The Lands Tribunal

Decisions

LANDS TRIBUNAL ACT 1949

LRX/52/1999

SERVICE CHARGE – Landlord and Tenant Act 1985 s19 – Block of 18 flats – management fees – interpretation of clause 1(d) of standard lease – jurisdiction of LVT – reasonableness - LVT exceeding jurisdiction – appeal allowed.

IN THE MATTER of an APPEAL FROM A DECISION of the LEASEHOLD VALUATION TRIBUNAL for the LONDON RENT ASSESSMENT PANEL

BY **LONGMINT LIMITED** **Appellant**

Re: 98/100 Crystal Palace Road, London SE26 6UP

Before: P R Francis FRICS

Sitting at: 48/49 Chancery Lane, London WC2A 1JR
on
16 May 2000

Andrew Bruce of counsel instructed by Juliet Bellis & Co, solicitors of London, for the appellant.

DECISION

1. This is an appeal by Longmint Limited ("the appellant") from a Decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") relating to an application made under s19 of the Landlord and Tenant Act 1985 ("the 1985 Act") by ten of the eighteen lessees at 98-100 Crystal Palace Park Road, London SE26 6UP ("the subject property"). Mr. Andrew Bruce of counsel appeared for the appellant.

Background

2. In their original application to the LVT the applicants had sought a determination in respect of various points of dispute relating to the service charge years ended 28/2/1998 and 28/2/1999. By the date of the hearing on 11 May 1999, these had been narrowed down to seven issues:

(a) The cost of the insurance premium.

(b) the fees and standard of service of the landlord's surveyor (appointed in connection with major works).

(c) The cost and standard of the video entry system.

(d) The cost and standard of cleaning of the common parts.

(e) The costs of repairs to car park walls and of works to one or two windows.

(f) The standard of service of the accountant.

(g) The costs and standard of management.

The LVT's decision on those matters was issued on 16 August 1999.

3. In granting leave to appeal on 20 January 2000, the President of this Tribunal determined that leave should be subject to the condition 'that the appeal be limited to the determination of the LVT in paragraphs 12.1 to 12.8 of its decision (grounds of appeal paragraphs 1 to 3)'. This relates to (g) - the costs and standards of management.

4. The subject property comprises a block of 18 flats. The leases are in common form and are for 125 years from 1 March 1998 subject to rising ground rents. In respect of the service charges and obligations, the relevant clauses are:

1(c) "The Service Obligations" mean the obligations undertaken by the Landlord to provide the services and other things specified in Clause 6.

1(d) "The Service Charge" means the cost of the Service Obligations together with an additional sum equivalent to 15 per cent of such cost as a management fee chargeable by the Landlord.

6. The Landlord covenants with the tenant that provided the tenant makes payment in Clause 5 (a) the Landlord will

(a) Pay all outgoings in respect of the Common Parts and of the Building and such sums as are charged for interest to the Landlord for discharging the Service Obligations prior to receipt of the Tenant's Contributions for the same.

(b) Keep the Common Parts and the Service Conduits in the Building clean and in repair and lit and maintained and rebuild or replace or maintain any parts that require to be rebuilt or replaced or so maintained

(c) (i) Keep the building comprehensively insured with a company of repute nominated by and through the agency and in the name of the Landlord for the full current reinstatement value against the usual risks for a building of this nature including professional fees and two years loss of rent and if required by the Tenant to produce evidence that this covenant is being performed and if requested by the Tenant to provide a copy of the Policy under which the property is insured together with a copy of the latest schedule

(ii) Effect such policies of insurance in respect of public liability and other insurance items in respect of the Building as may be prudent

(iii) Arrange for the building and replacement costs to be professionally assessed in an endeavour to ensure that cover is at least the re-instatement value

(d) At such intervals as the Landlord's surveyor shall consider reasonable to redecorate and paint the exterior surfaces of the window frames and of the window cills but not less often than once in every five years

> (e) (i) Procure when requested by the Tenant that the Service charge shall be duly audited by professional auditors who shall certify the actual expenditure during each accounting year and whose certificate shall be conclusive as to the expenditure
>
> (ii) Permit the tenant to inspect the vouchers and receipts for expenditure
>
> (f) Employ and/or retain managing agents surveyors solicitors and accountants and such staff as may be necessary for the reasonable supervision and performance of the Landlord's covenants hereunder and for the collection and recovery of the rents and Service Charge in respect of the building
>
> (g) Do such other acts and things as may be reasonably necessary or desirable for the maintenance of the building and for the comfort and convenience of the occupiers

5. In summary, in respect of this part of its decision, the LVT accepted Mr. Bruce's submissions that the tribunal had no jurisdiction to vary the terms of leases, but did not accept his argument that this was not a case where Clause 1(d) of the lease was unclear or required interpretation. The LVT considered that the words *"as a management fee"* in that clause should be construed so that the additional 15 per cent can only be charged on top of the costs of the Service Obligations (as defined by the lease) **where there is an element of management.** In considering it reasonable for the landlord to have appointed a surveyor to manage the major works contract (Mr. Nash (the surveyor) having not simply prepared specifications and obtained tenders, he also supervised the works and agreed the final accounts), the LVT's view was that his expertise and professional responsibility meant that the Landlord could and did delegate its management function, for the major works, to him.

6. As a result of charging management fees of 15 per cent on the cost of the major works and the surveyors own fees, the management fees had more than doubled in the year that the major works were carried out, whilst in the LVT's judgment, the management work of the Landlord had not significantly increased. It therefore determined that it was unreasonable for the Landlord to charge management fees on top, and the service charge should be reduced by that amount.

7. In its grounds of appeal, the appellant said that the LVT had no jurisdiction to determine the true construction of Clause 1(d) of the relevant leases, and that it had erred in construing that clause so as to delimit the landlord's entitlement to a management fee to 15 per cent of the cost only of those of the service obligations in which an element of actual management could be identified. It was wrong to determine that the management fees were unreasonably incurred or unreasonable in amount insofar as they included sums equating to 15 per cent of the cost of the major works and the surveyor's fees charged thereon. The LVT also failed to take into account evidence going to show the management duties undertaken by the landlord in connection with the major works, and in respect of the surveyor's role.

The appellant's case

8. **Mr. Bruce** said that although the LVT had accepted that it had no jurisdiction to vary the terms of the relevant leases, it had in effect done so by concluding that it could interpret Clause 1 (d) in such a way that (i) each service obligation cost should be considered separately; and (ii) the 15 per cent management fee could only be levied on a service obligation cost where management services had been provided that were referable to that particular service obligation.

9. He said that close scrutiny of Clause 1(d) would show the LVT's interpretation to be wrong and does not permit that analysis. The wording of the first part is clearly in the singular– *"the cost of the Service Obligations"*, and in his submission refers to the total cost and not individual component parts. Were it otherwise, the wording would need to refer to the costs of the Service Obligations. Likewise, reference to the 15 per cent management fee is to this single figure and states: *"15 per cent of such cost"* – again in the singular. The application of the management fee therefore, Mr. Bruce said, is upon the total cost of the provision of the service obligations.

10. Mr. Bruce said that a fixed percentage of total expenditure is hardly an unusual or extraordinary item

in a lease, and indeed reference to the service charge accounts for the subject property in the three preceding years to those in issue, show that that was how the management fees had always been calculated – and paid. He referred to the recommendations contained within the Royal Institution of Chartered Surveyors guidelines which, in regard to the calculation of management fees, offered two alternatives; either a flat rate per flat, or a percentage of the total cost of the provision of services. He said that at the LVT hearing, Miss Cummings, the Managing Director of Longmint Limited had given evidence that appropriate management fees generally, on a per flat basis, were in the region £75 to £300 and those at the subject property ought to be charged out at the upper mid-range rates. If that had been the case and, say, £200 per flat had been charged then the cost per flat in 1997/98 would have been more (it being calculated in accordance with the terms of the lease at £140.77 inc. VAT). The 1998/99 rate was higher, due to the major works, at £311.58 per flat.

11. The LVT decision in *Re: 53 Tintern Avenue, Wigan* (17 June 1998) had said:

> " A management fee of 15 per cent of costs, whilst not encumbent on the landlord for employing external agents, would be the correct charge for the services provided. The tribunal considered a percentage charge on total expenditure preferable to a fixed charge, and a fairer and more equitable manner of charging for the services provided".
>
> Mr. Bruce also referred to the LVT decision in *Re: 59b Canonbury Park North, London N1* (23 September 1998) where the tribunal had had no difficulty with an express term that permitted the landlord, if he did not employ a managing agent, to add 10 per cent to any of the costs, expenses and outgoings to which the lessee was required to contribute. It had also accepted that VAT is a cost like any other, and is plainly one of the expenses for maintaining the property. As such it was a fair conclusion that the 10 per cent management fee could also be charged on this expense. Whilst those decisions were not binding on this tribunal, Mr. Bruce said that they went to demonstrate the methods adopted by other LVTs across the country.

12. It was not being suggested that the management fee reflects proportionately the time spent on each component part of the service charge. After all, Mr. Bruce said, effective management may well, and often does, result in the reduction or even extinguishment of a particular service obligation cost. There were also many management duties, such as liaison with tenants and response to correspondence which cannot be seen as referable to a particular service obligation, and are all part and parcel of the service to which an overall fee based upon costs is applied. He gave an example, produced in evidence to the LVT, of where the appellant had expended management time on dealing with suggestions by one of the tenants (in respect of rubbish disposal) and had accordingly written to all the occupiers in that regard. This might seem a minor matter, but was an indication that the landlord was performing a management function the time for which could not be specifically compartmentalised, or separately costed in terms of fees.

13. Mr. Bruce also gave the example that by complying with an obligation to liaise with the tenants in respect of the major works, and by allowing them the opportunity to nominate contractors for the tender process, the lowest quote had been received from one of the tenant's nominations, and thus the landlord's percentage fee entitlement had reduced.

14. Charging a fee based upon overall service obligation costs does, by definition, result in higher management fees in years of major works, but the LVT's assertion in its decision that the management work of the landlord, in the year of the major works, had not significantly increased was, Mr. Bruce said, unsupported by the evidence. The landlord had not devolved its management responsibilities in connection with the major works to the surveyor, but, acting as its own managing agent, was instrumental in the overall process.

15. The landlord had organised preliminary specifications for the works, and, as stated above, had consulted with the tenants as to the works. It had arranged for the re-drawing of the tender documents to incorporate roof repairs following a report of leaks, and had liaised with the tenants following completion. It had offered (which it was not obliged to do) a payment plan to the tenants to defer the cost of the works, and had funded the works by settling the contractor's account in January 1999, notwithstanding monies had not by then been received from the tenants, and they only accepted the reasonableness of the account in May 1999.

16. Mr. Bruce said that the surveyor, who was appointed by the landlord, did not have direct contact with the tenants. His point of contact was with the contractor. It was the landlord's function to liaise with the both the surveyor and the tenants in order to see that this major project was completed efficiently– a clear division of responsibilities. Mr. Bruce submitted that there was no element of double charging in the landlord engaging a surveyor and also levying a management fee in connection with the works. He said there had been no argument at the LVT hearing regarding the standard or cost of the works.

17. He said the facts of the matter were that the LVT had no power to interpret Clause 1(b) of the lease in the way it had, and there was evidence from other LVT decisions to show that a management charge based upon the total cost of the Service Obligations, was a correct interpretation of the clause. He pointed out that, even though it was entitled, under the terms of the relevant leases to do so, the landlord did not employ an external managing agent, and then charge 15 per cent on top of its fees.

Decision

18. The sole matter for my determination relates to the LVT's interpretation of Clause 1(d) of the standard lease, and whether it exceeded its jurisdiction in that regard. In applying the interpretation that it did, the LVT effectively concluded that there were two aspects of the service charges upon which *no* management fee should be charged, the landlord having devolved its management duties entirely to the surveyor in respect of the major works. The question was not whether the charges for the works, or the surveyor's fee relating thereto, were reasonable – there being no issue between the parties in that regard, but purely whether the landlord was entitled to a fee in respect of those elements of the Service Obligations.

19. Under s19(2C)(a) of the 1985 Act, no application to the LVT may be made under subs (2A) in respect of a matter which has been agreed by the tenant. Under Clause 1(d) of the lease, the tenant has agreed to pay 15 per cent of the cost of the Service Obligations as a management fee. Therefore, the correct interpretation of Clause 1(d) must be that 15 per cent is payable on the totality of the amounts so determined and I can see nothing inherently unreasonable in this. I agree with Mr. Bruce that the wording of the clause is clear, and in my view it is unambiguous.

20. The interpretation by the LVTs in the two decisions referred to support this view and indeed, this was the basis upon which management fees had been calculated, and paid, in previous service charge years in respect of the subject property. The question should not be whether or not a particular constituent part of the service charge warrants the imposition of a management fee *at all*, as the LVT chose to arbitrarily determine in respect of the major works and surveyor's fees, but whether the charges are reasonable, and as I have said, there is no issue in this regard.

21. The evidence relating to the landlord's role in respect of the major works suggests to me that it was inequitable to determine that the management function had been devolved to the surveyor in respect thereof. In my experience the landlord (or appointed managing agent as the case may be) has a major role to play particularly in respect of liaison with the occupiers, and that is not the function of the surveyor appointed to deal with the works. Mr. Bruce pointed out that the cost of the major works, and the surveyor's fees relating thereto, had not been at issue and therefore, assuming I agree with his submissions on the interpretation of the relevant clause, the 15 per cent management charge must apply.

22. No question arises in this appeal on the reasonableness of the other charges. These were determined by the LVT.

23. In summary therefore, there is no doubt in my mind that the LVT was wrong in concluding that the management charge should not be applied to *any* of the costs of the major works, or the surveyors fees. The LVT does, of course, have to look at the component parts of the provision of the service obligations to be able to determine, on the evidence, whether or not a particular aspect was reasonable in terms of cost or standards, as set out in s19 2(A) of the 1985 Act. However, to conclude, as it did in this case, that no management fees at all should be charged on the cost of the major works or the surveyors fees amounts, in my judgment, to a misinterpretation of the provisions of Clause 1(d) of the lease. As I have said, the costs or standards of service in respect of these parts of the service charges were not in dispute, and therefore, the application of the management charge against these costs is appropriate. In any event I accept Mr. Bruce's argument that the landlord's management function was not devolved to the surveyor in respect of the major works, even though this finding is not crucial to the outcome of this appeal.

24. This appeal is therefore allowed.

25. I heard submissions as to costs from the appellant. If I found for it, the costs of this appeal should be awarded against the ten tenants who were the applicants to the LVT, rather than applied through the service charge, which would have the effect of penalising those occupiers who had not been a party to the application or the appeal. However, as the applicants elected not to respond to this appeal such an award cannot be made. I therefore make no order as to costs.

Dated:
(Signed) **P.R.Francis FRICS**

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