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LONDON RENT ASSESSMENT PANEL

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION
UNDER SECTIONS 27A & 20C OF THE LANDLORD AND TENANT ACT 1985**

Case Reference: LON/00AM/LSC/2011/0528

Premises: Venture House (k/a Olympic House) and Simpson House Hackney London N16 7TL

Applicant(s): Octagon Assets Limited

Representative: Mr M Allenby-Smith of Pitmans LLP

Respondent(s): Newlon Housing Trust

Representative: Mr N Lawlor of Devonshires

Date of hearing: 18 January and 5 March 2012

Appearance for Applicant(s): Mr E Peters - counsel
Ms S Short Accountant Westminster Management Services

Appearance for Respondent(s): Mr W Beglan -counsel
Ms S Parbhakar Assisitant Director of Housing

Leasehold Valuation Tribunal: Mrs E Flint DMS FRICS
Mr N Maloney FRICS
Mr L Packer

Date of decision: 18 May 2012

Decisions of the Tribunal

- (1) The Tribunal determines that at the date of the application none of the amounts claimed were payable.
- (2) The Tribunal makes the determinations as set out under the various headings in this Decision.
- (3) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the Tribunal proceedings may be passed to the lessees through any service charge.
- (4) Since the Tribunal has no jurisdiction over county court costs and fees, this matter should now be referred back to the Reading County Court.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") in respect of the service charge years 2007, 2009 and 2010.
2. Proceedings were originally issued in the Reading County Court under claim no.ORG03855. The claim was transferred to this Tribunal, by order of District Judge Henry on 24 August 2010 but was not received at the Tribunal until 1st August 2011.
3. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

4. The Applicant was represented by Mr E Peters of counsel at the hearing and the Respondent was represented by Mr W Began of counsel.
5. It appeared from the bundle that there was some uncertainty as to the location of the demised flats within the individual blocks and also the landlord/lessees responsibilities in the two buildings. Consequently at the commencement of the hearing the parties sought to clarify and agree the respective demised premises and responsibilities of the parties. The Tribunal was advised that the Respondents replies to the items on the Scott schedule in respect of the two blocks had been transposed and that the labels on the diagram of the building were also transposed. Consequently some time was spent clarifying matters and making appropriate amendments to the papers in the bundle.

The background

6. The properties which are the subject of this application comprise 2 adjoining blocks of flats in converted industrial buildings. There are approximately 90 flats in Olympic House and 61 flats in Simpson House.
7. The Respondent holds long leases of both properties which require the landlord to provide services and the tenant to contribute towards their costs by way of variable service charges.
8. Venture House (k/a Olympic House) 2-26 Somerford Grove London

Lease dated 13 December 2006 for a term of 125 years at an initial ground rent of £2,400 pa in respect of part of first, second and third floors. The demised premises comprise 12 x 3 bed flats, 2 x 2 bed flats and 2 x 1 bed flats edged green and the corridors edged red on the plan attached to the lease.

9. The lessor's covenants at para 6 of the lease provide for the repair and maintenance of the structure of the building and the common parts of the development, decoration of the exterior and the common parts, carpeting, cleaning and lighting of the common parts and insurance of the building
10. The lessee is required to pay 13.45% of the service charge expenses set out in the 5th Schedule of the lease which include the costs of employing a caretaker; the amount of the service charge is to be certified by the lessor's auditors or accountants; the service charge year is 1 January – 31 December, with a system of debits and credits to deal with under/over payments at the end of each year.
11. Simpson House 92-100 Stoke Newington Road London.

Lease dated 3 March 2006 for 125 years from 3 March 2006 at an initial ground rent of £3,250 in respect of part ground, part first, part second and part third floors. The demised premises comprise 10 x 1 bed flats and 3 x 2 bed flats as shown edged red on the plan annexed to the lease. The corridors serving the flats are not included in the demise, by contrast with the Olympic House lease.

12. The lessor's covenants at para 6 of the lease provide for the repair and maintenance of the structure of the building and the common parts of the development, decoration of the exterior and the common parts, carpeting, cleaning and lighting of the common parts and insurance of the building. There is no provision for employing a caretaker, again by contrast with the Olympic House lease.

13. The lessee is required to pay 11.09% of the service charge expenses set out in the 5th Schedule of the lease, the amount of the service charge is to be certified by the lessor's auditors or accountants; the service charge year is 1 January – 31 December, with a system of debits and credits to deal with under/over payments at the end of each year.
14. Photographs of the buildings and a diagram of a section through both buildings were provided in the hearing bundle. Neither party requested an inspection and the Tribunal did not consider that one was necessary.

The issues

15. The parties identified the relevant issues for determination as follows:

The payability and/or reasonableness of service charges relating to the costs of the caretaker, cleaning, lift management, refuse removal, electricity, the reserve fund and management included in the following invoices.

Olympic House

- (ii) Invoice Sm-029 £6,518.41 dated 8 April 2009
- (iii) Invoice AHSM-003 £9,429.23 dated 24 November 2009
- (iv) Invoice SM-040 £11,553.68 dated 24 November 2009

Simpson House

- (v) Invoice S-251 £2,823.97 dated 8 April 2009
- (vi) Invoice S-246 £5,500 dated 20 January 2009
- (vii) Invoice AHS-005 £4,185.54 dated 24 November 2009
- (viii) Invoice S-268 £7,592.77 dated 24 November 2009

16. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows.

Matters agreed during course of hearing

17. The service charge demands issued prior to 31 August 2011 did not comply with S21B.

18. Both parties had made mirror mistakes as to their respective liabilities relating to cleaning, lighting and decorating the common parts serving the demised flats.
19. Electricity. The Applicant agreed to reimburse 88.91% of costs incurred in relation to those parts of the building which were the landlord's responsibility but had been paid for by the Trust.

Cleaning

20. Ms Short stated that she had supervised the management of both properties since the commencement of the leases. The daily management of the building was carried out by Delta. She referred to a copy of the cleaning plan for the blocks which set out the duties of the cleaner for both blocks. Ms Short confirmed that she did not personally oversee the cleaning, but relied on the maintenance company's records. The building manager was responsible for overseeing the complex including monitoring the cleaning and refuse removal.
21. Ms Short confirmed that prior to these tribunal proceedings she had not appreciated that the landlord was responsible for the cleaning of the corridors throughout Simpson House. She accepted that the cleaning of those areas serving Newlon's flats had been arranged and paid for by Newlon.
22. Ms Parbhakar confirmed that the lessee had provided the cleaning to the common parts serving the demised flats. The obligation lay with the lessor.

The Tribunal's decision

23. The Tribunal determines that 88.91% of the expenditure incurred by the Respondents in relation to the cleaning of Simpson House should be refunded.

Reasons for the Tribunal's decision

24. The Lessor accepts that it should have paid for the cleaning of the common parts. A refund of the expenditure, net of the lessee's contribution, as proposed by the lessor is an appropriate way to deal with the payment.

Caretaker

25. There is no provision in the lease for the provision of a caretaker at Simpson House. No documentary evidence was produced to show that the caretaker was responsible for both blocks.
26. Ms Short confirmed that she had assumed that the lease contained a similar provision to that relating to Olympic House. She was however of the opinion

that lessee's tenants benefitted from the presence of a caretaker within the complex. Ms Short was unable to produce a contract relating to the duties of the caretaker or any other documents indicating how the lessee's tenants benefitted from the caretaker's service. The caretaker was based in Olympic House because there was space for a desk in the entrance hall. She understood that there was a notice in the disabled lift in Simpson House advising that the caretaker could be contacted in Olympic House.

27. Mrs Parbhakar stated that she was not aware of any services provided by the caretaker to the Trust's tenants in Simpson House; he is based in Olympic House. If there were problems the tenants contacted the Trust which provides a 24 hour telephone service. It was unclear how the Trust's tenants could access the caretaker's services.

The Tribunal's decision

28. The Tribunal determines that the amount payable in respect of caretaking at Simpson House is not payable.

Reasons for the Tribunal's decision

29. There is no provision in the lease for the provision of a caretaker at Simpson House. No documentary evidence was produced to show that the caretaker was responsible for or provided services to both blocks.

Lift

30. Ms Short confirmed that there are 5 lifts within Olympic House and that the maintenance of the lifts is outsourced to a specialist company. The lift for the disabled serves the first and second floors only.
31. Mrs Parbhakar stated that there had been lots of problems with the disabled lift. The primary purpose of the disabled lift was to assist the respondent's tenants.

The Tribunal's decision

32. Simpson House: The cost of lift maintenance is not payable.
33. Olympic House: The cost is allowed in full. Nevertheless the Tribunal notes with some concern that the Applicant appeared to link the provision of replacement keys for the disabled lift to payment of the disputed service charge.

Reasons for the Tribunal's decision

34. Simpson House: There is no express provision in the lease in relation to the lift, by contrast with the Olympic House lease. The Tribunal would expect to see specific reference to lift maintenance in the service charge provisions if it was intended that such a significant cost was intended to be included in the service charge account.
35. Olympic House: The lift was out of order for 2 months during 2010 however this was due to a delay in obtaining spare parts. No evidence was produced to show the costs were unreasonable.

Waste collection

36. Ms Short stated that the charges related to bulk waste collected from the site. This was an ongoing problem. She was not aware if the local authority had been approached to remove the rubbish but was of the opinion that the service referred to by the respondent related to removal of residents' rubbish rather than fly tipping.
37. Ms Parbhakar agreed that bulk rubbish should be removed from the site. The Trust had reduced fly tipping by the management of rubbish at its own sites and had tried to prevent it from happening. She agreed that it was not possible to eradicate it entirely.

The Tribunal's decision

38. The Tribunal determines that the amount charged is reasonable.

Reasons for the Tribunal's decision

39. The claim that the local authority would remove bulk rubbish without charging was unfounded. The respondent had not provided any alternative quotations for the work which was both necessary and reasonably incurred.

Reserve Fund

40. Ms Short stated that in accordance with Clause 2(2)(e) of the lease the Respondent was entitled to collect annual amounts to be paid into a reserve fund which had been included in the service charge at £50,000 pa for each block. The amounts had not been reviewed even though no works had commenced or even tenders sent out. She was unable to assist the Tribunal further as Delta had not produced the schedule of proposed works relating to the reserve fund.

41. Ms Parbhakar agreed that it was sensible to maintain a reserve fund and stated that the trust maintains reserve funds for its own properties. She was concerned that it was not clear what was included in the reserve fund and thought it was excessive based on the amount the trust would put into such a fund for a similar building.

The Tribunal's decision

42. The Tribunal determines that the reserve fund contribution for 2009-2010 is not payable in order to reduce the reserve fund to a more appropriate level.

Reasons for the Tribunal's decision

43. The parties and the Tribunal agree that it is good practice to operate a reserve fund. However the methodology adopted by the applicants has resulted in large reserve funds of the same value for both blocks despite the fact that there are approximately 50% more flats in Olympic than Simpson House. The schedule of proposed maintenance requires refinement since for example the cost of replacing the windows in both blocks is estimated at £150,000 per block despite the difference in the size of the blocks. The Tribunal noted that the maintenance programme indicated that the funds required by December 2011 were £85,000 and £75,000 for Olympic and Simpson House respectively.

Management Fee

44. The charges in the service charge account are:

- a. Olympic House: 10% + VAT of the costs incurred of which 13.45% payable by the respondent;
- b. Simpson House: flat fee of £12,000 pa + VAT for the building (of which 11.09% payable by the respondent).

45. Ms Short stated that the management fees were based on the work undertaken in managing the blocks. She agreed that no allowance had been made for the mistake regarding the areas in Simpson House which the landlord had covenanted to maintain.

46. Ms Parbhakar explained that the Trust is the first point of contact for their tenants as the Trust operates a 24 hour help line. She was of the opinion that the Trust effectively managed that part of Simpson House occupied by the Trust's tenants.

The Tribunal's decision

47. The Tribunal determines that the cost of management for Olympic House which equated to £130 per flat should be allowed in full and that for Simpson House limited to £50 per flat.

Reasons for the Tribunal's decision

48. Olympic House: Although the quality of management can be criticised the cost recoverable at £130 per flat is at the lower end of the range payable for blocks in London.

49. Simpson House: £50 per flat reflects the limited management responsibilities retained by the landlord for those parts of the building demised to the Trust.

Application under s.20C

50. At the hearing, the Respondent applied for an order under section 20C of the 1985 Act.

51. The Applicant indicated that no costs would be passed through the service charge account since the lease does not provide for such charges to be included in the account. However it was asserted that the charges could be dealt with under the lease provisions relating to S146, which is not a matter for this Tribunal. Having heard the submissions from the parties and taking into account the determinations above and for the avoidance of doubt, the Tribunal nonetheless determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge. The Tribunal decision reflects not only the determinations above but also the admission that at the date proceedings commenced in the County Court none of the invoices were in fact payable.

52. The Tribunal has no jurisdiction over ground rent or county court costs. This matter should now be returned to the Reading County Court.

Chairman: _____
Evelyn Flint

Date: 18 May 2012

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 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 subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (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.

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.