

LON/00BC/LSC/2005/0152

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN
APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT
ACT 1985 (AS AMENDED)**

Applicant: Mr A V Hadley

Respondent: Mountview Estates Plc

Re: 3 Hepworth House, Bentley Way
Woodford Green, Essex, IG8 0SD

Application received: 14 June 2005

Paper Hearing date: 4 August

Member of the Leasehold Valuation Tribunal:

Mrs J S L Goulden JP

3 HEPWORTH HOUSE, BENTLEY WAY, WOODFORD GREEN
ESSEX, IG8 0SD

1. The Tribunal was dealing with
 - (1) An application received on 14 June 2005 under Section 27A of the Landlord and Tenant Act 1985, as amended, (hereinafter referred to as "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
2. Directions issued by the Tribunal on 17 June 2005 indicated that it was considered that this dispute could be dealt with by way of a Paper Hearing unless either party made representations to the contrary within 14 days of the date of such Directions.
3. No representations were received by the Tribunal and accordingly a Paper Hearing was held on 4 August 2005.
4. In his application the Applicant, Mr A V Hadley, set out the matters in issue as follows:-

"Determination to assess whether Landlord can charge 10% fees on 'Gross' costs including VAT or whether fees should be on 'Net' value exc VAT. If landlord fees are on gross therefore 11.75% and not 10%..... Please assess whether management fees can be charged on 'Gross' figure inc VAT or should be on 'Net' figure. If charged on Gross then landlord is getting 11.75% fees. I consider management fees should be on net not gross otherwise should be on net not gross otherwise managing agent/landlord is getting a fee on a Government Tax!!..... I am a self employed surveyor – if I was able to charge my fees on the Gross and not net figure my cash flow would go up by 17.5% immediately!. Is it right to pay fees on a Government Tax!!
5. Mr Hadley requested a determination in respect of past, current and future years. The Tribunal treats this as a request for a Determination in respect of the principle of the charging of management fees.

The Applicant's Case

6. In a letter to the Tribunal dated 29 June 2005 Mr A V Hadley, stated, inter alia:-

"I consider it unjust that a Landlord/Managing Agent can charge fees on a Government tax, which effectively increases the fees from 10% to 11.75%, without any added 'service' provided by the Landlord/Managing Agent.

The Management Charges are based on a gross figure (inc. VAT) as the individual occupiers have no ability to reclaim the VAT. However the Landlord/Managing Agents compound the tax liability by charging fees on the VAT element.

I accept that fees should be 10% for a 'service' that the Landlord/Managing Agents perform. I do not accept that they should then get effectively a 10% 'bonus' for doing nothing, for which we have to pay for.

As previously stated if the principle of charging fees on VAT was acceptable then in my own business I would effectively increase my income by 17.5% overnight"

The Respondent's Case

7. In a letter to the Tribunal dated 13 July 2005, the Respondent, Mountview Estates Plc, set out the relevant clauses in the lease and stated, inter alia:-

"The Applicant has asked the Tribunal to determine whether the Respondent, Mountview Estates Plc is entitled under the Lease of this flat, to calculate its management charge as 10% of the gross expenditure incurred in complying with its obligations, ie inclusive of VAT, or whether on the other hand, the management charge should be calculated on the net expenditure, ie the cost before the application of VAT.....In our submission, it is not only fair and reasonable but also lawful under the Lease for the management charge to be calculated by reference to the gross cost of the provision of services (ie the cost inclusive of VAT)..... In his submission, the Applicant refers to the difference arising from the method of charging which we use, compared with the alternative which he prefers, as a "bonus". I submit that the true cost of the services supplied is their total cost including VAT and that we are therefore absolutely entitled to calculate the management charge as we do".

The Tribunal's Determination

8. The Applicant holds 3 Hepworth House Bentley Way, Woodford Green, Essex, 1G8 0SD and garage No 1 (hereinafter called "the property") under a lease dated 11 April 2003 (hereinafter called "the lease") made between the Respondent, Mountview Estates Plc of the one part and the Applicant and Mrs L P Hadley of the other part.
9. The lease is for a term of 125 years from 25 December 2002 at the rents and subject to the terms and conditions therein mentioned.
10. The service charge obligations on the lessees appear in Clause 2.2 and the Third Schedule of the lease.
11. Clause 2.2 of the lease sets out the lessees' obligations to pay inter alia **"the appropriate proportion of the lessor's reasonable expense and outgoings under the third schedule hereto in the repair and renewal of the Building and the appropriate proportion of the other heads of expenditure in such schedule together with value added tax payable thereon (if any.....)"**
12. The Third Schedule to the lease sets out the heads of expenditure in respect of which the lessees must contribute by way of the service charge. This schedule contains a covenant by the lessees to pay **"a proportionate part by way of service charge" of the landlord's expenses, outgoings and other heads of expenditure as set out in the Third Schedule"**
13. One the heads of expenditure for which the lessees are liable is to pay a contribution as referred to in the fourth paragraph of the Third Schedule which states

"All fees charges and expenses payable to any solicitor accountant surveyor agent or architect employed or instructed in connection with any question arising on the maintenance or management of the Building or the Estate including the ascertainment of the maintenance charge and the reasonable and proper fees of the Lessor's Managing agents or surveyors for general management of the Building and if there are no such charges for general management of the Building then the Lessor's own management charges not to exceed 10% of moneys expended in pursuance of the Lessor's obligations hereunder".
14. As stated above the Third Schedule to the lease sets out the Respondent's expenses, outgoings and other heads of expenditure in respect of which the lessees are to pay a proportionate part by way of service charge.

15. It is noted that paragraph 4 of the Third Schedule states that the lessees must contribute to:-

“All charges assessments and other outgoings (if any) payable by the Lessors in respect of all parts of the Building or the Estate (other than income tax but including Value Added Tax on all items referred to in this Schedule)”

16. The Tribunal considers that paragraph 4 of the Third Schedule is a stand alone clause relating to payments made by the Respondent including VAT where applicable.

17. Paragraph 4 of the Third Schedule is in two parts. The first part refers to:

“All fees charges and expenses payable to any solicitor’s accountant surveyor agent or architect employed or instructed in connection with any question arising on the maintenance or management of the Building or the Estate including the ascertainment of the maintenance charge”.

18. The second part of paragraph 4 of the Third Schedule refers to:

“the reasonable and proper fees of the Lessor’s Managing agents or surveyors for general management of the Building and if there are no such charges for general management of the Building then the Lessor’s own management charges not to exceed 10% of moneys expended in pursuance of the Lessor’s obligations hereunder”.

19. In this clause, the obligation is for the lessee to reimburse the **“reasonable and proper fees”** of its managing agents. The question for the Tribunal is whether the management fees should be charged on gross expenditure inclusive of VAT or net expenditure exclusive of VAT.

20. In the view of this Tribunal it cannot be **“reasonable and proper”** that management fees should be based on gross expenditure inclusive of VAT.

21. The Tribunal determines that the management fees should be based on net expenditure exclusive of VAT. However management fees in respect of general management (rather than management fees on monies expended in pursuance of the lessor’s obligatory under the lease) would reasonable and properly be subject to VAT.

22. It is noted that in a letter to the Applicant dated 8 April 2005, the Respondent stated, inter alia:-

"Perhaps you should bear in mind that, whilst this Company is a relatively large organisation in terms of its stock market value, it is not registered for VAT, there being no VAT input. The costs incurred in maintaining Hepworth House are therefore gross costs inclusive of VAT and are charged on through the service charge account in full. It follows that the cost of the Management Service provided, is calculated by reference to the gross cost of the services supplied".

23. In the view of this Tribunal, whether or not the Respondent company is registered for Vat purpose is immaterial to its consideration of how management fees are to be calculated.

CHAIRMAN.....



DATE.....

17/08/05

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