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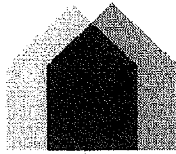

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LEASEHOLD VALUATION TRIBUNAL

LONDON RENT ASSESSMENT PANEL

DECISION ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985 (AS AMENDED)

Property:	33 Primrose Mansions, Prince of Wales Drive, London SW11 4EE
Applicant:	Mr M Tunstill
Respondent:	Primrose Mansions Limited
Hearing Date:	8th March 2010
Appearances:	Miss S Iyer of 7 New Square Chambers, Counsel for Applicant Mr C Fain of Tanfield Chambers, Counsel for Respondent
Also present:	Miss D Hockley, Chairman of Respondent company Dr P Haslam, Director of Respondent company Miss P Jeal, Director of Respondent company Mr J Pickering of Aspect Ltd, the Respondent's managing agents The Applicant was not present

Members of Tribunal

Mr P Korn (chairman)
Mr P Tobin FRICS MCIArb
Mrs R Turner JP BA

INTRODUCTION

1. This is an application under Section 27A of the Landlord and Tenant Act 1985 (as amended) ("**the 1985 Act**") by the leaseholder of the Property for a determination of liability to pay service charges. The application was originally in respect of the years 2003 to 2014, but in the Directions issued following a Pre-Trial Review on 21st October 2009 the application was limited to the years 2003 to 2009 (intended, in the Tribunal's view, to include the year 2009/2010).

2. The Property is on the second floor of a purpose-built Victorian mansion block ("**the Block**"). The Applicant is the current leaseholder of the Property under a lease ("**the Lease**") dated 16th January 1985 originally made between National Provident Association (1) and Messrs A.P.M. Davis and C.A. Gates (2), and the Respondent is an RTM company which was formed to manage the Block.

3. Aspect Limited act as managing agents on behalf of the Respondent.

4. The Applicant was not present at the current hearing (although was represented) and was neither present nor represented at the Pre-Trial Review.

5. The hearing bundles contained a large amount of material, not all of it pertinent to the issues in dispute. In this decision reference will principally be made to those items and those arguments considered by Counsel for one or both parties to be relevant.

6. At the hearing, Miss Iyer for the Applicant confirmed that the issues in dispute were as follows:-

   - The cost of hot water and boiler maintenance
   - Porters' salaries
   - Porterage telephone and other associated costs
   - Disrepair in common parts.

APPLICANT'S CASE

7. In relation to hot water and boiler maintenance, Miss Iyer said that the Applicant's concerns – as she understood them – was that he was uncertain as to what was being charged and why, and that he felt that the level of charges was generally too high. By way of comparison, the Applicant considered that the charges were higher than in the adjacent block known as Overstrand Mansions.

8. Miss Iyer said that she was also instructed to question whether the service charge provisions in Part II of the Third Schedule to the Lease were wide

enough to cover the replacement of the boilers but she conceded that such a challenge was quite difficult to pursue strongly. She also raised the question of whether there should have been more consultation as to a possible alternative approach to replacing the boilers.

9. The Applicant was concerned about the level of the porters' salaries and again had offered a comparison with Overstrand Mansions. If one added the benefit to the porters of their being provided with free accommodation then the aggregate salary was considered by the Applicant to be above the market rate. Miss Iyer understood that the Applicant also felt that perhaps only one porter was needed.

10. Miss Iyer also raised the point about the Lease referring to employment of staff "during normal working hours" and questioned – on the instructions of the Applicant – whether the Respondent was entitled to include within the service charge the cost of employing staff outside the hours of (say) 9am to 5pm.

11. The Applicant was also challenging the telephone and other costs associated with the porterage service and was questioning whether they should be paid at all or alternatively whether the amounts were reasonable.

12. As regards disrepair, Miss Iyer's instructions were that the photographs submitted in evidence by the Respondent did not fully reflect the state of the Block and that if one looked at the common parts carefully one would, for example, see some chipped woodwork. Miss Iyer did not have instructions to assert that the common parts were generally in a poor decorative state.

13. As a general point, Miss Iyer was instructed that the Applicant believed that there had been complaints from other leaseholders although she had not been provided with any hard evidence to support this assertion.

RESPONDENT'S CASE

14. As regards replacement of the boilers, the Applicant's challenge was considered to be misplaced as the boilers have not in fact yet been replaced. However, the Respondent intended to replace the boilers and asked the Tribunal to make a determination on this point to save the need for a separate application later. Miss Iyer on behalf of the Applicant confirmed that she was happy for the Tribunal to make a determination on this point.

15. Mr Fain for the Respondent argued that it was clear from the Lease – in particular paragraph 2 of Part II of the Third Schedule – that the Respondent has the power to replace the boilers and to recover the cost under the service charge.

16. As regards the ongoing hot water and boiler costs, the major item of expenditure was the oil. Mr Fain said that the amount spent on oil was considered to be reasonable and that the Applicant had provided no evidence to indicate otherwise. As regards any other aspect of the challenge to the cost of boiler maintenance, the Respondent was unclear what the nature of the challenge actually was but considered that all maintenance work has been carried out to a reasonable standard and at reasonable cost. The Respondent did try to obtain competitive quotes where possible.

17. In relation to the porters, the Respondent considered that all of the costs – including the telephone charges and other outgoings – were covered by the Lease, in particular paragraphs 3 to 5 of Part I of the Third Schedule.

MR PICKERING'S EVIDENCE

18. Mr Pickering acknowledged that leaseholders and other occupiers did make complaints from time to time about the running of the Block but in his experience this was absolutely standard and the level of complaints was no more than was normal for a block of this nature. Whilst he agreed that the porters had the benefit of free accommodation, no notional rent was charged to leaseholders through the service charge (or otherwise). As regards the other block to which the Applicant had referred by way of comparison – Overstrand Mansions – Mr Pickering did not consider it to be comparable; it was in his view a different type of block and it was managed in a very different way.

19. In response to a question from Miss Iyer, Mr Pickering conceded that different porterage options were considered at an AGM of the Respondent company, including the possibility of managing with just one porter, but a decision was made at the AGM to keep two porters.

20. Mr Pickering also conceded that the porters were allowed a reasonable number of personal telephone calls. However, the position was monitored, and when a friend of one of the porters made calls to Belgium and Australia the cost of those calls was recharged to the porter concerned.

21. Miss Iyer also asked why, if the porters' duties included an element of cleaning, it was felt necessary to employ two separate cleaners as well. Mr Pickering's answer was that there was quite a lot of cleaning to do.

22. Regarding the necessity of the porters having on-site accommodation, Mr Pickering considered that it would be difficult for the porters to do their jobs effectively (especially night-time call-out) if they were off-site. Also, if the Respondent did not provide the porters with accommodation it would be necessary to pay them a higher salary to enable them to afford to pay their own rent and this would increase the service charge.

23. As regards the cost of hot water and boiler maintenance, Mr Pickering said that the managing agents periodically tested the market but they also wanted to use maintenance engineers who had proved themselves to be reliable and who knew the Block's particular system. It was not a modern system and therefore historic knowledge of its weak points was very valuable.

24. As regards the state of the common parts, Mr Pickering readily conceded that there was some chipped woodwork. The Block contained a number of staircases and therefore at an AGM a programme of ongoing maintenance had been approved. The remaining staircases in need of refurbishment would to be dealt with between now and 2014. The work could not reasonably be done any quicker as new risers were needed and it would be illogical to touch up the woodwork before first attending to the risers.

MISS JEAL'S EVIDENCE

25. Miss Jeal had been a resident and a director of the Respondent company for many years. In her view there was no real problem with disrepair other than the usual wear and tear. As regards the planned replacement of the boilers, she said that it was a standard calculation to work out how long to manage with an imperfect boiler and at what point it became more cost-effective to replace it.

26. Miss Jeal noted from the Applicant's written submissions that he considered it a problem that one of the porters (Mr Shore) was being provided with accommodation when he was working as a trainee solicitor during the day and therefore his porter's duties were confined to evenings/night-time and weekends. Miss Jeal said that Mr Shore was paid a nominal amount and she considered that he provided a useful function. He was intelligent, good at his job and (as far as she could tell) was well-liked. The issues had been aired at the last AGM and the shareholders had voted to keep two porters on the existing basis, so the shareholders as a whole seemed happy with the arrangement.

27. Miss Jeal said that, far from wanting to limit the number of porters or the scope of their duties or the amount spent on porterage, other leaseholders had generally expressed the view that they would actually like more services to be provided and to move towards a concierge-type service.

28. In relation to a question (arising out of one of the Applicant's submissions) about the company secretary, Mr Hickie, Miss Jeal said that Mr Hickie received no remuneration or other benefit from his role as company secretary, either direct or indirect.

NO INSPECTION

29. The Tribunal members did not inspect the Block. Miss Iyer on behalf of the Applicant said that she believed that the Applicant wanted the Tribunal to inspect the Block. However, it appeared to be common ground between the parties that there was some chipping of woodwork in the common parts and Miss Iyer did not have instructions to assert that the common parts were generally in a poor decorative state. Furthermore, Miss Iyer was unable to explain how an inspection would benefit the Tribunal, as there was no challenge to the amount spent on repair or decoration, nor was there any challenge to the Respondent's management fees. Therefore, the Tribunal's view was that an inspection was not necessary in order for it to make a determination in the circumstances of the particular issues in dispute.

THE LAW

30. Section 19(1) of the 1985 Act provides:

"Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard

and the amount shall be limited accordingly."

31. Section 19(2) of the 1985 Act provides:

"Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

32. "Relevant costs" are defined in Section 18(2) of the 1985 Act as *"the costs or estimated costs incurred or to be incurred by or on behalf of the landlord...in connection with the matters for which the service charge is payable"*.

"Service charge" is defined in Section 18(1) 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 cost of management, and (b) the whole or part of which varies or may vary according to the relevant costs"*.

33. Section 27A of the 1985 Act gives a leasehold valuation tribunal jurisdiction to determine (on an application made to it) *"whether a service charge is payable and, if it is, as to...the amount which is payable..."*.

APPLICATION OF LAW TO FACTS

Hot water and boiler maintenance

34. It is clear from (in particular) paragraphs 1 and 2 of Part 1 of the Third Schedule to the Lease that the Respondent is entitled to charge the reasonable costs of maintaining etc the boilers and other plant and machinery used for the hot water systems and related conduits as well as the reasonable cost of fuel for the hot water supply.

35. The Applicant has provided no credible evidence to indicate that the amounts charged since 2003 have not been reasonable. In contrast, despite the difficulty of understanding the basis for the Applicant's challenge, the Respondent has taken the trouble to present reasonably detailed arguments in written submissions and has referred to them at the hearing. Mr Pickering was also called as a witness and was considered by the Tribunal to be a credible witness. He gave evidence as to the way in which decisions were made in determining which contractors to use in order to maintain the system and how to ensure that the amount spent on fuel was reasonable.

36. In the Tribunal's view, the hot water and boiler maintenance costs were reasonably incurred and are payable in full in respect of each year of challenge.

Boiler replacement

37. The Applicant appears to have initially been challenging the cost of replacement of the boilers although it is now common ground between the parties' respective representatives that the boilers have not yet been replaced. Nevertheless, both parties wanted the Tribunal to determine whether in principle the Respondent is entitled to replace the boilers and to recover the reasonable cost through the service charge.

38. As the issue of the cost of replacement of boilers has been raised in the application and both parties wish the Tribunal to comment on the point, the Tribunal is happy to do so. However, it should be noted that there can be no current challenge to the cost of replacement as the cost has not been charged (and the replacement has not yet taken place), and therefore the Tribunal's comments will not constitute a determination under Section 27A of the 1985 Act.

39. Subject to the above points and on the basis of the arguments presented by or on behalf of each party, the Tribunal considers that the Lease, and in particular paragraph 2 of Part II of the Third Schedule, is wide enough to allow the lessor to recover through the service charge the reasonable cost of

replacing the boilers, on the assumption that the decision to replace them is a reasonable one and provided that (or to the extent that) the work is carried out to a reasonable standard.

Under clause 4 of the Lease, the lessee *"COVENANTS with the Lessor to pay to the Lessor without any deduction by way of further and additional rent a proportionate part of the expenses and outgoings incurred by the Lessor in providing the services set out in the Third Schedule ... "*.

Paragraph 2 of Part II of the Third Schedule reads as follows:-

"The cost of replacing the boilers and other plant and machinery used for any common hot water systems serving the Mansions and the conduits and other pipes and valves in the common parts of the Mansions and any lifts lift shafts or other machinery therein".

Whilst Miss Iyer said that she was instructed to challenge this interpretation of the Lease, she conceded that it was difficult to do so convincingly and did not advance any specific arguments.

40. The Tribunal therefore considers that the Respondent can in principle recover the cost of boiler replacement subject to meeting the reasonableness test.

Porters' salaries

41. No credible evidence on this point was provided by the Applicant. The comparison with Overstrand Mansions was not explained in a meaningful way. The comment on the reference in the Lease to 'normal working hours' is not considered to be very persuasive. Whilst there are arguments either way as to what the phrase 'normal working hours' actually means, the phrase occurs in the section of the Lease containing lessor's **covenants** to provide services and there is nothing to indicate that the lessor does not have the **power** to charge for wider services if they are covered by the Third Schedule.

42. The salaries do not seem to the Tribunal to be manifestly unreasonable. Again, the Respondent has taken the trouble to present counter-arguments in written submissions and has referred to them at the hearing. Mr Pickering and Miss Jeal have also given credible evidence in relation to porterage issues.

43. The reasonable cost of paying porters is covered by the Lease, in particular paragraph 3 of Part I of the Third Schedule. It is noted that paragraph 3 of Part I does refer to 'porter' in the singular but this is not considered problematic if one takes the paragraph, and what the Tribunal considers to be its intended meaning, as a whole.

44. In the Tribunal's view, based on the evidence provided, the cost of the porters' salaries was reasonably incurred and is payable in full in respect of each year of challenge.

Porterage telephone and other associated costs

45. Again, no credible evidence on this point was offered by the Applicant. By contrast, the Respondent has explained the monitoring system that was in place to ensure that any significant increase in telephone charges (in particular) was investigated. The charges do not seem to the Tribunal to be manifestly unreasonable. The reasonable cost of paying telephone and other associated costs is covered by the Lease, in particular paragraphs 4 and 5 of Part I of the Third Schedule, and the Tribunal has been given no proper basis for concluding that these costs are not fully payable.

46. Therefore, in the Tribunal's view, the porterage telephone and other associated costs were reasonably incurred and are payable in full in respect of each year of challenge.

Disrepair

47. The challenge in relation to disrepair is considered by the Tribunal to be misconceived. At the hearing no evidence was presented to suggest that the cost of repair and maintenance was being challenged per se, nor that the management charges were being challenged. Therefore in relation to disrepair, the Tribunal considers that there is no actual challenge on which it needs to make determination.

DETERMINATION

48. **All of the disputed charges in respect of all of the years of dispute are payable in full.** To the extent that the ***estimated*** charges for the 2009/2010 service charge year are being disputed (in relation to the same heads of charge) these likewise are considered payable in full, albeit that when the actual charges for the 2009/2010 year are known and a balancing adjustment is made, the actual charges for 2009/2010 will be open to challenge in the normal way if the Applicant considers that those actual charges are unreasonable.

49. Whilst this is not part of the formal determination, **the Tribunal considers that the service charge provisions in the Lease are wide enough to enable the Respondent to recover the cost of replacing the boilers** on the assumption that the decision to replace them is a reasonable one and provided that (or to the extent that) the work is carried out to a reasonable standard.

50. The Applicant applied for an order under Section 20C of the 1985 Act that the Respondent shall not be entitled to include any costs incurred by it in connection with these proceedings under the service charge. However, in the Tribunal's view the Applicant's case was very weak generally, and despite competent advocacy by Counsel the application has failed on all issues in dispute. Therefore **the Tribunal will not be making a Section 20C order**.

51. However, it is also open to the Tribunal to determine whether the service charge provisions in the Lease are wide enough to allow the Respondent to recover its legal costs incurred in connection with this application and hearing through the service charge. Mr Fain for the Respondent, in arguing that they are indeed wide enough, relied on paragraph 9 of Part I of the Third Schedule, which allows the lessor to recover:-

    "The costs of the Lessor or of any surveyor managing agents or company appointed or formed for the purpose of running the Mansions for the general management and running of the Mansions including their proper charges or fees".

    In support of his submission that these provisions were wide enough Mr Fain referred the Tribunal to the Court of Appeal case of *Iperion Investments Corporation v Broadwalk House Residents Ltd (1995) 2 EGLR 47.* In that case, the tenant covenanted (among other things) to pay a proportion of *"the Landlord's costs"* which were defined as follows:-

    "all costs sums payments charges and expenses properly incurred by the Landlord in carrying out its obligations under the seventh schedule and also under the covenants and conditions contained in the Head Lease ... and in the proper and reasonable management of in and about [Broadwalk House]. The items comprising and included in the Landlord's costs are set out (but not by way of definition) in the eighth schedule."

    The eighth schedule referred to in the above definition includes a reference to *"the proper cost of management of [Broadwalk House]".*

    In *Iperion Investments*, Peter Gibson LJ (giving the first judgment) stated that, in his opinion, such wording was wide enough to include all costs properly incurred in the proper and reasonable management of Broadwalk House and that this would include the litigation and other costs of enforcing the tenant's covenants.

    In coming to this conclusion, Peter Gibson LJ distinguished the relevant wording as broader than the wording which came up for consideration in the case of *Sella House Ltd v Mears (1989) 1 EGLR 65.* In that case, the service charge included expenditure by the lessor in carrying out obligations (among other things) *"to employ Managing Agents and Chartered Accountants to*

manage the Building and to discharge all proper fees ... and expenses payable to such agents or other person who may be managing the Building including the cost of computing and collecting the rents ... in respect of the Building – and – 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".

In *Sella House*, Dillon LJ came to the conclusion that legal fees were outside the contemplation of the above provisions and Taylor LJ – noting the absence of any reference to lawyers, legal proceedings or legal fees – said *"on the respondent's argument a tenant, paying his rent and service charge regularly, would be liable via the service charge to subsidise the landlord's legal costs of suing his co-tenants, if they were all defaulters. For my part, I should require to see a clause in clear and unambiguous terms before being persuaded that the result was intended by the parties."*

As this Tribunal understands it, neither Peter Gibson LJ nor the rest of the Court of Appeal in *Iperion Investments* was questioning whether the decision in *Sella House* was good law. Instead, the Court of Appeal took the view that the relevant clause in *Iperion Investments* was wider and therefore covered legal costs incurred by or on behalf of the lessor in a management capacity.

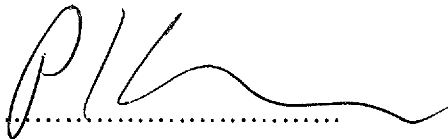
However, the basic principle remains that any ambiguity in a service charge is to be interpreted in favour of the tenant (see for example *Embassy Court Residents' Association v Lipman (1984) 2 EGLR 60*, where it was held that the costs of employing a managing agent would not be recoverable unless the lease expressly provided so). There is also no presumption that landlords should recover all their expenditure (*Rapid Results College v Angell (1986) 1 EGLR 53*). In addition, Taylor LJ's argument in *Sella House* quoted above is quite compelling, since if the service charge provisions in the Lease are wide enough to allow the Respondent to recover its costs in connection with these proceedings then it follows that they would also be wide enough to enable the Respondent to recover costs in proceedings for recovery of arrears from **other** leaseholders, i.e. proceedings wholly unconnected with the Applicant.

The provisions of paragraph 9 of Part I of the Third Schedule to the Lease, on which Mr Fain relies, are different from the provisions relied upon by the landlord in *Iperion Investments*. In *Iperion Investments*, the relevant clauses can reasonably be understood as allowing the recovery of whatever reasonable costs the landlord incurs in connection with management as the reference to *"all costs sums payments charges and expenses properly incurred"* is without limitation and does not, for example, specify surveyor's fees to the implied exclusion of legal fees. It is therefore logical to argue that it would be artificial to exclude particular categories of costs, such as legal costs, from the ambit of these clauses.

However, in the Tribunal's view, the provisions relied upon by Mr Fain are narrower than in *Iperion Investments*. There is no equivalent of *"all costs sums payments charges and expenses properly incurred ... in the proper and reasonable management of in and about [the building]"*. Instead, the relevant clause is limited to *"the costs of the Lessor or of any surveyor managing agents or [management] company including their proper charges or fees"*. The clause could easily have refer to "lawyers" or to "legal fees" had that been the intention or alternatively could have adopted the *Iperion Investments* formulation by not referring specifically to the lessor, surveyor etc but instead referring (effectively) to all costs incurred in connection with management. In the light of the general principles of construction of service charge clauses and in particular the reasoning of the Court of Appeal in *Sella House*, the Tribunal considers that the service charge provisions in the Lease are not sufficiently wide to allow the Respondent to recover these costs.

52. Accordingly, it is hereby determined that **the Respondent's legal costs incurred in connection with or in anticipation of these proceedings are not recoverable under the Lease.**

53. No other cost applications were made by either party.



CHAIRMAN.......................................
Mr P Korn

17th March 2010