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HM Courts & Tribunals Service

Residential Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

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

Case Reference:	**LON/00AS/LSC/2012/0550 & 0640**
Property:	**Flats 1-4, 11, 14, 15, 17-20, 24-29 and 34 Burlington House, 2 Park Lodge Avenue, West Drayton UB7 9FE**
Applicant:	St George West London Limited
Respondents:	Mr B MacGoey and Mr D O'Malley
Date of hearing:	7th February 2013
Appearance for Applicant:	Mr S Allison, Counsel for the Applicant
Appearances for Respondents:	Mr MacGoey and Mr O'Malley
Also present:	Ms L Taylor, Property Manager for Applicant's managing agents
Leasehold Valuation Tribunal:	Mr P Korn (chairman) Mr N Maloney FRICS FIRPM MEWI
Date of decision:	4th March 2013

Decisions of the Tribunal

The Tribunal makes the following determinations:-

- The 'on account' service charges for 2012 are payable in full.
- The legal costs of £7,453.98 are not payable.
- The Applicant is ordered to pay £250 to the Respondents by way of penalty costs pursuant to paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.
- The Tribunal orders, pursuant to section 20C of the Landlord and Tenant Act 1985 ("**the 1985 Act**"), that the Applicant may only add to the service charge a maximum of 50% of the reasonable legal costs incurred by it in connection with these proceedings.

The applications

1. The Applicant seeks a determination pursuant to section 27A of the 1985 Act as to the liability to pay and reasonableness of certain service charge items.

2. There are two separate applications, as follows:-

   - a direct application to the Leasehold Valuation Tribunal (LVT) for a determination of liability to pay and reasonableness of the whole of the 'on account' service charges for 2012 levied on the Respondents; and
   - a claim initially issued in Liverpool County Court, but transferred for determination to the LVT, for payment of £7,453.98 by way of legal costs incurred by the Applicant in connection with the recovery of previously unpaid service charges and administration charges.

3. At the end of the hearing the Tribunal invited the parties to try to reach an agreement amongst themselves on the legal costs issue by 12.30pm on 14th February 2013, on the basis that if they failed to reach an agreement by that deadline the Tribunal would make a determination. Both parties agreed that it would be helpful to have that extra time to try to reach an agreement, but in the event the parties were unable to agree and the matter was left for determination by the Tribunal.

4. The relevant legal provisions are set out in the Appendix to this decision.

The background

5. The Respondents hold the Property on a series of long leases, a copy of one of which is included within the hearing bundle. All of the leases are stated by the Applicant to be on the same terms for all relevant purposes.

6. The Tribunal did not inspect the Property, nor the building of which it forms part. Neither party requested an inspection and, given the nature of the issues, the Tribunal did not consider that one was necessary.

Dismissal Notice

7. The Applicant was directed to serve its statement of case in respect of each application by 10th October 2012 and 7th November 2012 respectively. As at 13th December 2012 it had failed to serve its statement of case in respect of either application. In response to this failure to comply with directions the LVT, pursuant to regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, gave notice that it was minded to dismiss both applications as an abuse of the LVT's process and that the question of dismissal would be considered at the start of the hearing.

8. At the hearing both parties were invited to make submissions on the question of dismissal. Mr Allison for the Applicant said that the delay had been the fault of the Applicant's solicitors and that the deadline had been overlooked by the junior solicitor with responsibility for the case. The Applicant had assumed that its solicitors were dealing with the matter in the appropriate manner. In addition, Mr Allison argued that Regulation 11 only applies where the "application" is an abuse of process and that there was nothing wrong with the application itself, the problem being with the delay in serving a statement of case.

9. The Respondents were caught in two minds as to how to respond. On the one hand they were unhappy with the length of the delay on the part of the Applicant, but on the other hand they had now seen the Applicant's statements of case and were not convinced that a dismissal of the applications would be in anyone's interests as it would leave the issues unresolved. They had taken time out and incurred expense in order to attend the hearing and felt on balance that it would be preferable to go ahead.

10. The Tribunal considered the issue. The Chairman noted that the Tribunal had a discretion as to whether to dismiss an application but also commented that in relation to the County Court transfer it was not (in the Tribunal's view) within its power to 'dismiss' the application, although it could choose to refer the case back to the County Court. The Tribunal was unimpressed by the considerable delay on the part of the Applicant and its clear non-compliance with directions, and it did not accept that the Applicant could escape censure simply because the case was being handled by its solicitors. However, taking all of the circumstances into account, including the Respondents' wish to continue and

the time and expense already committed to the case by the Respondents, the Tribunal decided on balance not to dismiss either application and to hear both applications with a view to making a determination in respect of each of them.

On Account Service Charge for 2012

11. Mr Allison explained that the development was still under construction and that the Respondents held 18 out of 34 units, and so their service charge contribution was very significant. He referred the Tribunal to the relevant provisions of the leases, the service charge accounts for 2011, separate information on block costs, estate costs and garage charges, the budget for 2012 and copies of relevant demands. In response to a question from the Tribunal about apparently high plant & machinery maintenance charges for 2011 he explained that there had been a partial credit back in respect of these charges. In Mr Allison's submission, the leases contained adequate provision for the payment of the 'on account' service charge for 2012, the demands had been properly issued and the amounts were reasonable.

12. In response, the Respondents said that they had been awaiting the necessary information from the Applicant for a very long time and that they had not previously received any copies of audited accounts. They also felt that the service charge had risen by too much since 2009. They also argued that they should pay a smaller percentage of the total service charge now that more units had been let.

13. Mr Allison for the Applicant said in response that his instructions were that copies of audited accounts had in fact previously been supplied.

14. As regards the Respondents' argument that the service charge had risen by too much since 2009, the Tribunal noted that the rise had actually been about 11.6% over the whole period since 2009 and queried whether this was really such a large rise given inflation and other possible factors.

15. As regards the Respondents' argument that they should pay a smaller percentage of the total service charge now that more units had been let, the Tribunal noted that it is standard practice for landlords themselves to bear the proportion payable by unlet units and that therefore the letting of further units would not necessarily reduce the amount payable per unit.

Legal costs

16. The Applicant's case on this issue was that the Respondents had failed to make certain service charge and administration charge payments and that as a result the Applicant had issued proceedings in Liverpool County Court for the sum of £24,897.36. After proceedings had been issued the Respondents made a payment of £17,443.38, leaving a disputed balance of £7,453.98 comprising the Applicant's legal costs.

17. In its statement of case the Applicant referred to the relevant provisions of the leases which it argued allowed for the recovery of such legal costs. It argued that it was either recoverable as a service charge item or as an administration charge. If recoverable as a service charge item, the leases allowed the Applicant to *"recalculate on an equitable and reasonable basis the proportions appropriate to all Properties"* and in the Applicant's submission the most equitable and reasonable approach would be to charge 100% of the legal costs to the Respondents as the defaulting lessees.

18. As regards the **amount** of the legal costs, the Tribunal asked Mr Allison what information he could supply as to their reasonableness, including evidence as to time spent by the Applicant's solicitors and hourly rates. Mr Allison submitted that the amount was reasonable when divided amongst 18 units, but otherwise he was not in a position to supply any other evidence on the question of reasonableness.

19. The Respondents' position was based on their stated belief that it was agreed between the parties as part of the overall settlement that the sum of £7,453.98 was not in fact payable. They referred the Tribunal to an email from their solicitors Mundays addressed to them and dated 14th September 2010. In that email, Mr Martyn of Mundays stated: *"I've now received confirmation of the landlord's agreement to your proposals; that is to pay the arrears, without making any payment in respect of costs or interest"*. There is also a further email from Mundays dated 20th October 2010 attaching copies of the notices of discontinuance of all proceedings filed against the Respondents by the Applicant and stating that they had received a telephone call from the Applicant's solicitors requesting confirmation of whether the Respondents had sent the cheque for £17,623.18 for the month of October in accordance with the agreed settlement terms. The Notice of Discontinuance simply states that the claimant discontinues all of the claim, in other words it does not specify the basis or give any indication that the defendant agreed to pay any particular sum or sums.

20. In response, Mr Allison said that his instructions were that the intention was for the legal costs to be paid on top of the settlement figure, but he conceded that there was no written agreement to support this proposition nor a telephone attendance note to confirm that this was the basis on which the two sets of solicitors reached agreement on the telephone.

Tribunal's analysis regarding 'On Account' Service Charge for 2012

21. The Tribunal is satisfied that the leases provide for the Respondents to pay a reasonable 'on account' service charge in each year. Whilst there is a dispute as to whether copy audited accounts have previously been supplied and whilst the Applicant was extremely slow to provide the Respondents with its statement of case, the statement of case was eventually supplied and the Respondents confirmed that they had received the necessary information in sufficient time to prepare for the hearing.

22. The Tribunal notes that the Applicant has supplied service charge accounts for 2011, separate information on block costs, estate costs and garage charges, the budget for 2012 and copies of relevant demands. It also notes Mr Allison's explanation regarding the apparently high plant & machinery maintenance charges in 2011.

23. In the Tribunal's view, the information provided by the Applicant is sufficient to demonstrate on the balance of probabilities that the 'on account' service charge for 2012 is reasonable, subject to the Respondents being able to make a successful challenge to the reasonableness of the service charge.

24. The Respondents' challenge seems to contain two elements. First of all, they argue that the rise in service charge from 2009 to 2012 is unreasonably high. On this point, as put to the Respondents by the Tribunal at the hearing, the rise over this period has been about 11.6%, and the Tribunal does not accept that a rise of less than 4% per year is intrinsically unreasonable. Simple inflation could account for a large part of the rise, but there are also many other possible factors. For example, fuel prices can fluctuate, as can building insurance premiums, and in any one year it could be necessary to budget for more repairs to be carried out.

25. Secondly the Respondents argue that the amount payable by the Respondents should decrease as more units are let. The Tribunal disagrees with this assessment. It is standard practice for landlords themselves to bear the proportion of the service charge attributable to unlet units, and the Tribunal would need at least some evidence that the Applicant was seeking to charge to existing leaseholders the proportion attributable to unlet units in order to be able to find in the Respondents' favour on this point.

26. In conclusion, on the basis of the information supplied by the Applicant and in the absence of any compelling challenge by the Respondents, the Tribunal determines that the Respondents' share of the 2012 'on account' service charge is reasonable and payable in full.

Tribunal's analysis regarding legal costs

27. The Applicant has mainly approached this issue from the perspective of whether and to what extent the leases allow for recovery of legal costs in these circumstances. Whilst this is of course a relevant factor, it is not the only issue. The Respondents' position is that as part of the overall settlement of the original claim it was agreed between solicitors that the only amounts payable were the particular sums specified and that the Respondents would not be obliged to pay the Applicant's legal fees on top of this.

28. The amount of available evidence as to what was agreed on this issue and as to what was the basis of the discontinuance of the claim is very thin. It seems on the basis of the evidence given at the hearing that neither firm of solicitors wrote to the other to summarise what was agreed. Instead, it appears that an

agreement was reached on the telephone and that neither firm even made an attendance note recording the details of the conversation. The Notice of Discontinuance itself makes no mention of any conditions to be fulfilled or amounts to be paid by the Respondents.

29. Mr Allison has asserted that it was understood, or should have been understood, that there was no intention to exclude the Applicant's right to recover its legal costs on top of the settlement figure. The Respondents disagree and point primarily to the emails from their solicitors. The difficulty, of course, with these emails is that they are simply correspondence between a solicitor and his clients and therefore of less weight in proving what was agreed than correspondence between opposing solicitors. Nevertheless, in circumstances where there is such a dearth of evidence as to what was agreed, in the Tribunal's view they do have some value.

30. In the Tribunal's view, whilst the poor quality of the evidence as to what was agreed makes it harder for it to reach a conclusion, on the balance of probabilities the legal costs were not intended to be payable on top of the specific sums agreed to be payable. Given that the Notice of Discontinuance gives no hint as to what sums if any were agreed to be payable by the Respondents it was incumbent on the Applicant through its solicitors to ensure that there was a written record of any sums or categories of sum agreed to be payable by the Respondents in return for the discontinuance of the claim, or failing that at least an attendance note of the conversation during which the agreement was made. Whilst the emails from the Respondents' solicitor are far from being perfect evidence as to what was agreed, those emails together with the Respondents' witness evidence and their consistency over a long period in disputing the proposition that they agreed to pay these costs are sufficient to persuade the Tribunal that on the balance of probabilities these legal costs were agreed to form part of the settlement figure such that they are not payable on top of the sums already paid by the Respondents.

31. Although the Tribunal has determined that the legal costs are not payable at all, it is considered appropriate to comment briefly on two other points. First of all, even if the legal costs were considered to be payable in principle, they would only be payable to the extent that they were reasonable in amount. The Applicant's submissions on this point were that if the total sum is divided between all 18 units then the amount per unit is quite low. The Tribunal does not accept the validity of this approach. Given the nature of the claim it seems clear that there is very little extra work involved in extending the claim to each additional unit, and therefore it is the overall cost for the amount of work needed that would seem to be the appropriate consideration. In addition, no information has been supplied as to the amount of time taken or the hourly rate of the fee earner(s) involved. In the absence of such information the Tribunal is of the view that the amount of the charge seems unreasonably high and that therefore even if it had agreed with the Applicant that the legal costs were payable in principle it would have reduced them to what it considered to be a reasonable amount.

32. The second point concerns the Applicant's analysis of the leases. It argues various points in the alternative, as it is entitled to do. Taking its argument that legal costs are a service charge item, it goes on to suggest that because it is entitled to recalculate the service charge *"on an equitable and reasonable basis"* this entitles it to charge 100% of the costs to the Respondents in this case. The Tribunal disagrees with this analysis and considers that this provision has a much more limited application. If the intention of the parties was for a defaulting tenant always to pay the cost of enforcing its breaches of covenant then the leases would spell this out and the cost would be recoverable as an administration charge.

33. As to whether legal costs of this nature are recoverable as administration charges under the leases as drafted, the Applicant in arguing this point relies on the general indemnity clause which obliges the lessee to keep the lessor *"indemnified in respect of charges for other services payable in respect of the Demised Premises which the Lessor shall from time to time be called upon to pay"*. No detailed arguments have been advanced as to whether this indemnity clause covers legal costs of this nature, and the Tribunal's view in the absence of detailed argument is that it does not cover these costs as they are not charges for a 'service' and the clause would need to cover legal costs of this nature more clearly in order to satisfy the established principle that ambiguities are resolved in favour of the interests of the paying party.

34. As regards the Applicant's alternative argument that the costs were incurred in contemplation of forfeiture proceedings and therefore (if payable) would be recoverable under the costs recovery clause in paragraph 6 of Part I of the Eighth Schedule, again this point has not been argued in much detail but the Tribunal's view on the basis of the limited information provided is that it seems too much of a stretch to describe these costs as having been incurred in contemplation of forfeiture proceedings, given that no real evidence has been offered to suggest that forfeiture was seriously being considered as an option.

35. In conclusion, on the basis of the limited evidence provided, the Tribunal determines that the legal costs of £7,453.98 are not payable by the Respondents.

Application for penalty costs

36. The Respondents have applied for penalty costs against the Applicant pursuant to paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 which allows a leasehold valuation tribunal to order a party to proceedings to pay up to £500 to another party to those proceedings towards their costs in circumstances where the first party has in the opinion of the leasehold valuation tribunal *"acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings"*.

37. As the parties are aware, the Tribunal came close to dismissing both applications pursuant to paragraph 11 of Schedule 12 on the basis that the

Applicant's serious failure to comply with directions arguably amounted to an abuse of the LVT's process. In this regard, the Tribunal does not consider that a party should escape censure simply because it has left a matter with its solicitors to deal with. Nor does the Tribunal accept the argument of Counsel for the Applicant that the application itself was not an abuse of the LVT's process. This would give an unrealistically narrow meaning to the word 'application', and in the Tribunal's view paragraph 11 of the Regulations was intended to cover the whole application process, not merely the contents of the initial application form.

38. Counsel for the Applicant also argued at the hearing that the Respondents had not in the end suffered any real prejudice by virtue of the Applicant's non-compliance.

39. In the Tribunal's view, the non-compliance with directions on the part of the Applicant in this case was serious and ought to be penalised. It caused aggravation to the Respondents and was disrespectful to the LVT. It was also wasteful of the LVT's time, and the LVT is entitled to have some regard to the fact that it is in part publicly funded and needs to protect its processes from abuse. At the same time it accepts that ultimately the level of prejudice suffered by the Respondents was not of a high order of magnitude. In the circumstances, whilst the Tribunal considers that a penalty cost award should be made against the Applicant, that award is limited to £250. Evidence received from the Respondents indicated that they had incurred at least £250 in expenses.

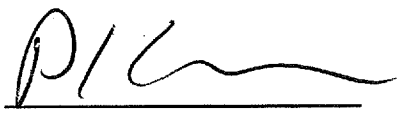
Section 20C application

40. The Respondents have also applied for an order that the Applicant's costs should not be put through the service charge. The Applicant has won part and lost part of its case, and arguably it has won on the major, and more time-consuming, element. Clearly the Applicant was entitled to make the applications, particularly the application on which it has won. However, the manner in which it has conducted its case, its serious failure to comply with directions and its failure to provide evidence as to the alleged reasonableness of the legal costs all point to the conclusion that there should at the very least be a reduction in the amount of costs that the Applicant is entitled to put through the service charge.

41. Taking everything in the round, the Tribunal considers that it would be just and equitable to order that 50% of the costs incurred by the Applicant in connection with these 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 Applicant's leaseholders.

42. Both parties should note, therefore, that the Applicant can only put through the service a maximum of 50% of its **reasonable** legal costs incurred in connection with these proceedings. They should also note that, in the

Tribunal's view, the Applicant does not seem to have spent much time preparing for either application and that therefore the Tribunal would not expect the Applicant's costs to be high. If on receiving details of these costs as part of the service charge the Respondents consider them to be too high they will have the option at that stage of challenging the amount of those costs through the LVT.

Chairman: 

Mr P Korn

Date: 4th March 2013

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.