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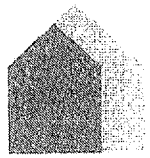

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL FOR THE
LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985, AS AMENDED SECTIONS 27A AND 20C

COMMONHOLD AND LEASEHOLD REFORM ACT 2002 SCHEDULE 11

Case Reference: LON/00AY/LSC/2010/0020

Property:	40 Bavent Road Camberwell London SE5 9RY
Applicant:	Ground Rents (Regisport) Limited
Respondent:	Dr J Lennon
Appearances:	Mr R Trivett, Head of Property Management, Pier Management Ltd Miss S Hurst, Insurance Analyst Pier Management Ltd **For the Applicant** Dr J Lennon **For the Respondent**
Date of Hearing:	24 May 2010
Date of Tribunal's Decision:	28 May 2010
Members of the Tribunal:	Mrs J S L Goulden JP Mrs S F Redmond BSc (Econ) MRICS

Background

1. The Tribunal was dealing with the following applications:-

   (a) An application under S.27A of the Landlord and Tenant Act 1985, as amended ("the Act") 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

   (b) An application for limitation of landlord's costs of proceeds before the Tribunal under S.20C of the Act was added at the Pre-Trial Review held on 17 March 2010.

   (c) An application in respect of an administration charge under Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

2. The Applicant landlord is Ground Rents (Regisport) Ltd and the Respondent lessee is Dr J Lennon.

3. The Applicant had issued a claim in the Lambeth County Court (Claim Number 9SS00904) for payment by the Respondent of £726.04 in respect of unpaid service charges, interest, court fees and costs.

4. On hearing the legal representative for the Applicant and the Respondent in person, an Order dated 5 January 2010 was made by District Judge Waken transferring the case to the Leasehold Valuation Tribunal ("LVT") under paragraph 3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. It is noted that the Order states that the transfer was *"for determination of the reasonableness of sum charged for insurance"* but the Tribunal has jurisdiction in respect of the service charge issues and has therefore included all such matters within the claim, namely insurance and administration charges.

5. It should be noted that the Tribunal's jurisdiction flows from the County Court and such jurisdiction is limited to the amount claimed in respect of the service charge dispute only. Other issues, such as interest and County Court costs remain within the jurisdiction of the County Court.

6. The Respondent's flat at No.40 Bavent Road, London SE5 9RY ("the property") is stated to be a first floor flat in an inner terraced two storey converted house containing two flats, each with a separate entrance.

7. The Respondent's underlease of the property was provided. This underlease was dated 3 May 2002 and was made between Bankway Properties Ltd (1) and the Respondent (2) and was for a term of 99 years from 25 December 1999 at an initial rent of £300 per annum doubling every 25 years and subject to the terms and conditions therein contained.

8. In view of the issues raised, an inspection of the property was not considered to be of assistance to the Tribunal.

Hearing

9. The hearing took place on 24 May 2010.

10. The Applicant landlord, Ground Rents (Regisport) Ltd, was represented by Mr R Trivett, Head of Property Management and Miss S Hurst, Insurance Analyst both of Pier Management Ltd., the Applicant's managing agents. The Respondent, Dr J Lennon, appeared in person and was unrepresented.

11. Mr Trivett said that of the sum claimed in the County Court, the amount due in respect of the service charges alone amounted to £576.51 (being £443.26 in respect of insurance and £133.25 in respect of administration charges). The service charge year in dispute before the County Court was 25 December 2008 to 24 December 2009.

12. As to the application under S.20C of the Act (limitation of landlord's costs of proceedings before the Tribunal), the Tribunal was advised that the Applicant did not seek to place such costs on the service charge account and accordingly no determination was required of the Tribunal in this respect.

Application for dismissal

13. At the commencement of the hearing, the Respondent, Dr Lennon, made an application for dismissal of the Applicant's case on the grounds that in his view the Tribunal's Directions had not been complied with in that the applicant had failed to supply him with the information he had sought.

14. The Applicant was of the view that there had been compliance with Directions insofar as had been possible. The Respondent had been invited to inspect documentation at their offices but the invitation had been refused.

15. The reasons put forward by the Respondent in respect of his application for dismissal were weak and without merit. The actions of the Applicant are not considered to be either frivolous, vexatious or an abuse of process. The Respondent has not demonstrated any prejudice to his case. The Tribunal must be fair to both sides. To dismiss an application is a discretionary power, and this Tribunal considers that to dismiss on the grounds as set out by the Respondent would be wholly disproportionate.

16. The application for dismissal was refused and the parties were so advised at the hearing.

17. After hearing the Respondent's application to dismiss and during the course of the hearing, the Tribunal afforded the parties several adjournments throughout the hearing in order to see whether the issues between the parties could be narrowed. This proved unsuccessful.

18. The outstanding issues were as follows:-

- **Insurance**
- **Administration charges**

Evidence

19. The burden is on the Applicant to prove its case with such relevant evidence as is sufficient to persuade the Tribunal of the merits of its arguments. The Tribunal is not permitted to take into account the personal circumstances of the parties when making a decision.

20. The salient points of the evidence and the Tribunal's determination is given under each head but the Tribunal considers that it might be helpful to the parties if it sets out the basis on which its considerations are made.

21. The Tribunal has to decide not whether the cost of any particular service charge item is necessarily the cheapest available or the most reasonable, but whether the charge that was made was **"reasonably incurred"** by the landlord ie was the action taken in incurring the costs and also the amount of those costs both reasonable.

22. The difference in the words "reasonable" and "reasonably incurred" was set out in the Lands Tribunal case of **Forcelux Ltd -v- Sweetman and Parker (8 May 2001)** in which it was stated, inter alia,

"....there are, in my judgment, two distinctly separate matters I have to consider. Firstly the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence. This second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market. It has to be a question of degree...."

23. In this particular case there was a paucity of evidence on both sides which was unhelpful. In particular the Applicant's bundle was not paginated and its representatives had failed to bring their working file to the hearing. On the other hand it appeared to the Tribunal that the Respondent was lax in providing his own evidence, relying on internet search engines.

Insurance

24. The insurance premium for the service charge year 2008/2009 was £443.26.

25. The Applicant said that before the Applicant had acquired the freehold in 2005, the insurance premium was £264.88 per annum. In 2005/2006 it had risen to £484.81, in 2006/2007 it rose to £523.60 and in 2007/2008 it had risen to £541.19. Dr Lennon accepted that the Tribunal could only deal with the premium in respect of the year 2008/2009 (being the only year referred to in the County Court claim) but he complained that he had raised queries as to the increases and also as to the declared re-building value of £137,181 and the amount of commission paid to the landlord, but had not received satisfactory answers. The premium had increased to an unacceptable level and therefore had been unreasonably incurred.

26. In its Statement of Case the Applicant stated, inter alia:-

"The Applicant has placed insurance via their brokers Oxygen Insurance Brokers Limited (Oxygen) with Brit Insurance Limited (Brit), a broker and insurer of repute. The insurance premium is payable to the landlord, on demand, by way of further rent. The certificate and policy booklet is very comprehensive and there is nothing further we are able to comment on. We are not specialised in insurance and are not FSA registered, we rely on our broker who is FSA regulated to arrange insurance and negotiate terms. Insurance is placed by the freeholder on a portfolio basis, not by individual property. Premises are paid in 'bulk' by Regis to the broker (i.e. sums of all properties in any given renewal month are paid collectively, we therefore cannot provide a single receipt or invoice for each individual property, hence premiums are clearly specified on the policy certificates). Oxygen has a binding authority agreement with Brit Insurance; Regis does not pay Brit directly. We can confirm that the Landlord does not derive commission from this property in isolation. The Regis Group owns a large portfolio of over 18,000 units and it is the ability to 'bulk buy' that enables them to benefit from commissions on the portfolio as a whole. The insurance is index linked and therefore the premium will usually increase on renewal. There is no insurance valuation; the sum insured was originally based on information obtained from the previous freeholder's policy. The Applicant has not instructed a valuation as this would incur additional cost to the leaseholders, however we can arrange to invoice the Respondent and neighbouring leaseholder to enable us to conduct a valuation and instruct a surveyor."

27. The Tribunal queried whether the insurance was actually for the whole building (in respect of which the Applicant should pay one half in accordance with the terms of his lease) but Miss Hurst said that each of the two flats was insured separately. She said that the freeholder had purchased in 2005 and in 2008 the then managing agents had gone into liquidation. The portfolio of insured units, which amounted to some 15,000 units, had been re-brokered and new insurance brokers had been chosen. She accepted that the properties had not been valued, and revaluation was hoped to be carried out by the end of the year. The cost of re-valuation would be placed on the service charge account. In her opinion, the new brokers had taken the information from the previous brokers.

28. The Tribunal considered that there was a lack of cogent evidence on both sides.

29. The Tribunal has considered the lease terms, the contract between the parties.

30. The definition of *"the building"* in the lease is *"any building or other structure that is now on the property or that is erected on the property in the term".*

31. The definition of *"the demised premises"* in the lease is *"the upper maisonette".*

32. Under Clause 3.1 of the lease, the tenant covenants to pay *"during the whole of the term by way of further rent a yearly sum equal to one half of the amount from time to time paid by the Landlord as premium for insurance of the building such further rent to be paid to the Landlord on demand".*

33. The landlord's covenant in respect of insurance appears in the lease at Clause 10.4 as follows:-

> ***"To insure the Building (but not the contents thereof) against loss or damage by fire tempest storm and other usual risks in the full rebuilding and reinstatement value thereof and to cause all money received by virtue of such insurance to be laid out forthwith in rebuilding and reinstating. The Demised Premises and to make up any deficiency out of their own money (provided that the landlord' obligation under this covenant shall cease if the insurance shall be rendered void by reason of any act or default of the Tenant) and whenever reasonably required produce to the Tenant or his mortgagees the policy or policies of such insurance and the receipt for the last premium for the same and in case the Demised premises or any part thereof shall at any time be destroyed or damaged by fire or tempest or other insured risk so as to be unfit for substantial occupation or use and the policy or policies effected by the Landlord shall not have been invalidated or payment of the policy monies refused in consequence or some act or default of the Tenant the rents hereby reserved or a just and fair proportion thereof according to the nature and extent of the actual damage done and as certified by the Landlord' Surveyor shall be suspended as from the happening of the said risk until the premises shall be again rendered fit for occupation and use but the Lease shall in no way be invalidated and in the event of The Demised Premises being so damaged or destroyed by fire to reinstate the same at their own expense and with all convenient speed."***

34. The Tribunal then considered the wording in the insurance certificate for the relevant period and it was noted that under the heading of additional risks it states *"the interest of the freeholder and head lessor of the buildings the owner or lessees of each flat and the mortgagees of any of them are noted under Section 1 of the policy the nature and extent of such interest to be disclosed in the event of a loss".* This wording does not immediately suggest (as stated by the Applicant) that Flat 40 alone is insured but does indeed indicate that it is the building itself which is insured. It is also noted that the same certificate refers to communal areas.

35. The Tribunal has also considered the guidance as set out in the RICS Service Charge Management Code which states at paragraph 15.3:-

> ***"When so instructed, you should arrange the various insurances n accordance with the landlord's instructions in compliance with the lease. You should regularly review the extent of cover and the level of premiums."***

36. Paragraph 15.16 of the same Code deals with valuations for insurance purposes as follows:-

> ***"You should consider this on a regular basis and instruct for such valuations to be carried out when necessary, usually conveniently before the annual renewal. Valuations must be carried out by qualified valuers with appropriate skill and experience in the types of properties being assessed, with their fees normally being regarded as a service charge item where allowed".***

37. Having taken account of the wording in the lease and insurance certificate, the guidance as set out in the RICS Code and the fact that the Applicant's representatives had never inspected the property, have not reviewed the insurance premiums since they took over management in 2005 and were unable to assist the Tribunal either as to the insurance claims history or the amount of commission paid to the landlord, the Tribunal has not been persuaded that the Applicant has properly tested the market. Changing insurers is not evidence of testing the market. The managing agents have not been proactive and have merely suggested to the Respondent that he produce a like for like quotation which they would then review. This is unsatisfactory. In respect of commission, the lack of information on behalf of the Applicant is unsatisfactory, but Ms Hurst did say that during the year in issue, the managing agents did deal with claims. There is a distinction between commissions which are, in effect, payments to the landlord for providing a service on behalf of the insurance company and simple profit making. Since, on Ms Hurst's evidence, some service was provided to the landlord, it would not be unreasonable for some commission to be paid (although the Tribunal can make no determination on quantum)

38. The Tribunal rejects the Respondent's contention that he has already paid £264.88 off the insurance for the service charge year 2008/2009. It is acknowledged that he did pay that sum during that year, but the Tribunal accepts the Applicant's argument that this sum was used to offset previous arrears.

39. The Tribunal also is of the view that the Respondent has not produced a like for like quotation as he was Directed to do. Merely checking on the internet for general quotes is insufficient. Dr Lennon also referred to other Tribunal decisions where the Applicant had been criticised, but as was explained to him at the hearing, previous Tribunal decisions are not binding and each case must be decided on its merits.

40. Since neither side produced firm evidence under this head, the Tribunal has used a broad brush approach and in respect of insurance for the year 2008/2009 determines that the sum of £350 is relevant and reasonably incurred and properly chargeable to the service charge account.

41. In making this determination, the Respondent should be aware that, as advised at the hearing, the Applicant may carry out a valuation (which is due to be carried out this year) the cost of which will appear on the service charge account, the premium may well increase due to index linking and possible claims and the Tribunal's present determination is based on the poor evidence presented. It is quite possible that the insurance may increase. The Respondent was advised that the Applicant is under no legal obligation to obtain the cheapest insurance.

Administration fees

42. The fees in issue totalled £133.25 being £23.50 arrears remainder charge (18 September 2008); £23.50 final notice fee (13 January 2009); £57.50 referral to mortgage provider (12 February 2009) and £28.75 mortgage provider remainder (16 March 2009). The Respondent said that he did not feel that these sums should be paid since the Applicant had not responded to his queries.

43. Clause 8.13.2 of the lease states:-

> ***"to pay a reasonable fee of not less than FORTY POUNDS (£40.00) or such additional sum as may be reasonable in the circumstances to the landlord or its Managing Agents as the case may be in respect of each occasion when it shall be necessary for the landlord to communicate to the Tenant any breach of covenant incurred by the Tenant whether in respect of non payment of rent or the failure of the Tenant to perform and observe any of its covenants and obligations herein contained".***

44. Administration charges are therefore payable under the lease. The Respondent was in arrears. The letters were legitimate and the Tribunal was provided with copies of the relevant letters to the Respondent and also the invoices. The amounts charged are not excessive and are less than provided for in the lease. It is noted that the applicant reserves the right to increase such fees in future *in line with the higher sums prescribed by the lease".* This will of course be subject to the test of reasonableness.

45. The Tribunal determines that in respect of the administration fees, the total sum of £133.25 is relevant and reasonably incurred and properly chargeable to the service charge account.

Service charges determined by the Tribunal as payable are binding on both parties and may be enforced through the County Courts if they remain unpaid.

Chairman: .....

Date: ...28 May 2010.....