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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

Case Reference:	LON/00BE/LSC/2011/0688
Premises:	3 Clifton Crescent London SE15 2RX
Applicants:	Mr C Bevan and Miss S.A. Champenois
Representative:	N/A
Respondent(s):	London Borough of Southwark
Representative:	Mr Strauss Solicitor with the Respondent
Date of hearing:	12 January 2012
Appearance for Applicant(s):	Miss S.A. Champenois appeared and represented the Applicants
Appearance for Respondent(s):	Mr Strauss
Leasehold Valuation Tribunal:	Dr Helen Carr Mr Frank Coffey FRICS Mrs S. Justice
Date of decision:	19 th April 2012

Decisions of the Tribunal

- (1) The Tribunal determines that the formula used to calculate the service charges payable by the Applicant is inadequate because the Respondent is unable to demonstrate the number of bedrooms in each flat of the property.
- (2) The Tribunal determines that in the absence of any evidence to the contrary the Respondent is required to proceed on the basis that the number of bedrooms in the disputed flat (Flat 7) is 2 and must therefore recalculate the service charges payable by the Applicants for the service charge year 2011- 2012.
- (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.

The Background

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge year 2011- 2012.
2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. The Applicant appeared in person and Mr Strauss .an in-house solicitor represented the Respondent.
4. The property which is the subject of this application is a two bedroomed flat, 3 Clifton Crescent, in a block comprising eight flats known as 1 – 8 Clifton Crescent. The property is the only dwelling demised under a long lease within 1 – 8 Clifton Crescent.
5. The Tribunal inspected the property after the hearing in the presence of Miss Champenois and Mr Strauss. Photographs of the building were provided in the hearing bundle.
6. The Applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.

The issues

7. At the start of the hearing the parties identified the relevant issues for determination as follows:
 - (i) The reasonableness of the formula used to determine the service charges for the year 2011 - 12

The formula

- 8.** The Applicants' lease provides, at paragraph 6 (1) and(2) of the Third Schedule to the lease that the Lessee shall pay a fair proportion of the costs and expenses associated with the property and that the Respondent may 'adopt any reasonable method of ascertaining the said proportion and may adopt different methods in relation to different items of costs and expenses. The method that the Respondent uses in order to determine the fair proportion is based upon the number of flats and the number of bedrooms in each of the flats.
- 9.** Specifically the Respondent has based its calculation as to what is a fair proportion on its understanding that there are eight flats in the block of which six are two bedroomed and two are one bedroomed.
- 10.** The Applicants' case is that one of the flats - Flat 7 - which the Respondent considers to have one bedroom actually has two bedrooms.

The evidence in connection with Flat 7

11. The Respondent has no plans of Flat 7. It provided a statement from Mr Davis Abulowodi, a Resident Officer with the Respondent, who also gave evidence to the Tribunal. In his statement Mr Abulowodi said that he had made repeated attempts to view the internal layout of Flat 7 only gaining access in December 2011. During his period of access he noted there was a living room, kitchen, bathroom and a single bedroom. He also noted a small additional storage cupboard but he stated that this would be too small to accommodate even a child's single bed. Mr Abulowodi took no photographs of the interior of Flat 7 nor did he take any measurements. He did not make a plan of the flat; indeed he said it was beyond his competence to do so.
12. The Tribunal were not satisfied with this evidence as the basis for the apportionment of the service charges. It considered that it should inspect the property. Unfortunately the Tribunal could not gain access to Flat 7 and was unable from an exterior inspection to reach any conclusion about the footprint of Flat 7.
13. The Tribunal therefore issued further directions requiring the Respondent in particular to provide a floor plan of either Flat 7 or Flat 8 (which it considered would give the Tribunal some basis upon which to make a decision about Flat 7, and provide the former Rateable Value of the flats in the block.
14. The Respondent in its further statement dated 9th February 2012 informed the Tribunal that it was unable to gain further access to flat 7; that the information about rateable values had been archived; that there are no details about the conversion of the property into flats.
15. It was able to tell the Tribunal that for the purposes of council tax, flat 7 is listed as band B whereas flat 3 is listed as band C. The bands are based upon assumed capital value of the properties as at 1 April 1991 and the Respondent argues that this would indicate that the rateable value of flat 3 was greater than that of flat 7.
16. The Applicants' response to the further statement was to argue that the Respondent should provide accurate facts upon which it is to base its calculations of service charges, that the external appearance of the block suggests that Flat 7 contains two bedrooms, and that without clear evidence to the contrary the Respondent should proceed on that basis.

The Tribunal's decision

17. The Tribunal determines that the amount payable in respect of service charges should be based upon the assumption that Flat 7 comprises two bedrooms rather than one bedroom.

Reasons for the Tribunal's decision

18. The Applicants have no means of gaining access to flat 7 and therefore cannot prove their case. However their assertion that from the outside the flat looks as if it contains two bedrooms does accord with what the Tribunal found at the inspection. The burden in a situation like this must be on the Respondent who is the owner of flat 7 to demonstrate that the formula it uses to calculate its service charge apportionment is fair

and reasonable. In the opinion of the Tribunal Mr Abulowodi's evidence is not sufficient to discharge that burden. He has no property qualifications and could provide no evidence to support his statement.

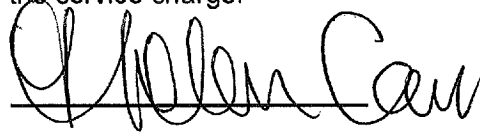
Application under s.20C

19. In the application form the Applicants applied for an order under section 20C of the 1985 Act. The Tribunal gave the Respondent an opportunity to respond to that Application in its further statement. The Respondent did not address the application in that statement. The Tribunal therefore 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:

Helen Carr

Date:



19th April 2012

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;

- (b) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
 - (c) 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;
 - (d) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (e) 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.