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LONDON RENT ASSESSMENT PANEL

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION
UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985**

Case Reference: LON/00BD/LSC/2012/0351

Property: Various blocks of flats at Gipsy Lane Estate,
Gipsy Lane, London SW15 5RJ

Applicant: Gipsy Lane Estate Limited

Respondents: Various leaseholders as per list attached to the
application

Representative: Residential Management Group Limited

Date of determination: 24th July 2012

**Leasehold Valuation
Tribunal:** Mr P. Korn

Decision of the Tribunal

1. The Tribunal determines that the damages of £26,295.51 and the legal costs of £63,527.01 are wholly irrecoverable from the Respondents. In other words, these costs cannot be charged to any of the leaseholders through the service charge.

The application

2. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether it is entitled to charge to the Respondents through the service charge the costs referred to in paragraph 3 below and, if so, whether those costs are recoverable as part of the building service charge or estate service charge.
3. The costs to which this application relates are the costs arising out of the settlement of a Claim and Counterclaim in the Central London County Court (Claim No: 8HI02372) between the Applicant as Claimant and Nasrin Mostoufi as Defendant.
4. The relevant statutory provisions are set out in the Appendix to this decision.

No hearing

5. The Applicant in its application stated that it would be happy for this case to be dealt with by way of 'paper determination', in other words without a hearing. The Respondents have not requested a hearing and the Tribunal considers that a paper determination is appropriate. Consequently, this case has been dealt with on the basis of written submissions only, without a hearing.

The background

6. The Property comprises six blocks of flats, namely Fir Lodge, Hawthorn Court, Horse Chestnut Court, Lime Court, Sycamore Lodge and Willow Lodge. Together they are known as the Gipsy Lane Estate ("**the Estate**").
7. The Tribunal did not inspect the Property. Neither party requested an inspection and the Tribunal did not consider that one was necessary.
8. The Applicant is the current management company under each of the leases of the individual flats within the Estate. In this capacity it covenants to perform various maintenance and other services as set out in each of the leases and in return the relevant leaseholder covenants to pay a building service charge and an estate service charge.

9. In July 2008 the Applicant issued proceedings in the County Court against Nasrin Mostoufi, the leaseholder of Flat 42 Lime Court, and Ms Mostoufi then counterclaimed for breach of repairing covenants under her lease. The claim and counterclaim were compromised between the parties in March 2012 on terms (as set out in a Consent Order) that the Applicant would pay to Ms Mostoufi damages of £26,295.51 and legal costs of £63,527.01.
10. The Applicant wishes to recover the said damages and legal costs either from the leaseholders of Lime Court (as part of that building's building service charge) or from the leaseholders of the whole Estate (as part of the estate service charge), whichever the Tribunal determines is appropriate.

Applicant's statement of case

11. The Applicant has referred the Tribunal to various provisions within the lease of Flat 42 Lime Court ("**the Lease**"). It is implied by the Applicant, and the Tribunal is happy to accept in the absence of any evidence to the contrary, that all of the leases are in the same form for all relevant purposes.
12. Clause 3 of the Lease contains a tenant's covenant (in favour of the Applicant as Maintenance Company and also in favour of the landlord) to observe and perform various covenants including (by virtue of paragraph 3 of the Third Schedule) a covenant to pay a maintenance contribution. The maintenance contribution comprises a specified percentage of a building service charge and a different specified percentage of an estate service charge.
13. The "Annual Maintenance Provision" by reference to which the on-account estimated service charge is calculated is defined as a sum comprising "*the expenditure estimated as likely to be incurred in the Maintenance Year by the Maintenance Company for the purposes mentioned in the Fifth Schedule*" (and there is also provision for a reserve amount and for items to be included from the previous year). Under clauses 4 and 5 of the Lease the Maintenance Company is obliged to hold sums received on trust and to apply them for the purposes set out in the Fifth Schedule.
14. The Fifth Schedule lists the items of expenditure for which the money is to be used. The Applicant notes that paragraph 2 refers to the management of the Buildings and the Estate, the collection of rents and contributions and the carrying out of other duties as may from time to time be required for the proper management of the Buildings and the Estate or are otherwise imposed on the Maintenance Company by the provisions of the Lease.
15. The Applicant further notes that paragraph 9 of the Fifth Schedule refers to the payment of all legal costs incurred by the Management Company in the running and management of the Buildings and in the enforcement of the covenants, conditions and regulations contained in the various leases.

16. Based on the above-mentioned provisions, the Applicant argues that the Lease allows for recovery of the damages and legal costs paid in settlement of the counterclaim as service charge items.
17. The Applicant further argues that sub-clause 5(a) of the Lease is helpful to its case. This sub-clause states that *“the Maintenance Company shall not become liable in damages to the Lessor or to the Tenant for breach of this covenant [i.e. the covenant to apply the Maintenance Fund for the purposes specified in the Fifth Schedule] in respect of any period ... prior to the receipt by the Maintenance Company of written notice from the Lessor or the Tenant specifying the breach”*. The Applicant argues that this implies that the maintenance fund can be used to pay damages to a third party.
18. The Applicant also seeks a determination as to whether – if these sums are recoverable through the service charge – they are recoverable as part of the building service charge for Lime Court or as part of the estate service charge (i.e. spread amongst all leaseholders within the Estate). The Applicant simply comments on this point that there is no specific guidance in the Lease.

Respondents' responses

19. Mr Thorn, leaseholder of 5 Fir Lodge, argues in written submissions that the landlord (Gipsy Lane Freehold Limited) should be solely responsible for these damages and legal costs because it failed to ensure the fulfilment by the Applicant of its obligations under Ms Mostoufi's lease. He also argues in the alternative that if these items do form part of the service charge then only the leaseholders of Lime Court should be liable to contribute as the issues are building issues, not estate-wide issues.
20. Ms Noeken, leaseholder of 38 Lime Court, argues in written submissions that it would be unfair for leaseholders of Lime Court to have to pay for mistakes made many years ago by the managing agents at the time. She also makes a comment as to what would happen if the Applicant were to go into liquidation.

The Tribunal's analysis

21. It is noted that neither the Applicant nor any of the Respondents have cited any case law or other legal authority, other than (in the case of the Applicant) an analysis of the relevant provisions contained in the Lease. This may well be, in the case of the Applicant, because it is not aware of there being any relevant legal authorities directly bearing on the points in issue.
22. The service charge mechanism in the Lease allows for the Maintenance Company to charge a service charge to the tenant, and there is the normal provision for estimating the service charge, demanding on-account payments, and then making a balancing adjustment when the actual service charge is

known at the end of each year. The key provisions are contained in the list of items included in the service charge in the Fifth Schedule.

23. The Applicant has referred the Tribunal to paragraphs 2 and 9 of the Fifth Schedule and the relevant provisions have been quoted above.
24. In relation to paragraph 2, the Applicant argues that this is wide enough to cover the reimbursement of damages paid out to Ms Mostoufi. It is noted that this paragraph refers to the management of the Buildings and the Estate, collection of rents and maintenance contributions and such other duties as may be required for the proper management of the Buildings and the Estate or are otherwise imposed on the Maintenance Company by the provisions of the Lease.
25. The Tribunal disagrees with the Applicant's interpretation of paragraph 2. Management of the Buildings/Estate can cover a range of functions, such as organising maintenance, cleaning etc. However, the damages paid out to Ms Mostoufi do not in the Tribunal's view come within the parameters of 'managing' the buildings or the Estate. On the contrary, the payment made arises out of an obligation to pay compensation to a specific leaseholder as a result of a **failure** to manage Lime Court adequately. Whilst there was no formal judgment against the Applicant in the County Court case, it is clear that the settlement agreement assumes an admission of failings on the part of the Applicant. This point equally applies to the phrase "other duties as may from time to time be required for the proper management of the Buildings of the Estate"; this was not 'proper' management but the result of improper management and it was not the carrying out of a duty but instead involved bearing the consequences of failing to carry out that duty.
26. As regards whether it could be treated as part of the Applicant's collection of the maintenance contributions, whilst perhaps it could be argued that the claim **began** this way, the amount paid out could not reasonably be described as relating to the collection of a maintenance contribution. Instead, it arose out of Ms Mostoufi's counterclaim.
27. The Tribunal also disagrees with the Applicant's interpretation of paragraph 9. The legal costs agreed to be reimbursed have been incurred as a result of a successful counterclaim brought by Ms Mostoufi for breach of the Maintenance Company's obligations under her lease. In the Tribunal's view, the phrase "*legal costs incurred ... in the running and management of the Buildings*" is not wide enough to cover this scenario and thereby to allow the recovery of legal costs paid out to a third party as a result of a successful claim by that third party for mis-management of the building or estate. As for the other part of paragraph 9(a) quoted by the Applicant, "*all legal costs incurred ... in the enforcement of the covenants conditions and regulations contained in the leases*", the legal costs which are the subject of this case were not incurred in the enforcement of any of these provisions but rather as a result of a failure on the part of the Maintenance Company and/or the landlord to comply with their own obligations.

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 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).

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.