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RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985, AS AMENDED – SECTIONS 27A AND 20C

REFERENCE: LON/OOAH/LSC/2012/0536

Property:	**Flat 5, Lyndhurst Court, 297a Whitehorse Lane, SE25 6UG**
Applicant:	**Lyndhurst Court RTM Company Ltd.**
Respondent:	**Mr M A Fuchs**
Appearances:	**Mr D Edwards of Counsel instructed by Brethertons LLP** **Mr A Kelleher, Director, KDG Property Ltd.** **Mrs T Winkworth, Estates Co-ordinator, KDG Property Ltd.** **For the Applicant** **Ms M McDermott of Counsel instructed by Saul Marine & Co.** **For the Respondent**
Date of hearing:	**7 March 2013**
Date of Tribunal's Decision:	**13 March 2013**
Members of the Tribunal	**Mrs J S L Goulden JP** **Ms S Coughlin** **Mr LG Packer**

REFERENCE: LON/00HA/LSC/2012/0536

PROPERTY: FLAT 5, LYNDHURST COURT, 297a WHITEHORSE LANE, LONDON SE25 6UG

Background

1.The Tribunal was dealing with the following applications:-

(a) an application by the landlord under S27A of the Landlord and Tenant Act 1985, as amended ("the Act") 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

(b) a cross application by the tenant for limitation of landlord's costs of proceedings before the Tribunal under S20C of the Act. This application was added at a telephone Pre Trial Review held on 28 August 2012.

2. The applications relate to Flat 5, Lyndhurst Court, 297a Whitehorse Lane, London SE25 6UG ("the property"). The Applicant landlord is Lyndhurst Court RTM Company Ltd. The Respondent tenant is Michael Aron Fuchs.

3.The lease of Flat 5, a copy of which was provided to the Tribunal, is dated 26 February 1988 and made between Pennant Projects Ltd. (1) and Susan Christine Harwood (2) and is for a term of 125 years from 25 December 1987 at the variable rents and subject to the terms and conditions therein contained. The Tribunal was advised that the building was a converted 19th century house containing 10 flats, with 8 flats in the main building and 2 flats having a separate entrance. All the flats were on long leases, and all the residential leases were in essentially the same form. It appears from the office copy entries on the register that the Respondent had purchased the property in or about February 2003.

4. The service charge year runs from 1 January to 31 December in each year. The issues in dispute related to the budget for the service charge years ending 31 December 2010 and 31 December 2011.

5.The Applicant had issued two claims against the Respondent for non payment of service charges in the Banbury County Court under Claim numbers 1ZA03353 and 0ZA03054. The cases had been transferred to the Willesden County Court.

6.Upon hearing Counsel for the Claimant and Solicitor for the Defendant an Order dated 25 May 2012 was made by District Judge Middleton-Roy by which the two claim numbers were consolidated, the action was stayed and the issue of the reasonableness of the service charges was transferred to the Leasehold Valuation Tribunal ("LVT") for Directions and Determination. The county court transfer was received by the LVT on 8 August 2012.

7. It should be noted that the Tribunal's jurisdiction in cases transferred from the county court flows from the county court and such jurisdiction is limited to the amount claimed in respect of the service charge dispute only. Other issues, such as interest and county court costs remain within the jurisdiction of the county court.

8. A telephone Pre Trial Review was held by the Tribunal on 28 August 2012 and Directions were issued on the same date, with a hearing date fixed for 10 December 2012. Paragraph 4 of those Directions stated:-

"The Tribunal has identified the following issues to be determined:

(i) The payability of service charges demanded on account in connection with intended works

a. The sum of £4,501.50 for service charge year 2010

b. The sum of £3,081.50 for service charge year 2011

(ii) whether the landlord has complied with the consultation requirement under s 20 of the 1985 Act (subsequently not challenged by the Respondent)

(iii) whether the cost of works are payable by the leaseholder under the lease (subsequently not challenged by the Respondent)

(iv) whether the estimated costs of the proposed works are reasonable, in particular in relation to the nature of the works, the contract price and the supervision and management fee (the contract price, supervision and management fee subsequently not challenged by the Respondent)

(v) whether an order under section 20C of the 1985 (Act) *should be made."*

9. A further oral Pre Trial Review was held on 10 December 2012 (the date on which the original hearing had been listed) and Further Directions were issued on the same date which, inter alia, varied the dates in the original Directions and listed a fresh hearing date of 7 March 2013.

Inspection

10. In view of the issues raised, the Tribunal considered that an inspection of the property would not be of assistance and would be a disproportionate burden on the public purse.

Hearing

11.The hearing took place on Thursday 7 March 2013.

12.The Applicant was represented by Mr D Edwards of Counsel instructed by Brethertons LLP. Mr A Kelleher, Director, KDG Property Ltd., the Applicant's managing agent attended and gave evidence on behalf of the Applicant. Mrs T Winkworth, Estates Co-ordinator, KDG Property Ltd. also attended, but did not give evidence.The Respondent did not appear but was represented by Mr M McDermott of Counsel instructed by Saul Marine & Co. The Tribunal was advised that Mr Fuchs lives abroad. No evidence was provided for or on his behalf, there was no statement of case, and his witness statement was only provided to the Tribunal on the day before the hearing.

13. It was noted from the Scott Schedule that certain issues were no longer challenged by the Respondent. The Tribunal permitted the parties an adjournment in order to see whether any further issues could be narrowed, and this proved successful in part. The Tribunal is grateful to Counsel on both sides for their assistance in this respect.

14.The issues which were noted as challenged by the Respondent on the Scott Schedule but where the challenge was subsequently withdrawn, either at the commencement or during the hearing, were in respect of

- repairs and maintenance
- management fees
- insurance
- gardening
- driveway repairs
- retaining wall works
- roof repairs
- tree surgery
- security and entryphone system
- external render repairs and redecorations
- whether consultation requirements had been complied with
- whether the cost of works was payable by the leaseholder under the lease
- contract, supervision and management fees in respect of the proposed works

15.In addition, Mr Edwards, for the Applicant, confirmed that legal fees should not have appeared on the Scott Schedule for either year (although he confirmed that the Respondent would still be pursued in this respect)

16.The issues which remained for determination by the Tribunal were as follows:-

- Cleaning
- Damp penetration
- Fire Safety and Asbestos Control Works
- Limitation of landlord's costs of proceedings

17.The burden is on the Applicants to prove its case with such relevant evidence provided at the hearing as is sufficient to persuade the Tribunal of the merits of their arguments. The Tribunal is not permitted to take into account the personal circumstances of the parties when making its decision.

18. However, the Tribunal also wishes to point out that it is insufficient for the Respondents to seek to put the Applicant to strict proof. In a recent case of **Assethold Ltd v 14 Stansfield Road RTM Co.Ltd.** which had been appealed from the LVT and determined by the President of the Upper Tribunal (Lands Chamber) on 30 July 2012, it was stated in relation to the "strict proof" point that it was insufficient to **"then sit back and contend before the LVT (or this Tribunal on appeal) that compliance has not been strictly proved. Saying that the company is put to proof does not create a presumption of non- compliance..."**

19.The contract between the parties is the lease between them and both sides are bound by the contractual terms contained therein.

20.The salient points of the evidence presented, and the Tribunal's determination, is given under each head. It is not to be inferred that evidence not referred to in the body of the Tribunal's Decision has been disregarded.

Cleaning

21.The estimate for the service charge years 2010 and 2011 was £1500 for each year (£3,000 in total).

22.Mr A Kelleher, Director of KDG Property Ltd., the Applicant's managing agents gave oral evidence on all the issues which remained challenged by the Respondent. He said that the Applicant company had acquired the Right to Manage on 9 June 2009, on which date his company had been employed as its managing agents.

23.Mr Kelleher said that the contract for cleaning had been outsourced to a contractor who charged £45 per visit once a fortnight (ie £90 per month). There was no fixed contract. He said that the cleaning was basic *"in theory"* and included keeping the common parts clean, sweeping the stairways and keeping the bin stores tidy. The contractor charged extra for bulb replacement and removed of refuse left within the grounds. This latter aspect was a problem since the building was almost opposite Crystal Palace Football Club and there had been a considerable amount of refuse dumped within the grounds

24.Mr McDermott said that the block was small and the cleaning carried out was basic. He contended that the estimate for each year should be no more than £1,250 per year.

The Tribunal's determination

25.No evidence was produced on behalf of the Respondent. Even on Mr McDermott's own calculations the estimate for each year should have been no more than £1,250 for each year. The difference is de minimis.

26.The Tribunal determines that the budget figures in respect of cleaning of £1,500 for each of the service charge years 2010 and 2011 (£3,000 in total) are relevant and if incurred would be reasonable and properly chargeable to the service charge account.

Damp penetration

27.The estimate under this head was £3,500 for the 2011 service charge.

28.Mr Kelleher said that the estimate had been based on a previous invoice dated 31 December 2010 to treat rising damp in Flat 2 in the sum of £1,504. He said that there was further damp to the common parts between Flats 2 and 3, the area of which was double in size to the area in Flat 2 and therefore an estimate of £3,500 was reasonable. He said at the time of preparing the budget he had to *"crystal ball it"*.

29.Mr McDermott said that the budget was excessive and the figure had been *"plucked out of thin air"* and should have been £1,500.

The Tribunal's determination

30.The Tribunal, taking into account the works required and the potential cost, considers the basis on which the estimate was calculated was reasonable. No evidence was provided on behalf of the Respondent.

31.The Tribunal determines that the budget figure in respect of damp penetration in the sum of £3,500 is relevant and if incurred would be reasonable and properly chargeable to the service charge account.

Fire Safety and Asbestos Control Works

32.The estimate under this head was £4,800 including VAT for the service charge year 2010.

33.Mr Kelleher said that it was his duty to ensure that the building was safe. . He referred to a report prepared by another director of his company, Mr A Dutta, dated 11 December 2009 in which the budget for 2010 under this head was suggested at £2,000 to £4,000 excluding VAT. Mr Kelleher was unsure what research Mr Dutta had carried out to arrive at the figure of £4,800, but thought the estimate was reasonable and pointed out that, at present, there was no automatic fire detection system in the building, which would cost approximately £2,000. In re-examination Mr Kelleher said that he had never been contacted by the Respondent at all in the last 2 to 3 years, and the only time the survey report was raised was when the Respondent's solicitors started writing to him once county court proceedings had been instigated. He said that the survey report would have gone by post and said that he felt sure that it had been sent. He was unable to produce any copy letter in support.

34.Mr McDermott complained that the Respondent had not seen the report until 21 November 2011 and therefore had not known what it contained until that time. The survey report indicated that the budget under this head was £2000 to £4000 excluding VAT and he saw no reason why the higher figure had been adopted. He suggested a budget figure of £3,353 including VAT would have been more appropriate.

The Tribunal's Determination

35.As a general comment, the Tribunal did not find the oral evidence of Mr Kelleher to be of great probative value under this head. Mr Kelleher had relied on his knowledge of the usual office practices employed within his firm and what should or should not have been done. Some of his answers were couched in vague theoretical terms.

36.No evidence was provided on behalf of the Respondent but Mr McDermott suggested that £3,353 including VAT (being a midway point between the £2,000 and £4,000 referred to in the report) would be a more appropriate estimate.

37.The Respondent may not have seen the report after it was produced in December 2009, but there was no suggestion that he did not receive the newsletters which were contained within the bundle and to which reference was made. In particular, the newsletter of February 2010, which was attached to Mr Kelleher's witness statement clearly states that fire, safety and asbestos control works were planned for 2010 and any initial questions or queries could be directed to Mr Kelleher, contact details of which were provided. Mr Fuchs knew or should have known from that report what works were envisaged and if not, then he could have made enquiries. Mr Kelleher has said in evidence that *"not once"* did Mr Fuchs ever get in touch with him to request further information.

38. Mr Edwards, in closing submissions, contended that there was nothing wrong for a managing agent to choose a higher estimate, particularly where safety is concerned. The Tribunal agrees.

39. The Tribunal determines that the budget figure in respect of fire safety and asbestos control works in the sum of £4,800 including VAT is relevant and if incurred would be reasonable and properly chargeable to the service charge account.

Limitation of landlord's costs of proceedings

40.Mr McDermott said, inter alia, that the Respondent had sought to mediate the matter. On 10 December 2012, the Respondent had made an offer to settle, but this had been rejected and no counter offer had been made by the Applicant. On 18 January 2013, the Respondent had notified the Tribunal that he would like to mediate, but the Applicant had refused to do so on 30 January 2013. On 1 March 2013, Mr Fuchs had made full admission of his liability to pay £7,583 on the basis that each party paid its own costs. The Applicant had insisted that its costs be paid by the Respondent. Mr McDermott said *"clearly mediation would have helped"*. On going through the proposed costs, Mr McDermott said that the disbursements were not challenged but some of the fees claimed appeared excessive.

41.Mr Edwards said, inter alia, that the Respondent had provided no evidence and had merely put the Applicant to proof. He said that Mr Kelleher had been *"a careful and responsible managing agent"*. In respect of the points raised by Mr McDermott, he said that mediation would not have been fruitful and over the previous 2 ½ years the Respondent had failed to clarify his position, both at the county court and at the LVT.

He said that his challenges had included lack of consultation and lack of certified accounts, both of which had been abandoned. No evidence had been presented by the Respondent and no statement of case had been produced. The other lessees had all paid their service charges and had no complaint of the managing agents. They had expressed anger at Mr Fuch's attitude. With regard to the Respondent's offer to settle, Mr Edwards said that the original offer in December 2012 had been a much lower offer than that made in March 2013. He said *"the Respondent has never provided meaningful information to identify what the issues are"* Mr Edwards went through the suggested costs and also referred to the terms of the lease on which it was intended to rely under this head.

The Tribunal's determination

42. S20C of the Act states:-

"(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 or leasehold valuation tribunal, or the Lands 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 the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;**
- **(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 Lands 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."

43.In the view of the Tribunal, the lease under which the property is held does allow costs in connection with proceedings before the Tribunal to be placed on the service charge account, and Mr McDermott did not argue otherwise. The question for the Tribunal is whether it is reasonable to allow the Applicant to place such costs on the service charge account.

44.In applications of this nature, the Tribunal endeavours to view the matter as a whole including, but not limited to, the degree of success, the conduct of the parties and as to whether, in the Tribunal's opinion, resolution could or might have been possible with goodwill on both sides.

45.In the judgement of His Honour Judge Rich in a Lands Tribunal Decision dated 5 March 2001 (**The Tenants of Langford Court v Doren Ltd**) it was stated, inter alia *"where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an order under Section 20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct. In my judgment the primary consideration that the LVT should keep in mind is that the power to make a order under Section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not to be used in circumstances that makes its use unjust".*

46.Under new legislation, there is now a limited power for the Tribunal to order costs, but Judge Rich's comments are still valid.

47.In accordance with S 20C (3) of the Act, the applicable principle is to be a consideration of what is just and equitable in the circumstances. Of course, excessive costs unreasonably incurred would not be recoverable by the landlord in any event (because of S19 of the Act) so the S20C power should be used only to avoid the unjust payment of otherwise recoverable costs.

48.In his judgement, Judge Rich indicated an extra restrictive factor as follows:-

"Oppressive and, even more, unreasonable behaviour however is not found solely amongst landlords. Section 20C is a power to deprive a landlord of a property right. If the landlord has abused his rights or used them oppressively that is a salutary power, which may be used with justice and equity, but those entrusted with the discretion given by Section 20C should be cautious to ensure that it is not itself turned into an instrument of oppression"

49.Whilst Mr McDermott's case under the S20C application was well argued, it is noted that at the time of the Respondent's offer to settle in December 2012 at a lower figure, Mr Fuchs had not complied with the Tribunal's Directions in that he had not submitted a statement of case. Mr Fuchs' later offer to settle the service charge aspect (although not the costs) was made just before the hearing date. Mr Fuchs' witness statement (which was sparse) was not sent to the Tribunal by his solicitors until very late in the day on 5 March, and was not seen by the Tribunal until the day before the hearing. Mr Fuchs did not appear at the hearing, no statement of case had ever been submitted and no evidence was produced on his behalf. It is not felt that he, or those instructed on his behalf, engaged with the process of the Tribunal in any meaningful manner.

50.The Respondent has been unsuccessful. The Tribunal sees no reason why the Applicant, a tenant led company, should be burdened with the consequence of that lack of success.

51.The Tribunal determines that it is just and equitable that the costs incurred by the Respondent in connection with proceedings before this Tribunal in the sum of £4,513 inclusive of VAT are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable. It is not known whether the

Applicant company intends to place such costs on the service charge account or whether it intends to pursue the Respondent personally.

The Tribunal's determinations as to service charges are binding on the parties and may be enforced through the county courts if service charges determined as payable remain unpaid.

CHAIRMAN.....

DATE...13..... March.....2013.....