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LON/00AG/LSC/2009/0666

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATION UNDER SECTION 27A OF THE LANDLORD & TENANT ACT 1985

Address:	Flats 13 & 14, Belsize Mews, Belsize Lane, London, NW3 5AS
Applicant:	Euston Holdings Ltd
Respondent:	Mr A. Shapiro
Application:	13 October 2009
Inspection:	Not applicable
Hearing:	14 January 2010

Appearances:

Landlord

Mr P. Sherrard) Sterling Estate Management Ltd, Managing Agent
Mr A Ahmed)

For the Applicant

Tenant

Miss A Creer Counsel
Mr V. Shaul Taylor Hampton, Solicitors

For the Respondent

Members of the Tribunal
Mr I Mohabir LLB (Hons)
Miss M. Krisko BSc(EstMan) BA FRICS
Mrs G. Barrett JP

IN THE LEASEHOLD VALUATION TRIBUNAL

LON/00AG/LSC/2009/0666

IN THE MATTER OF SECTION 27A OF THE LANDLORD & TENANT ACT 1985

AND IN THE MATTER OF FLATS 13 & 14, BELSIZE MEWS, BELSIZE LANE, LONDON, NW3 5AS

BETWEEN:

EUSTON HOLDINGS LIMITED

Applicant

-and-

ALEC SHAPIRO

Respondent

THE TRIBUNAL'S DECISION

Introduction

1. This is an application made by the Applicant under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of the Respondents liability to pay and/or the reasonableness of actual service charge is claimed in respect of the service charge years ended 31 December 2007 and 2008 and estimated service charges claimed in respect of the year ended 31 December 2009.

2. The Respondent is the long leaseholder of both Flats 13 and 14 Belsize Mews pursuant to separate demises granted on 10 April 2003 ("the leases"). These premises are two self-contained flats on the first and second floors respectively which are accessed by means of a separate entrance and stairwell. On the ground floor and basement of the building there is a commercial unit,

which was extended in 2006 and is currently operated as a restaurant. The Applicant took an assignment of the freehold on or about 29 September 2006.

3. As the Tribunal understands it, the relevant service charge provisions in the leases held by the Respondent that give rise to his service charge liability are identical. The definitions in the leases make a distinction between the service charge contributions to be paid between the residential and commercial units. "Apartment Expenditure" relates to the defined common parts used by the flats, for which there is a 50% liability. The "Buildings Expenditure" relates to the main structure of the building, for which there is a 20% liability.

4. Part I of the Fifth Schedule of the leases set out the mechanism for the recovery of service charges and can be summarised as follows. The landlord is to prepare estimates for the anticipated expenditure in any given year and is to notify the tenant by 31 December for the year following. Upon receipt of a demand, the tenant is to pay such estimated service charge by equal instalments on 1 January and 1 July. As soon as reasonably practicable after the end of any given service charge year, the landlord is to provide certified accounts and a balancing credit or debit is applied to the estimated service charge. Paragraph 4 of the Fifth Schedule provides for adjustment payment to be demanded based on revised estimates in the event that this is required. The Respondent submits, as a matter of construction, that the Applicant is required to send one service charge demand to each flat.

5. It seems that, after acquiring the freehold, the Applicant wrote to the Respondent in November 2006 seeking to recover a total sum of £5,693.42 ("the earlier sum"), which appears to have been owned to its predecessor in title, Santon Property Company Ltd. Thereafter, correspondence ensued between the Applicant and the Respondent's solicitors, Taylor Macmillan, regarding recoverability of this sum. In addition, the Respondent's solicitors put the Applicant on notice that he had not received any estimated service charge demands or final certificates in accordance with the terms of his leases and reserved his position in this regard.

6. By a letter dated 30 March 2007 the Applicants managing agents, Sterling Estate Management Ltd (" Sterling") served an estimated service charge budget and demand for 2007, which included elements of the disputed earlier sum claimed by the Applicant prior to acquiring the freehold interest. Further correspondence then ensued between the Respondent's solicitors and Sterling regarding the reasonableness of various estimated service charges claimed in the 2007 budget.

7. Eventually, by a letter dated 31 July 2007, the Applicant's solicitors confirmed that the earlier sum the Applicant had initially sought to recover was no longer being pursued. On 24 July 2007, revised demands in relation to that year were provided by the Applicant without explanation as to why the overall budget figure had been revised downwards from £4,200 to £3,800.

8. On 17 December 2007, the 2008 budget was served in accordance with the lease terms. However, it seems, the budget figures for this year replicated the sums claimed in the amended 2007 budget, possibly because the actual expenditure for 2007 have not been certified until 21 May 2008. Again, the Respondent put the Applicant to proof as to the reasonableness of the estimated amounts claimed because, in his view, they bore no resemblance to the likely expenditure. It was common ground at the hearing that the actual expenditure incurred in 2007 and 2008 was significantly lower than the budget estimates claimed by the Applicant.

9. The 2009 budget estimate is dated 13 October 2009. It was contended by the Respondent that because interim demands have not been properly made any sums claimed are not yet payable. Whilst this may be the strict contractual position, it did not preclude the Tribunal from making a determination in relation to this year because the tribunal has jurisdiction to do so under section 27A(3) of the Act in relation to any future liability to pay service charges. Accordingly, the Tribunal's determination below includes the estimated charges claimed in respect of 2009.

10. The service charges challenged by the Respondent, whether claimed as "Apartments Expenditure" or "Building Expenditure" for each of the disputed service charges are particularised below.

The Relevant Law

11. The substantive law in relation to the determination of this application can be set out as follows:

Section 27A of the Act provides, *inter alia*, 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 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."*

Subsection (3) of this section contains the same provisions as subsection (1) in relation to any future liability to pay service charges.

12. Any determination made under section 27A is subject to the statutory test of reasonableness implied by section 19 of the Act. This 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 works, only if the services or works are of a reasonable standard;*
> *and the amount payable shall be limited accordingly."*

Decision

13. The hearing in this matter took place on 14 January 2010. The Applicant was represented by Mr Sherrard and Mr Ahmed. The Respondent was represented by Miss Creer of Counsel.

Apartments Expenditure

Management Fees (2007 & 2008)

14. Total management fees of £600 is claimed in respect of 2007 and £650 is claimed in respect of 2008 and 2009 respectively. At paragraph 3.1 of the Applicant statement of case it is stated that the management fees based on a prescribed sum of approximately £282 plus VAT per unit for 2007.

15. The Respondent submitted that no such fees are prescribed under the terms of the leases. Moreover, the sum of £600 for both flats was unreasonable when the commercial unit was paying only £400 for management fees. If £1,000 was applied overall to the building and then the Respondent would only have to pay management fees of £200 per flat. Furthermore, the standard of the management carried out was not reasonable. On the face of the service charge accounts, there was little or no management because most of the service charge costs are nil. It was also submitted by the Respondent that if a management agreement was for a term of more than 12 months, it was a qualifying long-term agreement in respect of which no statutory consultation had taken place. Therefore, the maximum amount of the Applicant could recover for management fees was £100 per year.

16. It was accepted by the Applicant that the management fee was not prescribed under the terms of the leases. However, it was submitted that a management fee of £282 plus VAT per flat around was reasonable because the flats required a greater degree of management than the commercial unit. This included, for example, the preparation of two sets of service charge accounts, health and safety inspections (despite the small size of the common parts), dealing with tenants enquiries, placing the buildings insurance and other administrative costs.

17. The Tribunal accepted the Respondent's submission that the management functions carried out by Sterling especially in relation to 2007 and 2008. This was evidenced from the service charge accounts where, at best, costs were incurred only under three heads of expenditure and was probably as a consequence of the relatively small size and simplicity of the common parts,

which was effectively the stairwell to the flats. Accordingly, the Tribunal found that the management fees claimed in respect of the three service charge years under consideration not to have been reasonably incurred. The Tribunal determined that a reasonable management fee for 2007 is £200 per flat per year inclusive of VAT. The Tribunal also allowed the same amount for 2008 on the basis that little or no increase in management had taken place in this year. As to 2009, the Tribunal allowed, as a reasonable estimated figure, the sum of £225 per flat inclusive of VAT.

18. As to whether or not the management agreement was a qualifying long-term agreement, the Respondent advanced no positive case or evidence in this regard. Save for rival assertions, the Tribunal heard no evidence on this matter and, therefore, makes no finding as to whether or not the management agreement amounted to a qualifying long-term agreement and whether statutory consultation with the Respondent should have taken place. Unless and until a finding is made in these terms, then the statutory "cap" of £100 has no application.

Accountancy Fees (2007, 2008 & 2009)

19. A flat rate of £150 is claimed by the Applicant in relation to 2007, 2008 and 2009 for accountancy fees incurred in preparation of separate service charge accounts for the residential and commercial units. The Respondent simply submitted that this figure was excessive given the simplicity of the accounting exercise and that it was unreasonable to incur separate fees for the residential and commercial units.

20. The Respondent submitted that the lease terms require the preparation of two sets of accounts for the residential and commercial units. Therefore, the sum of £150 claimed was reasonably incurred and reasonable in amount.

21. The Tribunal accepted that under the definitions in the leases, the Applicant is entitled to incur and recover separately, as a service charge, audit fees in relation to the apartments and the building expenditure. However, the Tribunal had little difficulty in accepting the Respondent's submission that the

accounts prepared in respect of the flats were entirely straightforward and involved no complexity or difficulty whatsoever. Accordingly, it found that the accountancy fees claimed had not been reasonably incurred and allowed the sums of £75 including VAT for 2007 and 2008 and that the sum of £85 including VAT for 2009 for the separate preparation of each of the service charge accounts for the residential and commercial units as being reasonable.

Miscellaneous (2008)

22. A total sum of £1,274.88 is claimed by the Applicant for legal fees incurred. The Respondent submitted that these costs were incurred as a consequence of the Applicant unreasonably demanding sums which were not lawfully due and then demanding payment on account which subsequently bore no resemblance to the actual expenditure incurred. Furthermore, the costs were unreasonable having regard to the minimal correspondence that took place between the solicitors for the respective parties. The Applicant simply contended that it had become necessary to instruct a firm of solicitors to deal with this matter because the Respondent had refused to pay even the ground rent.

23. The Tribunal accepted the Respondent's general submission that some of these costs had not been reasonably incurred. It did not accept the submission that the managing agent could have dealt with the enquiries made on the Respondent's behalf, especially when he had considered it necessary to instruct a firm of solicitors to do so. To ensure equality of arms, it was entirely appropriate for the Applicant to instruct its own firm of solicitors. However, in the Tribunal's view, it was not necessary for a Partner to have conduct of a relatively straightforward matter on the Applicant's behalf. The Tribunal also found that the time engaged by the fee earner of four hours was excessive. It concluded that a Grade B fee earner engaged for three hours at an hourly rate of £200 was appropriate. Accordingly, the sum of £600 plus VAT was allowed as reasonable.

Minor Repairs (2009)

24. A budget provision of £1,200 is claimed by the Applicant on the basis of anticipated expenditure in relation to the common parts. It was submitted by

the Respondent this sum was excessive and no breakdown of anticipated works had been provided.

25. The Applicant submitted that the sum claimed was the bare minimum necessary to repair and maintain the common parts given that no work had been carried out in 2007 and 2008 because of non-payment of service charges by the Respondent. There was no money in the reserve or sinking fund. It was accepted that the figure of £1,200 was high and a lesser figure of £500 was proposed.

26. The Tribunal found that neither the sum of £1,200 or £500, as a budget provision for repair and maintenance of the common parts, was not reasonable because, by the time of the hearing, the service charge year had finished and no works had in fact been carried out. Therefore, this sum should be disallowed entirely.

Electricity (2009)

27. A budget provision of £100 had been estimated for the supply of electricity to the common parts. The Respondent contended that there was no separate electricity meter or account for the common parts. The Respondent also stated that the commercial unit was paying the electricity bills. Therefore, this figure was entirely arbitrary and it should be disallowed unless and until the Applicant could demonstrate that the electricity costs had been reasonably incurred.

28. The Applicant's representatives found themselves in some difficulty on this matter. They said that the freeholder had been paying electricity bills and had not explained to them how the supply of electricity to the common parts had been calculated. Nevertheless, they believed that it was reasonable and proper to make a budget provision for this item of expenditure. Any overpayment on the parts of the Respondent would be applied as a credit to the service charge account.

29. It was common ground that there is no electricity meter relating to the common parts. Given that the Respondent could not demonstrate in any way what electricity costs, if any, were attributable to the common parts, it follows that the Tribunal was bound to find that this item of estimated expenditure had not been reasonably incurred and was disallowed entirely.

Building Expenditure (2007, 2008 & 2009)

Insurance

30. The sums of £2,783.55, £2,500 and £3,500 claimed by the Applicant for the buildings insurance premiums paid in 2007, 2008 and 2009 respectively. In relation to 2007, the Respondent submitted that the buildings insurance premium was irrecoverable because the relevant service charge account had not been certified until 21 May 2008. Given that there were earlier demands have been made for this expenditure, it was now irrecoverable because the Applicant was now time-barred by virtue of section 20B of the Act. The buildings insurance premium for 2008 was agreed by the Respondent. In relation to 2009, the Respondent submitted that the 40% increase in the premium was unreasonable because no explanation has been given by the Applicant for the increase.

31. In relation to the premium claimed for 2007, it was contended by the Applicant that at, all material times, the Respondent had been aware of the service charge expenditure incurred in that year because extensive correspondence had passed between the respective firms of solicitors. The Tribunal was referred, in particular, to a letter written by the Applicant's solicitors dated for September 2007 in which the Respondent is invited to clarify what items of expenditure were being challenged and why. It was submitted that the Respondent had been put on notice about the expenditure that had been incurred in this year and, therefore, the buildings insurance premium was not caught by section 20B of the Act. As to the premium incurred in 2009, no explanation was offered as to why it had increased by 40% safe to say that the buildings insurance policy had been arranged by insurance brokers as a single policy.

32. The buildings insurance premium for 2007 in the sum of £2,783.55 was incurred on 26 September 2006. On any view, it is clear that this had not been specifically demanded, or at all, within 18 months of this cost having been incurred. Only a general demand for service charge arrears was made in correspondence by the Applicant's solicitors. This does not satisfy the requirements of section 20B(2) of the Act. In other words, the Applicant was required to specifically inform the Respondent that this expenditure had been incurred and it would be seeking to recover this cost at a future date. This would have had the effect of stopping the 18 month time limit under section 20B from running. The Applicant did not do so. Therefore, strictly, the buildings insurance premium claimed for 2007 is irrecoverable. However, having regard to the extensive and detailed correspondence passing between the respective firms of solicitors, it is beyond doubt that the Respondent, through his solicitors, did not specifically challenge the buildings insurance premium claimed in respect of this year. Had he done so, the Applicant may have taken such protective steps as were necessary to ensure that this item of service charge expenditure could be recovered. Indeed, the Respondent does not take the same point in relation to other service charge costs claimed for 2007. This approach strikes the Tribunal as somewhat opportunistic. Accordingly, the Tribunal found that the Respondent was now *estopped* from asserting that the buildings insurance premium was irrecoverable.

33. In relation to the buildings insurance premium for 2009, the Tribunal found that it had not been reasonably incurred because the Applicant had been put to proof by the Respondent and had been unable to provide any explanation for the significant increase in the premium. Therefore, given that the premium for 2008 had been agreed, the Tribunal applied indexation to this figure and allowed the sum of £2,750 as being reasonable.

Fire Safety Equipment (2007, 2008 & 2009)

34. The sums of £628.63, £555.18 and £1,000 is claimed by the Applicant for 2007, 2008 and 2009. Although the latter figure appears as a budget provision in respect of the residential units, it was accepted by the Applicant that this was an error and should in fact be allocated to the building expenditure.

35. In relation to 2007, the Respondent claimed a set off of £179.62, being the cost he had incurred to remedy a fault with the fire alarm system. In relation to 2008, the Respondent submitted that the sum of £211.50 for correcting faults in the fire detection and emergency lighting systems had not been reasonably incurred because the equipment had been serviced a week earlier by the very same contractor. As to 2009, the Respondent simply submitted that the cost was excessive.

36. In reply, the Respondent was unable to comment about what work had been carried out by the Applicants to the fire alarm system in 2007. It was contended that cost of £211.50 incurred in 2008 was reasonable because, invariably, faults occur in systems such as these can the cost of repair falls outside the scope of the service contract. The £1,000 budget provision for 2009 was to cover unforeseen expenditure. The fire safety system was old and this provision ensured that the Applicant would not have to issue a revised demand to the Respondent for the cost of any unforeseen repairs. It was submitted, therefore, that this estimated figure was reasonable.

37. The Tribunal determined that they did not have jurisdiction in relation to the set off claimed by the Respondent for the cost of carrying out repairs to the fire alarm system in 2007. Otherwise, no complaint was made by him in relation to the expenditure of £628.63 incurred in that year. Therefore, the Tribunal allowed the sum as being reasonable.

38. In relation to 2008, the Tribunal accepted the explanation given by the Applicant that it was necessary to incur the sum of £211.50 to remedy any fault in the fire detection and emergency lighting systems and that the cost of doing so fell outside the scope of the existing service contract. Whilst the timing of the repair was perhaps unfortunate, the occurrence of any such fault could not be predicted. Accordingly, the Tribunal found that this cost had been reasonably incurred and was allowed as claimed.

39. As to 2000, neither party gave any material or compelling evidence in support of their case. Nevertheless, the Tribunal's judgement the budget provision of £1,000 was excessive and it allowed the sum of £750 as being reasonable.

Reserve Fund (2008)

40. The Applicant submitted that a provision of £1,000 for the reserve fund in 2008 was unreasonable because no details have been provided of the anticipated expenditure. The Applicant contended that this provision was reasonable because no work had been carried out to the building for several years. It was intended to employ a firm of surveyors to prepare a schedule of repairs to begin this process. A similar provision had not been made in the 2009 budget because the Applicant was attempting to keep the budget as low as possible, especially when the Respondent had accrued service charge arrears. . It was stated that the reserve fund of £1000 was created by retaining money left over at the end of the service charge year.

41. The Tribunal had the benefit of considering this matter on a historic basis. It was clear that none of the anticipated expenditure had been incurred. Therefore, it was not open to the Tribunal to make a finding that this provision had been reasonably incurred and it was disallowed. However, it should be noted that the Tribunal considers it entirely appropriate for the Applicant to make such a provision for future years and this is provided for under the terms of the leases.

Minor Repairs (2009)

42. A provision of £1,200 was made in the 2009 budget for the anticipated cost of external repairs to the building. The Respondent contended for a figure of £500 on the basis that no such repairs were required or had been carried out previously. The Applicant submitted that this provision was reasonable and it would set a precedent from the Tribunal that it was good practice to set a budget. However, the Applicant was not aware of any such costs having been incurred in 2009. On the basis, the Tribunal could not make a finding that this provision was reasonable and it was disallowed. As a general point it should be noted that the lease does not require the payment of service charges in order

for the landlord to carry out his obligations, even if this leaves him out of funds.

Section 20C & Fees

43. The Respondent had also made an application under s.20C of the Act seeking an order that the Applicant be *disentitled* from being to recover all or part of the costs it had incurred in these proceedings.

44. Section 20C of the Act provides the Tribunal with a discretion to make an order preventing a landlord from being able to recover costs it had incurred in proceedings such as these when it is just and equitable to do so having regard to all the circumstances of the case.

45. The Respondent's arguments in support of this application are set out at paragraph 26 of his statement of case. It is not necessary to recite these in any detail. Generally, he contends that his concerns regarding the relevant service charge accounts in issue had not been given sufficient attention by the Applicant otherwise it is possible that this matter could have been dealt with in correspondence and without having to resort to litigation. He complained that he was met with a threat of forfeiture by Sterling even though a number of mistakes had occurred in the service charge accounts.

46. In contrast, the Applicant argued that the Respondent had a history of non-payment of service charges and ground rent. It had taken three years to reach this point and the Respondent still had not paid any service charge arrears. Every attempt had been made to accommodate the Respondent without success. In the circumstances, no order should be made preventing the Applicant from being able to recover the costs it had incurred in these proceedings.

47. Having regard to the pre-litigation correspondence that took place between the parties, the Tribunal was of the view that both sides could have adopted a more conciliatory and constructive approach in an attempt to resolve the issues that came before the Tribunal. This may possibly have prevented this

application being issued. In other words, the Tribunal considered that it was equal demerit in the conduct of both parties. Accordingly, it considers it just inevitable to make an order preventing the Applicant from recovering 50% of the costs it had incurred in these proceedings. For the same reasons, it orders the Respondent to reimburse the Applicant the sum of £250, being 50% of the total fees it has paid to the Tribunal to have this application issued and heard.

Dated the 22 day of March 2010

CHAIRMAN I Mohabir LLB (Hons)