

IN THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
LEASEHOLD VALUATION TRIBUNAL  
LANDLORD AND TENANT ACT, SECTIONS 27A & 20C

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LON/OOAC/LBC/2008/0042 & LON/OOAC/LSC/2009/0031

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**Premises:** 2 Hermiston Court, Friern Park, London N12 9LW

**Applicant:** Mr. Robert Newton

**Represented by:** In person

**Respondent:** Hermiston Court Limited

**Represented by:** Mr. Ohringer, counsel

**Tribunal:** Ms. LM Tagliavini, LL.M, DiplLaw, BA Hons

Mr. I Thompson BSc FRICS

Ms. G Barrett

**Hearing Date:** 9<sup>th</sup> and 10<sup>th</sup> March 2009

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1. This is an application by Mr. Robert Newton, the long lessee of Flat 2, Hermiston Court, pursuant to section 27A of the Landlord and Tenant Act 1985, seeking the LVT's determination as to the reasonableness of service charges incurred for the service charge year 2008 and 2009. Specifically, the Tribunal was asked to consider:
  - (i) Whether the lease provisions allow the freehold company to hold a Reserve Fund?
  - (ii) Whether the 2008 service charge demands comply with the statutory requirements and are reasonable and payable.
  - (iii) Whether 2009 service charges are payable pending the determination of the issues arising out of the 2008 service charge demands?
  
2. Although Mr. Newton sought to add that he hoped that the Tribunal could vary the terms of the lease in order to 'bring it up to date', however, there was no formal application for variation of lease terms before the Tribunal and therefore, the LVT was not able to deal with this matter.
  
3. Originally, an application pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 (LON/OOAC/LBC/2008/0042) was scheduled to be heard consecutively with Mr. Newton's application. In summary, the earlier application alleged that Dr. Datta, the long leaseholder of Flat 3, Hermiston Court was in breach of her lease, leading to issues of noise nuisance arising. However this application was settled by agreement between the applicant freehold company, Hermiston Court Limited and Dr. Datta. Therefore, the Tribunal was not concerned with any substantive issues arising out that application, and it was formally withdrawn by the applicant. However, an issue central to the application before the Tribunal concerned the payability and reasonableness of the legal costs incurred as a result of the application brought against Dr. Datta.

### Background:

4. Mr. Newton is the assignee of long lessee of Flat 2, made on 5<sup>th</sup> December 1958 for a term of 999 years less three days with effect from 24<sup>th</sup> June 1958 between Hermiston court Limited and Dorothy Marion Carroll. Flat 3, is a first floor in a purpose built block of nine flat built circa 1958. The long leaseholders of Flat 1, a ground floor flat, are the Trustees for the French family, and the flat itself is occupied by Mr. French's mother and sister. Mr. French is the chairman of Hermiston Court Limited.

### The Applicant's Case:

5. At the hearing of the application the Tribunal was provided by the Applicant with both a paginated bundle of documents and a supplementary paginated bundle. Mr. Newton also spoke to the written submissions he had prepared for the purposes of the hearing. In this, he stated that the freehold company had through its chairman, instigated proceedings against Dr. Datta and spent over £4,000 from the reserve fund in pursuit of this action. It was later ascertained that this sum had risen to some £13,000 and rising. Mr. Newton stated that he had sought to challenge the validity of the action against Dr. Data and queried the use of the Reserve Fund to pay for it. Mr. Newton went on to say that he also queried the validity of the service charge demands, as they did not appear to comply with either the lease or statutory requirements.
6. Mr. Newton gave the Tribunal details of the historical background to the voluntary increase of payment of on account service charges from £25 per quarter, as provided for in the lease, to £150 per quarter, *clause 20* of the lease. This change however, was not subject to any deed of variation in the terms of the lease. Similarly, the informal agreement among the leaseholders to make provision in this increased sum for a Reserve Fund was not reflected in any formal deed of variation of the lease terms. However, since the commencement of the litigation against Dr. Datta, which Mr. Newton believed

to be unreasonable, he wanted clarification as to the sums he was required to pay as service charges under the terms of the lease.

7. Mr. Newton stated that he did not accept that Mr. French had been authorised, either in a 'blanket' permission simply by reason of his standing as elected chairman of the freehold company, or as a result of any specific approval given by the leaseholders. At the highest, he accepted that Mr. French had been authorised to spend up to £2,000 in respect of legal fees, seeking advice both on the matter of Dr. Datta and various other issues.

#### The Respondent's Case:

8. In evidence, Mr. French maintained that he had been given authority to take legal action against Dr. Datta in respect of the alleged breaches of the lease. He accepted that the legal costs incurred as a result of that action had been paid out of the Reserve Fund and now amounted to around £10,000 and likely to reach £15,000. He asserted that he believed he had been given authority to act by the leaseholders by reason of their re-election of him, and specifically he had made it clear to the other leaseholders, that if re-elected he would bring an application against Dr. Datta on behalf of the freehold company.
9. In submissions, Mr. Ohringer accepted that there was no express provision in the lease obliging the lessor to enforce the covenants of the lessees, but such a term had to be implicit in the lease and which was behind the intention of clause 17 of the lease. The Tribunal was referred to Clause 17 of the lease which states:

*"The Lessee shall comply with and observe any reasonable regulations which the Lessor may consistently with the provisions of this Deed make to govern the use of the Flats and the Reserved Property such regulations may be restrictive of acts done on the Property detrimental to the character or amenities. Any costs charges or expenses incurred by the Lessor in preparing or supplying copies of such regulations or in doing works for the improvement of the Property providing services or*

*employing gardeners porters or other employees shall be deemed to have been properly incurred by the Lessor in pursuance of its obligations under the Seventh Schedule hereto notwithstanding the absence of any specific covenant by the Lessor to incur the same and the Lessee shall keep indemnified from and against his due proportion thereof under clause 19 of this Schedule accordingly.*

10. Mr. Ohringer submitted that this terminology covers anything, as it is such a broad term and referred the Tribunal to the case of *Reston v Hudson & Others [1990] 2 EGLR 51*, where reference to "costs and expenses incurred by the lessor" was held to fall squarely within the terms of the lease and included the legal costs of the application to the court. Mr. Ohringer conceded that there had been no express authorisation given by the leaseholders for the pursuance of legal action against Dr. Datta, but submitted that the litigation brought against Dr. Datta was not inherently unreasonable, even if a clear conflict had arisen by reason of Flat 1 being owned by the Mr. French and occupied by close family members. At least £4,500 cost had been incurred before the issue of mediation was raised. He submitted that if the Tribunal found the costs incurred as a result of the litigation with Dr. Datta were not reasonable, then the Tribunal should consider reducing them. If however, the Tribunal found that the lease did not provide for such legal costs to be added to the service charge, it was an end of the matter.

11. Mr. Ohringer also referred the Tribunal to the case of *Staghold v Takeda [2005] 3 EGLR 45*, where the principles of the construction of leases and interpretation of contracts was referred to. In *Staghold* there was clear reference to "costs, expenses and outgoings and in respect of which the tenants is to make a contribution" and para 6 of that schedule provided for amongst other things the cost of legal advisors. In that case legal costs were held to be recoverable.

Decision:

12. The Tribunal finds that the legal costs accumulated by the freeholder are not costs allowed for under the terms of the lease. The Tribunal does not accept Mr. Ohringer's interpretation of clause 17 of the lease as correct, but finds that the list of items prescribed for cannot properly include legal costs. The Tribunal finds that both the cases cited and relied upon by counsel are distinguishable from the facts of this present case and in particular finds that there is no reference at all to legal costs whether in the main body of the lease, or even by way of a heading. On a proper construction of the lease, the Tribunal finds that legal costs are not recoverable as a service charge item and therefore the Tribunal finds it is not required, or within its jurisdiction to determine the reasonableness of the legal costs incurred.
  
13. The Tribunal was concerned to note the apparent conflict of interest between Mr. French as both chairman of the freehold company and the long lessee of Flat 1, occupied by his elderly mother and sister and who were affected by the alleged nuisance. The free spending of the Reserve Fund for the litigation costs without apparent authorisation from the other leaseholders, (except for a £2,000 limit), also concerned the Tribunal, and appeared contrary to the purpose intended for the use of the Reserve Fund. Although, these matters raise questions of possible breaches of fiduciary duty owed by Mr. French to the other leaseholders, they are not matters that this Tribunal has jurisdiction over or which it can determine.
  
14. Further, the Tribunal finds that there is no provision in the lease for a Reserve Fund and therefore monies demanded in respect of this item are not due or payable under the terms of the lease. Further, the Tribunal finds that the service charge demands for 2008, do not comply with the lease provisions, (*clauses 20 & 10 of the seventh schedule*), or with the statutory requirements of *section 21B of the Landlord and Tenant Act 1985*, and therefore, finds that no sums are payable for 2008 or 2009 until such time as the defects are

remedied. Further, the Tribunal finds that until such time as there is a variation in the lease, no more than £25.00 per quarter can be demanded in advance in respect of the advance service charges. Thereafter, demands for service charges must be certified in accordance with the terms of the lease and fulfill the statutory requirements.

15. Lastly, the Tribunal finds that the lease does not make any provision for legal costs to be added to the service charge and therefore the costs of this litigation cannot so be added. The Tribunal notes, however, that the freeholder has entered into a contract with solicitors, and therefore the latter are on the face of it entitled to be paid by the freehold company. How the company resolves that matter is not a question that can concern this Tribunal.

  
Chairman: LM Tagliavini

Dated: 20<sup>th</sup> April 2009