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Ref: LON00ag/LSC/2008/0075 and LON/00AG/LSC/2010/0323

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

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

Applicant: Pledream Properties Limited

Represented by: Mr Mark Baumwohl of Counsel
Instructed by Ms R Sheridan of Sheridan & Stretton, Solicitors

Respondent: Mr A Morris

Represented by: Mr B Cordell of Bernard Cordell, Solicitors

Premises: Flat 4, 187 Goldhurst Terrace, London NW6 3ER

Hearing date: 6 and 7 September 2010

Members of the Leasehold Valuation Tribunal: Mrs F R Burton LLB LLM MA
Mr M A Mathews FRICS
Mr J E Francis QPM

Date of Tribunal's decision: 7 September 2010

LON/00AG/LSC/2008/0075
LON/00AG/LSC/2010/0323

FLAT 4, 187 GOLDHURST TERRACE, LONDON, NW6 3ER

BACKGROUND

1. This was a claim by the Landlord for payment of allegedly unpaid service charges of £6,790.95 for the years ending 31 March 2006 to 31 March 2007, referred from the Willesden County Court by order of District Judge Steel dated 21 December 2007 (order sealed 14 February 2008) for determination of liability to pay the sums claimed pursuant to s 27A of the Landlord and Tenant Act 1985. This followed filing of a Defence dated 29 October 2007 by the Defendant Lessee in the Edmonton County Court where the claim had originated.

2. The case then came before the LVT on 7 May 2008, where the Tribunal determined that the service charge years 1999 to 2000 were statute barred, but this decision was overturned by the Lands Chamber of the Upper Tribunal on 15 December 2009. A PTR was held by the LVT on 21 April 2010 when Directions were given for statements of case to be filed in the Landlord's application. Following the PTR (taking up the suggestion of the Lands Chamber's decision) the Lessee made his own cross application to the LVT to determine liability to pay service charges up to 31 March 2005, putting in issue all years from 1999 to 2007, and a second PTR was held on 25 May 2010 at which mediation was strongly recommended. The issues were then identified as (i) the cost of qualifying works in 1999 (Lessee's contribution £550.29) where it was alleged that there had been no s 20 consultation, limiting the Lessee's contribution to £50; (ii) the management charge (Lessee's contribution £519.67) in the year ending 31 March 2000 in respect of supervision of major works where it was claimed that there was already supervision by architects; (iii) liability for 4 years' worth of service charges 2004-2007 (£2,159.04; £1,451.26; £5,235.18; £1,778.22) where it was contended that the service charge demands were defective as they had not been served with the required auditors' certificates and when these were later provided the service charge demands were out of time. The case was set down for hearing on 6 September 2010.

3. The property is held on a Lease dated 18 September 1987 of which the parties are assignees.

THE HEARING

4. At the hearing the Applicant Landlord, Pledream Properties Limited, was represented by counsel, Mr Mark Baumwohl, instructed by Ms Rebecca Sheridan of Sheridan & Stretton, Solicitors, and the Respondent Lessee, Mr A Morris, by Mr B Cordell of Bernard Cordell, solicitors.

THE CASE FOR THE LANDLORD

5. Mr Baumwohl said that there were 3 issues on which he wished to address us. (i) the alleged lack of consultation in relation to the work in 1998 for which the Lesee's contribution was £550.29. In the absence of due consultation the Lessee's liability would be limited to £50. He confirmed that there had not been s 20 consultation owing to the fact that it had been reasonably thought at first that the works would cost under £1,000, however as on the escalation of the cost there had been no consultation nor application for a dispensation, the Landlord conceded that this sum was not payable by the Lessee and it was not economic to go to the County Court now for retrospective dispensation.

6. Mr Baumwohl said that (ii) the next issue was the management charges for the year ending 31 March 2000. The Lessee was claiming that it was not reasonable to charge a 20% management charge for supervision of the major works carried out by Baldwin Builders in this year, because architects, Usher Stephenson Design, had already been paid £542 for such supervision. However, Mr Baumwohl explained that the Usher Stephenson Design architectural company had been contracted to draw up a specification and to manage the tender process, so that any element of supervision of the works by them was only incidental to those functions and quite minor in scale. Moreover, the Lease, at page 20 of that document, Fifth Schedule clause (6) stated: "The Lessor has the right to charge a management fee of twenty per cent of the gross expenditure incurred by the Lessor under the terms hereof which fee shall be added to

the actual expenditure incurred and shall be payable in the due proportion by the Lessee as certified by the auditors of the Lessor. Mr Cordell interjected that this provision only permitted the Landlord to charge where he performed the management function himself. However the Tribunal pointed out that the Lease did not say that and that Sable Estates, members of ARMA, had been appointed by the Landlord to manage the property for him. Mr Baumwohl referred the Tribunal also to the witness statement of Mr R Jenkins, the Managing Director of the Landlord company, who confirmed both the contractual nature of the management charge of 20% (which the Landlord had allocated to Sable Estates) and the nature of the contract with the Usher Stephenson Design architects which did not envisage management or supervision as such of the major works, but the entirely different functions of preparation of the specification and management of the tender process, and did not specifically refer to management in any way. It appeared that there was no invoice available for the Usher Stephenson Design architects nor any letter of engagement, but the Tribunal accepted that in view of the lapse of time it was not surprising that this documentation was not available although it was accepted that Usher Stephenson Design had performed the specification and tender process functions.

7. With regard to his final point (iii) Mr Baumwohl said that the Lease contemplated 3 points at which service charges might be levied. Clause 3(2)(i) dealt with the advance payment of annual service charge "to be credited to the Tenant against his estimated liability for service charge for the period ...until the end of the next accounting period as defined in the Fifth Schedule hereto ..." (ie the annual interim service charge "paid in advance"). Clause 3(2)(ii) provided that the Lessee shall "pay to the Lessor within twenty one days of the same being demanded the specified proportion of such sum or sums as expended by the Lessor or which it might be necessary to expend in fulfilment of its obligations hereinafter contained in respect of which the Lessor is unable to obtain reimbursement from the annual service charge paid in advance or from any sinking fund by reason of the prior expenditure of such sums" (ie from the sums paid in advance under sub clause 3(2)(i) above). Clause 3 (2)(iii) "Within fourteen days of the certificate of the auditors referred to in the Fifth Schedule hereto (or a photographic copy thereof) being provided to the Tenant to pay to the Lessor as an annual charge the specified proportion of the cost (calculated as provided in the Fifth Schedule hereto) of providing the service and other things

specified in the Sixth Schedule hereto together with the amount of Value Added Tax at the date thereof prevailing.

8. Mr Baumwohl submitted that this provisions provided 3 points at which service charges could be demanded: in advance under sub paragraph (i), if costs exceeded the annual service charge in advance under sub paragraph (ii) and once the service charge accounts were certified if the service charges exceeded (i) and(ii). He said that there was no restriction to service charges being levied at any particular stage; even if the Lease was construed *contra preferentem* (since it was the Landlord's Lease) there could not be any restriction. He accepted that s 20B of the 1985 Act required that breakdowns should be served within 18 months of the costs being incurred, and in the present case these breakdowns had been accompanied by a demand. This demand was not accompanied by any separate letter stating expressly that these sums would be demanded when the auditors' certificates were available but, he submitted, if s 20B was construed purposively it was clear that the Lessee was being looked to for the payment of those sums. He added that he was not in a position to produce all the auditors' certificates for the relevant years today (although some were in the bundle), but could do so if required, if the Tribunal found that the demands were otherwise in order.

9. Mr Cordell interjected that this would not be good enough. He quoted the precise words of s 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 sub section (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Sub section (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".

10. To this Mr Baumwohl said that there was no dispute that the documents had

been sent accompanied by a demand for payment. He said that Mr Cordell had accepted that. Asked by the Tribunal what had gone out with the service charge account, Mr Baumwohl produced the application for payment, and the document produced to us showed a despatch by fax on 10 April 2006. Mr Baumwohl subsequently produced 3 authorities, copies of which he had sourced over the luncheon adjournment, which supported the contention that this was sufficient notification to the Lessee that service charge expenditure had been incurred so that there could be no question that the Lessee had been taken by surprise by any later demand when the auditors' certificates had become available. Mr Cordell again interjected to say that he agreed that all the figures had been provided, but they were not in the correct form unless or until they were accompanied by the auditors' certificates as required by the Lease in Fifth Schedule paragraphs (1) ("The cost of the services and other things for each year shall be actual expenditure as certified by the auditors of the Lessor incurred in providing the services and other things specified in the Sixth Schedule of the Lease") and (3) ("The said certificate of the auditors shall be conclusive and binding upon the Lessor and the Tenant as to the sums actually expended or the liability actually incurred") .

11. It was agreed between Mr Baumwohl and Mr Cordell that there were no cases on the precise point of intention to charge but there were some helpful dicta in the 3 authorities and another case which was referred to in one of them. He referred first to *Gilje and others v Charlegrove Securities Ltd and another* [2003] EWHC 1284 (Ch), where in the Chancery Division of the High Court Etherton J had stated that " ...so far as discernible, the policy behind s 20B of the 1985 Act is that the tenant should not be faced with a bill for expenditure of which he or she was not sufficiently warned to set aside provision. It is not directed at the lessor from recovering any expenditure on matters, and to the extent, of which there was adequate prior notice." Secondly, he referred to the Lands Tribunal case of *London Borough of Islington v Lucy Shehata Abdel-Malik* , LRX/90/2006 (16 July 2007) in which at paragraph 33 the *Gilje* decision is referred to and it was said that the section "should be considered purposively", citing the above extract. Paragraph 42 of the Lands Tribunal decision further emphasises this in stating that "the issue that consequently falls to be determined is whether the appellant [landlord] satisfied the notification requirements of section 20B(2) in respect of relevant costs that had been incurred and to which the

respondent [lessee] was required to contribute under the terms of [the] lease. This requires the appellant [landlord] to prove 2 things .... Firstly, that such relevant costs had been incurred by the date of the notice and, secondly , that the notice itself stated this to be the case."

12. Thirdly, Mr Baumwohl referred to the more recent case of *Paddington Walk Management Limited v The Governors of the Peabody Trust* (16 April 2009), a decision of HH Judge Hazel Marshall QC at Central London County Court, which refers to dicta in *Westminster City Council v Hammond* (23 October 1995, a decision of HH Judge Reynolds) "to the effect that any such notice in writing ought to be the equivalent of a demand and contain all the detail necessary to enable a tenant to consider his attitude to the reasonableness of the expenditure, went too far. The somewhat less demanding approach of HHJ Cooke in *London Borough of Haringey v Ball* , 6 December 2004, was to be preferred as being in line, also, with the approach of the Lands Tribunal in *Abdel-Malek. All that was required was to* 'identify the costs that had been incurred'. The Defendant was thus given the necessary information in this case, and this paves the way for the subsequent finalised demand to be valid, even outside the 18 month period". He said that defective demands satisfied the statute as there was no prescribed format for any s 20B notice.

THE CASE FOR THE LESSEE

13. Mr Cordell had two issues on which to address us, given that the s 20 consultation point had been conceded in respect of the £550.29 in relation to the service charge year 1999. (i) The management charges of 20% of all expenditure, including the charge made by the Usher Stephenson Design company in 2000. (ii) the defective service of the service charge demands in all other years in which the auditors' certificates had not been provided at the appropriate time, so that he claimed that the service charges for the years 2004-2007 were not recoverable when invoiced with the auditors certificates, as they were at first defective and, when resubmitted, too late.

14. Taking (i) the management charges first, Mr Cordell said that charge made by

Sable Estates was in any case not contractual as the person who could charge a 20% management fee was the Landlord not the managing agent. In the circumstances the charge of 20% of all costs incurred was not contractual at all but a charge levied by Sable Estates and was simply an excessive charge. In fact it appeared that Sable Estates were no longer managing the property, as they had been replaced by Crabtree who were now charging £225 p.a for the 2 smaller flats and 20% of expenditure as before for the 2 larger flats, so that this was unfair to the Lessee who could have had a fixed unit charge like the smaller flats. Secondly, he said, that the charge of 20% of all costs incurred was excessive. He did not accept that 20% was needed on top of supervision of other professionals, the Usher Stephenson Design architects, even if (as had been stated by Mr Baumwohl) 20% of the charge of £542 they had made amounted to only £108, of which the Lessee's proportion was £34.69. The point was that in principle there should not be percentage charges on top of percentage charges. He did not propose any alternative charge that might have been more appropriate as a management fee in relation to the management in the year of the major works (and the Tribunal noted that no challenge was made to the management fee in other years, though this was perhaps due to Mr Cordell's second point, which was that these charges in 2004-7 were not due at all).

15. Mr Cordell's second point (ii) was that he disagreed with the interpretation put forward by Mr Baumwohl of s 20B(2). He insisted that the section required a written notice that the figures notified on a defective service charge demand (ahead of a non-defective service charge demand) required a statement that the sums notified *would be* demanded in the future when the Lessee would be required to pay. He relied on the wording of the section that "those costs had been incurred and that he [the Lessee' would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge". He did not agree that Mr Baumwohl could rely on Clause 3(2)(ii) or (iii) to collect the costs notified on an earlier allegedly defective demand. He said that s 20B(2) was not designed to help Landlords out of procedural difficulties.

FINAL SUBMISSIONS

16. Mr Cordell said that he had no final submissions to make as he has already

put his case both in answer to the Landlord's as each point of that had been raised, and when making his own submissions in putting his own. He said that the Tribunal must decide what the statute required and apply it, as it was not, in his opinion, possible to give notice under s 20B accidentally, the Lessee had specifically to be notified (a) that the costs had been incurred and (b) that future payment would be required. He also adhered to his point about the inappropriate charge for management made by Sable Estates for the reasons he had given. Mr Baumwohl repeated his previous submissions.

DECISION

16. **Management fees in 2000**. The Tribunal is clear that the Lease permits the Landlord to charge a management fee of 20% of all service charge costs incurred and that the Landlord is at liberty to charge that percentage by means of an agent whom he appoints to manage the property under the Lease since the agents manage the property on behalf of the Landlord, in order to fulfil the Landlord's obligations under the Lease. The Tribunal does not consider that this charge should be reduced by reason of a modest charge made by the architects who had been contracted to perform expressly different functions in relation to the major works, in respect of which the managing agents would have had to engage the architects in the first place, supervise their work and that of the building contractor so as to check that everything was done properly and then pay them the £542 they had charged. Nor does the Tribunal consider that the Managing Agents in charging 20% of all costs incurred in the relevant year had over charged for their services. There is no invoice in the bundle for the 1999 management fee but it is shown in the accounts as a quarterly charge for the subject property at £110.30 or the equivalent of a unit charge of £445.20 pa. This is not in the opinion of the Tribunal, which is an expert Tribunal used to assessing the reasonableness of management fees, excessive for the work to be done in relation to a small block in West Hampstead, being a "Victorian end of terrace house converted into 4 flats". There are no economies of scale in managing such a small block in a high class residential area, and there is no scramble amongst agents to take on such work due to the demands that it places on an agent. The Tribunal determines that the management fee is reasonable and reasonably incurred.

17. **Liability to pay the service charges for the years 2004-7 and 1999-2000.** The Tribunal is satisfied that due notice was given of the sums incurred in relation to these years by service of the service charge demands ahead of the auditors' certificates for these years. The documentation served appears to have satisfied s 20B(2) of the 1985 Act as the Lessee knew that the figures notified would be payable when the auditors' certificates were available. It was common ground that he and his solicitor had the figures and that the Lessee was not taken by surprise. While the authorities cited by Mr Baumwohl do not expressly bind the LVT they are of course of persuasive authority and the Tribunal considers that it is no coincidence that there is helpful dicta in the decisions cited (in particular of those of judges with significant familiarity with the type of case involced) which supports the view the Tribunal has taken of the interpretation of s 20B(2). In any year in which the auditors' certificate has not been provided by the Landlord the service charges are then payable upon service of that certificate.

18. No decision of the Tribunal is necessary in relation to the liability to pay the disputed charge in 1999 since the Landlord's counsel conceded that there had not been a s20 consultation duly carried out but that they were not going to go to the county court to seek dispensation for the sake of a relatively small sum. The Lessee will therefore pay only £50 in lieu of the £550.29 originally demanded.

19. In the circumstances the service charges demanded in the county court and referred to in the Lessee's own cross application to the LVT are reasonable and reasonably incurred and that liability to pay them is established.

Chairman.....

Date.....7 September 2010