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HM COURTS & TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

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

Property: Flat 3, 138 Barlow Moor Road, Manchester M20 2PU
Applicant: Mr.S.Murdoch
Respondent: The Didsbury Management Company Limited
Lease: Lease dated 13 June 2003 made between
M.H.Howorth(1) the Respondent (2) and H.A.Lee and
A.V.Whitehouse (3)
Tribunal: Mrs.C.Wood (Chair)
Mr.D.Bailey
Date of decision: 30 April 2012

DECISION

Background

1. The Applicant is the Tenant of the Property.
2. By an application dated 8 September 2011, as amended at the direction of the Chairman at the Pre-trial Review held on 17 November 2011, ("the Application") the Applicant sought a determination under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") in respect of the reasonableness of, and the Applicant's liability to pay service charges for the service charge years 2009, 2010, 2011, 2012, a "one-off" payment of £500 in 2009, and the Applicant's contribution of £1827.50 for roof repairs completed in October 2011.

3. Directions were issued to the parties dated 18 November 2011 pursuant to which the following written evidence has been submitted by the parties:
 - 3.1 Applicant's Statement of Case; and
 - 3.2 Respondent's Statement of Case and supporting documents.
4. In accordance with the Directions, the matter was determined by the Tribunal based on the documentary evidence submitted by the parties.

Inspection

5. The Tribunal inspected the external and internal common parts at 138, Barlow Moor Road ("the Building") at or about 9.30am on Friday 13 April 2012. Ms.N.Rowlands attended the inspection on behalf of the Applicant; Mr.M.Howorth attended the inspection on behalf of the Respondent.
6. The Building has been divided into 4 separate flats of which the Property is one. There are 4 garages in the grounds of the Building.

The Lease

7. The relevant provisions of the Lease for this purpose are as follows:
 - 7.1 under clause 4(1), the Tenant covenants with the Lessor and the Maintenance Company to contribute and pay by way of additional rent the following:
 - (a) on execution of the Lease, the sum of £250 on account of the service charge for the year ending 31 December 2003;
 - (b) in the first and subsequent years of the Lease, a sum equal to one-fourth of the total cost and expense incurred in maintaining and providing the services mentioned in clause 4(4) of the Lease;
 - (c) in the first and subsequent years of the Lease, a sum equal to one-fourth of "the estimated future cost of providing the major services of maintenance of the structure and fabric of the Building of the external decoration thereof and the planting cultivation of the grounds and maintenance of drives".
 - 7.2 The Lease provides that the sums mentioned in (b) and (c) are to be referred to as "the Tenant's Contribution", and shall be paid half yearly in advance on 1 January and 1 July in each year.
 - 7.3 Clause 4(3) provides that the Maintenance Company may request the Auditors to provide a Certificate certifying the total cost and expenses incurred by the Maintenance Company and the estimated reserves required for future costs , and upon receipt of such a Certificate the Tenant shall pay any balance due or be credited with any amount overpaid.
 - 7.4 Clause 4(4) itemizes the sums to be expended and services to be performed by the Maintenance Company as follows:
 - (a) the expense of maintaining repairing redecorating and renewing the main structures and in particular the roofs main walls chimney stacks gutters foundations and rainwater pipes of the Building the gas and water pipes

- drains and electric cables and wires and ancillary apparatus in under or upon the Building and enjoyed or used by the Tenant in common with the Lessees of the other Flats and the boundary walls fences forecourts paths and drives of the Estate
- (b) the cost of keeping the forecourts grounds paths and drives and other similar parts of the estate in good condition and (as to the garden) cultivation
 - (c) the cost of painting and decorating the exterior of the Building
 - (d) all rates taxes and outgoings (if any) payable in respect of the Building and not payable by individual Lessees either under their respective Leases or under the general law
 - (e) the cost of insuring the Building and all structures erected in connection therewith
 - (f) the cost of cleaning the outside of the windows of the Building
 - (g) all other expenses incurred by the Maintenance Company in and about the maintenance and proper and convenient management and running of the Building
 - (h) the wages of any Staff employed by the Maintenance Company and the fees and disbursements paid to any managing Agents appointed by the Maintenance Company in respect of the Building PROVIDED THAT so long as the Maintenance Company does not employ managing Agents it shall be entitled to add the sum of Ten Per Centum to any of the above items for administration.

The Law

8. 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.
9. 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.

10. 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.

11. In *Veera SA v 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].

The Submissions

12. The Applicant's Statement of Case identifies the following issues:

12.1 in respect of the service charge year ended 31 December 2010, he has not seen a completed year-end report and does not have evidence of where monies have been spent;

12.2 during that year, the garages were painted by the Applicant who has not been reimbursed for time/materials spent;

12.3 in respect of the service charge year ended 31 December 2011, he has not been provided with any evidence of where money has been spent;

12.4 during that year, the communal entrance, stairway and landings were painted by the Applicant who has not been reimbursed for time/materials;

12.5 there has been a failure by the Management Company to provide a clear report of accounts or intentions for future expenditures, and repeated

- requests for clarification and/or further information have been to no avail;
and
- 12.6 there has been a failure to provide accurate information to explain the charging of the "one-off" fee of £500 requested in October 2009.
13. The Respondent's Statement of Case contains the following information:
- 13.1 a statement of service charges 2009 – 2011, budgeted amounts for 2009 – 2012, accounts for the years ended 31 December 2009 and 31 December 2010, confirmation of the payment of the service charge in 2 instalments, an explanation of the "one-off" charge of £500 in 2009, and a brief commentary on the background to the making of the roof repairs;
- 13.2 copy letters dated 12 August 2009, 26 June 2010, 1 January 2011 and 2 January 2012 requesting payment of service charge instalments;
- 13.3 annual reports for the years ended 31 December 2009 and 31 December 2010;
- 13.4 copy correspondence and documentation relating to the "one-off" charge of £500 in 2009;
- 13.5 copy correspondence including estimate, invoice and receipt, relating to the roof repairs in 2011;
- 13.6 response to the Applicant's Statement of Case confirming as follows:
- (i) year end reports and accounts for years ended 31 December 2009 and 31 December 2010 were submitted to all Lessees;
 - (ii) an agreement with the Lessees of Flats 3 and 4 that they undertake maintenance works at the Estate where the cost of materials (but not time) would be reimbursed on receipt of invoices;
 - (iii) his understanding of the background to the application.

Determination

14. The Tribunal must apply a three stage test to the application under section 27A:
- (1) Are the service charges recoverable under the terms of the Lease?
This depends on common principles of construction and interpretation of the lease.
 - (2) Are the service charges reasonably incurred and/or services of a reasonable standard under section 19 of the 1985 Act?
 - (3) Are there other statutory limitations on recoverability, for example consultation requirements of the 1985 Act as amended?
15. The Tribunal determined as follows:
- 15.1 in respect of the service charge year ended 31 December 2009 ("the 2009 S/C Year"):

- (i) the amounts incurred in respect of insurance, electricity, repairs and maintenance, accountancy, and sundry expenses are reasonable;
 - (ii) items of expenditure should be separately listed and not grouped as here with "Management fees, cleaning and gardening" which makes it difficult to consider the reasonableness of each item. Based on the analysis provided by the Respondent, it appeared that the £744 charged was in relation to management fees;
 - (iii) in accordance with clause 4(h) of the Lease, management fees are limited to 10% of the administrative expenses which, in the 2009 S/C Year, were £1521. The management fees are therefore limited to £152 and the service charge payable by the Applicant in respect of the 2009 S/C Year is reduced to £418.25;
 - (iv) there was no evidence before the Tribunal that an estimate of future expenses in accordance with clause 4(1)(c) of the Lease had been provided in respect of the 2009 S/C Year;
 - (v) therefore, in accordance with clause 4(3) of the Lease, any amounts paid by the Applicant in respect of service charge for the 2009 S/C Year in excess of £418.25 should be credited against the Applicant's liability for future service charges;
- 15.2 in respect of the "one-off" payment of £500 charged in October 2009:
- (i) there is no evidence of the issue of a Certificate in respect of the "one-off" fee in accordance with clause 4(3) of the Lease and, in the absence of any information identifying the expenditure which it is claimed has resulted in the deficit, the Tribunal is unable to determine whether or not the costs have been reasonably incurred and, if they relate to works done or services performed, whether they have been done/performed to a reasonable standard, and, accordingly, whether or not the Applicant is liable to pay it. Pending the Applicant's receipt of such information and agreement between the parties or further application to the Tribunal for its determination under section 27A of the Act in respect of this "one-off" fee, the Tribunal considers that any amount paid by the Applicant in respect of this "one-off" fee should be credited against his liability for future service charges;
 - (ii) subject to paragraph (i) above, from the information made available by the Respondent, it appears that £700 of the deficit of £2007 as at 31 December 2008 is arrears of service charges from Flats 1 and 2 accrued during the years 2003 – 2008 in respect of which the Applicant is not liable, and the amount of any deficit should be reduced accordingly ;
- 15.3 in respect of the service charge year ended 31 December 2010 ("the 2010 S/C Year"):
- (i) administrative expenses (excluding management fees) are £1238. In accordance with clause 4(h) of the Lease, management fees are limited to 10% of the administrative expenses ie £124 ; and
 - (ii) total administrative expenses (including management fees of £124) are £1362 which are reasonable;

- (iii) accordingly, the service charge for the 2010 S/C Year payable by the Applicant is £340.50;
 - (iv) there was no evidence before the Tribunal that an estimate of future expenses in accordance with clause 4(1)(c) of the Lease had been provided in respect of the 2010 S/C Year;
 - (v) therefore, in accordance with clause 4(3) of the Lease, any amounts paid by the Applicant in respect of service charge for the 2010 S/C Year in excess of £340.50 should be credited against the Applicant's liability for future service charges;
- 15.4 with regard to the roof repairs completed in October 2011, there had been a failure to undertake a consultation process in accordance with section 20 of the 1985 Act, and, in the absence to date of an application by the Respondent for dispensation under section 20ZA, the amount recoverable from the Applicant in respect of such works is limited to £250;
- 15.5 in respect of the demands for payment of service charges for the 2009 S/C Year, the 2010 S/C Year, the service charge year ended 31 December 2011 and the first instalment for the service charge year ending 31 December 2012, there was a failure by the Respondent to comply with the requirements of section 21B of the 1985 Act, specifically, to accompany each demand for payment of a service charge with a summary of the rights and obligations of tenants of dwellings in relation to service charges, entitling the Applicant (where payment has not been made) to withhold payment of the service charges in respect of which compliance has not been made (Section 21B(3));
- 15.6 in accordance with section 27A(5) of the 1985 Act the Tribunal is satisfied that the fact of the payments made by the Applicant in respect of the 2009 S/C Year, the 2010 S/C Year, the "one-off" payment and in respect of the roof repairs are not to be regarded as any agreement or admission by the Applicant of any of the matters the subject of the Application;
- 15.7 there was insufficient evidence before the Tribunal to enable it to make any determinations under s27A of the 1985 Act in respect of the 2011 S/C Year (other than in respect of the roof repairs) and the 2012 S/C Year;
- 15.8 in view of the Tribunal's determinations:
- (i) it is just and equitable to grant the Applicant's application under section 20C of the 1985 Act ; and,
 - (ii) in accordance with Regulation 9(1) of the Leasehold Valuation Tribunals (Procedures) (England) Regulations 2003, the Respondent is ordered to reimburse the Applicant its application fee for these proceedings;
- 15.9 the Tribunal makes no comment in respect of the agreement between the Respondent and the Applicant and the Tenant of Flat 4 regarding maintenance of the Building save that it would regard as unreasonable the inclusion by the Respondent within the service charge of any expenditure on items of maintenance that, with its consent, had been carried out by a Tenant unless and until reimbursement had been made;
- 15.10 in reaching its determinations, the Tribunal considered that the failures by the Respondent to comply with the terms of the Lease and relevant

legislation were attributable to ignorance rather than any willful disregard, but that they highlighted an unsatisfactory standard of management of the Building which the parties may wish to consider how best can be addressed in all their interests.

Catherine Wood.

Catherine Wood
Chair
Dated 30 April 2012