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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTIONS 27A & 20C OF THE LANDLORD AND TENANT ACT 1985

Case Reference: LON/00AL/LSC/2012/0449

Property: 197A and 199A Trafalgar Road, Greenwich, London SE10 9EQ

Applicants: Mr R. M. Patel and Mr D.M Patel (Leaseholders)

Represented by: Parker Arrenberg; Solicitors

Respondent: Premier Gold Investments Limited (Landlord)

Represented by: Trethowans; Solicitors

Tribunal: Mr L. W. G. Robson LLB(Hons)
Mrs A. Flynn MA MRICS

Determination Date: 19th October 2012

Date of Decision: 22nd October 2012

Decisions of the Tribunal

(1) The Service charge demands relating to insurance premiums of £304.55 are not payable under the terms of the Lease.

(2) The Tribunal makes the other decisions as set out under the various headings in this Decision.

(3) The Tribunal granted the Applicants' application under Section 20C and ordered that the landlord's costs relating this application chargeable to the service charge shall be limited to NIL.

(4) The Tribunal ordered the Respondent to reimburse the Applicants' fees payable to the Tribunal of £100.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") as to the legal liability to pay, and reasonableness of, (apparently in respect of both 197A and 199A) demands for service charges in the service charge year October 2011 to October 2012 relating to managing agents fees (£288), advance service charges (£224) and contribution of £304.55 to the insurance premium for the building under the terms of a lease dated 11th December 1989 (the Lease). Applications were also made to limit the landlord's costs of this application under Section 20C of the Act, and for reimbursement of the Applicants' fees paid to the Tribunal under Paragraph 9 of Schedule 12 of the Commonhold And Leasehold Reform Act 2002. Directions were given by the Tribunal for a paper determination on 1st August 2012 after a Pre-Trial Review by telephone, during which both parties were represented.

2. The Tribunal notes that the parties were able to reach agreement prior to the Pre-Trial Review that the managing agent's fees and the advance service charges were not payable under the terms of the Lease.

3. Thus the remaining issues for decision are the insurance premium contribution, costs and fees.

4. The relevant legal provisions relating to this hearing are set out in Appendix 1 to this decision.

Determination

5. The Tribunal considered the Applicants' statement of case and bundle of documents dated 11th September 2012, and the Respondent's statement in reply and documents dated 19th September 2012.

6. The Applicants submitted that the freehold interest in the property had originally belonged to them but in 1989 they had agreed a sale and leaseback of the property with the Woolwich Equitable Building Society (the Woolwich), completed on 11th December 1989. It was agreed that the Woolwich would only charge ground rent and the cost of repairs to the building as required from time to time. While other supporting paperwork was lost, the Lease incorporated the agreed terms. The Applicants agreed that the terms were unusual, but the Woolwich made no demands for building insurance premiums from them throughout the period of its ownership of the freehold, which was consistent with the agreement. In 2010 the freehold was acquired by Brookes Properties Limited (Brookes). Brookes initially sent a demand for insurance premium, but withdrew it after Parker Arrenberg wrote to them pointing out the relevant provisions of the Lease. Brookes sent no further demands. Later the freehold was sold to Sandling Investments Limited (Sandling). Their agents were very aggressive. After a letter dated 21st March 2012 from the solicitor acting for Sandling, the Applicants (who were not well) bowed to pressure and paid the demands made by Sandling for service charge and insurance, intending to make this application later.

7. The relevant provisions in the Lease are clauses 3(b) and 4(b). Sandling's solicitor contended that *"the lessees are responsible to contribute to such additional risks insured over and above those referred to in clause 3(b) but not so as to exclude the lessees from responsibility to pay towards the basic risks".* However this interpretation was not supported by clause 4(b) which imposes an obligation on the lessee to pay *"the cost of insuring against such additional risks other than those referred to in clause 3(b) as the Lessor may from time to time reasonably require".* The wording was clear that there is no requirement in the leases for them to have to pay for the costs of the basic cover that the lessor is required to provide pursuant to its covenant in clause 3(b).

8. The Applicants made no submissions on the issue of reasonableness, resting their case on liability to pay. They made no submissions on costs under Section 20C or fees, beyond the Application itself

9. The Respondents submitted that they purchased the property at Auction on 28th May 2012 without the benefit of replies to enquiries and very basic service charge information. The purchase was completed on 1st June 2012. The sellers gave no indication of a dispute with the Applicants over service charges or "insurance rent". The sellers served notice of assignment on 6th June 2012. The Respondent served notice of assignment upon the Applicants on 22nd June 2012. Parker Arrenberg only notified the Respondent of this application on 5th July 2012.

10. The Respondent's interpretation of clause 4(b) was that the lessees were responsible for the insurance premium apportionment for the risks covered that the landlord insures under clause 3(b), including standard risks of lightning, aircraft, riot, flood, escape of water, and subsidence. The full buildings insurance apportionment was recoverable from the lessees. It was reasonable for it to be charged to the lessees as they had paid it to the

previous owners. Also it was fair and reasonable that the insurance proportion be recoverable from the lessees as otherwise the building could be "double insured". The way the Lease was drafted is that the landlord insures the building and charges the insurance rent cost under the service charge provisions. This is the normal arrangement for buildings divided into flats since it is important there should be one single policy covering all risks for the building as a whole.

11. The Respondent made no submissions on the questions of reasonableness, costs under Section 20C or fees

Decision

12. The Tribunal considered the evidence and submissions. The relevant sections of the Lease provide:

"3. The Lessor hereby covenants with the Lessee subject to contribution an payment by the Lessee as hereinafter provided as follows:-
(a)...
(b) To insure and at all times during the said term to keep insured in an insurance office of repute the Building against loss or damage by fire storm tempest explosion and all other risks and special perils as the Lessor may from time to time deem it prudent to insure and against which the Lessor may have insured (here collectively called the "insured risks") in a sum sufficient to cover the cost of rebuilding the same (including architect and surveyors' fees) in the event of total destruction...."

"4. The Lessee hereby covenants with the Lessor to pay to the Lessor throughout the term hereby granted the specified percentages of the costs expenses and outgoings and other matters referred to in the following sub-clauses hereof (hereinafter called "the Service Charge")
(1) 28% of the following costs....
(a)...
(b) The cost of insuring the Building and the Lessor's interest therein against such additional risks other than those referred to in Clause 3(b) hereof as the Lessor may from time to time reasonably require"
(c)...

13. The Tribunal considered the wording of the relevant clauses, and the interpretation argued for by the Respondent (and its predecessor in title). Their position could be described as a triumph of hope over reality. They appear to have started their consideration from what they considered is usual or desirable, and then attempted to make the words of the two clauses fit.

14. The correct approach to interpretation of the Lease (being the contract between the parties) is to start with the wording of the Lease itself. Only if those words are ambiguous should the canons of construction be applied. The Tribunal decided that the words, in their plain natural meaning, bear the interpretation argued for by the Applicants. The Respondent seeks to argue that the words can bear another meaning, i.e. that the full amount of the insurance premium is recoverable from the Applicants. If that is so, then the words should have said that. The plain fact is

that the words used in this case do not say that. The original Lessor, being an experienced lender with professional advice, should have got such a basic and important item right. Instead it opted for a very unusual and different wording, which tends to support the Applicants' explanation of the agreement made in 1989. If the Respondent claims ambiguity and another meaning of the words, then it must put forward at least some argument in support of its proposition. It has not done so. The contra proferentem rule is also relevant. Essentially it has made an assertion, supported by its own view of what the usual insurance arrangements for flats should be. The fact that the Applicants had paid the money demanded by the previous landlord was the Respondent's only support. Against that, was the Applicants' own evidence of the agreement and the history of dealings by the original lessor over a considerable number of years, and the evidence that another previous landlord had withdrawn its demand for payment of insurance contributions on receipt of the letter from Parker Arrenberg dated 24th June 2010. The Tribunal found it significant that a previous landlord had accepted the Applicants' interpretation of the Lease. It also noted the very frank comment in paragraph 1 of the statement from the Respondent relating to the pressure applied to it by Sandlings, and the lack of replies to enquiries. This seems to mirror the evidence in the bundle of the considerable pressure placed on the Applicants by the same party. However, if the Respondent considers it was misled in any way, its remedy is against Sandlings, not the Applicants.

15. The Tribunal therefore decided that the balance of the evidence favoured the Applicants. The Respondent's demand for an insurance contribution was not made in accordance with the terms of the Lease.

Costs and Fees

16. The Application included an application for an order under Section 20C, to limit the landlord's costs of the application being added to the service charge. This power is discretionary. The Tribunal notes that the Lease can be construed to allow the Respondent to charge its costs, but in the light of its decision on the substantive matters above, the Tribunal decided to make an order limiting such costs to NIL.

17. The Application also included an application for reimbursement of the fees the Applicants had paid to the Tribunal (t under Paragraph 9 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002.

18. The Tribunal notes that its jurisdiction under Paragraph 9 is discretionary. The Tribunal noted that the Respondent had settled some issues after the application was made, but took the view that a reasonably knowledgeable landlord & tenant lawyer would have realised that the case put forward in defence was extremely weak. The Tribunal thus orders that the Respondent reimburse the Applicants' fees paid to the Tribunal of £100.

Signed: Lancelot Robson
Chairman

Dated: 24th October 2012

Appendix

Landlord & Tenant Act 1985 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 would be payable, and
e) the manner in which it would be payable

(4) – (7)……….

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 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)……

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

Commonhold and Leasehold Reform Act 2002
Schedule 12

Paragraph 9

"(1) Procedure regulations may include provision requiring the payment of fees in respect of an application or transfer of proceedings, or oral hearing by, a leasehold valuation tribunal in a case under-

(a) The 1985 Act (service charges and appointment of managers)
(b) – (e) ……..

(2) Procedure regulations may empower a leasehold valuation tribunal to require a party to proceedings to reimburse any other party to the proceedings the whole or any part of any fees paid by him

(3) The fees payable fees payable……shall not exceed-
(a) £500….”