5135

MAN/00BR/LSC/2009/0127

LEASEHOLD VALUATION TRIBUNAL
OF THE
NORTHERN RENT ASSESSMENT PANEL

REASONED DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985
SECTION 27A (1)

Property:	34, Merchant's Quay, Salford, Lancashire M50 3XR
Applicant:	Urban Waterside Management Company Limited
Respondent:	Mr.W.R.Jones
Tribunal members:	Mrs.C.Wood (Chairman) Mr.J.Faulkner Mr.L.Bottomley
Date of decision:	21 June 2010

DECISION

The Tribunal determines as follows:

1. That there are no arrears of service charge for the periods from 1 July 2005 to 31 December 2008 owing by the Respondent at the date of the decision.

2. That no service charge demand has been made in respect of the period 1 January – 30 June 2007 and unless and until the Applicant makes service of such demand in accordance with section 21B of the Landlord & Tenant Act 1985 ("the 1985 Act") and the Service Charge (Summary of Rights & Obligations, and Transitional Provision) (England) Regulations 2007 ("the Regulations"), the Respondent will be entitled to withhold payment in respect thereof.

3. That the legal cost of £82.25 incurred by the Applicant's predecessor, Wood Management, is determined not to be reasonable or, as having been reasonably incurred and is not payable by the Respondent.

4. That the application by the Respondent under section 20C of the 1985 Act should be granted on the basis that it was not just and equitable in the circumstances to permit the recovery by the Applicant of any cost incurred in connection with the proceeding before the Tribunal.

REASONS FOR DECISION

Background

1. The Applicant, Urban Waterside Management Co. Limited acting through its agents, P.R.Gibbs & Co, issued proceedings against the Respondent for arrears of service charge and ground rent in respect of the Property. The Respondent is the leaseholder of the Property under a lease dated 3 November 1989 made between Urban Waterside Limited (1) and the Respondent (2) ("the Lease").

2. The matter was referred to the Tribunal by the Salford County Court for a determination of the liability to pay service charges in respect of the Property. The Tribunal has no power to make a determination in respect of ground rent.

3. Directions were issued to the parties dated 21 January 2010.

4. The Applicant's Statement of Case comprising a copy of the Lease, a statement of account dated 12 January 2010 and a witness statement of Clare Pyatt was received by the Tribunal on 14 January 2010.

5. The Respondent's Statement of Case dated 1 March 2010 ("the Respondent's Statement") comprised the defence in the County Court proceedings and additional documents numbered 5 – 53 in the Bundle which included all exchanges of correspondence following the submission of their respective Statements of Case.

6. A hearing was arranged for Monday 19 April 2010 at 11.30am at 1st Floor, 5, New York Street, Manchester M1 4JB. The Tribunal inspected the common parts at the Property at 10.00am on 19 April 2010.

Inspection

7. The Tribunal made an external inspection of common areas of the Property on the morning of 19 April 2010. The Property is one of 8 apartments in a modern purpose-built 4 storey block. The block is of steel frame construction with brick external walls and a tile roof. Entry to the communal hall and staircase is accessed by a door entry system; there is a rear entrance which overlooks the Quay. There is a lift which was working at the time of inspection. The windows in the common parts to the front of the block are double-glazed but the windows on the staircase to

the rear of the block are softwood frames in some need of repainting/replacing. The hallways and staircase are carpeted and were clean, tidy and well-maintained.

The Lease

8. Under paragraph 27 of the Fifth Schedule to the Lease, the Respondent agreed to pay "...a due proportion" of "...the Maintenance Contribution and Balancing Charge...by way of additional rent in respect of each Accounting Period...by equal half yearly instalments payable in advance on the 1st January and 1st July in every year..."

9. "Maintenance Contribution" is defined in clause 1.6 of the Lease as "...such proportion...of the annual maintenance provision for the Estate as provided in the Seventh Schedule.

10. In respect of a flat, "Proportion" is defined in clause 1.7 of the Lease as "...firstly one proportion in respect of the matters referred to in Part I of the Sixth Schedule and in Clauses 2 (b) (c) (d) and (e) of Part II of the Seventh Schedule and secondly a separate proportion in respect of the matters referred to in Part II of the Sixth Schedule...". Clause 2(b) provides for inclusion within the Maintenance Contribution of fees and disbursements of any solicitor in relation to its collection.

11. "The Accounting Period" is defined as "...the period beginning the 1st day of January in any year and ending 31st day of December in the same year..."

The disputed charges

12. As set out in the letter dated 13 January 2010 from the Applicant's solicitors to the Tribunal, the Applicant claims that the sum of £1031.18 (including interest) is owing by the Respondent in respect of the period from 1 July 2008 to 1 January 2009, which amount included the annual ground rent of £30 per annum (in respect of which the Tribunal has no jurisdiction). The Applicant claimed that interest continues to accrue at the rate of 0.22p per day.

13. The Applicant also claims the sum of £80 in respect of costs.

14. The Respondent claims that the only amount outstanding is in respect of service charge for the period 1 January 2007 to 30 June 2007, and that the reason for non-payment was that no invoice for this period had been received by him.

15. The Respondent also disputed the following charges/payments:
(i) a non-presented cheque for £175;
(ii) legal costs of £82.25; and
(iii) discrepancies of £32.03 (as detailed on page 2 of the Respondent's Statement).

The Law

16. Section 18 of the the 1985 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, improvements 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 or later period.

17. Section 19 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 of works only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

18. Section 27A provides 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 date at or by which it is payable, and
(d) the manner in which it is payable.
(2) Subsection (1) applies whether or not any payment has been made.
(3) .....
(4) No application under subsection (1)...may be made in respect of a matter which –
(a) has been agreed by the tenant.....

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

19. In *Veena SA v Cheong* [2003] 1 EGLR 175, Mr. Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word "reasonableness" should be read in its general sense and given a broad common sense meaning [letter K].

20. The Tribunal must apply a three stage test to the application under section 27A:

(1) Are the service charges recoverable under the terms of the Lease? This depends on common principles of construction and interpretation of the lease.

(2) Are the service charges reasonably incurred and/or services of a reasonable standard under section 19 of the 1985 Act?

(3) Are there other statutory limitations on recoverability, for example consultation requirements of the 1985 Act as amended?

The Hearing

21. The Applicant was represented at the hearing by Mr.Gibbs of the agents, P.R.Gibbs & Co.. The Respondent attended in person, together with a Mr. Clarke. A Mr. Cain attended the hearing as an observer.

22. The Applicant explained that they had taken over the management of the Estate, including the Property, in 2008. At this date, the opening balance for each lessee was entered into their system. The information received about the Respondent showed an amount outstanding in respect of service charge and ground rent which was regarded as unacceptably high and in respect of which they therefore sought recovery through the courts.

23. The Applicant confirmed that:
(i) no judgment was made by the County Court in respect of the arrears;
(ii) the non-presented cheque had been received;
(iii) the discrepancies on the Wood Statement were agreed.

24. In response to a question from the Tribunal's Chair, the Applicant stated that there was some difficulty in ascertaining the period to which the arrears relate in part because payments received were applied against the oldest debt.

25. The Respondent stated that:
(i) in respect of the non-presented cheque, this had been cleared well before the issue of proceedings by the Applicant;

(ii) in 2005/06, the then Managing Agents stopped sending invoices for the service charge etc. The Respondent explained that, in order for him to be able to claim pension credit – which he needed in order to make payment – he had to be able to produce an invoice. He said that an invoice for the period 1 January – 30 June 2007 had never been produced;
(iii) in respect of the sum of £82.25 charged for legal costs, there had been no correspondence, no invoice and no supporting documentation although it had been suggested that it relates to late payment of invoices/issue of court proceedings.

26. The Tribunal Chair stated that a consideration of the documentation had raised issues relating to the existence and/or amount of any arrears which had not been resolved by the initial submissions from the parties. In particular, the Chair made it clear that there was some difficulty in reconciling the Wood Statement with the information provided in the handwritten schedule of payments (pages 31 – 32 of the Respondent's Statement) (" the Payments Schedule"), not least because in respect of the periods 1 July – 31 December 2005 and 1 January – 30 June 2006 the charges and payments were recorded as monthly demands/receipts although neither invoiced or paid as such.

27. As a result of these difficulties and the complexity of the documentation, the Chair suggested to the parties that there be a short adjournment with the intention that, on resumption, the parties seek to clarify the issues raised by the Tribunal. The parties did confirm that there were no arrears before the period in dispute ie as at 30 June 2008, and that all payments had been made in respect of service charge demands issued in respect of periods commencing after 1 July 2009.

Resumption of Hearing

28. On resumption, neither of the parties adduced any further information and/or provided any further clarification to the Tribunal which, having regard to the Wood Statement and the Payments Schedule determined as follows:
(i) that in respect of the period 1 July – 31 December 2005, the Respondent had made payment in full of the amount of £700 invoiced in respect of half-yearly service charge;
(ii) that, in respect of the period 1 January – 30 June 2006, the Respondent had made payment in full of the amount of £700 invoiced in respect of half-yearly service charge.
It was noted by the Tribunal that, if the payment of £1000 was made in February 2006, as claimed by the Respondent, then as at 5 July 2006, there were no arrears on the Respondent's account. If the payment was made on 25 July 2006, as indicated on the Wood Statement, then there were arrears of £700 as at 5 July 2006. This was relevant in determining the reasonableness, or otherwise, of the charge for legal costs which appears on the Wood Statement as at 7 July 2006.

(iii) that, in respect of the period 1 July – 31 December 2006, the Respondent had made payment in full of the amount of £710 invoiced in respect of half-yearly service charge (although this appears in the statement incorrectly as £720);
(iv) that no invoice was issued for the half-yearly service charge in respect of the period 1 January 2007 – 30 June 2007. (This charge appeared incorrectly in the Wood Statement as £720 but was confirmed as £584.29 in the letter dated 28 August 2007 from Dunlop Haywards to the Respondent (which appears as page 27 in the Respondent's Statement)).
The Tribunal suggested that this had led to there being no arrears or possibly a credit due to the Respondent although this was subsequently challenged by letter dated 20 April 2010 from the Applicant's agents which has been copied to the Respondent;
(v) that, in respect of the periods 1 July – 31 December 2007, and 1 January – 30 June 2008, the Respondent had made payment in full of the respective amounts of £727.15 invoiced in respect of the half-yearly service charges for these periods.

29. The Tribunal further determined that:
(i) the legal costs of £82.25 were unreasonable and/or unreasonably incurred. The Respondent claimed that the payment of £1000, which appears on the Wood Statement as received in July 2006, was, in fact, made in February 2006. Further, he claimed that the payment of £600 was made on 18 March 2006 (although it does not appear on the Wood Statement until 5 April 2006). As at February 2006, the service charges invoiced for the periods 1 July – 31 December 2005, and 1 January – 30 June 2006 were unpaid. On the assumption that the payments totalling £1600 were made in February and March 2006, the arrears at this date would have been paid in full leaving a credit balance on the account of £200. The Tribunal therefore determined that to incur legal costs on or around July 2006 in relation to the collection of arrears was unreasonable and the costs unreasonably incurred;
(ii) having regard to all the circumstances that it would not be just and equitable for the Applicant to recover any cost incurred in connection with the proceedings before the Tribunal;
(iii) there was no evidence that the Applicant and/or its predecessors had complied with the requirements of section 21B of the 1985 Act and/or the Regulations in respect of service charge demands issued after 1 October 2007. It was noted that the Respondent would be entitled to withhold payment of a service charge demanded until such compliance is made.

Further Submissions

30. By a letter dated 20 April 2010, the Applicant's agents questioned the determinations of the Tribunal at the hearing and, in particular, the conclusion reached that there was no amount owing by the Respondent. The Applicant claimed in this letter that amounts appearing on the Payments Schedule had been incorrectly included by the Tribunal in the calculation of receipts on the Wood Statement. The Applicant maintains that, if these payments are excluded, then the

arrears in respect of service charge would be £1529.44. The Applicant stated that " [I]t is a matter of agreement that before the start date in the Wood Management Statement that the balance due was zero and it is agreed that the P R Gibbs & Co Statement that follows directly on from the Wood Management Statement is correct...".

31. A copy of the letter dated 20 April 2010 was sent to the Respondent and his comments invited. In response the Respondent stated that he regarded the letter "as a diversion" and wished to await the Tribunal's written statement before raising points.

Tribunal's Conclusions

32. The Tribunal, having considered the submissions of the parties in their respective statements of case and responses thereto, the evidence adduced at the hearing, and the submissions made in the letter dated 20 April 2010 by the Applicant determine as follows:
1.(i) that the only amount unpaid in respect of service charge payable for the Property is for the period 1 January – 30 June 2007;
(ii) that this amount was unpaid because no invoice was received by the Respondent in respect thereof;
(iii) that the amount of £720 in respect thereof as stated in the Wood Statement is incorrect and any invoice/demand to be issued should be in the amount of £584.29 as stated by Dunlop Haywards in their letter dated 30 August 2007 (page 27 of the Respondent's Statement);
(iv) that compliance must be made with s21B of the Act and the Regulations in respect of all demands for service charge after 1 October 2007, including, without limitation, any demand issued after the date of this decision in respect of the period 1 January – 30 June 2007;
(v) that, in support of the above determinations, the Wood Statement, the Gibbs Statement and the Respondent's schedule of payments can be reconciled as follows:
(a) service charge of £700 for period 1 July – 31 December 2005: paid by 2 payments of £600 and £100. Only £578 is credited on the Wood Statement but receipt of the £600 is acknowledged by Dunlop Haywards in their letter dated 29 March 2006 . This accords with the receipt date of 5 April 2006 (presumably the delay relates to the clearance of the cheque) on the Wood Statement;
(b) service charge of £700 for period 1 January – 30 June 2006, and 1 July – 31 December 2006: paid in 3 payments of £1000, £200 and £210;
(c) service charge for period 1 January – 30 June 2007: no invoice issued and no payment made accordingly;
(d) service charge of £727.15 for period 1 July – 31 December 2007: paid in 3 payments of £250, £170.15 and £307;
(e) service charge of £727.15 for period 1 January – 30 June 2008 charged on the Wood Statement: paid by 2 payments of £137 and £100 which appear on the

Gibbs Statement together with credit for 2 payments received by Dunlop Hayward of £83.34 and £231.81 also on the Gibbs Statement; and
(f) service charge of £727.15 for period 1 July – 31 December 2008 charged on the Gibbs Statement: paid by 4 payments of £170, £185, £165 and £91.35, all of which appear on the Gibbs Statement;
2.(i) in their letter dated 20 April 2010, the Applicant stated that the balance due from the Respondent was £1529.44. This amount was calculated by deducting from the total amount invoiced on the Wood Statement of £4376.59 the aggregate payments of £2387.15 from the Respondent on the Wood Statement and the agreed discrepancies of £32;
(ii) the Tribunal determined that the following further deductions should be made from this amount:
(a) payments totalling £552.15 which appear on the Gibbs Statement but refer to the service charge for the period 1 January – 30 June 2008 which appear on the Wood Statement;
(b) £175 in respect of the unpresented cheque;
(c) £720 in respect of the non-invoiced service charge for the period 1 January – 30 June 2007;
(d) £82.29 being the aggregate of the amount invoiced in respect of legal costs and the agreed discrepancy of 0.4p.
The effect of these further deductions is to leave a nil balance.

Catherine Wood.

Catherine Wood
Chairman
Date 21 June 2010