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MAN/13UG/LIS/2009/0005

**LEASEHOLD VALUATION TRIBUNAL
OF THE
NORTHERN RENT ASSESSMENT PANEL**

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

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

Property: 21 Lilybrook Drive, Knutsford, Cheshire. WA16 8WR

Applicant: Lilybrook Management Company Limited

Respondent: Mr R. A. Quenby

Tribunal: Mr G C Freeman
Mr D Pritchard FRICS
Miss C Roberts

Dates of Hearings: 30th October 2009
23rd April 2010

ORDER

- A. No service charges are payable by the Respondent unless and until the Applicant provides to the Respondent written summaries setting out the Service Charge Expenditure as defined in the Lease of the Property and as provided by clause 2 of the Second Schedule, such summaries to be certified by a qualified accountant in accordance with the said Lease.**
- B. No service charge is payable in respect of any costs incurred in the period prior to 1st December 2007 pursuant to section 20B of the Landlord and Tenant Act 1985.**
- C. Subject to the above, and to the deductions referred to in paragraph 27, the service charge for the periods in question are reasonable.**
- D. None of the costs incurred, or to be incurred, by the Applicant in connection with the proceedings before the court or the leasehold valuation tribunal, are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent.**

Preliminary

1. The Applicant has issued proceedings in the Manchester County Court against the Respondent for unpaid service charge in respect of the Property. The claim number is 8MA19220. The amount claimed is £2643.68 plus court fees of £85.00. The amount claimed represents service charge due from 1st January 2006 to 31st December 2008.
2. The Respondent entered a Defence on 29th October 2008 and the case was transferred to the Altrincham County Court. On 29th December 2008 District Judge Clegg sitting at that Court, ordered that the issue of what service charges are payable by the Defendant be transferred to the Leasehold Valuation Tribunal pursuant to section 31C of the Landlord and Tenant Act 1985 and the Civil Procedure Rules 56PD.52 (now replaced by section 174 and Schedule 12 of the Commonhold and Leasehold Reform Act 2002 and CPR PD 56 Para 15).

The Lease

3. The Respondent is the registered proprietor of the leasehold interest in the Property, under title number CH519163. An Office Copy of the Lease accompanied the court file. The Lease is dated 21st January 2004 and is made between Egerton Estates Limited of the first part the Applicant of the second part and Mohamed Munir Choudhary of the third part. The lease grants a term of 999 years from 1st January 2001 and reserves a rent of £195.00 together with a service charge of 1/23rd part of the expenditure described in clause 7.1 and the Second Schedule of the lease "*so far as such expenditure relates to the Estate and an equal proportion of such expenditure so far as it relates to the Development calculated by dividing such expenditure by the number of properties on the Development*".
4. Service charge is payable by two half yearly instalments on the 25th March and 29th September in each year. However, the lease is silent on the period which is to constitute the service charge year. It may be varied from time to time by clause 4 of the Second Schedule. The "Estate" is defined as Plots 1- 8 The Courtyard shown edged green on the plan. The "Development" is shown edged blue, and consists not only of flats but houses.
5. Clause 7.1 of the Lease imposes an obligation on the owner of the Property to pay service charge which may include anticipated expenditure. The Second Schedule sets out the heads of expenditure which may be recovered by way of service charge. Clause 2 of the Schedule provides:-

"2. As soon as convenient after the expiry of each accounting period of not more than 12 months commencing with the accounting period now current there shall be prepared and submitted to the Tenant a written summary ("the Statement") setting out the Service Charge Expenditure in a way showing how it is or will be reflected in demands for payment of the Service Charge and showing money in hand. The Statement will be certified by a qualified accountant as being in his opinion a fair summary complying with this

requirement and sufficiently supported by the accounts receipts and other documents produced to him”

Inspection and Hearings

6. The Tribunal inspected the development of which the Property forms part on the morning of 30th October 2009. It consists of a development of flats and houses close to the centre of Knutsford, constructed about seven years ago. There are 23 houses and flats in total. Within the Courtyard, in which the Property is situated, there are 5 Flats, one house and two duplex apartments. The remainder of the development consists of seven houses. There is a common entrance to the flats forming the Courtyard, with individual post boxes, electric heaters and carpeting to the hall and landings. There is also a mains fire alarm system, and door entry system to allow access to each property.
7. A hearing was arranged for 30th October 2009 at the Knutsford Civic Centre, Toft Road Knutsford. The Applicant was represented by Ms A Gardner of Stevens and Scanlan, managing agents, Mr P Holden of Moore Stephen, Chartered Accountants, and Messrs M Boswell, M Kirchin and Ms C Carey and Ms J Ball, directors of the Applicant. The Respondent did not attend and was not represented. The Tribunal were not satisfied that sufficient documentation had been produced to enable a decision to be made. For example, the statutory accounts of the Management Company had been produced, but there was no evidence that the Respondent was a member of the Company and was therefore entitled to have a copy of those accounts or that he had received a copy. It was confirmed he was not a director. The service charge demands which had been allegedly sent to the Respondent all bore the same date – 18th August 2009, - a date some time later than the periods covered by the demands. There was produced at that hearing a copy of a letter from the managing agents dated 7th May 2009 with a blank addressee to which was attached a service charge budget for 1st July 2009 to 30th June 2010. This appears to be a circular letter sent to all owners. A copy of a letter from the managing agents addressed to Mr Kirchin dated 24th June 2010 enclosing a “Statement of Anticipated Service Charge Expenditure” was also produced. This also appears to have been sent to all owners. The Tribunal made further directions for the disclosure of accounts, statements and invoices.
8. The adjourned hearing took place on 23rd April 2010 at the same location. The Applicant was again represented by Ms Gardner, Mr Kirchin and Ms Carey. The Respondent attended in person.

The Law

9. 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.

10. 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.

11. 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.

12. No guidance is given in the 1985 Act as to the meaning of the words "reasonably incurred". Some assistance can be found in the authorities and decisions of the Courts and the Lands Tribunal.
13. In *Veena v S A 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].

Landlord to supply statements of service charge

14. Service Charge provisions in leases often provide the Tenant with only limited rights to know how the Service Charge is calculated. Section 21 of the Landlord and Tenant Act 1985 grants to a Tenant the right to request the Landlord to supply a summary of the relevant Service Charge costs which were incurred during the previous accounting year. This has been amended by section 152 of the Commonhold and Leasehold Reform Act 2002 but as yet regulations under sub-section (4) of this section have not been promulgated.
15. Under section 21 as currently enacted, a Tenant may require a Landlord to supply him with a written summary of the costs incurred:-
 - (a) if the relevant accounts are made up for periods of twelve months in the last such period ending not later than the date of the request; or
 - (b) if the accounts are not made up for periods of twelve months in the period of twelve months ending with the date of the request.

and which are relevant costs in relation to the Service Charges payable or demanded as payable in that or any other period.

16. The Landlord is required to comply with the request within one month or within six months of the end of the period referred to above which ever is the later.
17. If the Service Charge in relation to which the costs are relevant costs as mentioned in section 21 (1) are payable by the Tenants of more than four dwellings, the summary of relevant costs must be certified by a qualified accountant as in his opinion a fair summary complying with the requirements of section 21 (5) and being sufficiently supported by accounts, receipts and other documents which have been produced to him.
18. By section 25 of the Act, it is a summary offence for a person to fail without reasonable excuse to perform any duty imposed on him by section 21, 22 or 23 of the Act.
19. Section 20B of the Act provides:-
 - (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a

demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within a period of 18 months beginning with the date when the relevant service costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

The Respondent's Case

20. The Respondent's case may be summarised as follows:
- 20.1 The service charge demands supplied to the Tribunal at the earlier hearing in October are incorrectly dated and are inconsistent with the demands included in the Applicant's bundle. The Applicant has not proved which demands were served, if any.
 - 20.2 The service charge has not been calculated in accordance with the provisions of the lease, for example, no accountant's certificate was produced.
 - 20.3 The Applicant, having failed to supply statements under section 21 of the Act, the Respondent is entitled to withhold payment under section 21A. Thus no payments are due and the proceedings in the County Court are a nullity.
 - 20.4 The Applicant has failed to notify the Respondent of the liability to pay under section 20B and therefore amounts due in respect of the period more than 18 months prior to the proceedings being issued are irrecoverable.
 - 20.5 Certain items of expenditure are not service charge items under the lease and /or are excessive or the work was not carried out.

The Applicant's Case

- 21. Ms Garner stated that she had had to interrogate her company's computer to obtain copies of the service charge demands as required by the Tribunal's directions. She stated that the correct demands sent out were included in the Applicant's bundle and those previously produced to the Tribunal were incorrect. She stated that the only statements sent to the Respondent, other than service charge demands were the Respondent's statutory accounts, incorporating a profit and loss account and a balance sheet.
- 22. Ms Garner stated she had not received complaints from any resident, including the Respondent, that cleaning or other services had not been carried out or was substandard. She inspected the development at regular three monthly intervals. The cleaning contract had been tendered and the company used the same cleaners on other developments which they managed.

The Tribunal's Conclusions

23. The Tribunal concluded that the amount payable by the Respondent for the provisions of services within the Property was a variable service charge within the meaning of the Act and that they had jurisdiction to consider the reasonableness of the amount payable.
24. Having decided this, the Tribunal must then apply a three stage test to the application under section 27A:-
 - 24.1 Are the service charges recoverable under the terms of the Lease? This depends on common principles of construction, and interpretation of the Lease.
 - 24.2 Are the service charges reasonably incurred and/or for services of a reasonable standard under section 19 of the 1985 Act?
 - 24.3 Are there other statutory limitations on recoverability, for example consultation requirements of the Landlord and Tenant Act 1985 as amended
25. Applying the recoverability test under paragraph 24.1 above, the Tribunal noted that the Lease provides for the payment of a service charge. The provisions for its calculation follow the provisions of section 21 of the Act, for example, the requirement for an accountant's certificate to accompany the statement to be sent out to the tenant "as soon as convenient after each accounting period". However no evidence was produced to the Tribunal that such a statement was ever produced to the Respondent at the relevant times. Further, no evidence was produced (despite a specific direction to that effect) that statements were produced to the Respondent at the relevant times apportioning the service charge actually charged, as opposed to a budget similar to that enclosed with the letters referred to at paragraph 7 above, and showing "money in hand", in accordance with the lease.
26. An accountant's certificate accompanied the Applicant's bundle of documents. It was not the certificate which should have been sent in accordance with the lease because it dealt with issues raised by the Tribunal in its directions, and further, it did not deal with other requirements of the lease, for example, by showing " money in hand". The Tribunal noted that the apportionments set out in the certificate were inconsistent. For example, for the period 1st June 2006 to 31st May 2007, the apportionment for ground maintenance for 18 – 25 Lilybrook Drive is shown as 42.42%. For the year 1st June 2007 to 31st May 2008 it is shown as 39.46% For the following period 1st June 2008 - 31st December 2008 it is shown as 34.78%. Ms Garner was unable to offer an explanation for the discrepancy.
27. The Tribunal then turned to individual items of expenditure as follows:-

27.1. It was conceded by the Applicant that the sum of £94.00 paid to Cheshire Digital Services for their invoice dated 8th March 2007 had been charged twice.

27.2. The Respondent contended that the repair to the video handset at 25 Lilybrook Drive on 28 February 2007 was not a service charge item, it being within a flat and not on the communal parts of the development. The Tribunal considered whether the expenditure fell within paragraph 1(3) of the Second Schedule and was for:-

“the provision of services facilities amenities improvements . . . where the Management Company . . . in its absolute discretion from time to time considers the provision to be for the general benefit of the Development and the tenants of the properties and whether or not the Management Company has covenanted to make the provision”

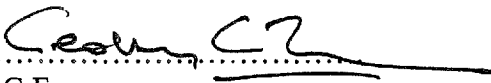
27.3 The Tribunal noted that the video entry phone hand set was within the flat concerned. It could not therefore be said to be for the general benefit of the development as a whole or the tenants of the properties. It was a benefit for that individual property, and was therefore not a service charge item.

28. The Tribunal then considered the Respondent's contention that he was entitled to withhold payment of service charge by virtue of section 21A (1) and (2) of the Act. They noted that although the section was inserted in the Act by the Commonhold and Leasehold Reform Act 2002, it has not yet been brought into force.

29. The Tribunal decided that, in the absence of any evidence of a written complaint made at the time by the Respondent, or, (according to the Applicant) , by any other resident. there was no evidence to suggest that the cleaning and maintenance had not been carried out, either badly or at all, during the periods in question. The Tribunal considered that the costs of these items were reasonable.

30. The Tribunal then considered section 20B of the Act. They noted that the demands for service charge produced by the Applicant did not specify what expenditure was being recovered, except for the budget statement sent in the letters referred to in paragraph 7 above, covering the year 1st July 2009 to 30th June 2010. The Tribunal found as a fact that for the year from the 1st July 2009 to 30th June 2010, such a letter would have been sent to the Respondent and he would have received it in the ordinary course of post. However, despite paragraph (1) of the Tribunal's directions issued on 30th July 2009, no evidence was produced to the Tribunal that similar letters and budgets were sent to the Respondent, or anyone, for previous years. The Tribunal concluded therefore, that the Applicant has failed to fulfil section 20B(2) in relation to previous years, by notifying the Respondent in writing that costs had been incurred and that he would subsequently be required to contribute to them by the payment of a service charge. Accordingly, any such costs incurred more than 18 months prior to 1st June 2009 are irrecoverable.

31. Some leases allow a landlord to recover costs incurred in connection with proceedings before the LVT as part of the service charge. The Respondent has made an application under s20C of the Act to disallow the costs incurred by the Management Company of the application in calculating service charge payable for the Property, subject, of course, to such costs being properly recoverable under the provisions of the Lease.
32. The Tribunal was pleased to note the assurance from Ms Gardner that her firm was not making any charge in respect of the application. Nevertheless the Tribunal determines that, as it has found that the Applicant has largely ignored the correct procedures for calculation of service charges for the period in question, it would be reasonable to make such an order, and it therefore has done so.


.....
G.C.Freeman
Chairman

Dated 27 April 2010