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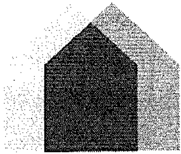

Residential Property
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LON/00AC/LSC/2010/0643

# LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

## S27A AND S20C LANDLORD AND TENANT ACT 1985

**Property** 4 Marwood Court, 25 Gruneisen Road, London N3 1LT

**Applicant** Marwood Court Resident Association Limited
Represented by Mr R Egleton of Counsel

**Respondent** Mrs Sheila Gregory
Represented by Mr P Gregory

**Date of Hearing** 6 May 2011

**The Tribunal** Mr P M J CASEY MRICS
Mr M Taylor FRICS
Mrs L Walter

## Decision on applications under S27A and S20C Landlord & Tenant Act 1985 ("the Act")

## Preliminary

1. The applicant freeholder is a tenant owned company which acquired Marwood Court, a block of six, 1960s built flats in 1987. It was represented at the hearing by Mr R Egleton of Counsel.

2. The respondent is the owner of a long leasehold interest in flat 4and, along with all the other long leaseholders, is a member of the company. Her son, Mr P Gregory, represented her at the hearing.

3. On 2 November 2009 proceedings were commenced by the applicant in the County Court in respect of unpaid service charges for the years 2008/9 and 2009/10 in the sum of £800 in respect of each year together with interest at the County Court rate and legal costs and disbursements. The respondent entered a defence and by an order of the Barnet County Court dated 31 August 2010 the application was transferred to the Leasehold Valuation Tribunal.

4. A pre-trial review was held by the Tribunal on 27 October 2010 and directions for the conduct of the proceedings were issued on the same day though these were varied on 21 January 2011. The hearing date was amended to 6 May 2011 with the Tribunal hearing the application to decide if an inspection was required. We have decided it is not necessary.

5. In accordance with the directions the applicant provided a bundle of documents relevant to the hearing.

## The Hearing

6. Mr Egleton, instructed by SLC Solicitiors, said he had briefly spoken to Mr Gregory and it appeared to him that the respondent's issues had little to do with the service charges demanded per se but more to do with how the respondent had been treated in the past. She was 89 (90 later this year) and up until 2003 she had been a very active member of the company undertaking many tasks on its behalf without remuneration. Other members had been paid for services to the company and this seemed to be the source of Mr Gregory's complaints. He claimed to be acting under an enduring Power of Attorney but SLC had had issues with this over registration. He accepted however

Mr Gregory's right to represent his mother at the hearing, but what had or had not happened in the past was nothing to do with service charge demands for the years ending 1 April 2009 and 1 April 2010. These had been for each year for payment in advance of £800 being 1/6th of the applicant's estimate of expenditure for the coming year.

7. The respondent holds the property under a lease dated 14 May 2007 for a term of 999 years from 25 December 1967 said to be on the same terms (with the possible exception of the ground rent) as the original lease granted to her and her husband on 1 March 1968 which had been for a term of 99 years from 25 December 1967. Only the original lease was included in the bundle.

8. There is no dispute between the parties that by the provisions of the lease the respondent has convenanted to pay "a fair proportion" of the cost of the applicant of insuring and repairing/maintaining etc the building incompliance with its covenants nor that 1/6th of the total so estimated is a fair proportion. The respondent does not dispute the right under the lease to demand such sums in advance nor to the service charge period operated by the applicant which ends on 31 March each year.

9. These sums had been demanded by e-mails sent to Mr Gregory on 23 April 2008 and 10 May 2009 which itemised the budget and showed the contribution sought and gave payment details. When asked by us if the demands had been accompanied by a summary of tenants' rights and obligations as required by S21B he replied, on the advice of his witness, Mr Smith, a director of the applicant, that they had not and asked for a short recess to consult by phone with his instructing solicitors as he accepted this might be fatal to his client's County Court claim.

10. After the short adjournment we allowed he advised that he had managed "to pull a rabbit from the hat" in the form of the solicitors' pre-action letter to the respondent dated 20 August 2009 which had again demanded the sums said to be owed and had been accompanied by the relevant summary. Documentary confirmation of this was faxed to the Tribunal later in the day.

11. The applicant's financial statement with summaries of service charge expenditure, lists of each item of expenditure and supporting invoices were also provided in the bundle and Mr Michael Smith, a retired Chartered Accountant and the director of the applicant responsible for finance matters in the years in question gave evidence on these and his witness statement, lodged as part of the County Court proceedings but signed and dated by him at this hearing.

12. He said that as a tenant owned company they ran their own affairs to keep costs to a minimum. In 2007 they had been quoted fees of £2,000 plus VAT by a managing agent with accountancy fees costing more on top. He received £450 per annum for providing company secretarial services (£200) and doing the accounts, bill paying, issuing demands etc. A sum of £100 per annum was provided for whoever looked after maintenance issues but as no one did at present this hadn't been spent. Levels of service and expenditure were agreed at the company's AGM when all books receipts etc were available for any member to inspect. There hadn't been such a meeting since 2007 as there had been no need and information was sent by e-mail instead. He accepted no accounts or summaries of expenditure had been sent to Mr Gregory for the years in question but he had not asked for them. Prior to that in 2007/8 he had had everything sent to him including old account books.

13. The budget was, he said, based on previous expenditure with known charges built in. The budgets on which the disputed sums were based are as follows:

| **Records of Expenditure** | **2008/9** | **2009/10** |
|---|---|---|
| Building Insurance | £1,500 | £1,500 |
| Emergency Assistance Cover | £242 | £252 |
| Cleaning Common Areas | £600 | £600 |
| Gardening Services | £650 | £650 |
| Electricity – Common Areas | £140 | £150 |
| Bank Charges | £65 | £70 |
| Annual return/Safe custody fees | £35 | £35 |
| Sundry Minor Maintenance | £500 | £450 |
| Estimated direct costs | £3,732 | £3,707 |
| Property Management fees (per AGM) | £550 | £550 |
| Emergency fund (15% of direct costs | £518 | £543 |
| | £4,800 | £4,800 |

14. The management fees were those referred to in paragraph 10. Insurance actual premiums were £1,417 and £1,408 respectively which Mr Smith thought justified an estimate of £1,500. Cleaning and gardening were carried out by the same firm. Nothing was included in the budget other than sums for the usual and recurrent costs needed. The emergency assistance cover was recommended by their broker to give a 24 hour response to problems such as leaks, damaged locks etc.

15. He explained the emergency fund as being a reserve fund they had operated for years with AGM approval. No refunds or credits were given to leaseholders for the excess of

budget contributions over actual expenditure, the surplus was treated as company funds as they had long ago through the AGM agreed not to collect ground rents and indeed he believed the 999 year leases the applicant had granted each for its members were he thought at a peppercorn rent.

16. He also in his statement addressed what he saw as the difficulties with Mr Gregory and said they had had no option but to take action to recover the service charges he was refusing to pay.

17. Mr Gregory had prepared a witness statement which he produced and read at the hearing. He accepted that much of it addressed issues prior to the years in question and he understood that as we had explained to him, our jurisdiction in these proceedings was confined to the two service charge years 2008/9 and 2009/10. He raised an issue about lettings to asylum seekers invalidating the insurance though this was denied by Mr Smith. He also confirmed that he had not since 2007/8 made any requests in writing to Mr Smith to be provided with copies of the accounts or summaries of expenditure nor to be given facilities to inspect receipts.

18. In reply to a question from Mr Egleton he said he did not have any objection to these two year's budgets taken in isolation and he may have gone about seeking to address past issues in the wrong way. Nevertheless he felt the applicant had failed in the past to act reasonably and provide him with the information he had then sought which would have avoided these proceedings. He did not think his mother should have to pay the legal or other costs; in fact the applicant should pay hers. He did not wish to make any closing submissions.

## Submissions

19. Mr Egleton in closing said there was no real challenge to the sums demanded in this application. It was sensible to have the emergency fund though he accepted there was no provision for a reserve fund in the lease.

20. He strongly opposed the making of an order under S20C of the Act to limit the applicant's right to recover the costs of these proceedings through the service charge. The respondent had not objected to the budget sums, he had not provided a statement of case and so the applicant had no way of knowing what case they faced, serious allegations had been made against members of the applicant company and communications between the parties had broken down. For all these reasons it was entirely reasonable to engage counsel to ensure appropriate conduct of the proceedings. The applicant was owned by the leaseholders and had access to only limited funds from its members. He also argued that the respondent's conduct and failure to comply with directions made it an appropriate case for us to order the respondent to reimburse the applicant the LVT fees as provided for by paragraph 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 and to make a Costs Order against her in the maximum sum of £500 allowed by paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002.

## Decision

21. Our jurisdiction in these proceedings comes from S27A of the Act but is limited to only those matters in the application or court referral, ie the service charge years 2008/9 and 2009/10. We have no doubt, that under the terms of the lease, the respondent is liable to pay by way of service charge 1/6$^{th}$ of the majority of the estimated heads of expenditure

set out in the budgets for those two years. The only head of expenditure which is not so recoverable as is admitted on behalf of the applicant is the "emergency fund" which is clearly a reserve fund which the lease make no provision for and is accordingly disallowed by us in both years. The respondent does not dispute the payability or quantum of any of the other heads of estimated expenditure and we allow them as set out in the budgets.

22. Clause 293)(i) of the lease which allows for payment in advance of service charge contributions based on an estimate of expenditure provides that such contribution be paid within 14 days of receipt of the notice containing the estimate and demand. However, these were not accompanied by the summary of tenants' rights and obligations and in such circumstances the respondent was lawfully entitled to withhold payment. The deficiency was only made good by SLC Solictiors pre-action letter and demand dated 20 August 2009 and the liability to pay arises 14 days after that date.

23. Clause 2(3)(ii) goes on to provide that "if in the opinion of the Lessor … the unexpended contributions shall at any time be more than is necessary to cover the estimated Estate Expenses any excess shall be refunded or credited to the Lessee in proportion to the contribution made by him …". The accounts for the year ending 31 March 2010 show on the statement of income and expenditure a surplus described as "NET PROFIT" of £361. In the profit and loss account this sum is added to the outstanding amount from the previous year's accounts to give £5,685 which is then shown in the balance sheets as "Shareholders' fund". These monies are not, of course, shareholder funds, they are leaseholders surplus contributions to the service charge and they exceed the currently estimated amount being demanded each year as advance service charge contribution, namely, £4,800. This may have been a long standing

practice of the applicant's but Mr Egleton did not raise arguments of estoppel nor that the treatment of the money as the property of the applicant and its shareholders was justified by the shareholders and the leaseholders being the same people. With some reluctance in the circumstances we have reached the view that if the applicant wishes to take action to recover service charges under the terms of the lease then it must ensure that the amounts it seeks are calculated in accordance with all the terms of the lease. The respondent should therefore be given credit for her contributions to the excess before the amount she is obliged to pay in accordance with our decision are recalculated.

## S20C Landlord & Tenant Act 1985

24. The Third Schedule to the lease defined the costs expenses, etc to which the lessee is to contribute and paragraph 2(g) includes in this the "whole of the expenses properly incurred by the lessor in connection with the Building in the collection of the rents hereby reserved and payments herein covenanted by the Lessee to be paid and of the administration and management of the repairs, maintenance and other matters mentioned in this Schedule or at the lessor's option the reasonable or usual charges of Estate Agents or Managing Agents employed ...". Whilst not specifically mentioning legal costs we are satisfied that for a tenant owned landlord company with limited access to funds this provision is widely enough drawn to allow recovery through the service charge of the cost. We have no doubt given the nature of the respondent's arguments and allegations recovery of arrears was only likely through recourse to law and that it was appropriate for the arguments advanced by Mr Egleton, that Counsel was employed. We do not in the circumstances think it right to make the S20C Order asked for by the respondent.

25. We are not though prepared to order the respondent to reimburse the applicant the LVT fees or to pay any of its costs. The applicant has made mistakes in billing, in complying with the lease and in its treatment of leaseholder funds and whilst the respondent did not fully comply with directions her son is not a lawyer and whilst he has sought to address some deep concerns he holds in the wrong way he did not appear to us to have acted "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceeding".

Chairman P M J CASEY

Dated: 7th June 2011