were established in 1988 and there was no reason to change the system, and every reason to retain it, it being the most fair.

5. A further point has been taken by solicitors acting on the Applicant's behalf in correspondence. They challenge the change, not so much on the basis of that contended for by the Applicant herself, but on the basis that the decision taken in 2008 was not in accordance with the Respondent's Memorandum and Articles of Association nor, by extension, the lease.

The Respondents' Case

6. Mr Anastasis is a property manager employed by Messrs. Symon Smith & Partners, which is the management company appointed by the Respondents. It was so appointed in April/May 2008. He essentially contends that the decision to alter the system was one which was entirely open to the Respondent company in accordance with the terms of the lease and, moreover, the decision was either validly executed in the first place or was alternatively undoubtedly formalised and validated by a meeting and resolution which took place on 3rd March 2010 as evidenced in the minutes of the Respondents at pages 130 and 131 in the hearing bundle.

Analysis and Conclusion of the Tribunal

7. It seems to the Tribunal that the two issues in this case can be crystallised in the following manner:

   (i) Was the decision to change the manner in which the service charges are calculated to the proportions referred to above, a decision which in principle the Respondent was entitled to take under the terms of the lease?

   (ii) If the answer to this question is "Yes" was the decision in fact formally and correctly executed so as to be enforceable within the terms of the lease?

   The Tribunal will deal with these matters in turn.

8. In respect of the first question, the Respondent's lease is dated 1st July 1988 and is for a term of 999 years from 25th March 1988. Clause 2 sets out the tenants' covenants, and clause 2.7 contains an obligation on the part of the tenant:

> *"... at all times during the said term save insofar as such items are or become the responsibility of the local or public authority to pay and contribute a reasonable proportion as defined from time to time by the landlord of the expenses of repairing maintaining managing supporting rebuilding and cleansing the said building and all structures on the estate ..."*

9. Further, at clause 9 of the lease it is provided that:

> *"The tenant hereby covenants with the manager and as a separate further covenant with the landlord that during the subsistence of the said term he will pay to the manager such sum or sums of money as may be determined from time to time by the directors in accordance with the manager's articles to ensure that each member of the manager paying the said sum or sums the aggregate sum received by the manager shall equal the aggregate amount reasonably required to be expended by the manager and the amount of any reserve or reserves reasonably required by it in connection with the performance of its obligations ..."*

10. It should be mentioned that this is a tripartite lease containing provisions relating to the landlord, the manager and the tenant.

11. Accordingly, in the view of this Tribunal, the lease contains two clear provisions investing the landlord and the manager with a broad discretion to fix and define the proportions in which the expenses are to be contributed by the tenant. In this case, albeit contrary to previous practice, the decision has been taken by the Respondent, as landlord, to calculate the contributions by reference to the floor area of the composite flats. As observed in an earlier decision of this Tribunal dated 4 September 2006 and concerning this property:

> *"There is no perfect mechanism for apportioning service charges and expenditure between contributing lessees. Certainly 'reasonable' does not equate to 'most reasonable'. Most, if not all, of the mechanisms described above would generally be considered reasonable."*

12. The methods described above in that decision included the familiar method of calculation by reference to the internal floor areas of the flat. The Tribunal has some sympathy with the Applicant in that this method may operate fairly in respect of the external repairs and insurance but less equitably in relation to cleaning of the common parts for example, for the reasons she advances. However it seems to the Tribunal that it is impossible to say that the method adopted, in respect of which a wide discretion is granted by the lease, is in itself an inherently unreasonable method, and it seems to the Tribunal that the terms of the lease entered into by the Applicant entitle the Respondent to exercise its discretion in this way. Whilst one can understand the Applicant asking why there should be any departure from a well-established practice, the provisions of clause 2.7 referred to above themselves signal the possibility of change by use of the words: *"a reasonable proportion as defined from time to time..."* The first question is therefore answered in favour of the Respondent.

13. So far as the second question is concerned, it appears not to be in dispute between the parties that the landlord, being a corporate body, is required to make decisions in a manner complying with its Memorandum and Articles of Association. The decision was initially taken on the basis of an exchange of opinions or votes obtained in the context of an email exchange included within the hearing bundle. The Tribunal finds that that "sounding out" of the relevant parties by email did not constitute the calling and holding of a proper company

meeting sufficient to comply with the Memorandum and Articles of Association of the Respondent and, insofar as incorporated therein, the provisions of the Companies Act 1985 as amended. The email exchange appeared to culminate in the email dated 24th November 2008 appearing at pages 123 to 124 of the hearing bundle, following enquiries made of all the leaseholders. That decision would, had it been valid, have governed the position for the service charge year 2008/9.

14. When the formal point was taken by solicitors acting for the Applicant by letter dated 17th February 2010, a formal meeting was indeed called for and held on 3rd March 2010 and a resolution by majority was carried to the effect that the method should indeed be changed in the manner suggested in that earlier email exchange. No basis was put forward at the hearing for suggesting that that could be of retrospective effect and it therefore would govern the service charge year in which it was made and subsequent years unless and until changed by further resolution. The service charge year runs from 1st April to 31st March and thus the decision would bite for the service charge years 2009/10 and 2010/11, and any subsequent years unless, as indicated, validly changed.

Conclusion

15. For the reasons indicated above, the Tribunal has concluded that, in accordance with the provisions of the lease, the Respondent had discretion and was entitled to change the method of calculation for the service charges so as to make the relevant sums calculable by reference to internal floor areas. The decision taken in November 2008 was not properly formally executed and thus the preceding method applies for the year 2008/9. The new method, having been regularised by the formal meeting called in March 2010 has the effect of validly changing the method for the two other years before the Tribunal, that is to say 2009/10 and 2010/11.

16. The Applicant has made an application for a Section 20C Direction that the costs of these proceedings should not be added to her service charge account. The Tribunal is satisfied that this application was perfectly legitimate and

indeed necessary so far as all leaseholders were concerned in order to resolve this issue. In the circumstances, the Section 20C application is granted.

Legal Chairman: **S. Shaw**

Dated: **29th October 2010**