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REF LON 00BK/LSC/2009/0341

IN THE LEASEHOLD VALUATION TRIBUNAL

IN THE-MATTER OF THE LANDLORD AND TENANT ACT 1985
SECTION 27A

AND IN THE MATTER OF 26 RIVERTON CLOSE LONDON W9
3DS

Applicant Maureen Pepper

Represented by Mr John May solicitor of John
May Law

Respondent City of Westminster

Represented by Mr C Kokelaar of counsel
instructed by city of
Westminster Solicitor

The Tribunal
Mr P Leighton LLB (Hons)
Mr F Coffey FRICS
Mrs J Clark JP

Hearing Date 7th and 8th October 2010

Date of Oral Decision 8th October 2010

Date of Written Decision 3rd November 2010

DECISION

- 1 This application which came before the Tribunal on 7TH October 2010 following the directions which had been given as an abortive hearing on 9 August 2010 after which the directions were given on 12 August and specified that the application having come perilously close to having been dismissed as an abuse of the process as she had failed to comply with the directions given by the Tribunal (Mr Dutton) in May 2010 . The directions stressed that it was vitally important that the specific directions were complied with by the Applicant and her solicitor and that if she did not do so that the proceedings would be dismissed .
- 2 One of the failures of compliance related to the completion of a schedule setting out particulars of the items of service charge in dispute with appropriate amounts to be deducted.. The Applicant was therefore directed to comply strictly with the directions which the Tribunal then proceeded to give. Para graph14 of the directions required in particular the completion of the schedule of items remaining in dispute.
- 3 It became clear at that hearing that the Applicant's case had been considerably expanded to allege that all the accounts for the years from 2003 4 to date were invalid based on material errors, some of which were admitted, and some of which were disputed in those accounts. Mr May for the Applicant contended that as a result of those errors in the accounts the service charges could not be properly demanded and were therefore not payable The result of this contention would involve the consideration of a number of items going back to the year 2003 in contrast to the application which had only specified challenges to the 2008 and 2009 accounts.
- 4 When the matter returned before the tribunal it was clear that although there had been some compliance with the directions in so far that there was a detailed witness statement for the Applicant and the documents

were in proper order there was a failure to comply with paragraph 14 of the decision and the direction which required the completion of the schedule.

- 5 It was clear from the skeleton arguments which were at used by each party that the issue concerning the validity of the accounts had now become the main issue in the case and Mr Kokelaar indicated at the hearing that whilst he was able to deal with that particular submission, which was either a matter of law or of mixed law and construction he was still unable to deal with the remaining items in the dispute, because the Applicant had failed to complete the schedule as directed and he was still unclear as to the Applicant's case on those items.
- 6 Mr May in reply stated that there had been compliance in so far as the items in dispute could be elicited from the lengthy statement supplied by the Applicant and that the proceedings could continue as they were errors admitted on the accounts than it was agreed that the Tribunal would deal with the main submission regarding the validity of the accounts and then decide what action should be taken in relation to the specific items in dispute
- 7 The respondent had admitted eight errors in the accounts spanning the period 2003 to 2009 those errors amounted to £157.36 to which was added a further sum of £26.31 in respect of an issue relating to the children's playground covered by a letter from Mr Gibson an officer of the Respondent in 2005. In addition the respondent con ceded a further sum of £120 being 50% of the cost of the preparation of the accounts. The total amount therefore which fell to be deducted from the Applicant's account came to approximately £304
- 8 In addition to the agreed items there were further 13 items disputed amounting to approximately £373 making a total of 21 items in the total sum of £677 which would have amounted to approximately 5% of the total service charge account for the period so the Tribunal was informed.

The figure of £120 which was conceded, however, was not an error in the accounts as such but a figure which the Respondent itself deducted from the cost of preparation arising from the admitted errors in the accounts

9 Mr May in his submission referred to paragraph 14 of his skeleton argument which stated

: “the tribunal must be guided by the overriding principle of reasonableness. It is not unreasonable for a landlord to make mistakes it is less reasonable for a landlord's accountant to accept the mistakes. It is unreasonable to persist with mistakes when the error has been pointed out and meeting. It is wholly unreasonable to repeatedly make the same mistakes after they had been pointed out and the landlord has admitted them and promised to avoid them in future.”

10 .Mr Kokelaar in reply stated that although eloquent those words did not express the law correctly which was concerned with the procedures necessary to recover service charges in accordance with the terms of the lease. The test, he submitted, was whether the sums claimed were recoverable in accordance with the terms of the lease and with any required certificate of the accounts.

11 Mr May's submission went further and was to the effect that whilst an initial set of accounts may not be initially invalid if they contained errors, that if the errors were repeated in subsequent sets of accounts that would retrospectively render the earlier account invalid as well as the later accounts. He therefore submitted that all the accounts from 2003/f4 onward were invalid and that no sums could be recovered from the Applicant during that period until the accounts had been corrected and the demand resubmitted in accordance with corrected accounts

12 The Tribunal found this to be a startling proposition since if it were correct it would mean that the landlord would be unable to collect necessary service charges to maintain and insure large blocks of property, pay the wages of caretakers and other staff and generally carry out repairs to the

building. The effect would be that large sums of money would need to be refunded until all the proper accounts were resubmitted

13 Following Mr Kokelaar's reply Mr May did not strongly press the argument on retrospectivity although he did not abandon the point but submitted to the Tribunal that in any event once the error had been discovered and pointed out all subsequent accounts should then be declared invalid until corrected and resubmitted

14 Mr Kokelaar stated that this too was an incorrect view of the law as it would create uncertainty and would be subject to the views of different tribunals as to which accounts would become invalid and when

15 The Tribunal considered that Mr Kokelaar's submission was correct and that courts or tribunals might differ as to which accounts were valid and which were invalid which would give rise to considerable uncertainty. The Tribunal also considered that this submission was contrary to the decision of His Honour Judge Gilbert QC. In the case of **Barrinton –v- Sloane Properties (2007) 3 EGLR 91** in which he stated at paragraph 44 of the decision

“It follows that I do not accept put before me by both counsel as to validity. In my judgement either a certified account of service charges is a nullity or it is a valid not A notice that would be of no effect would be one that was not drafted to refer to a year or was not certified as required or or set out no amount said to be due or or was otherwise defective on its face”

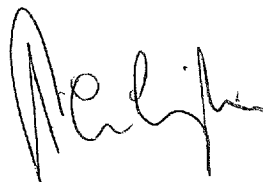
16 He then goes on to say once they are held to be valid then the LVT or the Upper Tribunal can determine whether they are payable under section 27A of the 1985 Act .the Tribunal does not understand the learned judge to state that repeated errors in accounts would render them a nullity and in spite of Mr May's submissions that the errors when repeated were reckless, the tribunal does not accept that the errors relied upon in this case could render these accounts invalid.

- 17 Where mistakes occur in the account or items are wrongly claimed the lessee's remedy is to apply to the Tribunal to exercise its jurisdiction under Section 27A of the 1985 Act to decide whether or not the disputed items are payable
- 18 In considering the submissions as to the validity of these accounts the Tribunal was referred to the terms of the lease which governed recovery of the service charges. These are set out in clause 3 (C) of the lease which provides as follows:- After dealing with the initial reference period it defines the interim payment as "such sum as may be notified to the lessee by the lessor from time to time as representing the due proportion of the reasonably estimated amount required to cover the costs and expenses incurred ought to be incurred by the lessor in carrying out the requirements or providing any additional services to the reserved property or to the estate as the lessor may in its absolute discretion from time to time during the remainder of the term hereby granted consider necessary and which are for the benefit of the demised premises or the lessee and in carrying out the obligations or functions contained in the schedule referred to in this clause and in clauses 4 and 6 thereof and in performing the covenants set out in the ninth schedule hereto and..... by such estimated amount to be payable half yearly in advance on the date of payment of rent herein contained and in the event of default of the lessee such management charges shall be forthwith recoverable by action as if rent in arrear"
- 19 Then clause 3(D) provides that where the sums paid to the lessor on demand the amount by which the estimated sum paid by the lessee to the lessor under sub clause C of this clause in respect of the management charges is less than the due proportion of the total monies properly and reasonably expended or retained by the lessor such due proportion being a proportion of the total sum expended or retained by the lessor as aforesaid in respect of or otherwise of the benefit or use of the property.

- 20 Clause 3 (E) provides that if the amount by which the estimated management charges paid by the lessee to the lessor under soft clauses (A)(B) or (C) of this clause is more than the due proportion of the total monies properly and reasonably expended or retained by the lessor as above the excess as paid shall be carried forward by the lessor to be credited to the account of the lessee.
- 21 It should be noted that the clauses governing recovery of the service charge made no reference whatsoever to being subject to the presentation of accounts certified by an accountant. It is also clear in the view of the Tribunal that a mere error in any one of the accounts would not preclude the landlord from recovering the service charges in accordance with the provisions of clause 3 of the lease.
- 22 Whilst the Tribunal does not go so far as to suggest that where there is a multiplicity of errors in one year's accounts that those accounts cannot ever be invalidated, the Tribunal is satisfied on the facts of this case that even put at its highest the 21 alleged errors over a period of five years amounting to a total of just over £550 (i.e. the £373 plus £184 of the admitted errors in the accounts) would not amount to a procedural defect which would render the accounts invalid, and thereby preclude recovery of the numerous valid and correct items in the accounts.
- 23 Mr May referred to the decision of the Court of Appeal in Leonora Investments Ltd-v- Mott Macdonald EWCA 2008 Civ 867 in which Lord Justice Tuckey in giving the leading judgment of the court set out the clause which triggered recovery under the terms of a commercial lease and stated in paragraphs 22 and 23 that the steps taken by the landlord were insufficient to trigger recovery.
- 24 Mr May referred to the fact that the actual costs were matters of which only the landlord had knowledge and that where there were repeated errors the Tribunal was entitled to infer that the correct procedure had not been adopted, that there was not a compliance with the lease and therefore not recoverable.

- 25 It is clear that since 2007 it is necessary to serve a notice giving a summary of the tenant's rights and obligations and it is also clear that if this were not done service charges would not be recoverable until such notice is given. The Tribunal concludes that this is a procedural requirement but on the facts of this case the relevant notices were given.
- 26 In circumstance where an error occurs in the accounts the tenant is not without a remedy since the 1985 Act gives the Tribunal wide powers under Section 27A to correct , amend or disallow service charges which have been wrongly claimed or are otherwise unreasonable. That however does not invalidate the account itself
- 27 The effect of invalidating the whole account in these circumstances could be catastrophic for a landlord of a large block of flats or an estate in the public or private sector since he would be unable to collect the necessary service charges to properly administer and maintain the building and the services necessary for the benefit of all the leaseholders.
- 28 The Tribunal concludes that the Mr May's submission is neither legally sustainable nor does it conform with commercial reality. The Tribunal rejects the submission that the accounts can be set aside on the grounds of error and determines that the accounts are valid. The errors which have been admitted have already been credited to the tenant's account and if any further errors or breaches are established there is power to refund further amounts.
- 29 That then left the remaining 13 breaches relied upon by the Applicant in her statement of case and the Tribunal indicated that it would consider submissions from the parties as to whether in the light of the further failure to comply with the directions as to whether those allegations and whether the remainder of the claim should be adjourned , determined or dismissed.
- 30 Following further discussions the parties withdrew to consider a settlement of the remaining issues and informed the Tribunal that the remainder of the application would be withdrawn on terms agreed between the parties and which are contained in a schedule signed by both advocates

Chairman Peter Leighton
Date October 2010

A handwritten signature in black ink, appearing to read 'Peter Leighton', written in a cursive style.