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**LEASEHOLD VALUATION TRIBUNAL**

**Case number : CAM/12UD/LSC/2012/0152**

**Property** : **Riverview, 3 North End, Wisbech, Cambs PE13 IPE**

**Applications** : For determination of liability to pay service charges for the years 2009 to 2012 inclusive [LTA 1985, s.27A]

For an order that all or any of the costs incurred by the landlord in connection with past proceedings before a leasehold valuation tribunal, and costs to be incurred in these 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 [LTA 1985, s.20C]

**Applicants**

1 Mr Paul Rhodes

2 Mrs Marion J Phillips

3 Ms Maria Sage

4 Mr Colin Freer

**Respondent** : Mr David Housden

**DECISION FOLLOWING PAPER DETERMINATION**

Handed down 25<sup>th</sup> March 2013

**Tribunal** : G K Sinclair (chairman) & G F Smith MRICS FAAV REV

**Determination** : Friday 22<sup>nd</sup> February 2013 at the tribunal office, Quern House, Mill Court, Great Shelford, Cambridge CB22 5LD

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**Summary**

1. The management of the subject premises has previously been considered by a Leasehold

Valuation Tribunal, on the application of the lessee of flat 1 concerning the service charge periods ending 30<sup>th</sup> September 2006, 2007 and 2008.<sup>1</sup> A copy of that tribunal decision was included in the application bundle at Section F, pages F5–F13. On this occasion the tenants of all four flats have jointly applied for a variety of forms of relief, some of which strayed far beyond a determination of issues under section 27A, and this problem was identified in the tribunal's directions issued on 28<sup>th</sup> November 2012. In response, at the first page numbered 1 in the bundle, the Applicants have re-cast the application to focus on just three issues :

- a. The reasonableness of the service charges levied
- b. The quality of Mr Housden's management, and
- c. The breakdown in trust between the lessees and Mr Housden.

2. The third of those issues is not strictly a matter for the tribunal's determination, so it has concentrated upon the specific service charge points made in the application form against each of the years in question. The tribunal's findings appear in paragraphs 17–50 below.
3. Neither party wanted to incur the trouble and expense of an oral hearing so, as on the previous occasion, the application was dealt with by way of paper determination.

**Material statutory provisions**

4. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :
  - 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...
5. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
  - 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.
6. Section 21B of the Act adds a further procedural requirement :
  - (1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.
  - (2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.<sup>2</sup>
  - (3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.
  - (4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

<sup>1</sup> CAM/12UD/LSC/2010/0031 — decision dated 9<sup>th</sup> August 2010

<sup>2</sup> The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 [SI 2007/1257]

7. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

#### **Material lease provisions**

8. Copy leases for flats 2, 3 and 4 were included in the bundle, but not that for flat 1, which had been disclosed in the previous proceedings.
9. The 2010 decision recorded that by a lease dated 13<sup>th</sup> October 2006 the [landlord] granted to the [tenants] a lease of flat 1, on the ground floor<sup>3</sup> to the rear of the building known as Riverview, 3 North End, Wisbech, for a term of 99 years from 1<sup>st</sup> March 2006 at a premium of £57 000 and an annual ground rent of £250,<sup>4</sup> with a service charge contribution of one quarter of the service costs by way of further rent. The ground rent is payable every 1<sup>st</sup> March<sup>5</sup> and the service charge in two tranches :
- a. An interim service charge instalment equivalent to the final service charge shown on the last service charge statement presented, payable on 1<sup>st</sup> March<sup>6</sup>; and
  - b. A balancing payment in respect of the final service charge (being one quarter of the actual service costs for the year ending 30<sup>th</sup> September), payable within 14 days of receipt of a certified service charge statement showing any balance due.<sup>7</sup>
10. That decision further recorded that the lease makes no provision for the recoverability of any administration charges whatever (save for landlord's costs in connection with the service of a section 146 notice – which these days are further constrained by the need to obtain a prior determination under section 168 of the Commonhold and Leasehold Reform Act 2002 that there has been a breach of covenant).
11. The lease of flat 2 (to Sage) is dated 30<sup>th</sup> July 2004 and was drafted by Frasers, a local firm of Wisbech solicitors. It grants a term of 99 years from 1<sup>st</sup> March 2004 at a premium of £65 000 and an initial annual ground rent of £250, with elaborate rent review provisions in clause 5. As further rent the tenant must pay a service charge calculated in accordance with the Third Schedule on the dates stated there. The services to be provided by the landlord, the cost of which may be recouped, appear in the Fourth Schedule. Payment is in two parts, as in paragraph 9 a and b above. If the service charge statement shows a balance in favour of the tenant then the landlord must pay that sum to the tenant when giving the statement. The lease appears not to contain a forfeiture clause.
12. The lease of flat 3 (to Freer) is undated but grants a 99 year term from 1<sup>st</sup> March 2006

<sup>3</sup> Clause 2.3 incorrectly states that the flat is on the first floor

<sup>4</sup> Clause 2.1

<sup>5</sup> Clause 3.1

<sup>6</sup> Schedule 3, para 3

<sup>7</sup> Schedule 3, para 4

at a premium of £61 000 and a fixed annual ground rent of £250. It is drafted in slightly different terms from the other leases, refers at clause 3.28 to a car parking space, but one is not mentioned in the grant. The service charge provisions are broadly the same. Again, the landlord must repay any surplus, and there is no forfeiture clause.

13. The lease of flat 4 (to Rhodes) is dated 26<sup>th</sup> January 2006 and was drafted by Frasers. It grants a term of 99 years from 1<sup>st</sup> March 2004 at a premium of £73 000 and a fixed ground rent of £250. Its service charge provisions are similar.

#### **Evidence, issues & findings**

14. The tribunal did not inspect the premises and dealt with the application entirely on the basis of the documents and written submissions filed by the parties. The Respondent's submissions dated 21<sup>st</sup> December 2012, comprising five loose sheets with an attached three-page schedule and some supporting documents, can all be found in a plastic wallet in Section A.
15. As in the previous application, and with complete disregard for the directions issued, the tribunal was presented with a confusing, overlarge and unmanageable bundle comprising some documents or collections of documents filed as loose unnumbered pages in plastic wallets, these being interspersed with idiosyncratically numbered pages filed directly. From the parties' respective submissions and the voluminous documents enclosed the tribunal could see that for a brief period shortly after the previous hearing the landlord sought to engage independent managing agents, Block Management UK Ltd, of Boxford in Suffolk. Each side blamed the other for the withdrawal of that company within a few short months, but while in charge it did manage to produce service charge accounts for 2009 and 2010 and issued demands for advance service charge on 6<sup>th</sup> August 2010.
16. The tribunal focussed on the points specifically challenged in the application form under each of the years in question, at least insofar as those points were legitimate challenges to service charges.

#### **2009**

17. *Landlord's administration fees – £1 584.* Mr Housden explains this figure as follows :
- £200 pa per flat (£800) plus VAT @ 17.5% (£140) – based on LVT's previous decision that £200 is a reasonable figure
  - £450 plus VAT @ 15% (67.50) – for a specially convened meeting for all leaseholders, to resolve certain issues
  - £126.10 mark-up on all purchases to cover variable overhead costs, including provision of 24-hour emergency service.
18. On 10<sup>th</sup> October 2011, according to the table annexed to his statement in response and his letter at page G86, Mr Housden gave the leaseholders a credit of £684, reducing the total for the building to £900.
19. *Decision :* The earlier tribunal decision was in 2010 and thus post-dated the year in question. Some of the items claimed, such as the "mark-up" rejected in that decision as unacceptable, are claimed for 2009. Attending at a meeting with leaseholders forms part of the normal management and does not justify an additional fee. These items are not

allowed. Further, the standard of management is most likely to have been no better than that castigated as inadequate in the tribunal's 2010 decision, so this tribunal is prepared to allow no more than the amount per flat allowed before, with a modest increase for inflation : £110 per flat (£440) is allowed in total.

20. As for the claimed VAT, the landlord's supply of services under a lease of residential property will be exempt from VAT unless he has opted to tax. In residential lettings this will not be possible, although the correct treatment of service charges has been called into question as a result of the decision of the Court of Justice of the EU in *RLRE Tellmer Property*<sup>8</sup>, a case concerned with charges for cleaning the parts of an apartment block which was let to tenants. However, the Court of Justice has since done much to clarify this issue in its more recent decision in *Field Fisher Waterhouse LLP v Revenue and Customs Commissioners*<sup>9</sup>, in which it said that it is for the national courts to decide whether the letting and the provision of the services are so closely linked that they must be regarded as making up a single supply. The fact that the lease in that case gave the landlord the right to terminate it for non-payment of the service charge is evidence that the landlord made a single supply but is not conclusive on the point. This tribunal disallows the claimed VAT.
  21. *Legal and professional fees – £56.00.* This is for the cost of Mr Housden's solicitor/PA attending the meeting with leaseholders. In fact the solicitor was Mr Housden's own daughter, who was not practising as a solicitor at the time [see the landlord's letter dated 20<sup>th</sup> November 2011, at page G90].
  22. Decision : Even if the person in question held a valid practising certificate at the time this is not a cost which can reasonably be visited upon the leaseholders.
  23. *Insurance.* Two different figures are claimed for this year : £314 (for which there is evidence at A7 page 12) and £480 (for which there is not).
  24. Decision : £314 only is allowed, and the tribunal notes that the insurance documentation disclosed reveals over the years in question a complete muddle, with alterations made to insurance periods and some overlap in cover [see under 2010].
  25. *£29.45 "finance charge" and 2 x charges of £80.50 for "creation of sub-lease".* The tribunal made clear in its directions that if administrative charges were to be challenged then a request should be made to amend the application accordingly.
  26. Decision : With no such amendment sought the tribunal ignores these items as outwith the scope of the current application.
- 2010
27. *Landlord's administration fees – £2 019.* Mr Housden calculates these as follows :
    - a. £225 pa per flat (£900). [VAT is not mentioned]
    - b. £750 for dealing with very time-consuming cost of transferring all the records to

<sup>8</sup> *RLRE Tellmer Property sro v Financni reditelstvi v Usti nad Labem* : Case C-572/07 [2009] STC 2006

<sup>9</sup> Case C-392/11 [2012] 38 LS Gaz R 20, [2012] NLJR 1258

- c. Block Management, plus VAT of £288.75 ("as recommended" by the LVT)  
£80.03 mark-up on all purchases to cover variable overheads

28. Decision : As mentioned above in connection with the previous year, the tribunal is not satisfied that the standard of management was any more satisfactory than that dealt with in its 2010 decision. The additional costs of the abortive instruction of an independent managing agent (Block Management) are a matter for the landlord and not rechargeable to leaseholders. For the avoidance of doubt, while the earlier tribunal welcomed Mr Housden's decision to put the management of the building on a more professional footing by engaging external managing agents, it did not "recommend" this particular company (Block Management); the history, reputation and financial standing of which it knew nothing. No tribunal would ever consider recommending a specific agent.
29. Again, the insurance position for 2010 is very confusing and not in accordance with Mr Housden's own schedule [see A7] submitted as part of his Statement of Case. The insurance year starts in April, yet a new policy (including cover for a grossly excessive loss of rent in the sum of £55 762) came into force on 16<sup>th</sup> December 2010. [Compare A7 pages 11 & 14] This is a further example of poor management, so the annual fee is allowed at only £110 per flat, as in 2009.
30. *Legal and professional fees – £59.* This is described as the landlord's cost of obtaining advice on changes to leasehold matters, with this block taking a 10% share of the total cost incurred for 8 blocks under management. In his letter to leaseholders dated 20<sup>th</sup> November 2011 [at page G90] Mr Housden explains this as being advice from Frasers "on the leasehold legislation – the need for annual certification of accounts, what notices had to be issued, and when, and under what circumstances".
31. Decision : As a professional landlord Mr Housden should know this, and in any case the leases specifically require certification of the accounts. This item is disallowed in full.
32. *Postage and stationery – £121.* Mr Housden states that this item was incorrectly classified by Block Management and should really refer to the administrative costs of his PA attending the premises to take meter readings and check the state of the gardens and common areas.
33. Decision : this is one of the standard management tasks for which the annual fee is charged. No additional payment for this is justified and it is disallowed in full.
34. *Need to consult on carpet?* Very little information is provided, but the Block Management account for the year shows a total for repairs, decoration and maintenance of £807 [C7], and the cost of the new carpet is only £145.
35. Decision : No consultation was required (although it is suggested by Mr Housden that Mrs Sage and Mrs Phillips were heavily involved).
- 2011
36. *Freeholder administration – £900.* Mr Housden claims £225 pa per flat, based on the LVT's 2010 determination plus inflation.

37. Decision : there is an insurance overlap, and the accounts are wrong (too low) [see A7, pages 8, 9 & 11]. There is a dispute between Mr Housden and Block Management as to the failure of the Block contract, with the leaseholders providing an e-mailed statement from Paul Mather of Block at section E in the bundle . Additional costs of sorting this out are not to be visited on the leaseholders.
38. However, it is undoubtedly the case that Mr Housden spent a lot of time dealing with a long-running dispute over the electricity bill, therefore the tribunal is prepared to allow a management fee of £150 per flat for this year.
39. *Block Management fees – £972.10.* Mr Housden explains this as being a management fee of £384.60 plus an initial set-up fee of £587.50, which he disputes. However, he then says that he still holds £611.82, the unpaid [part] of Block Management's fees, in case an attempt is made by the latter to pursue it. This would have been credited for 2012, but as he (having sold the building) is no longer managing it, he forgot.
40. Decision : As stated above, the reasons why the Block Management contract came to a speedy end are disputed by the leaseholders and Block (on the one side) and Mr Housden (on the other). Each regards the other as behaving unreasonably. However, this is not a cost which, in this tribunal's judgment, should properly be passed to the leaseholders. It is the landlord's problem. (The tribunal notes that the clearest annual service charge accounts were produced by Block while it was briefly in charge).
41. *Bank charges – £25.*
42. Decision : These are neither properly explained nor challenged. Bank charges are not mentioned as a recoverable cost in the Fourth Schedule to the leases and ordinarily these (as opposed to bank interest) would be a standard cost of management included within the annual fee. This item is disallowed in full.
43. *Electricity/common parts – £269.83.* This relates to a disputed bill rendered by British Gas (as electricity supplier) which Mr Housden did not pay. He negotiated with the supplier over a prolonged period, until beyond the end date for this year's accounts. The amount was later reduced.
44. Decision : As an accounting exercise it was legitimate for the landlord to include this disputed account as a contingent liability in the accounts as the dispute had still not been resolved by the year end. This is allowed in full, although the eventual reduction in this item should be brought into account in a later year in accordance with normal accounting principles.
- 2012 (part)*
45. *Management fee – £583.24.* This is justified as a pro rata charge for the 7 months prior to Mr Housden's sale of the freehold reversion, based on the LVT's earlier determination plus an allowance for inflation, thus producing an annual figure of £250 per flat, but on this occasion again with VAT.
46. Decision : Mr Housden's figure in fact suggests a charge of £250 x 12 / 7 including VAT.

The tribunal is prepared to allow £150 per unit (with inflation), which pro rata is a total of £350. For the reasons given above VAT is disallowed.

47. *Common parts cleaning, etc.* These are all minor items with very specific figures claimed. No real challenge is made to these items.
48. Decision : With the single exception of the bank charges (for the reasons given above) the tribunal allows all these items in full.

*Generally*

49. Mr Housden's response, at pages 2-3 of 5, refers to "unpaid balances" allegedly owed by three leaseholders, and that two only have been "passed for collection to Assethold". Who is Assethold – the new freeholder (to whom the right to sue has been assigned), or a debt collection agency? If the former, should it not be a party?
50. As the leases make no provision for recovery of legal costs (save in connection with section 146 notices, etc) the question of making a determination under section 20C does not arise.

Dated 25<sup>th</sup> March 2013

Graham K Sinclair – Chairman  
for the Leasehold Valuation Tribunal