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Residential Property
TRIBUNAL SERVICE

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

REF: LON/00AG/LIS/2007/0044

FLAT 3, 277 EVERSHOLT STREET, LONDON NW1

MR SIMON de DENEY **Applicant**

MR JASVENT PATEL **Respondent**

Date of hearing: 10 September 2007

Date of decision: 26 September 2007

Tribunal: Mr M.A. Martynski - Solicitor
Mrs S. Redmond BSc MRICS
Mr O. Miller BSc

Present: Mr S de Deney
Mr L. Pearl (Saffron Property Ltd. - Managing Agents for the Respondent)

Summary of decision

1. The correct apportionment of the service charge is that the Applicant pays 30 per cent of the total service charge for the building at 277 Eversholt Street, NW1 (the Building).

2. The management fees of Saffron managing agents payable by the Applicant are limited to £100 per year for the years 2006 and 2007.

3. An order is made pursuant to section 20 Landlord and Tenant Act 1985 in respect of the costs incurred by the Respondent in these proceedings.

4. The Respondent is to reimburse the Applicant the fees paid by him in these proceedings of £250.00.

Background

5. This is an application made by the Applicant under section 27A Landlord and Tenant Act 1985 in respect of service charges demanded for the years 2006 and 2007.

6. The Building is a terraced property with six floors. The Applicant is the long leaseholder of the flat situated on the top two floors of the Building. On the two floors below the Applicant are two other residential flats. On the basement and ground floors of the Building are commercial premises.

7. The Respondent is the freehold owner of the building. He also owns the residential flat number 2 in the Building which he lets out on short-term tenancies.

8. In former years the Building was managed directly by the Respondent. During the course of 2005 the Respondent instructed Saffron managing agents to fully manage the letting of flat 2 in the building. Later, in November of that year, the Respondent entered into a contract with Saffron whereby Saffron became the managing agents for the residential parts of the Building. The Respondent continued to manage the commercial parts of the building himself.

The issues and the Tribunal's decisions

9. By the time of the final hearing, the dispute between the parties could be put into two main categories. First there was the question as to how the service charge was being apportioned. Second, there was a question about the reasonableness of Saffron's fees in terms of both cost and performance.

Apportionment of the service charge

10. The Applicant's lease contains clear clauses specifying the way in which the service charge is to be apportioned as follows;

> BUILDING AND ADDRESS: 277 Eversholt Street .....
> [paragraph 4 of the particulars on page 1]
>
> TENANT'S SHARE OF TOTAL EXPENDITURE: 30% of the Total Expenditure by the Lessors in respect of the Building
> [paragraph 7 of the particulars on page 1]
>
> "Total Expenditure" means the total expenditure.....incurred by the Lessors in any accounting period.....incurred in connection with the Building
> [Fifth Schedule paragraph 1(1)]
>
> "The Service Charge" means such proportion percentage or fraction to Total Expenditure as is specified in paragraph 7 of the Particulars
> [Fifth Schedule paragraph 1(2)]

11. Mr Pearl of Saffron managing agents however apportioned the service charge in a different way from that set out in the lease extracts above. Mr Pearl had been specifically instructed only to manage the residential parts of the building. He therefore produced accounts for just that part. The Respondent told Mr Pearl that the commercial parts of the Building were responsible for 40 per cent of the service

charges. The expenditure that touched on the whole building (such as buildings insurance) would therefore have 60 per cent of that sum charged to the residential parts. It appeared that expenditure solely attributable to the residential parts was charged 100 per cent to those residential parts. The total of the amounts charged to the residential parts were then split 50 per cent to the Applicant's flat and 25 per cent to each of the other residential flats. In this way Mr Pearl sought to give practical effect to the terms of the lease.

12. It was Mr Pearl's case that apportioning in this way was justified under clause 5(4)(n) of the Applicant's lease which provides as follows;

> Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors may be considered necessary or advisable for the proper maintenance safety amenity and administration of the Building

13. Whilst the Tribunal accepts that Mr Pearl was acting in good faith and was trying to adopt a pragmatic approach to the costs incurred given that there was a split between the management of commercial and residential parts, the Tribunal finds that the method of apportionment adopted is wrong. It is confusing and potentially unfair. There had already been a mistake for the service charge for 2006. The insurance premium charged to the residential parts was the entire premium for the building. Mr Pearl to his credit had adjusted the figures for that service charge year as soon as the error was brought to his attention.

14. The lease is quite clear on the way in which the service charge is apportioned. The part of the lease relied on by Mr Pearl is not relevant to the apportionment of the service charge and cannot override the very clear service charge provisions as to apportionment.

15. Accordingly the service charge payable by the Applicant is 30 per cent of the total service charge expenditure on the Building as a whole.

The management fees – qualifying long term agreement

16. The Tribunal first considered the question of whether the contract entered into between the Respondent and Saffron for the management of the building was a qualifying long-term agreement. Such an agreement is described in section 20ZA Landlord and Tenant Act 1985 as;

> An agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than 12 months

17. The contract in question contained no details as to its duration and neither did it contain any provisions as to how it could be brought to an end. The contract provided that Saffron would be responsible for the expenditure, preparation of annual accounts (the Applicant's lease states that the service charge year is the calendar year) and collection of service charges. The only other part of the contact that gave an indication as to its intended duration was a requirement for the Respondent to provide Saffron with details of requirements for planned refurbishment / maintenance over the two years following the commencement of the contract.

18. The Tribunal finds that the contract with Saffron is a qualifying long term agreement for the following reasons;

(a) The contract started in November 2004. Mr Pearl stated that he did some work under that contract in November/December 2004. It was clearly anticipated in the contact that Saffron would deal with an entire service charge year. Given that the service charge year under the lease starts in January and the contract started in November 2004, it must have been contemplated by the parties that the contract would last at least until 31 December 2005 making a period of in excess of 12 months.

(b) The requirement for the Respondent to give to Saffron details of plans over the next two years also points to the contract being for more than 12 months.

(c) The contract has in fact now been running for nearly three years without any renewal.

19. The contract, at its outset, provided for fees payable to Saffron of a minimum of £500 plus VAT. The minimum charge to the Applicant therefore would have been £150 plus VAT. If a landlord wishes to enter into a qualifying long-term agreement under which the contribution payable by any single tenant would exceed £100, he is obliged to enter into a consultation process with his tenants regarding that proposed agreement or seek dispensation from the requirement to consult[1].

20. Mr Pearl very honestly and helpfully told the Tribunal that he had written to the Respondent asking him if there had been consultation with the tenants regarding his firm's appointment. He had not however received a response. The Applicant told the Tribunal that he had not been consulted in any formal way over the appointment of Saffron. Accordingly the Tribunal concludes that there was no consultation and that no application had been made to dispense with the requirement to consult.

21. The consequence of failing to comply with the law regarding consultation is that the costs recoverable from a tenant in respect of the fees for the contract in question are limited to £100 per service charge year. Accordingly the Applicant's liability for the fees of Saffron managing agents under the contract in question is limited to £100 for each of the service charge years 2005 to 2007.

22. The Applicant then raised issues as to the payability of Saffron's management fees on the grounds that the fees were too high and that the level of management service was poor. Given the Tribunal's decision above that the fees payable by the Applicant are restricted, any further decision on these issues by the Tribunal will have no practical effect. The Tribunal has however made decisions on these issues as the decisions may be useful to the parties in any event.

Management fees – level of fees

23. Saffron's fees at the outset of the contract were a start up fee of £50.00 per flat plus £500 per annum (plus VAT) or 15 per cent of the total annual service charge

[1] Sections 20 & 20ZA Landlord and Tenant Act 1985; The Service Charges (Consultation Requirements) (England) Regulations 2003

expenditure whichever is the higher. The minimum fee of £500 was increased to £1,000 from January 2007.

24. The Tribunal's view is that the increased minimum fee of £1000 is too high. This amounts to over £300 per flat. Some of the normal work of managing agents such as arranging the buildings insurance is done by the Respondent in this case. Therefore in a year without major works, there is actually little work to be done by the managing agents. The Tribunal is of the view that a fee of £750 plus VAT would be a reasonable and payable figure.

25. The Tribunal considers that the alternative charging basis of 15 per cent of the total annual service charge is unreasonable. Charging in this way gives the tenant no clear idea of what forthcoming management charges will be and is not the charging practice recommended by the RICS management code. If a charge was made on this alternative basis, the managing agents would be earning fees on the back of routine service charges and on items in the service charge on which they had done no work (e.g. insurance arranged by the landlord). The Tribunal is of the new that 15 per cent as a percentage amount is too high in any event. If the managing agents want to base their fees on a percentage of the total service charge costs, then a reasonable and payable percentage figure would be 10 per cent.

Management fees – level of service

26. The next issue put to the Tribunal by the Applicant was the allegation that the service provided by Saffron had in any event been substandard. The Applicant had no direct complaint himself, the evidence he relied on consisted of complaints in writing from the short-term tenants of flat 2 and a letter from the long leaseholder of flat 1.

27. The Tribunal discounts the evidence from the short-term tenants. Theirs it seemed were complaints that were concerned with the management of their flat and their own letting. Saffron manages flat 2 directly under a separate contract. The complaints from those tenants therefore had no bearing on Saffron's management of the Building in general.

28. As to the evidence in the letter from the long leaseholder of flat 1, Mr McHugh, he complained of the following matters;

(a) Cleaning of communal parts not having been done:- Mr Pearl explained that there had only been one cleaning job carried out to the common parts which was specifically arranged for. There had been no other regular cleaning as residents were not willing to pay for this service.

(b) A delay in arranging for the treatment of an infestation of mice:- Mr Pearl took the Tribunal carefully through the steps that he had taken to deal with the infestation which involved arranging for a series of treatments by pest control contractors.

(c) A leak from the flat above and a communal door lock that had been changed:- These matters appeared to have occurred in March and July 2004 which was before Saffron were employed to manage the Building.

(d) A problem with the supply of codes for the fire alarm system:- Mr Pearl explained that there was a delay in the codes being provided to him by the company concerned hence the delay in passing the information to the tenants.

29. The Tribunal found no evidence to substantiate the Applicant's assertion that there was a sub-standard service on the part of Saffron. Accordingly there was no case to support a contention that the fees for Saffron were not reasonably incurred due to sub-standard service.

Costs and fees

Costs

30. The Applicant made an application pursuant to section 20C Landlord & Tenant Act 1985. Section 20C (1) provides as follows;

> *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 or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.*

31. The Tribunal is satisfied that the costs of the proceedings before it were, so far as the lease was concerned, not recoverable as a service charge. There is no clause in the Applicant's lease sufficiently clearly worded to allow such costs[2]

32. Had the lease allowed the Respondent to claim its costs of the proceedings as a service charge, given that the Tribunal had found substantially against the Respondent, it would have made an order under section 20C to the effect that 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.

Fees

33. The Tribunal has the power to order a party to proceedings before it to reimburse the other party in respect of the Tribunal fees paid by that party[3]. The Applicant has paid fees of £250.00 to the Tribunal offices. He brought questions to the Tribunal which have very largely been decided in his favour and accordingly is entitled to be reimbursed by the Respondent.

26 September 2007

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Mark Martynski - Chairman

[2] St. Mary's Mansions Ltd v. Limegate Investments Co. Ltd [2003] 1 E.G.L.R. 41
Sella House Ltd v. Mears [1989] 1 E.G.L.R. 65

[3] Regulation 9 of the Leasehold Valuation Tribunals (Fees)(England) Regulations 2003