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LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985 SECTION 27A

Ref: LON/00BJ/LSC/2009/0810

Property:	74 Battersea Rise London SW11 1EH
Applicant:	Sagehall Limited
Respondents:	(1) Mr S Edmonds (2) Penhurst Properties Limited (3) Mr B Deasy
Date of Application:	10 December 2009
Date of Pre-Trial Review:	20 January 2010
Date of Directions:	20 January 2010
Date of Hearing:	15 April 2010
Date of Decision:	20 April 2010
Members of Tribunal:	Mr S Shaw LLB (Hons) MCIArb Mr P Roberts DipArch RIBA Mr E Goss

DECISION

INTRODUCTION

1. This case involves an application dated 10 December 2009 by virtue of which Sagehall Limited ("the Applicant") applies to the Tribunal for a determination as to the payability of certain service charges pursuant to the provisions of Section 27A of the Landlord and Tenant Act 1985. The Applicant is the freehold owner of the property known as 74 Battersea Rise, London SW11 ("the Property"). The property comprises commercial premises on the ground floor (presently used as a restaurant), and residential flats on the first and second floors. Mr S Edmonds ("the First Respondent") owns the head lease of the two residential flats on the first and second floors. The two flats are the subject of sub-leases. Penhurst Properties Limited ("the Second Respondent") owns the sub-lease of the second floor flat. Mr B Deasy ("the Third Respondent") owns the sub-lease of the first floor flat.

2. A Pre-Trial Review was held in respect of this matter on 20 January 2010. At the hearing of that Pre-Trial Review the Second and Third Respondents, who had not been joined by the Applicant as parties, were nonetheless joined by the Tribunal as parties to the proceedings on the basis that they are *"likely to be significantly affected by the application"* as provided for by Regulation 5 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003.

3. A hearing of the matter took place before this Tribunal on 15 April 2010 on which occasion the Applicant was represented by Mr S Jackson (who is a manager of the Applicant company) and Mr D Moore who is a director of the Applicant company. The First Respondent appeared in person as did the Third Respondent and the Second Respondent company was represented by Mr T Nicholson who is a director of that company.

THE ISSUES

4. Pursuant to the Directions issued by the Tribunal, the Applicant prepared a Statement of Case which appears in the bundle of documents prepared by the Applicant for the purposes of the hearing at Tab 3. That Statement of Case is dated 1 February 2010 and within the body of that statement the Applicant sets out the service charge claim for the years 2005 – 2008 inclusive. The arrears of service charge alleged by the Applicant against its tenant, the First Respondent, are, subject to the adjustments which will be referred to below, the sums claimed by the Applicant and in respect of which a determination is sought from this Tribunal. Pursuant to the terms of his head lease, the First Respondent is required to pay 65% of whatever figure this Tribunal determines as being the appropriate sum within the provisions of the 1985 Act. Although the total service charge is listed in the Statement of Case dated 1 February 2010 the essential dispute between the parties, as confirmed by the parties at the inception of the hearing, is in respect of the insurance premium charged for each of the four years in question. The parties confirmed that there is no dispute as to the balance of the service charge, and that the area of dispute is in respect of the insurance premium. It is of course the First Respondent's liability under the head lease to pay whatever is the appropriate sum to the Applicant. However under the terms of his sub-leases with the Second and Third Respondents it is the sub-lessees (the Second and Third Respondents) who will effectively be paying the appropriate premium. From the point of view of the Applicant however, the First Respondent is the person to whom it looks for recovery of the appropriate service charge.

5. It is proposed to review in summary the evidence put before the Tribunal by the Applicant and Respondents respectively, and thereafter to give the Tribunal's determination on the basis of this evidence.

THE APPLICANT'S CASE

6. As indicated, the Applicant prepared a Statement of Case in which it set out the sums it sought to recover from the First Respondent in respect of the insurance premium for the four years from 2005 – 2008 respectively. The insurance premiums charged for the whole building (including the commercial premises) were £2,869.46, £2,973.57, £4,103.63 and £2,450.15 respectively. It was not in dispute that the first Respondent under the terms of his lease is required to pay a service charge including insurance for the whole of the building in respect of which his demised premises form part. His proportion under the terms of his lease is 65% of the relevant sum.

7. The Applicant's case was supported by the documents contained within the hearing bundle and by evidence from Mr Gary Connell who is a Clients' Relations Executive employed by Heath Lambert Limited who for some years have acted as the Applicant's insurance brokers. He told the Tribunal that he has been dealing with the Applicant's account since 18 April 2005, thus effectively for the whole of the period with which this application is concerned. He regarded his brief to be that of ensuring that the widest cover was obtained for his client at all times and that there should be some consistency in the cost on a year to year basis. To this end he would carry out reviews, although in his letter to the Applicant dated 28 January 2010 (appearing at tab 4 of the bundle) and in his evidence before the Tribunal he confirmed that there would not necessarily be an annual review if the quotation obtained from the insurers (in this case the Royal Sun Alliance) was explicable by reference to the buildings sum insured and the loss of rental for which cover was to be obtained.

8. He was asked why there had been a very significant uplift in the premium from 2006 (£2,973.57) to 2007 (£4,103.63). His answer was that he had been instructed by Mr Moore on behalf of the Applicant to increase the value of the building to be covered from £523,604 to £600,000, and moreover to increase the cover for 3 years loss of rent from £54,000 to £180,000. It should be observed that there is provision in the head lease for insurance of 3 years loss of rent.

9. When Mr Moore for the Applicant saw at the Hearing that cover had been given for £180,000 loss of rent, he confirmed that this was an error, and that the cover should have been for £60,000 loss of rent. Mr Connell initially thought that that would have had a minimal impact upon the premium but, after the luncheon adjournment, confirmed that on that basis, the appropriate premium should have been not £4,103.63 but £3,498.87. The Applicant's claim was reduced accordingly.

10. When further asked why there had been a drop in the 2008 premium to £2,450.15 he told the Tribunal that Mr Moore had approached him in March 2009 (the insurance period runs from 14 November 2008 to 13 November 2009) and told him that his tenant was expressing concern about the level of insurance cost. He accordingly conducted a meeting with the Royal Sun Alliance in an attempt to have the premium reduced but this was unsuccessful. This property is part of a portfolio owned by the Applicant and it transpired that Mr Connell was able to negotiate a much more competitive figure with an alternative insurer (Zurich) by having this property, as it were, detached from the portfolio (or block insurance) and insured individually. The result of this was that although the insurance costs for the period November 2008 until 9 March 2009 had to remain with Royal Sun Alliance, for the rest of that year (that is to say March 2009 until November 2009) it was possible to obtain a reduction. In this year there had also been a mistake in insuring for £180,000 loss of rental rather than £60,000 and Mr Connell told the Tribunal that that should also involve a reduction to £2,368.23, so as to allow for a credit of £81.92 obtained from Zurich. He was unable to tell the Tribunal what the appropriate reduction (to allow for the over insuring of rental loss) should be for the earlier period of November 2008 until 9 March 2009.

11. Mr Connell commented upon an alternative quotation for insurance dated 3 March 2010 obtained by the First Respondent from Brokers called Bluefin Insurance Services Limited trading under the name Platinum. That quotation for this property was an annual premium of £1,747.81 (as opposed to the £2,368.23, being the reduced figure now put forward by the Applicant). He said it was impossible properly to comment upon this quotation because regrettably

the terms and conditions upon which the insurance was to be placed had not been included (contrary to the Directions given by the Tribunal) with the quotation and therefore it could not be demonstrated that the quotation had been obtained on a "like for like" basis. Often he said there were exclusions in insurance policies whereas the cover he had obtained was an "all risks" cover. Moreover, it appeared that there was no terrorism cover in the quotation obtained by the Second Respondent whereas the cover obtained included this risk.

RESPONDENTS' CASE

12. The First Respondent told the Tribunal that he effectively regarded himself as a "postmaster" given that the people from whom the Applicant would be recouping these costs would effectively be the Second and Third Respondents (his sub-lessees). He accepted however that he was the person with the liability to make these payments under the terms of his head lease. He was troubled by the fact that the Applicant presented its invoice for the insurance premium service charges generally substantially into the year following the close of the service charge year (in December of each year). He was also concerned by the fact that the Applicant did not consult either with him or his sub-lessees as to the level of insurance premium before placing the insurance. He accepted however, that in respect of these concerns, the head lease placed no particular obligation upon the Applicant so to conduct itself.

13. Mr Nicholson for the Second Respondent told the Tribunal that he felt that more could have been done by the Applicant to, as he put it "drive down" the brokerage fee which was included within the premium charged each year. These fees are set out by Mr Connell in his letter dated 3 February 2010 to the Applicant appearing at page 2 of tab 4 of the bundle. These brokerage fees appeared to amount to about 35% of the premium charged each year. However, Mr Nicholson was unable to put before the Tribunal any evidence, other than that to be referred to below, as to what the appropriate level of brokerage fee should be, either in terms of the amount or the percentage.

14. Mr Deasy, the Third Respondent stressed that it was only because he raised the level of these insurance premiums with Mr Moore that Mr Moore eventually, on behalf of the Applicant, raised the matter with the Applicant's brokers, resulting in the reduced premium for 2008. He felt that the declared value of the building (effectively the re-building cost) was too high at £630,000 for the most recent year. He guessed an overall square footage of 2,000 and postulated a re-building cost of £150 per square foot which would produce a re-building cost of £300,000. However, Mr Deasy told the Tribunal that he was a Chartered Accountant, that he was estimating the internal square footage, and he produced no supporting evidence for his suggested re-building cost. He accepted some questions on behalf of the Applicant to the effect that the market value of the whole building was in the order of £750,000.

15. The main evidence put forward on behalf of the Respondents was an alternative quote of the kind referred to above from Platinum Insurance Brokers. As indicated above however, the difficulty with this quotation was that the terms and conditions upon which it was to apply were absent at the hearing, despite the Directions given to the effect that the full policy terms should be included with any alternative premium quotation.

ANALYSIS AND DETERMINATION OF THE TRIBUNAL

16. It was common ground between the parties that there is a range in terms of reasonableness for the level of insurance premium, for the purposes of the 1985 Act. It was also common ground (and indeed in keeping with various authorities) that there was no requirement so far as the Applicant was concerned to obtain the cheapest insurance available, or even to match a quotation obtained from the Respondent. The obligation of the Applicant, pursuant to its covenants within the head lease, was to keep the building (of which the demised premises form part) insured against the risks there referred to *and "any other perils which the lessor may at its discretion consider desirable"* and, amongst other things, the cost of demolition and three years loss of rent. It seemed to the Tribunal

that provided this insurance was placed through reputable brokers, with reputable insurers, for a sum which was not patently outside the appropriate range, the initial evidential burden was discharged by the Applicant. The only evidence put before the Tribunal of an alternative quotation was that obtained from Platinum in March 2009 which was in the sum of £1,747.81. This evidence is of speculative value for the reason indicated above, that is to say that the terms and conditions applying to this cover are unavailable to the Tribunal. If this figure is to be compared with the figure for which the claim is made, the appropriate year would be November 2008 to November 2009 and the comparable figure on the Applicant's case is £2,368.23. Obviously the Respondents' quotation is lower, but not so much lower that it seems to the Tribunal to be outside the appropriate range. It could well be that a wider range of cover has been obtained by the Applicant than that covered by the quotation obtained by the Respondent, and insofar as there is doubt in this regard, it is the Respondents who have failed to resolve that doubt by producing the appropriate terms and conditions. It should be said that this alternative quotation itself overstates the rental income to be insured, but again, this is the only evidence put before the Tribunal by the Respondents.

17. In the circumstances, the Tribunal's room for manoeuvre in this case is very limited. It is not open to the Tribunal to speculate as to whether more competitive levels of cover could have been achieved in the earlier years in the absence of clear evidence in this regard from the Respondents. It is to be noted that the insurance cost, since objection has been raised on behalf of the Respondents, has come down significantly and it is to be hoped that it will remain at a consistent level hereafter. The Tribunal on the evidence before it does not feel able to find that the levels of insurance premium charged are outside the scale of reasonableness for the purposes of the Act, although for the first three years of the period concerned, they would appear to be at the upper end of the level of reasonableness. Moreover, although Mr Connell was unable to supply the Tribunal with what he considered to be the appropriate reduction for the period November 2008 to 9 March 2009, after applying the correct rental income figure, it seems to the Tribunal that a calculation is possible on the figures supplied. In 2007 he told the Tribunal that the appropriate reduction

from £4,103.63 should be £604.76. If a broadly similar reduction is made for the period November 2008 to March 2009 the appropriate reduction is £205.46 (which is in accordance with corrective information sent to the Tribunal by the Applicant after the Hearing, and which is in line with the Tribunal's own calculations). This added to the reduction of £81.92 for the latter period in that year produces a total reduction of £287.38. This would mean that the appropriate premium for 2008 is £2,162.77, which is the sum the Tribunal determines as being reasonable for that year.

CONCLUSION

18. For the reasons indicated above, the Tribunal determines that the appropriate insurance premiums for the whole building for the years 2005, 2006, 2007 and 2008 are £2,869.46, £2,973.57, £3,498.87 and £2,162.77 respectively. The Respondents' apportionment of these figures should be calculated at the rate of 65%. Moreover, credit should be given for the payment on account paid by Mr Deasy in the sum of £2,336.81 (or whatever other payments may have been paid on account).

COSTS AND INTEREST

19. The Applicant then applied to the Tribunal for a determination as to its entitlement to interest upon any arrears of insurance premium. There is a covenant on the part of the tenant (see the Third Schedule) to pay interest on arrears and unpaid service charge, and obviously the Applicant is entitled to such interest as is provided for in the lease. However, as observed at the Tribunal hearing, the position in this regard is complicated because in almost all of the years concerned, it transpires that the First Respondent has been invoiced for an incorrect figure which has required re-calculation either by the Applicant or as a result of this hearing. The Tribunal makes no determination in respect of interest other than to say that the parties are entitled to enforce such contractual rights as may exist in the lease, but the Applicant may think that given the inaccurate invoices issued, it may wish to review its position in this regard. It is plain that the Respondents will be able to argue that there have been clear errors

in the Applicant's invoicing, and the correct figures have not been apparent until this determination by the Tribunal – in which event no interest may be payable. A further dispute in that regard would be uneconomic and disproportionate to the sums involved.

20. The Applicant also invited the Tribunal to make an Order for costs against the Respondent or Respondents given that no monies have been paid (with the exception of the payment by Mr Deasy) since 2005. The Second and Third Respondents told the Tribunal that they had never objected to the payment of some appropriate premium for insurance, and had tried to engage the Applicant in discussion in order to reach a consensus, but that they had been rebutted. As it transpires, there have been some fairly significant reductions in relation to the premiums recoverable, and it seems to the Tribunal that there should be a sharing of the responsibility for this dispute having arisen. The Tribunal makes no Order for costs in respect of either party in relation to this case.

Chairman: S. Shaw

Dated: 20 April 2010