9370

Case Reference	:	**LON/OOAJ/LSC/2013/0365**
Property	:	**Southall Court, Southall, London**
Applicant	:	**Southall Court Residents Limited**
Representative	:	**Mr Peter Ward**
Respondents	:	**41 tenants of the 48 flats in Southall Court, Southall whose details appear on the document accompanying the original application**
Representative	:	**Miss Nicola Muir of Counsel, representing those leaseholders whose details appear on the statement of case by the Respondents prepared by Mr Gary Scott of Philip Ross Solicitors** **Mr R Guraya (Flat 4)** **Mrs F Francis (Flat 45)** **Mr J Fox of Safe Haven Limited, Flats 6, 18, 22 and 35** **Mr J Walsh, representative of Mrs P Walsh, Flat 17**
Type of Application	:	**Section 27A of the Landlord and Tenant Act 1985**
Tribunal Members	:	**Mr A A Dutton (Judge)** **Mr L Jarero BSc FRICS** **Mr J E Francis QPM**
Date and venue of Hearing	:	**London** **6th November 2013**
Date of Decision	:	**22nd November 2013**

DECISION

The Tribunal determines that the certificate does not comply with Clause 3(iii) of the lease and that accordingly whilst the sum of £3,378.12 is the sum representing the maintenance charge for the year ending 23rd June 2008, such sum is not payable until it is properly certified in accordance with the terms of the lease. Our reasons for this finding are set out below.

The Tribunal orders that the provisions of Section 20C of the Act shall apply in relation to the application and the hearing before us on 6th November 2013.

BACKGROUND

1. There is a history of disputes between the applicant company and the leaseholders of the 48 flats at Southall Court. It is not necessary for us to set out that history, suffice to say there have, since 2001, been proceedings before the Leasehold Valuation Tribunal as it was, a number of County Courts and the Upper Tribunal. The disputes have continued and the hearing before us on 6th November was another example of disagreement between the parties. It is perhaps appropriate to quote the judgement of Mr N J Rose FRICS of the Upper Tribunal in case number [2011]UKUT218(LC) involving a dispute between the Applicant and a Mr and Mrs Tiwari where Mr Rose said at paragraph 17 as follows:- *"It is strongly to be hoped that any future disagreements about service charges payable at Southall Court will be resolved by negotiation rather than litigation. For all landlords and tenants, recourse to courts or tribunals should be a last resort, and certainly not an inevitability."* A sentiment which has been echoed by a number of tribunals over the years.

2. This matter came before us on 6th November 2013 for the purpose of determining whether or not the applicants had complied with the certification requirements set out at Clause 3(iii) of the lease. It should be noted that there had been a variation of the leases which has changed these arrangements but, for the purposes of this matter, Miss Muir in her skeleton argument accepted that the lease before variation should be the one considered and the wording contained therein the appropriate one. We mention that Mr Guraya, who gave some evidence, was of the view that in fact it should be the varied lease that applied. It is perhaps appropriate at this stage to record that we do not agree with that view. We have seen the order varying the lease which makes no indication that it is retrospective. For the sake, therefore, of certainty and in respect of this application, we propose to proceed on the basis that it is the unvaried lease which applies and the following wording:-
"3(iii) If the expenditure incurred by the landlord in any accounting period of 12 months in carrying out its obligations under Clause 4 hereof (hereinafter called "the annual cost") exceeds the aggregate amount payable (or deemed to be payable) on account as aforesaid by the tenants of all flats in the Building in the accounting period in question (herein after called "the annual contribution") together with any unexpended surplus as hereinafter mentioned and a certificate of the amount by which the annual cost exceeds the total of the annual contribution and any such unexpended surplus be served upon the tenant by the landlord or its agent with audited accounts in support thereof then the tenant shall pay to the landlord within 28 days of the service of such certificate (which said certificate shall as respects the matters therein contained bind the landlord and the tenant unless some manifest error shall be

found therein or in such accounts in which such case error shall be rectified) a proportional part (hereinafter called "the excess contribution") determined by the landlord or the surveyor of the landlord of the amount of such excess shown therein such sum to be recoverable from the tenant in the case of default as if the same were rent in arrears PROVIDED that if in any such accounting period as aforesaid the annual costs is less than the annual contribution the difference (being the unexpended surplus) shall be accumulated by the landlord and shall be applied in or towards the annual cost in the next succeeding or future accounting period or periods as aforesaid."

3. In the bundles before us was an extensive statement of case prepared on behalf of the Respondents by Philip Ross Solicitors, a letter from Mr Rhaza saying that he did not acquire his interest in his flat until after this service charge had become payable and a letter from Mr Fox of Safe Haven dated 6th July 2013 setting out his concerns at the application.

4. In addition to the above the landlord had filed a reply with supporting documentation and as a result of the matter, which was intended to be a paper case, coming before us for oral hearing, a further reply was made dated 17th October 2013 with enclosures. In addition to the bundle which also contained the lease and some previous decisions, a separate bundle had been prepared listing no less than nine case details with supporting papers in respect thereof.

5. The directions issued by the Tribunal on 18th June 2013 stated at the introduction, paragraph b as follows:- *"By a decision dated 2nd July 2009 under reference LON/OOAJ/LSC/2008/0591 a Tribunal determined that the costs comprised in that charge were reasonably incurred. Permission to appeal that decision was refused and the decision is therefore final and will not be revisited. In paragraph 24 of its decision, however, the Tribunal held that the service charge costs for that year had not been properly certified in accordance with the lease and were not recoverable until they had been so certified. Unless, therefore, the tenants wished to raise legal issues other than certification the only issue for determination would appear to be whether the service charges for the year 2007/2008 have been properly certified."* The directions went on to indicate that Mr Ward for the applicant company had indicated his willingness for the matter to be dealt with on paper. However, one of the Respondents, it is believed Mr Guraya, requested a hearing and the matter came before us on 6th November for that purpose.

6. The demand, which is the subject of this hearing is contained in a letter of 20th December 2012 headed Invoice 12/02. The redacted copy that is in the bundle is headed *'Service Charge'* and underneath *'maintenance charge 2007/08 (see note 3 below) £3,378.12'.* Note 3 states as follows:- *"It is certified that, in accordance with Clause 3(iii) of the leases then in force, the total of the annual contribution and any such expended surplus was £169,349 less £7,200 aggregate maintenance charge £3,378.12 is one 48th."* The letter goes on to deal with notification of costs incurred in 2011/12 and includes as a third page a document headed 'Southall Court, Southall, Middlesex UB1 2RG Service Charge Certificate'. This lists, in simple form, the expenditure for the year ended 23rd June 2008 which totals £169,349.99. Beneath that is the heading 'Accountants Report' and the following wording:- *"We have prepared the above accounts*

from the records and vouchers held and provided to us by the managers during the year.

We certify that this account shows the expenditure for the year as defined in the leases. As far as we are aware the account complies with the Landlord and Tenant Acts 1985 to 1987 and the Housing Acts 1988 to 1996.

We also certify that, in accordance with Clause 3(iii) of the leases then, in the total of the annual contribution and any such unexpended surplus was £163,349.99 as stated above less £7,200 aggregate maintenance charge.

Please note this certificate replaces all previous certificates for the year. Underneath that, DFO Consulting Chartered Certified Accountants." This company it seems practised at Churchill House, 120 Bunns Lane, Mill Hill, London NW7 2AS.

7. In reaching the decision set out below we have considered the documentation provided to us. It seems unnecessary to recount the contents in detail as it is available for the parties.

8. At the hearing Mr Ward took us through his statement of case and the relevant terms of the lease. Mr Ward's view was that the certificate was compliant although he accepted there was a possible argument that the accounts had not been "audited." He, however, felt that it had been audited and that it complied with the lease requirements.

9. Miss Muir on behalf of 19 leaseholders had herself filed a detailed skeleton argument which we do not need to repeat. She told us that the certificate had made no attempt to show what had been paid by leaseholders and actually what was due and owing. She said her clients needed to know this. There was a discrepancy in respect of demands made in relation to this year in question in that leaseholders had been requested to pay £3,480.93 but of course the sum had now been reduced to £3,378.12. The nub of the problem, she said, was that the Applicants, through Mr Ward, were taking action against leaseholders when not providing leaseholders with a proper account to show what had been paid and what was actually due. There is no dispute that the sum of £3,378.12 is an amount payable for the year 2007/08 but there is no evidence to show what the unexpended surplus might be. Furthermore, an interest charge in respect of this year had been made in excess of £2,000 which she said was clearly inappropriate as the sum was not yet due and owing.

10. Matters then progressed in discussion form as to the possibility of resolving these issues by producing to the leaseholders an account with which they had confidence and which would hopefully lead to a resolution of the longstanding complaints by the leaseholders that the accounting arrangements for the property were unsatisfactory.

11. We agreed an adjournment to enable the parties to consider whether or not there were areas of agreement which could progress this matter. We are pleased to say that following this adjournment and subsequent discussions between ourselves and those present, the directions, which are set out at the foot of this

document, have by and large been agreed with all parties, although there are one or two matters which we have clarified in the course of committing those directions in writing.

12. We should also record that Mr Guraya commented that notices had not been received by other leaseholders. There was no evidence that this was the case and we find it surprising that given the history of the animosity between the leaseholders and the freeholder in this property, that there was not a full knowledge by each leaseholder as to the application that we were requested to consider on the 6th November. Mr Guraya told us that he was the Secretary of the residents association although he indicated that he had not in fact told his members that this application was underway. He asked for the application to be dismissed and that an order be made under Section 20C.

FINDINGS

13. Before we address the directions in the hope that this matter will now move forward, we first set out our findings in respect of the basis of the application before us. We have considered the form of demand and the certificate which accompanies same and do not see that the certificate bears any evidence of an audit having been carried out. Indeed we are forced to the conclusion that such an audit has not taken place. We would not expect to see the words as is set out on the certificate *"as far as we are aware the account complies with the Landlord and Tenant Acts 1985 to 1987 and the Housing Acts 1988 and 1996."*

14. According to the Association of Chartered Certified Accountants, *"audited accounts have been subjected to independent scrutiny resulting in a report stating that the auditors have found no material mis-statements in the company's accounts. Unaudited accounts have been prepared from the books, records and explanations supplied by the company and have not been subject to any verification procedures."*

15. It seems to us quite clear from the certificate that there has been no scrutiny on an independent basis of the records. Not only is the wording in the certificate uninspiring, it seems to us that the accountant's report contains no evidence as to the income received during the financial year, nor does it set out and certify what the unexpended surplus might be. The unexpended surplus is referred to the total of the expenses incurred in that year. In those circumstances, unfortunately, the landlord has still failed to comply with the terms of the lease and unless and until he does so we cannot be satisfied that the amount claimed is properly recoverable.

16. Mr Ward indicated a wish to obtain a further certificate from the accountants who were instructed by his newly appointed managing agents. Given the directions which are set out below it seems to us it would be sensible for him to wait until hopefully audited accounts and certificates can be issued by an accountant who has the confidence of the leaseholders. Accordingly with a view to moving this matter forward, and possibly bring to an end this long run of litigation between the parties, the following directions are to be followed. We record also that Mr Ward provided the Tribunal and the parties with an undertaking. That undertaking says as follows:- *"The Applicant undertakes to*

provide all reasonable assistance and co-operation to the accountant appointed in this application including access to the portacabin at the front of Southall Court but not including photocopying. For the avoidance of doubt, this extends to its director Peter Ward and includes access to all its financial records." The undertaking was signed by Mr Ward and is dated 6th November 2013. We are grateful to Mr Ward for giving this undertaking and rely on this, he being a barrister.

17. Before we proceed to deal with the directions we should also record our view that it seems to us inappropriate for the Applicant to take any form of enforcement action against the leaseholders until such time as the accounts have been prepared as envisaged by the directions set out below. There is clear uncertainty as to what is the 'unexpended surplus'. We heard evidence from a number of people indicating that they had made payments which had not been credited and there is it seems no running account showing details of income and expenditure for each individual leaseholder. On the basis of the papers which we have seen it is impossible for a leaseholder to determine whether all payments have been credited to their account and what sum they actually owe. A number of Tribunal proceedings have altered the amounts originally demanded and it seems to us that an account needs to be prepared showing the sums demanded, credits given against those sums where the Leasehold Valuation Tribunal or the First Tier Tribunal or indeed any other tribunal or court has reduced the amounts payable to the Applicant. That account also needs to record payments made by individual leaseholders during the period which is covered by the following undertaking, that is to say the accounting years ending June 2007 through to June 2013. Until, therefore, these accounts have been resolved, our view is and we put it no higher than that, that it is inappropriate for further court action to be taken.

18. Having discussed the matter with Mr Ward, Miss Muir, Mr Fox and other leaseholders in attendance, we make the following directions:

    1. The Respondents are to seek to obtain three appropriate nominations from the Association of Chartered Certified Accountants, 29 Lincolns Inn Fields, London WC2A 3EE within seven days of the receipt of our decision and these directions.

    2. Details of those proposed accountants are to be provided to the Applicant who shall have 14 days in which to select the accountant to be nominated. Failure by the Applicant to make such nomination in 14 days will enable the Respondents to nominate one of the named accountants to act. It should be noted and conveyed to the accountants so chosen that the initial responsibility for settling that accountant's fees for carrying out the works referred to below rests with the Applicants in the first instance. This is without prejudice to the Applicants' right to seek to recover the costs of such accountancy works as a service charge in the future. The Applicant is to confirm with the nominated accountant that it will be responsible for payment of the fees and that it will comply with any reasonable request for payments on account.

3. After the selection of the proposed accountant the Applicants will provide access to the accounting documentation of the Applicant and to the use of the portacabin at Southall Court if required by that Applicant within 14 days of such accountant being nominated. It is to be noted that if that accountant decides to use the portacabin he will be responsible for any photocopying arrangements.

4. Within three months of paragraph 3 the accountant is to prepare audited accounts and certificates for the years ending June 2007 through to June 2013.

5. Those accounts will be submitted to the leaseholders who will have 28 days to raise any issues in respect of their own personal statements of account.

6. The accountant will have 21 days thereafter to review his accounting documentation in the light of the submissions made by the leaseholders.

7. The Applicant will have a right to respond 28 days thereafter setting out whether the accounting documentation is agreed and if not, why not.

8. Thereafter the Tribunal will, upon application from either party, list the case for a case management conference.

19. At the conclusion of the hearing Mr Guraya made a claim for costs associated with the accountants fee that he had had to pay in relation to a report he had not produced until he gave evidence at the hearing and photocopying charges of £30 together with six hours of his own time. Mr Fox sought costs of £500 for each flat for attending the hearing on 6th November when in his view it was not necessary as he said that his company Safe Haven had paid all monies then due. He told us that his daily rate was £1,000. Mrs Francis also sought to make a claim for costs of £40 per day in respect of loss of earnings.

20. An application for an order under Section 20C was made. The Applicant reserved its position on the question of costs despite being requested to make submissions.

21. The matter came before us for hearing on 6th November 2013 not as a result of the Applicant's request for such a hearing to take place, but as a result, we understand, of Mr Guraya's request for a hearing. The costs, therefore, incurred by Mr Guraya, Mr Fox and Mrs Francis of attending the hearing are not as a result of any actions on the part of the Applicant which fall within the provisions of Schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002. The Applicant had no choice but to return to the Tribunal to seek an order that the certificate complied with the terms of the lease and although it has been unsuccessful in that regard, it cannot in our view be said that they have acted in the manner as set out in paragraph 10 of schedule 12 which would result in a costs order being visited upon it. In those circumstances, therefore, we dismiss Mr Guraya's, Mr Fox's and Mrs Francis' claim for costs.

22. Insofar as the costs of the proceedings are recoverable by the Applicant are concerned, it seems to us, given our findings, that it is just and equitable to

make an order that Section 20C applies and that the costs of the proceedings are not to be recovered as a service charge.

23. We record that although we have our concerns that the sums in respect of service charges are in dispute and should not be the subject of any further court proceedings for the moment, nonetheless there is an obligation on the leaseholders to pay the ground rent, the insurance rent and the annual payment, as provided for in the varied leases, to the sinking fund. Failure to do so should not prohibit the Applicant from taking action to recover those sums of monies, although we sincerely hope that that will not be necessary and that both sides will allow a hiatus from the war of attrition that has been undertaken in respect of this property.

24. We also record Mr Ward's stated wish that whilst the Applicant would rely on the accounts produced for the period ending June 2007 onwards, and in effect draw a line in respect of any claims prior to that date, he reserved a right to proceed for earlier years if the Applicant so wished but it would, he accepted, be the Applicant's responsibility to ensure that the accounts were in good order for those early years so that the arguments which were ventilated before us as to the history of payments made by the leaseholders is covered.

25. We add also that it seems to us that the responsibility for payment of the accountant must rest in the first instance with the Applicant. Our view is, that the undertaking on behalf of the Applicant can be extended sufficiently to ensure that it provides the necessary letter of instruction and arrangements for the settling of the costs of the accountant who is going to carry out this fairly extensive work. As we have indicated above, however, it does not seem to us that this would preclude the Applicant from seeking to recover the costs of the accountant's work as a service charge, although of course, subject to the provisions of Section 19 and Section 27A of Act.

Andrew Dutton
Tribunal Judge

22nd November 2013