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Case Number: MAN/00CJ/LSC/2011/0040

HM COURTS & TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Property: 1 Forth Banks Tower, Forth Banks,
Newcastle-upon-Tyne, NE1 3PN

Applicant: Imran Khan

Respondents: (1) Triplerose Ltd.
(2) Mandale Residential Management Company Ltd.
(3) Y & Y Management Ltd.

Application: (1) Under ss. 27 and 20C of the Landlord and Tenant
Act 1985, and
(2) under Schedule 11 of the Commonhold and
Leasehold Reform Act 2002

Application date: 11 April 2011

Tribunal: P Forster (Chairman)
A Robertson

Decision

1. The Applicant is liable to pay Triplerose Ltd. the following sums in respect of the Insurance Rent due:

2009	£244.06
2010	£544.36
2011	£544.45

2. The Applicant is liable to pay Triplerose Ltd. services charges due in respect of the period 21 March 2011 to 31 December 2011. The amount to be paid is to be apportioned for 2011 between Triplerose Ltd. and Mandale Residential Management Company Ltd. by reference to the date that the charges were incurred during that year.

3. The Applicant is liable to pay Triplerose Ltd. the administration charges incurred between 21 March 2011 and 31 December 2011 the amount to

be apportioned by reference to the date that the charges were incurred during that year.

4. The Tribunal does not make an order under s.20C of the Landlord and Tenant Act 1985

Background

5. There are two applications to be determined by the Tribunal. Both applications are made by Imran Khan ("the Applicant"), the leasehold owner of Flat 1 Forth Banks Tower, Forth Banks, Newcastle-upon-Tyne, NE1 3PN ("the Property"). He holds the Property under a lease dated 13 May 2008.
6. The first application is under s.27 of the Landlord and Tenant Act 1985 ("the 1985 Act") for the Tribunal to determine the amount of service charges payable in respect of the Property for the years to 31 December 2009; 2010 and 2011. The second application is under Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") for the Tribunal to determine who is liable to pay and the reasonableness of an administration charge.
7. In respect of both applications there are also applications under s.20C of the 1985 Act that the costs incurred by the Respondents in respect of these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by the Applicant as tenant.
8. The Property is one of thirty seven flats in Forth Banks Tower, a thirteen storey block situated close to the Quayside in Newcastle-upon-Tyne overlooking the River Tyne. It is part of a development started in about 2007 that includes an adjoining car park.
9. The Property is held under a complicated legal structure. The freehold is owned by Bowesfield Investments Ltd. The thirty seven flats were let under long leases of one hundred and twenty five years. As well as Bowesfield Investments Ltd. and the individual leasees, Mandale Residential Management Company Ltd. ("the 2nd Respondent") was a party to each lease as "the Management Company".
10. Each lease includes a Recitals clause where it is stated that "the landlord [Bowesfield Investments Ltd.] has or shall enter into a contract to grant a lease to the Management Company [the 2nd Respondent] of the Estate following completion of the grant of leases of all the flats within the Estate (though subject to the leases of all the flats within the Estate) ("the Head Lease").

11. Further, it is recited that the landlord "has entered or shall enter into a contract to transfer the reversionary interest in the Estate to Mandale Freehold Ltd. following the grant of the Head Lease".
12. On 31 March 2009 Bowesfield Investments Ltd. granted a long lease of one hundred and twenty five years plus ten days to Triplerose Ltd. ("the 1st Respondent"). That is the "Head Lease".
13. Bowesfield Investments Ltd. still owns the freehold. It has not transferred it to Mandale Freehold Ltd. or to anyone else.
14. On 21 March 2011 the 2nd Respondent went into liquidation. Under the terms of the individual leases in the event of the insolvency of the management company the landlord becomes liable to carry out the services subject to receiving payment of the service charge from the tenants.
15. Y & Y Management Ltd. ("the 3rd Respondent") was appointed by the 1st Respondent as managing agents and it took over the management of the building on 1 July 2009 from Kingston Property Services (although apparently the 1st Respondent did not acquire its interest until 31 March 2010) who were the previous managing agents. Kingston Property Services were appointed by the Mandale Group of which Bowesfield Investments is a part.
16. The Tribunal gave directions on 8 June 2011 that provided for each party to serve a statement of case; for the exchange of witness statements and for the preparation of an agreed bundle of documents. Both parties have served statements of case and bundles of documents have been agreed. There are no witness statements. The parties agreed that the case should be dealt with on the papers without an oral hearing.
17. Both members of the Tribunal had previously inspected the Property in February 2011 when dealing with a separate application and so there was no inspection on 19 March 2012 when this case was heard at the Asylum & Immigration Centre, North Shields.

Issues

18. The first issue to be determined is whether or not the Applicant is liable to pay the 1st Respondent for the service charges claimed for 2009; 2010 and 2011. The demand for payment is made in the name of the 1st Respondent.

19. If the Applicant is liable to pay the service charges then the Tribunal must determine how much is payable.
20. The items specifically challenged by the Applicant are: insurance; cleaning; lifts; utilities and professional fees.
21. The second issue to be decided by the Tribunal is the liability to pay and the amount of an administration charge claimed by the 1st Respondent.
22. The Tribunal must also determine whether or not the costs incurred by the Respondents in relation to these proceedings can be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by the Applicant as tenant.

Liability to Pay the Service Charges

23. S.27A of the Act provides that:
 - (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.
24. In Schedule 4 to the lease the tenant:

“covenants with the Landlord and as a separate covenant with the Management Company that the Tenant will at all times:-

 1. pay the Rent and the Insurance Rent at the times and in the manner provided
 2. pay to the Management Company the relevant Specified Proportion of the Service Charges at the times and in the manner provided in this lease without any deduction

25. Paragraph 3.3 of Schedule 3 of the lease provides that “the tenant shall pay to the Management Company the Specified Proportion of the Service Charge in the manner following ...”
26. “Management Company” is referred to in the Recitals as “a company formed with the object of (inter alia) maintaining the Common Parts within the Estate common to the Property and Other Sites and providing the Services to the Flats”. The 2nd Respondent is a party to the lease and is described as “the Management Company”.

Liability to Pay the Administration Charge

27. Schedule 11 of the 2002 Act provides where relevant:

- 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.
- 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.

The Applicant's Case

Service Charges to year ended 31 December 2009

28. The Applicant states that the initial service charge was set by Kingston Property Services. They estimated that expenditure would be around £40,683.00. The 1st Respondent wrote to the Appellant on 30th November 2010 claiming that the budget had been unrealistic and setting out the expenditure claimed for 2009, namely, £73, 014.87. The Appellant says that he was charged an extra £425.46.
29. Further, the 1st Respondent wrote to the leaseholders on 19 October 2010 claiming an extra £526.17 on the Insurance Schedule for the period 7 June 2009 to 07 June 2010. In total the 1st Respondent claims an excess £951.63 for 2009 over the original Schedule.
30. The Appellant asks the 1st Respondent for proof that all the invoices for 2009 show all actual expenditure incurred. He challenges the expenditure on utilities in 2009 claimed at £16,204.00 including water charges of £5,289.59 and electricity charges of £10,914.41. The Appellant questions what appears to be claimed, namely that the utility bills were higher in 2009 and fell substantially in 2010.
31. In respect of the insurance premiums claimed: the 1st Respondent claims £21,789.09 but the Appellant points out that in 2010 £18,194.00 is invoiced. The Appellant doubts that insurance costs have fallen.
32. In respect of the management fees the 1st Respondent has billed £9,782.00 according to the accounts. However, the 3rd Respondent only took over 01 July 2009. Is the £9,872.00 for just a six month period?

Service Charges to year ended 31 December 2010

33. The 1st Respondent claims that the budget was set at £81,336, the Applicant's proportion being £2,415.68. However, the Applicant says that the actual expenditure was £74,910, so his actual share should be £2,224.82. The Applicant claims a rebate in 2011.
34. In respect of other items claimed by the 1st Respondent, the Applicant says as follows:

- (1) Electricity - £4,519.00 is claimed but the Applicant says that the invoices only total £3,281.01 resulting in an overcharge of £1,237.99.
- (2) Repairs and /Maintenance - £4,518.00 is claimed but the invoices only total £4,444.44 so there is an overcharge of £73.56.
- (3) Insurance - £18,194.00 is claimed but the Insurance Schedule shows a cost of £1,716.00 so there is an overcharge of £478.00
- (4) Legal and professional fees - £2,418.00 is claimed. The Applicant says that when he was threatened with legal action he was told that he would be liable for legal costs but the 1st Respondent has also put it on the service charge leading to a double charge. The Applicant states that it is unreasonable to charge leaseholders legal costs for action taken against other leaseholders.

The invoices only show payment of £489.25 yet £2,418.00 is claimed resulting in an overcharge of £1,928.75.

- (5) Lift Maintenance Contract and Lift Repairs - £5,145.00 and £602.00 are claimed but the invoices total only £4,730.77 which is an overcharge of £1,016.23.
- (6) Lift Telephone - £171.00 is claimed but the line rental is £13.03 per month. 12 months at £13.03 is £156.36. There is an overcharge of £14.70.
- (7) Management Charges - £12,390.00 yet Y&Y's fee is £11,086.13 resulting in an overcharge of £1,303.87.

In 2009 Kingston Property Service set the service charge. They included their management fee at £5,318.00 for the period 01/01/2009 to 31/12/2010. Therefore, the management fee has been more than doubled. The Applicant says that the level of fee for the service provided is unjustified.

Further, the 1st Respondent has charged £9,782.00 for the management fee for 2009 so is charging twice for the same service.

- (8) Water Charges - £8,034.00 is claimed but the invoices total only £5,417.84. The invoice at page 151 of the Bundle is addressed to 134 Apartments Hanover Mill for £4, 769.42 and should not be included. There is an overcharge of £2,616.16.

35. In summary, the documents produced support expenditure of £66,240.74. The Applicant's share of the service charge for 2010 is £1,967.34 so he has been overcharged by £448.34.

Service Charges to year ended 31 December 2011

36. The Appellant claims a rebate from previous years. The Appellant says that has been over looked and therefore the level of service charges is incorrect, it is too high.

Administration Charges

37. The Appellant does not accept that the time spent preparing for and considering the application has been 7 hours at a cost of £700.00. He says that this is totally fabricated and inflated. He asks for an explanation of the claim for travel and photocopying of £200.00.

The 1st Respondent's Case

38. The 1st Respondent says that the allegations about its accounting practices are untrue and that it is only seeking to recover what is due under the lease. It is asserted that the Applicant has ignored invoices included in the bundle and has cited invoices with incorrect amounts which give the appearance that there are discrepancies. The 1st Respondent says that the Appellant's submissions are vexatious.
39. The accounts are certified by independent accountants and points out that the Applicant was invited to inspect the invoices and other paperwork but he has not done so.

Service Charges to year ended 31 December 2009

40. The 1st Respondent states that the audited accounts for 2009 and the invoices that support them have been produced.

Service Charges to year ended 31 December 2010

41. The 1st Respondent says in respect of the 2010 end of year balancing credit that the accounts were finalised and a balancing credit applied to the accounts in August 2011.
42. In respect of the items claimed the 1st Respondent's case is:

(1) Electricity – the certified accounts show the total for electricity was £4,519.00 and the invoices are included in the bundle.

- (2) Repairs & Maintenance – the certified accounts show the total of £4,518.00 for General Maintenance.
- (3) Insurance – the certified accounts show the total of £18,194.00 the invoices are in the bundle.
- (4) Legal fees – The certified accounts show the total of £2,481.00, the invoices are in the bundle.
- (5) Lift Maintenance Contract and lift repairs – The certified accounts show the total of £5,145.00 for the Lift Maintenance Contract and £602.00 for lift repairs, the invoices are in the bundle.
- (6) Lift telephone – the certified accounts show the total of £171.00, the invoices are in the bundle.
- (7) Management charges - The certified accounts show the total of £12,390 for management fees. The invoices are in the bundle.

The Applicant has compared the charges raised by the 3rd Respondent with charges raised previously by Kingston Property Services. The 1st Respondent submits that the invoice at page 473 of the supplementary bundle shows that the fees billed by Kingston Property Services were only for half the year, from 1st January 2009 to 30th June 2009. That invoice is for £2,659.36 for general management and £3,465.97 for car park management - totaling £6,125.33 for half the year. In addition, there was a charge for £457.38 for call out attendances at the property for maintenance.

- (8) Water charges – the certified accounts show the total of £8,034.00. In addition to the invoices listed by the Appellant there are further invoices which have not been included which account for the sums the Applicant disputes.

The 1st Respondent submits that the invoices have been produced and accounts certified for the charges raised. The Respondent denies that the Applicant has shown that any charges demanded have not been properly incurred.

Service Charges to year ended 31 December 2011

43. The sums payable for 2011 are budgetary sums unaffected by the actual expenditure. A copy of the budget is included in the bundle. These sums were payable from the 1st January in advance and the 1st Respondent submits that the reasonableness of these should be determined by reference to the previous expenditure and in the reasonable estimation by the agent of the anticipated works and services required for the following year.

Administration charges

44. The 1st Respondent submits that the administration charges cover fees charged by their agent in relation to the LVT case as detailed in the bundle of documents. Costs were reduced by instructing the managing agent instead of a solicitor. The Applicant's comments with respect to the RTM do not relate to the charges subject to this application.

Decision

Preliminary Issue

45. An issue arose in respect of the validity of the demands for payment of the service charges. This had not been raised by any of the parties but it is one that must be addressed by the Tribunal.
46. Demands by a landlord for payment of sums due under a residential lease must comply with s.47(1) of the Landlord and Tenant Act 1987 which provides that: "(1) where any written demand is given to a tenant of premises..., the demand must contain the following information, namely (a) the name and address of the landlord..." S.47(2) further provides that if a tenant is provided with a demand which does not contain this required information, the sum will not become due until the information is provided.
47. In the present case, the demands for payment of the service charges are included at pages 155 to 157 of the Respondent's Bundle. They are in the form of invoices issued by the 3rd Respondent. The demand for 2009 is at page 157. The invoice is dated 30 November 2010. In respect of 2010 the invoice is dated 26 November 2009 and is at page 155. In respect of 2011 the invoice is dated 1 December 2010 and is at page 156.

48. It appeared to the Tribunal that those demands did not appear to comply with s.47(1) of the 1987 Act. They name the landlord but give a care of address which is the address of the 3rd Respondent. The invoices expressly refer to s.48 of the 1987 Act which deals with the provision of an address for service of notices. This point was in issue in the recent case of *Beitov Properties Ltd. v Martin* [2012] UKUT 133 (LC). The Upper Tribunal made a distinction between the s.47 and 48 of the 1987 Act and concluded that the two sections are distinct. The purpose of s.47 is to provide a tenant with sufficient information to identify its landlord.
49. The Tribunal invited the parties to make written submissions on the issue of the address and the validity of the demands for payment. The only submission received was from the 1st Respondent's solicitors. They point out that the landlord's name is stated on the demands for payment and that although a care of address is given for service under s.48 of the Act the landlord's registered office address at 88 Edgware Road, Edgware, Middlesex, HA8 8JS is also given together with other details of the company. The Tribunal accepts the 1st Respondent's submission that the demands for payment are compliant. It may be a technical point but it is one which the Tribunal was bound to follow particularly when there has been no oral hearing and where the Applicant acts in person and apparently without the benefit of legal advice.

The Issues

50. The first issue is whether or not the Applicant is liable to pay the 1st Respondent for the service charges claimed for 2009; 2010 and 2011.
51. Schedule 4 of the Lease is clear that the Rent and Insurance Rent shall be paid in the manner provided. Clause 3 provides for the Rent and Insurance Rent "to be paid by banker's order (if the Landlord so requires) in advance ...". Payment is due to the landlord.
52. The ground rent does not fall within s.18 or s.22 of the 1985 Act and therefore the Tribunal has no jurisdiction to consider such matters.
53. The "Landlord" is defined in the lease as "the person for the time being entitled to the reversion immediately expectant on the determination of the Term". The Applicant's Lease was granted on 13 May 2008 by Bowesfield Investments Ltd. as landlord. On 31 March 2009 Bowesfield Investments Ltd. granted a long lease to the 1st Respondent who became entitled to the reversion.
54. The years under consideration are 2009; 2010 and 2011.

55. The "Insurance Rent" defined as "a fair and reasonable proportion of the costs incurred by the Landlord in insuring the Building pursuant to Schedule 5 of this Lease" stand to be paid in the same way to the Landlord from time to time. In respect of 2009 that necessitates an apportionment. Included in the service charge demand is the sum of £325.42. The Tribunal determines that of that sum £244.06 is payable to the 1st Respondent. In 2010 and 2011 the sums due are respectively, £544.36 and £549.45.
56. In respect of the insurance rent the Tribunal accepts the sums claimed as justified by the relevant invoices produced and the submissions made on behalf of the 1st Respondent. Advice was sought and received by appropriately qualified insurance brokers.
57. The Tribunal must then consider the services charges themselves. Schedule 4 of the Lease provides that the relevant proportion of the Service Charges are payable to the Management Company at the times and in the manner provided for.
58. The 2nd Respondent is the Management Company and a party to the Lease and therefore the person to whom the Service Charges are payable. However, the 2nd Respondent went into liquidation on 21 March 2011. Under the terms of the Lease in that eventuality the Landlord becomes liable to carry out the services subject to receiving payment of the service charge from the tenants. In 2009 and 2010 the service charges were payable to the 2nd Respondent and in respect of 2011 an apportionment is required between the 2nd and 1st Respondents as at the 21 March 2011 when the 1st Respondent took up responsibility for providing of the services under the Lease.
59. The demands for payment dated respectively, 26 November 2009; 30 November 2010 and 1 December 2010 all pre-date the liquidation of the 2nd Respondent but are made in the name of the 1st Respondent. The Applicant is asked to make cheques payable to the 3rd Respondent, who is a managing agent appointed by the 1st Respondent. There is no liability under the Lease for the Applicant to pay the 3rd Respondent. Payments to the 3rd Respondent are made to it on behalf of the 1st Respondent.
60. The complicated legal structure under which the Property is held leads to a lack of clarity and to understandable uncertainty on the part of the Applicant about who the service charges are payable to.
61. Services charges due from the Applicant in 2009 and 2010 are payable to the 2nd Respondent now in liquidation and in respect of 2011 need to be apportioned between the 2nd Respondent and the 1st Respondent as at 21 March 2011 the date of the liquidation. Those charges cannot simply be apportioned on roughly a 25% / 75% basis because the apportionment will

depend on the date that the various costs were incurred and not on the date of the liquidation.

62. The Tribunal is not able to undertake the accounting exercise required to determine what part of the 2011 services charges is payable to the 1st Respondent. It can only state the basis on which those charges are to be calculated.
63. The liquidator of the 2nd Respondent has so far as the Tribunal is aware made no demand for payment of services charges that were incurred up to three years ago.
64. The Tribunal determines that in respect of the demands issued on behalf of the 1st Respondent in respect of the years 2009; 2010 and 2011 the following is payable by the Applicant to the 1st Respondent:

2009	Insurance Rent	£244.06
2010	Insurance Rent	£544.36
2011	Insurance Rent	£549.45

65. The Applicant's submission in respect of the 2011 service charges is that he is entitled to a rebate in respect of earlier years. Any such rebate would be due to him from the 2nd Respondent now in liquidation. There is no direct challenge to the sums actually claimed.

The Administration Charges

66. The Tribunal must first determine if the charges claimed by the 1st Respondent fall within the statutory definition of an administration charge. The charges claimed are *in connection with 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* and therefore fall within paragraph 1(1)(c) Schedule 11 of 2002 Act. The charges have been incurred to recover unpaid service charges claimed from the Applicant.
67. The next question is to whom the charges are payable? Under the terms of the Lease, clause 2.14 of Schedule 3 the *costs incurred by the Management Company in bringing or defending any actions or other proceedings against or by any person whatsoever* are recoverable as service costs as part of the services charges. They are payable to the Management Company which from 21 March 2011 was in effect the 1st Respondent.
68. These proceedings commenced on 11 April 2011 when the Applicant's application was received by the Tribunal. Most of the costs relating to the proceedings are likely to have been incurred since that date. However, there may have been costs incurred between 21 March 2011 and 11 April

2011 in which case they are payable as an administration charge to the 1st Respondent.

69. The sum claimed appears to the Tribunal to be reasonable having regard to the considerable time required to deal with matters and the rate applied. The Tribunal is not able on the available evidence to apportion the total sum between the 1st and 2nd Respondents.

Costs

70. The Applicant has applied for an order under s.20C of the 1985 Act which provides:

(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.

(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.

71. Success alone is not the relevant criterion and all circumstances must be considered by the Tribunal including the conduct and circumstances of the parties. If a Respondent has behaved improperly or unreasonably, he cannot normally expect to recover his costs of defending such conduct. There is no automatic expectation of an order in favour of a successful tenant.

72. In the present case the Tribunal has found that there are sums due to the 1st Respondent and to that extent it has been successful in defending the Applicant's case. However, for the reasons given, the Applicant has also prevailed to some extent although payment may still be due it is not to the 1st Respondent alone. Taking into account all the circumstances of the case the Tribunal is of the view that it would not be appropriate to make an order under s.20C of the 1985 Act.

P Forster Chairman

Dated: 16 August 2012