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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

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/00AZ/LSC/2012/0445
Premises:	Flats 71 and 71a Laleham Road, London SE6 2HU
Applicants:	Mr Daniel Nagre (Flat 71) Miss Andrea Peckover (Flat 71A)
Respondent:	Regisport Limited
Representative:	Countrywide Estate Management
Date of hearing:	27 September 2012
Appearance for Applicants:	Mr Nagre and Miss Peckover appeared in person
Appearance for Respondent:	Ms Louise Vidgeon (Countrywide Estate Management)
Leasehold Valuation Tribunal:	Mr Robert Latham Mr Neil Martindale FRICS
Date of decision:	31 October 2012

Decisions of the Tribunal

(1) The Tribunal makes the following determinations in respect of the service charges for 2009, 2010, 2011 and 2012 (budgeted) in respect of which each Applicant is obliged to pay 50%:

(i) Management Fees: The sums claimed are not payable.

(ii) Reserve fund contributions: The sums claimed are not payable.

(iii) Accountancy fees: £60 is payable for 2009; £72 for 2010 and £72 on account for 2012.

(iv) Out of Hours Service: the sum claimed of £25.30 for 2009 is not reasonable and is not payable.

(v) Stock Condition Survey: the sum claimed of £223.25 for 2010 is not reasonable and is not payable.

(vi) Professional fees; the sum claimed of £60 for 2010 is not reasonable and is not payable.

(vii) Health and Safety Survey: the sum claimed of £180 for 2011 is not reasonable and is not payable.

(viii) General Repairs and Maintenance: the sum claimed of £200 included in the budget for 2012 is not reasonable and is not payable.

(2) 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.

(3) The Tribunal determines that the Respondent shall pay the Applicants £250 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicants.

The application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years 2009, 2010, 2011 and 2012 (budgeted).

2. Directions were given on 25 July 2012 (at p.1 of the Bundle). Pursuant to these directions, the Applicants have produced a Scott Schedule which is at p.5.

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

The hearing

4. The Applicants appeared in person. They both gave evidence.

5. The Respondent was represented by Ms Vidgeon, the Client Account Manager employed by Countryside Estate Management (CEM). CEM managed the premises on behalf of the Respondent between 1 October 2008 and November 2011. Ms Vidgeon provided a statement which is at p.91-6. She exhibits a number of documents at p.97-150. She gave evidence. The accounts for 2009 are at p.15-21; 2010 at p.26-32 and 2011 at p.35-41.

6. The premises are now managed by Gateway. However, CEM were responsible for the service charge accounts with which we are concerned.

7. Mr D Bland, of Pier Management, appeared at the Directions Hearing. Pier Management are responsible for insuring the premises and collecting the ground rent. There is no challenge in respect of the building insurance. He therefore did not appear at the current hearing.

The background

8. 71 Laleham Road is a mid-terrace property. As constructed, there was a shop on the ground floor with a residential flat above. This was the position when the lease under which Mr Nagre derives his title was granted on 25 February 1987 for a term of 99 years from 25 December 1986. The ground rent was £50 per annum for the first 33 years of the term. It has now increased to £150. His flat is known at 71 Laleham Road. The Respondent acquired the freehold interest on 29 September 1998. Mr Nagre acquired his leasehold interest on 19 May 2009, albeit that it does not seem to have been registered until 23 February 2011 (see p.102).

9. Miss Peckover derives her interest under a lease dated 26 August 1988. By this date, the ground floor had been converted into a residential flat. The term of the lease is also one of 99 years from 25 December 1986. The ground rent was £75 per annum for the first 33 years of the term. It has now increased to £150. Miss Peckover acquired her leasehold interest on 25 August 2011 (see p.105).

10. This was the first home that Mr Nagre has owned. He told us that when he acquired his lease, he was unaware of his liability to pay a service charge. He telephoned CEM about the state of the roof. They stated that they would not speak to him because they did not have his details. He therefore spent some £6,500 on repairs to the roof (p.11-13) and some £3,000 on damp proofing works (p.14). Whilst the scaffolding was erected, he replaced the rotten windows with new UPVC windows at a cost of some £2,000. He also repainted the windows. He was assisted in these tasks by his father.

11. Miss Peckover acquired her leasehold interest on 25 August 20111. She has not carried out any works to the exterior of her ground floor flat. However, the previous tenant had replaced the rear windows with new UPVC windows. There are double glazed units at the front of her flat which were presumably installed when the shop was converted into a flat in 1988.

12. There are no common parts within the building; each flat has its separate entrance door. The significant obligations on the landlord are to keep the premises insured and to keep the structure and exterior of the building in repair. This latter obligation is not significant, if as here, the tenants accept responsibility for external repairs. The only common parts are a small forecourt and wall between the front of the property and the pavement. The refuse bins are in this area. This is illustrated in the photo at p.45. Ms Vidgeon confirmed that the landlord had expended no sums on repairs or external decorations during the period that the Applicants have owned their flats.

The Leases

13. The leases for Flat 71 (the first floor) and 71A (the ground floor) are at p.51-72 and p.73-90 respectively. In each case, "the property" is defined as all the freehold property at 71 Laleham Road in respect of which the landlord has freehold title. Mr Nagre's lease was executed when there was still a shop on the ground floor. At that time, the front forecourt was within the demise of the ground floor shop. Ms Nagre's demise does not extend to this forecourt. Her demise in respect of the ground floor flat is defined in Schedule 1. There is a plan annexed to the lease in which the demise is edged red for the purpose of identification only. The leases are largely in similar terms, apart to the references to "the shop" which no longer existed when Miss Peckover's lease was granted.

14. The Tribunal highlight the following terms of the leases:

(i) The landlord is obliged to insure the property (Clause 4(ii)). As noted, the service charges in respect of insurance are not in dispute.

(ii) The landlord has the normal obligation to keep in good and substantial repair and condition the structure and exterior of the property (Clause 4(iv)).

(iii) Whilst the landlord repairing covenant extends to any common installations for the supply of gas, water and electricity, in practice the two flats have separate supplies, which fall within the tenants' responsibilities.

(iv) The tenants' internal repairing obligations extends to the windows, window frames and doors to their flats (Clause 2(3)). Any obligation on the landlord to carry out external decorations would therefore be extremely limited. It would seem to extend to the stone cills and sandstone detailing.

(v) the tenant have the right, but not the obligation, to carry out certain works of repair and maintenance to the premises. This should normally be on notice to the landlord (Paragraph 4 of the Second Schedule).

(vi) Each tenant is obliged to pay 50% of the service charge (Clause 3).

(vii) The scope of the landlord's expenses which may be passed on through the service charge ("maintenance charge") are specified in the Fifth Schedule.

(viii) The landlord may collect an interim service charge (Clause 3(e)).

(ix) At the year end, there is to be a reconciliation between the interim charge and the actual expenditure (Clause 3(f)).

(x) The service charge extends to the cost of keeping and auditing the service charge account (paragraph 5 of the Fifth Schedule).

15. Two issues have arisen in respect of the leases. First, do the leases permit the landlord to employ managing agents? Secondly, do the leases permit the landlord to build up a reserve fund?

16. The Respondent rely upon the following provisions:

(i) The Lessee shall if required by the lessor with every payment of rent reserved hereunder pay to the Lessor such sum in advance and on account of the maintenance charge as the Lessor or its Managing Agents shall specify at their absolute discretion to be a fair and reasonable interim payment" (Clause 3(e)).

(ii) "All charges assessments and other outgoings (if any) payable to the Lessor in respect of all parts of the Property (other than income tax)" (Paragraph 3 of the Fifth Schedule).

17. The Tribunal does not consider that these provisions are drafted sufficiently widely to permit the Respondent to employ managing agents. The Fifth Schedule specifies the landlord's expenses, outgoings and other heads of expenditure which the tenant is to pay a 50% share by way of the maintenance charge. If the maintenance charge is to extend to the cost of the landlord employing managing agents, express provision should be made for this. The Fifth Schedule does not do so. This omission is not surprising given the limited duties involved in managing this property. Given these limited obligations, there are no grounds for implying such a term in order to give the lease business efficacy (*see Embassy Court Residents' Association Limited v Lipman* (1984) 271 EG 545).

18. Neither does the Tribunal consider that these provisions are drafted sufficiently widely to permit the Respondent to accumulate a reserve fund. Clause 3 contemplates a maintenance charge for each year (Clause 3 (a)). The account for the year is to contain a summary of the expenses and outgoings to be incurred by the landlord during the financial year to which it relates (Clause 3 (b)). At the end of the year, there is to be reconciliation between the interim charge and the actual expenditure (Clause 3(f)). Thus any interim payment which may be required relates only to the year ahead. It does not extend to a

contribution to a reserve fund in respect of any expenditure which may be incurred more than a year ahead. Again, this omission is not surprising given the limited nature of the landlord's repairing obligations. The roof and the external walls fall within the landlord's covenant; whilst the external doors and windows fall within the lessee's obligations.

Service charge items & amount claimed

19. 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.

Management Fees

20. The following sums are claimed for management fees: £560 (2009); £470.04 (2010) and £480.12 (2011) (see Scott Schedule at p.5). £480 is budgeted for 2012. Ms Vidgeon refers to her firm's generic management agreement (at p.119-20 and the normal duties of a managing agent which are specified in the RICS Guide (at p.122-3). In addition, £57.50 was claimed for the landlord to approve the budget (see p.24).

21. The Tribunal finds that none of these sums are payable:

(i) We do not consider that the lease is drafted sufficiently widely to permit the Respondent to employ managing agents (see [17] above).

(ii) If we are wrong on this, we consider that £100 per annum would be reasonable for this property (£50 per flat)..

(iii) However, were such a contribution to be payable, the Tribunal would need to consider what sum would be reasonable having regard to the obligations that the landlord had assumed over the relevant period. No management services have been provided, apart from one inspection. No external repairs or decorations have been executed. Rather, Mr Nagre has expended some £6,500 on repairs to the roof. In the circumstances, were a management fee to be payable, we are satisfied that it would not be reasonable to levy any management fee.

The Reserve Fund

22. The following sums are claimed in respect of contributions to the reserve fund: £250 (2009); (250 (2010); £250 (2011) (see Scott Schedule at p.5). £300 is budgeted for 2012. No accounts have been provided to the tenants. Such sums should have been held in a trust account. There is no evidence that it has been accounted for in this manner.

23. The Tribunal finds that none of these sums are payable:

(i) We do not consider that the lease is drafted sufficiently widely to permit the Respondent to accumulate a reserve fund (see [18] above).

(ii) If we are wrong on this, we consider that £100 per flat per annum would be a reasonable contribution to a reserve fund having regard to the limited nature of the landlord's obligations under these leases.

(iii) However, having regard to the recent history with regard to external repairs, we are satisfied that it would not be reasonable to collect any contribution to the reserve fund.

The Accountancy Fee

24. The following sums are claimed for accountancy fees: £60 (2009) and £72 (2010) (see Scott Schedule at p.5). £100 is budgeted for 2012.

25. The landlord is entitled to claim "all fees and costs incurred in respect of the annual account and of accounts kept and of audits made for the purpose thereof" (paragraph 5 of the Fifth Schedule of the lease (at p.70)). Given the modest sums that need to be expended on service charges in respect of this property, we are satisfied that a reasonable charge would be £50 per annum for this property. However, we are not satisfied that the sums charged for 2009 and 2010 are unreasonable. They are therefore payable. However, the sum of £100 budgeted for 2012 does seem excessive. We note that the landlord has consistently budgeted for more for the accountancy charge than has actually been expended. This in 2010, the budgeted figure was £250, whilst the actual expenditure was £60 (see p.28). We therefore reduce this figure to £72, the expenditure in 2010.

Miscellaneous Items

26. Out of Hours Emergency Service: £25.30 is claimed for this for the year 2009. The invoice is at p.25. The Applicants stated that they were unaware of the service. It has only been charged for one year. We do not consider that such a service is justified given the limited repairing obligation on the landlord. We therefore conclude that it has not been reasonably incurred and is not payable.

27. Preparation of a Stock Condition Survey: £223.25 is claimed for this for 2010. The invoice us at p.33. The Respondent, Regisport Limited, commissioned a Stock Condition Survey from Morgan Sloane. The Respondent provided us with a copy of the report at the hearing. Mr Rylands, a Chartered Building Surveyor, inspected the property on 15 August 2011. The Applicants were not alerted to the inspection. Mr Rylands therefore had no access to the premises or to the rear and was unable to inspect the rear of the property. He merely noted that the roof, walls and external redecorations were in a satisfactory condition. Whilst it was open to the freehold to obtain this report for its own

benefit, we do not consider that the cost of this report is an expense that can reasonably be charged through the service charge account.

28. Professional Fees: £60 is claimed for the year 2010. The invoice is at p.42. It is charged for the freeholders approval of the service charge budget for the year ending 31 December 2011. The Tribunal is satisfied that if the freeholder wants to satisfy itself that the budget is appropriate, it is a matter for it. It is not an expense that can reasonably be charged through the service charge account.

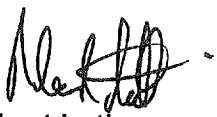
29. Health and Safety Survey: £180 is claimed for the year 2011. The invoice is at p.43. The report is at p.133. It was commissioned by Countrywide Managing Agents. The survey was carried out by Mr Wild on 26 April 2011. It was correctly noted that the only common parts were the footpaths (forecourt) and the waste storage area. The survey related to asbestos; fire; legionella; slips, trips and falls and other risks. The only relevant issue was the state of the forecourt. The Respondent has given no adequate explanation as to why this report was considered necessary. There has been no complaint that the forecourt was in a poor state of repair. We are satisfied that this is not an expense that can reasonably be charged through the service charge account.

30. General Repairs and Maintenance: £200 is included in the budget for 2012 for general repairs and maintenance. The Respondent has spent nothing on general repair and maintenance over the previous three years. The Respondent has also claimed a contribution of £300 towards a repair fund. There has been no suggestion that it is any more likely that the Respondent will incur any expenditure on maintenance and expenditure than in previous years. Given the history of management of this property, we are satisfied that this is not an expense that can reasonably be charged through the service charge account.

Application under s.20C and refund of fees

31. At the end of the hearing, the Applicant made an application under Regulation 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 for a refund of the fees that he had paid in respect of the application/ hearing. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal orders Respondent to refund any fees paid by the Applicant within 28 days of the date of this decision. We understand that these total £250. The Applicants have been largely successful in their application.

32. In the application form, the Applicants apply for an order under section 20C of the 1985. Given that the Applicants have been largely successful in their claim, the Tribunal 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 Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.



Robert Latham

(Chairman)

31 October 2012

Appendix of Relevant Legislation

Landlord and Tenant Act 1985

Section 18 – Meaning of "service charge" and "relevant costs

(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 – Limitation of service charges: reasonableness

(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 – Liability to pay service charges: jurisdiction

(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 20 – Limitation of service charges: estimates and consultation

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B – Limitation of service charges: time limit for making demands

(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 – Limitation of service charges: cost of proceedings

(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.

Leasehold Valuation Tribunals (Fees) (England) Regulations 2003

Regulation 9 – Reimbursement of fees

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).