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HM Courts
& Tribunals
Service

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

**LANDLORD AND TENANT ACT 1985 – SECTION 27A AND
COMMONHOLD AND LEASEHOLD REFORM ACT 2002 - SCHEDULE 11**

Ref: LON/00BA/LSC/2011/0604

Property: 50 Monarch Parade, London Road, Mitcham,
London, CR 4 3HA

Applicant/Landlord: Goldplaza (Mitcham) Limited
Topcrest Properties Limited

Appearances for

the Applicant/Landlord: Ms A Berry – Counsel
Mr S Singh – Property Manager of HML
Hathaway

Respondent/Tenant: Mr Y A Zerroud

Appearances for

the Respondent/Tenant: None in Attendance

Date of Hearing: 19th December 2011

Tribunal: Mrs H C Bowers (Chairman),
Mr F Coffey FRICS
Mr J Francis QPM

DECISION

- Service Charges of £872.60 are reasonable and payable by the Respondent
- Administration Charges of £164.50 are reasonable and payable by the Respondent.
- The Respondent is to reimburse the Applicant £150 in respect of the hearing fee.
- No order for costs is made under the provisions of Schedule 12 of the Commonhold and Leasehold Reform Act 2002.

REASONS

Introduction

- 1) Proceedings in respect of 50, Monarch Parade, London Road, Mitcham were commenced in the County Court. In an order dated 24th August 2011 made by District Judge Nisa sitting at the Kingston-upon-Thames County Court these matters were transferred to the Leasehold Valuation Tribunal.
- 2) A pre-trial review was held on 21st September 2011, although neither party attended. Directions were issued 21st September 2011 that identified a total sum of £1,281.57 for services and administration charges.

Background

- 3.) The Applicant is registered as the freehold owner of Monarch Parade, the development in which the subject property is located. We understand that the development comprises a parade of shops with 42 residential units above. The Respondent/Tenant is registered as having a leasehold interest in 50 Monarch Parade.

The Lease

- 4.) The Tribunal was provided with a copy of the lease of the subject flat. The lease was dated 18th May 1993 and was originally between Kindale Limited as the Lessor (Landlord) and Julia Margaret Thompsett as the Tenant. The lease was for a term of 999 years from 25th March 1993.
- 5.) The lease defines the Building as being two elements, namely “the North Building” (30–65 Monarch Parade) and “the South Building” (66-94

Monarch Parade) and includes "certain access parking and service areas connected therewith".

6.) Under the clause 1(b) of the lease the Tenant covenants to pay "a fair and reasonable proportion (as determined by the Lessor) of the cost of complying with the items specified in the Second Schedule hereto and such fair and reasonable proportion of all sums incurred by the Lessor under its obligation contained in clause 3(2) hereof such further rents to be paid without any deduction on the quarter day next ensuing after the said expenditure and to be recoverable by distress the same way as rent in arrear."

7.) Under clause 2(8) the Tenant covenants "To pay a fair proportion (to be conclusively determined by the Surveyor for the time being of the Lessor) of the expenses incurred by the Lessor in respect of constructing repairing rebuilding and cleansing all party walls fences sewers drains channels sanity apparatus pipes wires passageways stairways entrance ways roads pavements and other things the use of which is common to the Demised Premises and to the other premises".

8.) Clause 3(2) states that the landlord covenants "At all times during the said term (subject to the payment of the sums referred to in Clause 1 hereof) to maintain and keep in tenantable repair and condition the staircase (including the structures thereof) access ways in respect of which the Demised Premises may have rights of user or of way whether alone or in common with others and to keep in such repair and condition the sewers drains pipes water-courses cables and other services the use or benefit derived from which are enjoyed by the Demised Premises whether alone or in common with others and structure and fabric of the Building and the foundations and main and load bearing walls of the Building in all cases however only to the extent that the responsibility for such repairs and condition does not rest upon the Tenant or upon the tenant or tenants of other parts of the Building".

9.) Second Schedule (1) states that the tenant is to pay a fair proportion "to be determined and apportioned between the Demised Premises and other premises in the Building (whether commercial or residential) by the Lessor's Surveyor of any costs and expenses (including attributable management costs professional fees and interest charges) incurred by the Lessor in maintaining cleansing lighting repairing or renewing access ways sewers drains pipes watercourses cables or other services for use of or benefit derived from which is enjoyed by the Demised Premises whether alone or in common with others". And clause (2) of the second Schedule states that the tenant is to pay a fair proportion "to be determined and apportioned between the Demised Premises and other residential premises in the Building (if any)

(whether let independently or together with commercial premises) by the Lessor's Surveyor of any costs and expenses (including attributable management costs professional fees and interest charges) incurred by the Lessor in maintaining cleansing lighting repairing renewing rebuilding any staircase (including the structure thereof) maintaining the flowerbeds and trees on the common parts and access ways thereto the use of which is enjoyed by the Demised Premises whether alone or in common with others or in maintaining repairing renewing or rebuilding the structure or fabric of the roof of the Building the foundations of the building or main or load bearing walls of the Building or in complying in whatsoever manner with the Lessor's obligations contained in sub-clause (2) of Clause 3 hereof".

10.) Under clause 2(17)(A) the tenant covenants *"To pay all expenses including Solicitors costs and Surveyors fees incurred by the Lessor incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under Section 146 and 147 of that Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court"*.

Inspection

11.) The Tribunal did not consider that it was necessary to make an inspection of the property as the issues before the Tribunal either had some historic element or were points of principle. We had the assistance of a lease plan that helped to identify the two elements of the Building, the gardens, drying area, car spaces and an area in the occupation of a third party as a garage.

The Law

12.) Section 18 of the Landlord and Tenant Act 1985 (the 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, improvement 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 period”*

“Section 19

- (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.*
- (2) *Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.”*

“Section 27A

- (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 amount which is payable,*
 - (d) *the date at or by which it is payable, and*
 - (e) *the manner in which it is payable.*
- (2) *Subsection (1) applies whether or not any payment has been made.*
- (3) *An application may also be made to a leasehold valuation tribunal for a determination whether if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and if it would, as to-*
 - (a) *the person by whom it would be payable,*

- (b) the person to whom it would be payable,*
- (c) the amount which would be payable,*
- (d) the date at or by which it would be payable, and*
- (e) the manner in which it would be payable”*

12.) Schedule 11 of the Commonhold and Leasehold Reform Act 2002 provides:

“1 (1) In this Part of the Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly –

- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,*
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,*
- (c) in respect of a failure by a tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or*
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.*

(3) In this Part of this Schedule “Variable administration charges” means an administration charge payable by a tenant which is neither –

- a. Specified in his lease, nor*
- b. Calculated in accordance with a formula specified in his lease.*

2 A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

5 (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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.”*

Hearing and Representations

13.) A hearing was held at 10, Alfred Place, London on 19th December 2011. The landlord was represented by Ms Berry, Counsel and Mr S Singh a property manager from HML Hathaway Limited. The tenant was not present

or represented at the hearing. There were written representations from the landlord, but no representations from the tenant. During the hearing an issue arose in respect of the question of the apportionment of the services charges and especially in relation to the commercial premises including as part of the Building and in respect of interest charges. The parties were given additional time for further submissions to be made on these points. Further submissions were received from the Applicant on 15th March 2012. There was no response from the Respondent. The Tribunal had full consideration of all of the evidence and submissions and a brief summary is detailed in the following paragraphs.

Landlord's Case

14.) At the start of the hearing the sums being claimed in respect of the current application was a total of £1,281.57 which consists of £940.82 for service charges and £340.75 administration charges. The periods in question and the relevant sums with submissions are set out in the following paragraphs:

Service Charges:

15.) 25/12/2008- 24/3/2009

The total sum for the period was £4,380.10, 1/42ths of this sum is £104.28 and the payment allocated against this sum is £92.74, leaving £11.54 outstanding from the Respondent. Five items of expenditure were identified for this period, namely pest control, insurance, maintenance, management fees and bank charges and supporting documentation was presented in respect of those items.

16.) 25/3/2009-23/6/2009

The total sum for the period is £4,139.20, 1/42ths of this sum is £98.55, the total sum is being claimed by the Applicant. Five items of expenditure were identified for this period, namely health and safety, insurance, pest control, management fees and electricity. Supporting documentation was produced in respect of those items.

17.) 24/6/2009-28/9/2009

At the hearing it was explained that there were some adjustments for this period and the total sum was £6,210.06, 1/42ths is £147.86. Items under this expenditure included pest control, insurance, maintenance, signage, management fees, bank charges, rubbish clearance and cleaning and gardening. Photographs and invoices were produced in respect of these items.

18.) 29/9/2009-24/12/2009

The total sum for this period was £5,458.85 and the Respondent's contribution was calculated to be £129.97. The items of expenditure were for pest control, insurance, maintenance, plumbing, management fees, cleaning, gardening and rubbish clearance. Supporting documentation was provided to explain the expenditure.

19.) 25/12/2009-24/3/2010

At the hearing there were some adjustments to the figures and this resulted in the total expenditure for the period being £8,080.40. The proportion to be paid by the respondent was £192.39. Evidence was provided in support of the figures claimed.

20.) 25/3/2010-23/6/2010

At the hearing it was confirmed that the total expenditure for the period was £7,299.86 and a 1/42th proportion was calculated to be £173.80. Items of expenditure were cleaning, gardening, electricity, pest control, repairs, management fees and insurance. Supporting documentation was provided.

21.) 24/6/2010-28/9/2010

It was confirmed at the hearing that the revised sum being claimed from the Respondent was £164.42. This was derived from a total amount for this period of £6,905.68. Supporting documentation was provided to evidence this amount. The heads of expenditure included insurance, cleaning, maintenance, gardening, drains/gutters, electricity and management fees.

22.) Included with further submissions from the Applicant were copies of the relevant bank statements that itemised the bank charges included in the service charge statements.

23.) Submissions were made in respect of the relevant apportionment that should be applied to the subject flat. The Applicant copied to the Tribunal a draft commercial lease and leases in respect of 32 and 33 London Road and 31 London Road. It was acknowledged that the leases have similar clauses. Clause 1 of each lease describes the extent of the demise and rights of way and states "...ALL THAT ground floor shop and premises situate and known as TOGETHER with a right of way at all times and for all purposes and with or without vehicles in common with all others similarly entitled over the yard and passages at the rear of the Buildings of which the demised premises form part and the passageway at the side of the said Buildings to and from the public passage ways adjoining Monarch Parade..." This clause continues with rights of shelter and protection and the free passage regarding water, soil, gas and electricity. The Applicant makes reference to a continuation in clause 1 that states "AND IT IS HEREBY DECLARED that save as hereinbefore expressly

granted this Lease shall not include any ways watercourses sewers drains lights liberties privileges easements rights or advantages whatsoever in though over or upon any land of the Lessors adjoining or near to the demised premises". Clause 2.6 of the leases states "At all times during the said term to pay and contribute a fair proportion of expenses of providing repairing maintaining and renewing all structures and services which shall belong to or be used by the demised premises in connection with other premises near or adjoining thereto ...". The Applicant's quote from the lease of 31 London Road, which provides additional wording. From this the Applicant suggests that the rights in clause 1 are "very limited" and the reason that it is limited is that the commercial premises have full repairing and insuring leases. It is suggested that the contribution under clause 2 of the commercial leases is limited to structural work and provision of service media. It is acknowledged that in the past there was a contribution from the commercial units to the roof repairs.

24.) The Applicant relies on the fact that in another LVT decision (LON/00BA/LSC/2010/0564) in the same block a determination was made that the proportion payable was based on 1/42th and that the current decision should be consistent with that decision. The focus with the current application is in relation to the subject flat and its lease. In particular it is fair and reasonable for each flat to pay 1/42th; that notwithstanding that the commercial units may derive some benefit, they have no contractual obligation to contribute to the "specific services"; regard should be had to the contractual agreement and the Applicant had adduced a copy of the head lease.

25.) In respect of insurance charges claimed under the service charge regime, these only relate to the residential units.

26.) Reliance is made that the lease for the subject flat states that the Respondent's contribution is a fair proportion to be "determined and apportioned between the Demised Premises and other residential premises in the Building ...". Specific reference is made to the items within the service charge account and the relevant lease provisions including "water" services, gardening, pest control, rubbish and cleaning, lighting of common areas, maintenance, cleaning and repairing of the common parts, management fees, administration fees, health and safety issues and that these items are to be divided between the residential occupants of the block and not all of the occupiers.

27.) The Applicant submits that the structure of the leases is such as to allow the Lessor flexibility as to how various items are re-charged through the service charge regimes.

Administration Charges:

28.) There are three items identified as administration fees. £94 is claimed as a management arrears fee, a further sum of £82.25 is identified as a referral arrears management fee and a sum of £164.50 was itemised as PDC legal fees.

Schedule 12 Costs:

29.) An application was made by the Applicant for costs under the provisions of Schedule 12 of the Commonhold and Leasehold Reform Act 2002. It was acknowledged that the Respondent had not acted in a vexatious manner. However, it was stated that he had not engaged in the proceedings and as such had acted in an unreasonable manner. This lack of engagement had resulted in additional costs for the Applicant amounting to £700 plus VAT. The Applicant was seeking the maximum sum allowable under Schedule 12 of £500.

Hearing and Application Fees:

30.) The Applicant submitted that the Respondent should be responsible for the re-imbusement of any application fee or hearing fee. The Respondent had not communicated or participated in resolving this issue and the Applicant had no other alternative than to proceed to the Tribunal hearing.

Tenant's Case

31.) There were no submissions from the Respondent in this case.

Decision**Service Charges:**

32.) The sums for service charges identified at the hearing were £918.53 as shown in the previous paragraphs. As there were no representations from the Respondent there were not challenges to the sums incurred and overall the Tribunal considered that the sums identified and evidenced via invoices and other documentation appeared to be reasonable. However, at the hearing the Tribunal identified two areas of concern in respect of bank charges and the correct apportionment of the service charges. These issues were subject to further submissions from the Applicant and copied to the Respondent, but there was no further response received.

33.) Regarding the bank charges, included with the further submissions was the relevant documentation supporting the charges being claimed. The Tribunal is satisfied that the sums have been correctly identified and as such are payable.

34.) In respect of the issue of apportionment, it is clear that the combination of the commercial and the residential leases in the development means that the service charge regime is complex. The Applicant suggests that the lease structure allows flexibility to recover various items of service charges from the occupants of the building. It is clear to the Tribunal that there is a mechanism in the commercial leases for the recovery of some of the service charge costs for common parts in the development. Whilst this in itself, does not affect the interpretation of the subject lease, it is relevant to the question of reasonableness. In looking through the various invoices supplied it is impossible for the Tribunal to determine which if any invoices relate to any of the communal areas. However, we consider it highly likely that there is some expenditure which could be within the service charge regime of the commercial leases. We consider that we must take a pragmatic approach in dealing with this point. We consider that it would be appropriate to make a discount of 5% of the service charges levied on the Respondent to reflect that there may be an overcharge due to a lack of apportionment to the commercial tenants. We accept that this is not ideal and that we would prefer accounts that fully deal with the identification and apportionment of the costs. In total £918.52 was identified as the sum being sought from the Respondent in respect of service charges we determine that a sum of £872.60 (£918.53 less 5%) is reasonable and payable by the Respondent.

Administration Charges:

35.) There were three elements of the administration fees. The first two appear to have been incurred by the managing agents as the start of an arrears process. It is the opinion of the Tribunal that it would be reasonable that some initial work to recover non payments or arrears would be included in the overall management fees set by the managing agent. As such it is the opinion of this Tribunal that such sums should not be recovered separately from the Respondent. Accordingly the Tribunal determine that the sum of £176.25 (£94 and £82.25) is not payable by the Respondent.

36.) However, there is an additional administration fee of £164.50 invoiced from PDC as legal fees in relation to the arrears for the subject flat. It is the opinion of the Tribunal that such a sum would be covered by clause 2(17)(A) and that the sum was incurred in relation to the contemplation of proceedings under section 146 of the Law of Property Act 1925. As such the Tribunal determine that the administration fee is payable and we are of the opinion that the level of fee is not unreasonable. Accordingly, the Tribunal determine that the sum of £164.50 is payable by the Respondent.

Schedule 12 Costs:

36.) The Tribunal appreciates the frustration of the Applicant in trying to resolve this matter and that in order to resolve this matter it had been

necessary to proceed to a hearing at the Tribunal. However, the Tribunal considers that the use of the costs award under Schedule 12 should be restricted to extreme cases of parties acting in a frivolous, vexatious, abusive, disruptive or other unreasonable manner. In this case we consider that the lack of engagement by the Respondent in itself would not be in the most extreme circumstances envisaged by Schedule 12. We make no order of costs under the provisions of Schedule 12.

Hearing and Application Fees:

37.) A sum of £150 was paid by the Applicant in respect of the hearing fee, but no further application fee was paid to the Tribunal. We consider that given the lack of engagement by the Respondent, the Applicant had no choice other than to bring this case to the Tribunal and therefore we consider that it would be appropriate that the Respondent reimburses the Applicant the sum of £150 in respect of the hearing fee for this matter.

Chairman
Helen Bowers

9th May 2012