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IN THE LEASEHOLD VALUATION TRIBUNAL REF
:LON/OOAWL/LSC/2010/0082

AN APPLICATION UNDER SECTION 27A LANDLORD AND TENANT ACT
1985

PREMISES : Flat 1A, 192 Cromwell Road, London SW5 0SN

APPLICANT : CH Chesterford Limited

REPRESENTED By : Mr Dovar (Counsel), Mr Tilister of Joseph
Ackerman(Solicitors for the applicant), Miss B. Rhodes of HML Hawksworth Ltd.
Managing Agents for the applicant. Mr K. Rose also of HML Hawksworth Ltd.

RESPONDENT : Ms R. Toppin

REPRESENTED By : Mr W. Parker (Friend of Respondent)

TRIBUNAL : Mr O.E. Abebrese BA LLM, Mr I. Holdsworth FRICS and Mr L.
Packer Lay Member

DATE OF HEARING : 3rd June 2010

The application

1. The applicant seeks a determination of liability to pay and reasonableness of service charges under Section 27A Landlord and Tenant Act 1985(as amended) (the"1985 Act"). The amount claimed by the applicant is £6,942.97.

Issues before the Tribunal.

2. At the Pre-Trial Review held on 2nd March 2010 the issues before the Tribunal were stated by the respondents to be the following. The respondent believed that the bulk of the alleged arrears about £4,000 had in actual fact been already paid; The insurance premium was considered to be too high; the interest that had been charged was considered not to be recoverable under the terms of the lease; some of the service charge items were considered by the respondent to have been charged wrong proportion of the total cost; specifically in relation to the charge of £1,374.80 dated 19th January 2010 in the Statement of Account and described as "Flat 1 Ist Rear SC 25/12/2009 to 23/06/2010", it was considered that this sum was not payable until June 2010.

Directions

3. The respondent was ordered to provide the following evidence : to produce bank statements to support the claim that the bulk of the claim had already been paid ; produce such evidence to justify the claim that the insurance premium is too high ; provided details of the interest charges disputed ; provided details of those service charge items in respect of which she claims she has been charged too high a proportion ; provided details as to why the sum of £1,384.80 is not payable ; The applicant was ordered to serve on the respondent a response to their defence and in particular to provide reasons as to why the charges which are in dispute are considered to be fully and properly payable.

The hearing

4. At the hearing the applicant's representative Mr Dovar informed the Tribunal that they were no longer pursuing two elements of their claim firstly, the interest charges under the provisions of the lease and the proportion of the total service charges being claimed. The remaining parts of their claim were still before the Tribunal for determination.

Evidence

5. The applicants submitted that the sums being claimed remain outstanding. The Tribunal were referred to Page 36 of the hearing bundle ("the bundle"). The schedule of payments on page 36 list 9 payments made by the respondent which have been omitted from amount being claimed. The applicants since the Pre-Trial Review have also acknowledged two payments dated 18th June 2007 and 17th December 2007 both for the amount of £910.03 had been received the managing agents., but these payments were repaid late without telling the respondents and they also did not show any of these payments or counter payments in the respondents account. These payments are listed as 5 and 6 in the schedule. The applicant maintains that these amounts are still in dispute because the cheque either bounced or was returned by the respondents bank. The applicants found a counter payment of £910.03 listed as item 10 in the schedule, this payment was made July 2007 and the respondent has been given credit for this. The applicants on this issue also referred the Tribunal to contents of a letter written by applicants solicitors to the respondent dated 16th March 2010. The solicitor's state that the two payments referred to above had been returned "unpaid", this was confirmed by the previous managing agents. The applicants solicitors also requested bank statements for a period of three months setting each of the alleged payments. They also noted that there are missing bank statements. The applicants in their response to the defence of the respondents claim that the respondent's has a history of late payments and bounced cheques. The applicant's representative submitted that the sums referred to on page 36 of the bundle is also set out set out on page 64 of the bundle.

5. The respondent representative Mr Parker in response stated that the payment on 18th June 2007 did bounce but it was repaid by the agents some weeks later. As regards the payment in December 2007 was paid and not returned. The respondent's bank statement showed that the money had not been returned. The applicants accepted that the evidence provided by the respondents regarding this payment was acceptable and would therefore submit give the respondent credit for this payment. Mr Parker submitted further that on 19th December 2003 there was a payment of £1,238 and that this had not been taken into account he referred the Tribunal to page 82 of the bundle where they provided a Royal Bank of Scotland receipt for the sum of £1,238. Furthermore, the schedule provided by the applicants on page 64 of the bundle confirms that the above sum was paid. The applicant's according to the respondent has not taken the amount into account (Tribunal noted that the amount of £1,238 is dated in 2003 and the applicants claim is for the period 2006-09). The respondent however submitted further that the balance brought

forward on 28th November 2008 included the sum which the respondent had paid. The amounts that she had paid in previous years should be set off from the amount being claimed by the applicant.

Mr Parker also submitted that in 2002 the opening balance was £4,439.58. The respondent paid £607 (twice), £590(twice), and £607(twice) in total the sum of £2,043 should be deducted. Mr Parker was asked by the Tribunal for his evidence to support these claims, he admitted that he did not have any evidence to support his claims but that his conclusions were nevertheless reasonable. The Tribunal then considered whether the insurance claims of the applicant is too excessive. The Tribunal were referred to pages 46 and 47 of the bundle. The insurance premium is £8,241.19. The applicant relies on the evidence of Jan Walker of Mulberry Insurance Services. In summary her evidence is as follows. The property in question forms part of a portfolio acquired by the applicant on December 2003. The respondent is challenging the premium stated above for the year 2009. The lease provides at clause 5C of the lease provides that the landlord may insure such risks as the lessor thinks fit in some insurance office of some repute. The policy currently in place is with Great Lakes Reinsurance (UK). The Tribunal noted the contents of the policy

6. The respondent obtained three quotes from Royal & Sun Alliance, £4,475.22, Aviva, £4,253.52 and Axa, £5,236.88. The Tribunal noted that the policy covers all risk including terroism and subsistence. Mr Dovar relied on the authority of **Havenridge v Boston Dyres Ltd 1994 2 EGLR 73** to submit that that the insurance qoutation had been obtained in the ordinary course of business and that it had been obtained from a reputeable company. He relied further on the case of **Berrycroft v Management Company Ltd Sinclair Gardens Investment Ltd 1997 EGLR 47** for the submission that the cost of the insurance had been reasonably incurred. He submitted that the commission of 30% is not unreasonable or excessive. Mr Dovar also referred the Tribunal to page 88 of Jan Walker's second statement, paragraph 2 of her statement which deals with payment of a commission to the landlord. She states "We have already stated that no commission has been paid to the landlord or any of the landlord's associates". He submitted further that the level of the insurance also takes into account the poor history. He referred the Tribunal to Page 74 of the bundle and Paragraph 9 of the statement of Jan Walker in which she states :"The property has been surveyed by the current insurers and they have accepted the inherent problems with water damage at the current rating level. On this basis we have advised CH Chesterford that it would be difficult to

obtain cover elsewhere with such claims history and inherent problems or that any such policy would attract a higher premium or one with either adverse restrictions or moratoriums. On this basis we have not obtained alternative figures from other insurers". Mr Dovar relying on the authorities above submitted that the test was whether the landlord had had procured insurance in the normal course of business, and that bit did not matter that a lower insurance premuim could have been obtained elsewhere. It was not he added incumbent on the landlord to "shop around".

7. Mr Parker in response to above submitted that the portfolio as a whole is running at a loss and this has had a negative impact on the level premium that he pays. The amount of premuim that he pays has to be reasonable and that it was incumbent on the landlord to shop around, it also has to be reasonably incurred. He submitted that the principle is that the amount charged by the landlord has to be reasonably incurred otherwise the landlord could plead justification in all cases without having tested the market. It is normal and not unreasonable for the landlord to test the market every three years. The applicants insurers have not gone to other insurers and therefore on the facts of this case the market has not been tested. Mr Parker also pointed out to the Tribunal that Jan Walker in her statement refers to a lift in the building this should be omitted as the building does not contain a lift. Mr Parker concluded by stating that the premium should be reduced because the landlord had not tested the market.

8. Both parties made representations to the Tribunal on the relevant date for the making of advance interim payments on account. It was submitted by Mr Dovar that the relevant dates for the payments are December and June. Mr Dovar relied on the 5th Schedule of the lease and in particular paragraph 3 which indicates that the first payment from the commencement of the lease had been made in December 1976. Mr Parker in response to this argues that the payment on account should be in reveres to the submissions made by Mr Dovar ie in June and December. This point was finally conceded by Mr Parker.

9. Mr Dovar at the request of the Tribunal at the end of the hearing provided final figures for the sums being claimed by the applicant in light of the concessions regarding the interest and the proportion. The applicants were willing to deduct the sum of £910 from the original figure and this amounted to a figure of £6033.94, the interest and the proportion having been adjusted. In respect of 2006-2009 the figure is £784.42, the amount of interest to be deducted is £101.77. Regarding the cumulative excess the applicant is willing to deduct £1,246.88. This issue was withdrawn from the Tribunal hence the willingness to deduct. The applicants also agree to credit the account of the respondent in respect of interest for the years 2005-2009 the sum of £221.67. Taking into account all the deductions the sum left to be paid by the

respondent is £4,564.39. In conclusion therefore Mr Dovar submitted that the applicant was entitled to their cost because the applicant had conceded on the terms of the lease in relation to advance interim payments on account ; the applicants case had evolved during the process of the hearing and he was no seeking deductions which go beyond the period being claimed by the applicant. The applicants have powers under the lease to claim for the payments under Clause 5 of the lease dealing with the tenant covenants and expenditure on the part of the landlord in respect of service charges. Mr Parker claims that the wording of Clause 5 does not entitle the applicant to claim for service charges as it deals with the obligation to maintain the property in good and substantial repair.

Decision

10. The applicants seek a determination from the Tribunal on the amount of £4,564.39. The Tribunal considered whether the applicant's claim falls to be determined within the provisions of the Landlord and Tenant Act 1985. Section 18(1) of the Act states : '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 cost of management, and (b) the whole or part of which varies or may vary according to the relevant cost. The Tribunal found that the sum being claimed by the applicant falls within the above section. The service charge needs to satisfy the test of reasonableness under Section 19 . Section 19(1) states : 'Relevant cost 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 (2) where they are incurred on the provision of a service or the carrying out of the works, only if the service or works are of a reasonable standard. Section 27A of the Act deals with liability to pay and the jurisdiction of the Tribunal. Section 27A(1) provides that an application may be made to the Leasehold Valuation Tribunal for a determination whether a service charge is payable.

11. The applicant claims that they have power under the provisions of the lease to seek payment from the respondent. Clause 5 (5) of the lease deals with the tenants covenants and provides a wide definition of expenditure for service charges. The definition includes maintenance, repairs main structure of the building, common parts and boundary walls and fences. The applicant relies further on the provision of the 5th Schedule(1) of the lease states :'Total expenditure means the total expenditure incurred by the lessor's in any Acccounting Period in carrying out the obligations of the lease under Clause 5(5) of the lease and any other cost and expenses reasonably and properly

incurred in connection with the Building'. The Tribunal also found on the reading and interpretation of the 5th Schedule that the tenant's share of the total expenditure is 1/12th. Mr Parker submitted that the reading of the above provisions did not fall within the statutory definition of a service charge. The Tribunal accepted the submissions of Mr Dovar on the interpretation of the above clauses of the leases. The applicants relied on a copy of a service charge account of the former managing agents, Haywards Property Services and the current managing agents, HML Hawksworth. The statement had been provided to the respondent on several occasions. The respondent submitted during the course of the hearing that Mrs Toppin had other payments which had not taken into account by the applicants in their schedule of payments on page 36 and 64 of the bundle. The Tribunal accepted the evidence of the applicants that sums were due except for the sum of £910.03 which is a counter payment made by the respondent. The applicants accepted the receipt of payment provided by the respondent and are willing to make a deduction. The Tribunal found on the facts that there is a history of late payments and bounced cheques and that accept for the concession of the applicant the amount being claimed is payable by the respondent. The Tribunal did not accept the evidence of the respondent that she made two payments of £619 in 2003 and these had been omitted.

The respondent relied on relied on a Royal Bank of Scotland receipt on Page 82 of the bundle. The Tribunal make a finding of fact on the evidence that the sums stated above do not come within the 2006-2009 which is the relevant period which the Tribunal have been asked to consider by the applicants. Similarly the Tribunal rejected the representation of the respondent that the opening balance in 2002 included payment which had been made by the respondent ie £607 (twice), £590.849(twice). Mr Parker was unable to provide evidence regarding his statement that the opening balance in 2002 was £4,439.58. The Tribunal accept the final figures provided by Mr Dovar in Paragraph 9 of this decision. The amount which is payable by the respondent after the deductions is £4,564.39.

12. The respondent claims that the insurance premiums being charged is excessive. The insurance premium for 2009 is £8,241.19. The figure budgeted for 2010 is £8,400 which does not include terrorism cover. Issues on commission was also raised during the course of the hearing. The applicants relied on the statement of Jan Walker in which he states that the property forms part of a large portfolio owned by the landlord. The property has remained with the same insurer for many years. The portfolio has historically had a poor claims record with an overall loss ratio based on the last five years in excess of 100% to net premium. It is in her opinion prudent for this portfolio to remain with the same insurer in order to provide consistency. The portfolio in any event is not attractive to other insurers. The respondent provided thre alternative quote from Royal & Sun Alliance £4,475.22, Aviva,£4,253.52 and Axa, £5,236.88.The respondents quotes cover terrorism. The also considered the authorities provided by both parties. The submissions of Mr Dovar on behalf of the applicants is that the insurance has been reasonably incurred and it does not matter even if the respondent is able to

provide a cheaper qoutation. It was submitted further that the qoutation has been obtained during the ordinary course of business.

13. The Tribunal accepted the evidence and representations of the respondent on this issue. Mr Parker relied on the qoutes which had been provided to the Tribunal. He submitted that the insurance premium has to be reasonably incurred otherwise the landlord could always plead justication without having to test the market. The Tribunal found that bearing in mind the history of the property and the loss of the portfolio that it is reasonable for the respondent to have testes the market rather than staying with the same insurers. The quotes provided by the respondent all include terroism which is excluded from the premium presented by the applicants. The Tribunal found that the insurance premium had not been reasonably incurred and that the respondents revised f igure of £4,703 was reasonable. The Tribunal rounded up this to figure of £5,000. This includes terroism. The revised figure would be applied for the years 2006-2009.

The issue in relation to the interest payments was withdrawn by the applicants for the period 2006-2009 and was not an issue during the hearing. The respondent also conceded that her share of the service charge should be culculated at $1/12^{th}$. The percentage charges for the years prior to 2006 was withdrawn from the Tribunal by the applicant.

The Tribunal also noted that the respondents were no longer contesting the issue of advance of advance interm payments. The Tribunal accepted the evidence and submissions of the applicants on this point. The lease commenced in 1976 and it is apparent that the first interim payment is in December and the second interim payment in June.

Section 20(C)

14. The Tribunal also considered whether the cost of the landlord should be regarded as relevant in relation any future service charges payable by the tenant. The Tribunal found that the respondent had on the whole raised issues in the proceedings which were on balance reasonable and that it would not therefore be just and equitable for such an order to be made under Section 20(C) of the Landlord and Tenant Act 1985.

15. The applicant's application for cost of the application was granted.

Date

Signed

Owusu Abebrese

Chairman