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LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER [SECTIONS 27A & 20C OF THE LANDLORD AND TENANT ACT 1985] [& SCHEDULE 11 TO THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002]

Case Reference: LON/00AF/LSC/2011/0608

Premises: Flat 19 Hammelton Road Bromley BR1 3PZ (1)
Flat 19b Hammelton Road Bromley BR1 3PZ (2)

Applicant(s): Mrs Winnie Daniella Valle Valenzuela and Mr Richard Graham Walkley (1)
Mr David Ross Kennedy (2)

Respondent(s): Whitehall Place Properties Limited

Representative: Mr K Ford and Mr Steven Stidworthy (both of Hamways Ltd Managing Agents for the Respondent)

Date of hearing: 24th January 2012

Appearance for Applicant(s): Mrs Winnie Daniella Valle Valenzuela and Mr David Ross Kennedy

Appearance for Respondent(s): Mr K Ford
Mr Steven Stidworthy

Leasehold Valuation Tribunal: Mrs N Dhanani LLB(Hons)
Mr S A Manson FRICS
Mrs G V Barrett JP

Date of decision: 21 February 2012

(NB: Unless otherwise stated: the numbers in the square brackets correspond to the page numbers in the papers produced by the Applicants and Respondent)

Decisions of the Tribunal

- (1) The Tribunal determines that the following sums are payable by the Applicant to the Respondent in respect of the service charges for the following years:
 - a. **2008/9:** the sum of £321.38 each in respect of Flat 19 and Flat 19b being the outstanding balance due.
 - b. **2009/10:** Nil
 - c. **2010/11:** Flat 19 : 33.333340% of £2098.28 = £699.43
Flat 19b: 33.333330% of £2098.28 = £699.43
 - d. **2011/12:** The sum of £524.57 being 75% of the preceding years service charge is due for each Flat on the 24th June 2012.
- (2) **2009/2010:** The Tribunal determines that the Respondent refunds the sum of £3148.15 to the leaseholders.
- (3) The Tribunal makes the determinations as set out under the various headings in this Decision.
- (4) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the Tribunal proceedings may be passed to the lessees through any service charge.
- (5) The Tribunal determines that the Respondent shall pay the Applicant £350.00 within 28 days of this Decision, in respect of the reimbursement of the Tribunal fees paid by the Applicant

The application

1. The Applicants seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years ending 23rd June for the years 2008/9, 2009/10, 2010/11 and 2011/12.
2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. The Applicants appeared in person at the hearing and the Respondent was represented by Mr Ford and Mr Stidworthy of Hanways Ltd.

The background

4. The two properties which are the subject of this application are comprised in a converted semi detached Victorian property with a communal garden, a basement and driveway with parking. Flat 19 is situated on the ground floor and Flat 19b is situated on the second floor. Each flat has two bedrooms.
5. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
6. The first Applicants hold a long lease of the Flat 19 and the second Applicant holds a long lease of Flat 19b. Each lease requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of each lease will be referred to below, where appropriate.

The issues

7. At the start of the hearing the parties identified the relevant issues for determination as follows:
 - (i) **2008/9:** In relation to the service charge for the year ending 23rd June 2009 the Applicants confirmed that they disputed £405.83 of the total service charge being $\frac{1}{4}$ of the service charge demanded for that year. In the application the Applicants had claimed that no accounts or demands for payment were received for this period until a letter dated 26th January 2011. They now accept that they did receive a notice dated 21st July 2008. The Applicants also accept that the Respondent has now served the summary of tenant's rights and obligations as required by Section 21B of the 1885 Act.
 - (ii) The Respondent's agent having taken advice accepts that the lease does not provide for the collection of sums in relation to a reserve fund and so the service charge accounts have been recalculated removing the contribution to the reserve fund and revised service charge demands for this period have been issued.
 - (iii) The Respondent's agent accepted that the amount due in respect of the year in question is a $\frac{1}{4}$ of £1285.50 [119] which is £321.38 and not £405.83. The Respondent's agent undertook to revise the service charge account accordingly. The Applicants accepted the sum of £321.38.
 - (iv) **2009/10:** The Applicants stated that the letter of the 25th August 2010 enclosing service charge accounts for the year ending June 2010 was the first indication that they received in respect of a liability to pay a service charge for the year ending June 2010. The Applicants stated

that it was apparent from these accounts that the Respondent had transferred funds from the reserve fund to pay the service charge. The Applicants stated that they had thought that the reserve fund was for future works and the monies were held on trust for the leaseholders and so they were surprised that the Respondent had used these funds to pay service charge.

- (v) The Respondent's agent admitted that the sum of £3148.15 was taken from the reserve fund to pay the service charge for the year in question, they admitted that no notice or demand had been made in respect of the service charge for this year. The Respondent's agent accepts that as no notice of this service charge has been served on the leaseholders that it is likely to be caught by the provisions of Section 20B of the 1985 Act. As a result the Respondent's agent agreed to forego payment of the full service charge of £3148.15 for the year ending 23rd June 2010. The Respondent's agent agreed to amend the demands accordingly and refund the sum of £3148.15 to the service charge.
- (vi) **2010/11:** The Applicant stated that they were first notified of a liability to pay $\frac{3}{4}$ of the service charge by a letter dated 26th January 2011 and the remaining $\frac{1}{4}$ by a letter dated 16th June 2011. The service charge year in accordance with the terms of the lease ends on the 23rd June, so the notice of the amount of service charge due was issued before the end of the service charge year. The Applicants stated that the lease provides that the balance of service charge can only be requested following delivery of the Maintenance account and such an account cannot be produced until after the expiry of the relevant period (24th June 2010 to 23rd June 2011).
- (vii) The Applicants raised various objections to the demand for this service charge on the basis that the tenant's rights and obligations did not fully comply with the various requirements of The Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) (Regulations) 2007 such as the font used being not less than 10 point amongst other matters.
- (viii) The Applicants also questioned the reasonableness of the certification fee of £290 and £150 which appears to be charged each year.
- (ix) The Respondent's agent has responded in his statement in response to the points raised by the Applicants. The Respondent's agent admitted that service charge demands were not issued for the year ending June 2010. Mr Ford explained that this was during a time at which extensive consultation was underway as per the letter dated 12th August 2009. He stated that it was hoped that agreement for the cost of the works and the funding could be achieved but in fact this was not possible. He stated that the actual service charge incurred for the service charge year 2010/11 is £1638.33 this is shown on the demands

as £409.58 being $\frac{1}{4}$ of the total service charge [88] and £1228.76 being $\frac{3}{4}$ of the total service charge [350]. The Respondent produced a revised account adjusted to remove the contribution to the reserve fund [448 - 451] so the total service charge due for the year ending 23rd June 2011 is £838.34 from Flat 19 and £838.33 from Flat 19b.

- (x) In respect of the certification fees Mr Ford accepted that a separate charge should not have been made, as this service is included in the management fees charged as per the management contract. Accordingly he agreed that they will revise the accounts and will not require the leaseholders to pay a separate contribution in addition to the management fees in respect of a certification fee.
- (xi) **2011/12:** The Respondent confirmed that the contribution to the reserve fund has been removed and the charges are based on actual expenditure for the in the year ending 23rd June 2011 of £2338.34. The Respondent has not served a copy of the revised statement of account and service charge demand with a fully compliant Summary of tenants' rights and obligations' on the leaseholders, but copies have been included in the bundle of papers for the hearing. The service charge calculated on the basis of actual expenditure in this case is $\frac{3}{4}$ of £2338.23 which is £1753.67 and a $\frac{1}{4}$ being £584.56.
- (xii) On the basis of the documentation produced for the hearing the Applicant accepted that the terms of the lease permit the Respondent to charge $\frac{3}{4}$ of the preceding years maintenance charge
- (xiii) **Additional matters:** The Applicants in their application had raised several issues in relation to the insurance of the property, the maintenance charges and accounts.
- (xiv) The Respondent produced copies of the insurance certificates for the years ending 2009, 2010, 2011 and 2012 and confirmed that the premiums had been paid out of the service charge.
- (xv) The Applicants confirmed that apart from the reasonableness of the maintenance charges the remaining issues had been addressed in the Respondent's statement in reply and the accompanying bundle of papers produced for the hearing, as well as the further clarification provided by Mr Ford in the oral submissions made during the course of the hearing.
- (xvi) The Applicants questioned the reasonableness of a standard maintenance charge of £500 [89] charged each year particularly as the Applicants were concerned about the lack of maintenance at the property. The Applicants contend that the charges do not meet the requirements of the lease to show the particulars of such costs.

The Tribunal's decision

8. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows.

9. **The lease:** The Lessee covenants under clause 2 (iii) of the lease for Flat 19 provides as follows:

“(a) To contribute and pay to the Lessor or his agents or as he may direct during the said term a sum (hereinafter called “the Maintenance Charge”) being a proportion of the costs expenses and outgoings incurred by the Lessor in respect of the matters referred to in the Fourth Schedule hereto which the rateable value of the premises bears to the rateable value of the Building

(b) The Maintenance Charge shall be paid as follows:-

As to SIXTY POUNDS (£60.00) per annum or seventy five per centum (75%) of the Maintenance Charge for the preceding year whichever is the higher (hereinafter called “the Interim Charge”) payable in advance on the day of payment of rent As to the balance (if any) within twenty – one days of delivery to the Lessee by the Lessor of an account (hereinafter called “the Maintenance Account”) showing particulars of such costs expenses and outgoings for the year up to the previous Twenty – fourth day of June PROVIDED THAT if the Maintenance Account shall show that the proportion payable by the Lessee of the said costs expenses and outgoings for the year to the previous Twenty –fourth day of June amounted to less than the Interim Charge the difference shall be refunded to the Lessee within twenty – one days of delivery of the Maintenance Account Provided that the Lessor shall be entitled to retain out of such difference such sum as it may reasonably estimate to be necessary to provide (without any sums retained from previous years) a fund to meet future costs expenses and outgoings the cost of which should be spread over several years ..”

10. The rent payment date is stated to be the 24th June in each year.

11. The lease relating to Flat 19b is in an identical form to the lease for Flat 19 except that the Interim Charge is stated to be £100 per annum or seventy five percent of the Maintenance Charge for the preceding year whichever is the higher.

12. **2008/2009:** The Tribunal was not required to make a determination in respect of the service charges for the year ending 23rd June 2009 as the parties agreed the sum of £ 321.38 was reasonable for the remaining ¼ of the service charge due.
13. **2009/2010:** The Tribunal was not required to make a determination in respect of the reasonableness of the service charges for the year ending 23rd June 2010, as the Respondent's agent agreed to concede the whole of the service charge for this period and refund the sum of £3148.15 to the leaseholders. The Tribunal noted that the Respondent's agent admitted that no demands had been issued in respect of the service charge for this period and the leaseholders had not been notified of their liability to pay a service charge as the monies held in the reserve fund was used to settle the service charges. The Respondent's agent accepted that if a demand were to be issued at this stage it is likely that it would fall foul of the provision of Section 20B of the 1985 Act and so the Respondent's agent agreed that the Applicants are not required to pay a service charge for this period and they will revise the accounts accordingly.
14. **2010/2011:** The Tribunal having considered the evidence presented by the parties and accepted the expenditure shown on the revised service charge account [448] to be reasonable, apart from the charge of £150 in respect of the certification fee and the sum of £500 plus vat in respect of the Management charge.
15. The Management agreement dated the 3rd June 2011 provides for a management fee of £500 plus vat for the services specified under Appendix II of the agreement. One of the services specified in Appendix II is to "...prepare and certify a statement of account for service charges each year as soon as practicable after a year end". Therefore the management fee includes a charge in respect of the certification of the accounts. Accordingly the Tribunal does not consider the certification fee charged in addition to the management fee to be reasonable and so this is not allowed.
16. In relation to the management fee please refer to the paragraph 16 below.
17. Accordingly the Tribunal calculated the total expenditure [448] for the year to be £2098.28. The Tribunal considers the following sums to be reasonable:
- (i) Flat 19 : 33.333340% of £2098.28 = £699.43
- (ii) Flat 19b: 33.333330% of £2098.28 = £699.43
18. **2011/2012:** The lease provides for the payment of an Interim charge calculated to be 75% of the preceding year's service charge, payable on the rent payment date being the 24th June in each year. Accordingly the Tribunal determined that the sum of £524.57 is due from the lessees of each flat to the Respondent on

the 24th June 2012. The Tribunal noted that a demand had not yet been issued for this sum.

19. **Management Fee:** The Tribunal noted that the Applicants were of the view that the Managing agents were not providing any service for the fee charged, however it is clear that they have maintained the building insurance, they have maintained bank accounts, paid the electricity bills, arranged for some items of property maintenance and prepared and sent out service charge budgets and accounts. It is noted that the Managing agent has not provided a service to the required standard, and there has clearly been some mismanagement of the accounts as well as a lack of communication between the parties. Although the Tribunal did not consider the sum of £500 plus vat as an annual Maintenance charge to be unreasonable, in this case for the reasons stated the Tribunal is of the view that the sum of £375 plus vat to be a more reasonable sum commensurate with the level of service provided.

Application under s.20C and refund of fees

20. At the end of the hearing, the Applicant made an application under Regulation 9 of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 for a refund of the fees that they had paid in respect of the application/hearing. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal orders the Respondent to refund the sum of £375 in respect of the fees paid by the Applicants within 28 days of the date of this decision.
21. In the application form, the Applicants applied for an order under section 20C of the 1985. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

Chairman: Mrs N Dhanani

Date: 20th February 2012.

Having heard the submissions from the parties and taking into account the determinations above, the Tribunal orders the Respondent to refund the sum of £375 in respect of the fees paid by the Applicants within 28 days of the date of this decision.

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

- (1) In the following provisions of this Act "service charge" means 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 costs 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 in an earlier or later period.

Section 19

- (1) 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 provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
 and the amount payable shall be limited accordingly.

- (2) 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.

Section 27A

- (1) An application may be made to a Leasehold valuation tribunal 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.

- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to a Leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
 - (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
 - (a) has been agreed or admitted by the Tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20B

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

Section 20C

- (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, residential property tribunal or leasehold valuation tribunal, or the Upper 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 which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
 - (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 Upper 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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

- (1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.
- (2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.
- (3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
 - (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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.
- (2) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) may be made in respect of a matter which—
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
- (a) in a particular manner, or
 - (b) on particular evidence,
- of any question which may be the subject matter of an application under sub-paragraph (1).

Schedule 12, paragraph 10

- (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
- (2) The circumstances are where—
- (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
 - (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
- (3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
- (a) £500, or
 - (b) such other amount as may be specified in procedure regulations.
- (4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.