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MAN/00CB/LSC/2009/0042

**LEASEHOLD VALUATION TRIBUNAL
OF THE
NORTHERN RENT ASSESSMENT PANEL**

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

**LANDLORD AND TENANT ACT 1985
SECTION 27A (1) and SECTION 20C**

Property: Flats 4 and 6, 5 Valentia Road Hoylake CH47 2AN

Applicants: Mrs J Furber and Cyberbird Limited

Respondent: Mr T J Cowley

Tribunal: Mr G C Freeman
Mr J Faulkner FRICS
Miss C Roberts

Date of Hearing: 18 February 2009

ORDER

- A. Subject to the Respondent complying with Sections 47 and 48 of the Landlord and Tenant Act 1987, the reasonable service charges for the Property payable by the respective Applicants to the Respondent for the periods set out in the Application are those set out at paragraph 40 of this decision.**
- B. No part of the Respondent's costs incurred in connection with the Application are to be included in the service charge payable by the Applicants for the period which is the subject of the application.**
- C. (1) The Respondent will reimburse to Cyberbird Limited the Application fee and Hearing fee of £145.00.**
- (2) The Respondent will pay to Cyberbird Limited its expenses of £38.46 for postage and copying charges.**
- (3) The Respondent will pay to Cyberbird Limited the sum of £300.00 on account of the losses incurred by Cyberbird Limited in connection with having an employee of the company attend the proceedings.**

Application

1. By an application dated 26th May 2009 Cyberbird Limited seeks a determination of the liability to pay and reasonableness of service charges for

the above property where costs have been incurred, or are about to be incurred, for the service charge period 1st October 2005 to 31st March 2006 and for the year from 1st April 2006 to 31st March 2007. Cyberbird Limited named the Respondent in its application as its landlord.

2. By her application dated 8th June 2009 Mrs Furber applied to be joined as a party to the application.
3. The Tribunal issued directions to the parties on 2nd July 2009. The Applicants complied with those directions under cover of a letter dated 16th July 2009.
4. A pre trial review was held on 10th November 2009. The Applicants attended this hearing. The Respondent did not attend and was not represented. The Respondent did not comply with the directions nor the further directions issued at the pre trial review.
5. By letter dated 20th October 2009 the Tribunal was informed of the dates when the Respondent would not be available. These were taken into consideration when the hearing was arranged for 18th February 2010. On being informed of the hearing date, the Respondent wrote to the Tribunal stating that he would not be available on that date. Shortly before the hearing date, the Respondent applied for a postponement of the hearing on the grounds that he wished to bring his accountant to the Tribunal as an expert witness. A procedural chairman refused to grant the postponement on the ground that it was not reasonable to do so, under Regulation 15 (2) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003. The Respondent had failed to comply with the directions and had given no valid reason for stating that he would be unavailable for the hearing on a date which had been fixed specifically taking into account his availability.

Inspection

6. The Tribunal inspected the Property on the morning of the hearing in the presence of the Applicants. The Property comprises part of a semi detached house ("the Building") built in the late nineteenth century which has been converted into six flats. There is car parking to the front of the Building and a concrete yard to the rear. At the rear there is a single storey extension which is believed to house a gas fired boiler which provides heating to the whole building. The Tribunal was unable to inspect this, because the access door was locked.
7. Internally, a small entrance hall leads to a communal staircase which is carpeted. There is one battery powered smoke alarm on the first floor landing. On the ground floor there are two flats, the entrance to one of which is externally from the rear of the building. Flat 4 is located on the half landing and has a separate bathroom, access to which is gained from the half landing. Flat 6 is a similar layout on the floor above. Each consists of one bed sitting room, a separate kitchen and separate bathroom. There are four radiators in each flat and one radiator in the hallway. Other radiators are believed to serve the remaining flats in the Building

The Lease

8. The Applicants produced the Lease of Flat 6. It is dated 20 September 1984 and made between Phyllis Annie Shepherd of the one part and Julia Mary Lewis of the other part. It grants a term of 999 years from 1st October 1983 and reserves a ground rent of £25.00 per year payable in advance on 1st October. It also includes a car parking space.
9. Clause 4 of the Lease provides that the Landlord is to keep the parts of the building not included in the leases in good and substantial repair and in clean and proper order and condition. It also requires the Landlord to decorate the internal communal parts and exterior of the building and to keep the grounds of the building in good order. The Landlord is further required to keep the Property insured to its full replacement value, to produce a copy of the policy of insurance to the Tenant within fourteen days notice and to reinstate the Property on damage by an insured risk.
10. In addition to the ground rent referred to above, the Lease also reserves a further or additional rent representing a proportion of the amount which the Landlord may from time to time expend performing the Landlord's obligations above, and the provision of central heating to the Property between the 1st October and 1st April in each year.
11. The proportion payable towards the expenses for each flat is one sixth of the total costs except for the provision of gas central heating. The proportion payable for the provision of central heating is 8% of the total cost for Flat 6. In respect of flat 4, the Tribunal accepted the Applicants' contention that the proportion payable for central heating was 9% of the total cost.

The Law

12. Section 18 of the Landlord and Tenant Act 1985 ("the 1985 Act") provides:
 - (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.

13. Section 19 provides that

- (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 provision 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.

14. Section 27A 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 date at or by which it is payable, and
 - (d) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3)
- (4) No application under subsection (1)...may be made in respect of a matter which –
 - (a) has been agreed by the tenant.....
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

15. No guidance is given in the 1985 Act as to the meaning of the words “reasonably incurred”. Some assistance can be found in the authorities and decisions of the Courts and the Lands Tribunal.

16. In *Veena v S A Cheong* [2003] 1 EGLR 175 Mr Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word “reasonableness” should be read in its general sense and given a broad common sense meaning [letter K].

Notices

17. Section 47 of the Landlord and Tenant Act 1987 (“the 1987 Act”) states:-

(1) "Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely:-

- (a) the name and address of the landlord, and
- (b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

(2) Where:-

- (a) a tenant of any such premises is given a demand, but
- (b) it does not contain any information required to be contained in it by virtue of subsection (1),

then (subject to subsection (3)) any part of the amount demanded which consists of a service charge or an administration charge ("the relevant amount") shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant.

(3) [Not relevant to this decision]

(4) In this section "demand" means a demand for rent or other sums payable to the landlord under the terms of the tenancy".

18. Section 48 of the 1987 Act states:-

(1) "A landlord of premises to which this Part applies shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant.

(2) Where a landlord of any such premises fails to comply with subsection (1), any rent, service charge or administration charge otherwise due from the tenant to the landlord shall (subject to subsection (3)) be treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does comply with that subsection.

(3) Any such rent, service charge or administration charge shall not be treated in relation to any time when, by virtue of an order of any court [or tribunal] there is in force an appointment of a receiver or manager whose functions include the receiving of rent, service charges or (as the case may be) administration charges from the tenant".

Hearing

19. A Hearing was held at Blackburne House, Hope Street, Liverpool, L8 7PE at 11.15am. Mrs Furber and Mr Lawson of Cyberbird Limited attended in person. The Respondent attended in person with his father Mr N G Cowley.
20. Mr N G Cowley applied for the application to be dismissed on the grounds that it was frivolous, vexatious and otherwise unreasonable. The Chairman indicated that he did not consider that the application fell within any of these parameters and refused it.
21. Mr Lawson, on behalf of the Applicants, referred to the service charge demands within the Applicants' bundle of documents and pointed out that these were arithmetically incorrect and also did not apportion the service charge in accordance with the respective leases. Mr N.G. Cowley conceded that an incorrect rate for the central heating costs had been charged. He admitted that the reason for this was that he had not read the leases.
22. The Tribunal considered each individual head of service charge within the service charge demands for the periods as follows:-

1 October 2005 to 31 March 2006

23. **Window Cleaning.** (£45.00)

The Applicants conceded that window cleaning costs were reasonable.

24. **Insurance Premium.** (£412.00)

The Applicants stated that no receipt for payment for the premium had been produced and they contended that no payment of insurance premium had been made. Mr N G Cowley denied that premiums had not been paid but he could not produce the receipt.

25. **Electricity.** (£77.68)

The Applicants contended that the cost of communal electricity was not reasonable bearing in mind that the cost for the year 2003 was approximately £22.00.

26. **Management Charge.** (£375.00)

The Applicants contended that no management charge should be payable on the grounds that actual and budget service charge accounts were arithmetically incorrect, that they did not comply with the apportionments set out in the respective leases, that no copies of any invoices had been produced to substantiate service charge payments, that no reconciliation or brought forward balances for the service charge had been produced and that the building as a whole had generally been badly managed.

27. **Gas Central Heating. (£1028.62)**

The Applicants had produced an invoice for gas consumption for the communal parts of the Property for the period 1st November 2005 to 20th March 2006 for a total sum of £1,834.59. This included VAT charged at 17.5%. The bill had been calculated on an estimated reading. The total cost of gas used shown on this account was £1,459.50. The Applicants also produced a replacement invoice dated 3rd May 2006 covering the period 1st November 2005 to 20th April 2006. This was based on an actual meter reading and showed a total cost of gas used at £821.32 resulting in a credit for an overpayment of £805.97.

28. The Applicants alleged:-

28.1 No reconciliation of the gas bills had been produced. At this point Mr N G Cowley produced what he stated to be a reconciliation statement for gas consumption. However, when the Tribunal Chairman indicated that he wished to pass these to the Applicants for comment, he immediately withdrew them. As a result neither the Tribunal nor the Applicants saw them and they were not introduced as evidence.

28.2 VAT had been charged on the gas bill at the rate of 17.5% instead of the rate charged in respect of residential properties at 5%. The Applicants alleged that this error should have been discovered by the Respondent and corrected with British Gas.

29. At this point Mr N G Cowley left the hearing.

30. **Maintenance and Service Costs (Central heating) (£125.00)**

The Applicants alleged that no invoice for the maintenance costs shown on the service charge demands had been produced. The Applicants produced an invoice for servicing the boiler and providing a gas safety certificate for a period prior to the Respondent taking over the management of the Building. This was for a sum of £60.00. The Applicants queried whether such costs had actually been incurred. No invoices for such costs were produced by the Respondent.

1 April 2006 to 31 March 2007

31. **External Decorating. (£500.00)**

The Applicants produced a quotation addressed to the Respondent for external redecoration from a contractor for £1,200.00. Mr T. J. Cowley stated that the Property was decorated for a lower amount but was unable to state for how much nor could he produce an invoice for the cost. The work was carried out in the Spring 2006. The Applicants pointed out that although £500.00 had been collected on account of the external redecoration, there was no provision

in the Lease for the creation of a sinking fund. The whole cost should therefore have been charged for the year, but no invoice had been produced.

32. **Repairs** (£450.000)

The Applicants agreed that the sum of £450.00 for repairs was reasonable.

33. **Insurance** (£707.81)

The Applicants challenged whether the sum of £707.81 had been paid for insurance for that year, for the same reasons set out in paragraph 24 above.

34. **Gardening** (£500.00)

The Applicants challenged the sum of £500.00 for the cost of gardening. They stated that Mrs Furber had done the gardening. Mr T. J. Cowley stated that he employed a management company, Willow Management Limited, to carry out the gardening and he had not checked whether the management company had in fact ensured that the gardening was carried out. The Applicants pointed out that the directors of Willow Management Limited shown on its letterhead were Mr T J Cowley and Mr N J Cowley. Mr T. J. Cowley stated that he was a director of the management company "in name only" and therefore did not know anything about the actual management.

35. **Electricity** (£100.00)

The Applicants pointed out that the sum of £100.00 shown as the actual expenditure for the year was identical to the amount shown in the budget. Mr Lawson suggested that a reasonable figure for electricity would be some 10% to 20% above the previous year's figure. Mr T. J. Cowley made no comment.

36. **Management Charge** (£750.00)

The Applicants objected to the sum of £750.00 for management charges for the reasons stated at paragraph 26 above and also on the grounds that the Respondent had failed to manage the Property in accordance with the Service Charge Residential Management Code issued by the Royal Institution of Chartered Surveyors (second edition). This, amongst other things, states that:-

"..... the contents of the code may be used in evidence and taken into account, if relevant, in Court and Tribunal Proceedings....."

" 10.28 when a Tenant has paid service charges in advance the amount payable must be reasonable and you must repay any excess paid or deduct it from subsequent charges as the Lease directs once the costs have been incurred. Advance payments and actual expenditure should be presented clearly."

37. **Gas Boiler Maintenance** (£250.00)

The Applicants objected to the sum of £250.00 charged for this. Mr T. J. Cowley stated that Gas Safety Certificates were obtained but he was unable to produce these nor any invoices for the cost of repairs.

The Tribunal's Findings

38. The Tribunal considered each individual item of expenditure within the service charge accounts produced to it by the Applicants. The Tribunal noted that the Respondent had not produced any invoices for the actual costs for which he sought reimbursement despite being directed to do so by the directions and the pre trial review.
39. The Respondent was aware as early as July 2009 what he was to produce in the terms of accounts, invoices and receipts. The Tribunal did not accept as a valid reason for non production of the invoices, the Respondent's excuse that they were with his Accountant who was away skiing. The Respondent was aware of the hearing date in December 2009 and should have ensured copies were supplied to the Tribunal and the Applicants. In the light of Messrs Cowley's refusal to allow the Applicants or the Tribunal to see the alleged reconciliation statements for the provision of gas central heating, the Tribunal concluded that the Respondent's refusal to produce the documents was wilful and unreasonable.
40. The Tribunal therefore concluded that the reasonable service charge for the period for each flat was as follows:-

1 October 2005 to 31 March 2006

	£
Window Cleaning	45.00
Insurance	412.48
Electricity	77.68
Management Charge	<u>100.00</u>
	<u>635.16</u>
One sixth share:-	<u>105.86</u>

Central Heating Costs:

Gas consumed per account 3 May 2006	875.43
VAT @ 5%	43.77
Gas maintenance	<u>125.00</u>
	<u>1044.20</u>

Service charge for gas:-

Flat 4: £1044.20 x 9% = £93.98

Flat 6: £1044.20 x 8% = £83.54

Total service charge

Flat 4: £105.86 + £93.98 = £199.84

Flat 6: £105.86 + £83.54 = £189.40

1 April 2006 to 31 March 2007

	£
Window Cleaning	120.00
External Decoration	500.00
Repairs	450.00
Insurance	707.81
Gardening	0.00
Electricity	100.00
Management charge	<u>200.00</u>
	<u>2077.81</u>
One sixth share:-	<u>346.30</u>

Central Heating Costs:

Estimated gas consumed	900.00
Climate change levy	50.00
VAT @ 5%	<u>50.00</u>
	1000.00
Less overpayment from previous year	<u>805.97</u>
	194.03
Gas maintenance:	<u>125.00</u>
	<u>319.03</u>

Service charge for gas:-

Flat 4: £319.03 x 9% = £28.72

Flat 6: £319.03 x 8% = £25.52

Total service charge:

Flat 4: £346.30 + £28.72 = £375.02

Flat 5: £346.30 + £25.52 = £371.82

41. The Tribunal noted that no evidence was produced to it that the Respondent had complied with section 47 and 48 of the 1987 Act. The Applicants are entitled to withhold payment of service charge until the Respondent does so.

Section 20C Landlord and Tenant Act 1985

42. Some leases allow a landlord to recover costs incurred in connection with proceedings before the LVT as part of the service charge. The Applicant has made an application under s20C of the Act to disallow the costs of the application incurred by the Respondent in calculating service charge payable for the Property, subject, of course, to such costs being properly recoverable under the provisions of the Lease.
43. The Tribunal determines that, as it has found that the Respondent has largely ignored the correct procedures for calculation of service charges for the period in question, it would be reasonable to make such an order, and it therefore has done so.

Costs

44. Schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002 provides that a Leasehold Valuation Tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub section 2.

45. The circumstances are where:-

"10(2)(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

10(2)(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively, or otherwise unreasonably in connection with the proceedings."

46. The Tribunal find that, in failing to comply with the directions of the Tribunal, and in withholding evidence from the Tribunal, the Respondent has acted unreasonably. Mr Lawson produced the Accounts of Cyberbird Limited which were examined by Mr T J Cowley. He claimed that as a result of having to attend to the case and the hearing, the Company had incurred a loss of income which would have been earned had Mr Cowley been available to attend to the Company's business. Therefore, pursuant to the above Regulations, the Tribunal orders that

46.1 The Respondent will reimburse to Cyberbird Limited the Application fee and Hearing fee of £145.00 in total.

46.2 The Respondent will pay to Cyberbird Limited the its expenses of £38.46 for postage and copying charges.

46.3 The Respondent will pay to Cyberbird Limited the sum of £300.00 on account of the loss of income incurred by Cyberbird Limited in connection with the proceedings.

Dated 26th February 2010

A handwritten signature in black ink, appearing to read 'G.C. Freeman', with a horizontal line underneath.

G.C Freeman
Chairman