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SOUTHERN RENT ASSESSMENT PANEL AND TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/00MR/LSC/2006/0068

BETWEEN:

MISS K MCDERMOTT	APPLICANT/LESSEE
AND	
PROPERTY PROPRIETORS LTD	RESPONDENT/LESSOR

PREMISES: FIRST FLOOR FLAT, 27 SALISBURY ROAD, SOUTHSEA

TRIBUNAL: MR D AGNEW LLB, LLM (Chairman)
MR D LINTOTT FRICS
MISS J DALAL

DATE: 20 October 2006

ORDER AND REASONS

ORDER:

The application under Section 27A and 20C of the Landlord and Tenant Act 1985 ("the Act') shall be and is hereby dismissed as the Tribunal has no jurisdiction at the present time to determine the Application.

REASONS:

1. The Application

1.1 On 28th July 2006 the Applicant submitted to the Tribunal an application under Section 27A of the Act for a determination as to the reasonableness of service charges in respect of the First Floor Flat, 27 Salisbury Road, Southsea, Hampshire ("the Premises") of which she was the leaseholder.

1.2 On the application form the Applicant referred to the "years in question" as "Year 1", "Year 2" and "Year 3" without identifying which years they were. In answer to a query from the Tribunal office the Applicant identified these years as 2006, 2007, 2008 and possibly 2009 respectively.

1.3 In a Directions order made on 3rd August 2006 it was ordered, inter alia, that the Respondents or their Managing Agents should send to the Tribunal a detailed response to the Application and in

particular send "copies of all service charge notices and all demands for contributions for each financial year".

1.4 In the Respondent's response to the Application it was clear that no service charge demands had yet been made for the years 2006, 2007, 2008 and 2009

2. Background

2.1 The Applicant's concern is first as to the liability of the lessees to pay for the removal of an iron external fire escape and consequential internal works at 27 Salisbury Road. The need for this work to be carried out was identified at a meeting with the newly appointed managing agents, Labyrinth Properties Ltd, on 10th December 2003.

2.2 Quotations were sought and the Section 20 consultation procedures were implemented. The lowest quotation was for £63,626.20 plus VAT. A contract was not placed on receipt of the tenders because the project manager seemed to think that they had to have the lessees consent to the placing of the contract but also because it was discovered that building regulation approval had to be obtained. This, in turn, required plans to be drawn up and submitted to the Council. By the time this had been effected the quotations no longer held good. In the meantime a Dangerous Structure notice was served on the Landlord in respect of the fire escape.

2.3 The problem with the fire escape is that the ironwork has corroded. Where the structure was tied into the brickwork of the flank wall of the building it has caused the brickwork to crack.

3. The Applicant's case

3.1 The Applicant contends firstly that she should not be liable to pay any of the costs of works to and connected with the fire escape. She says that when she purchased her property in 2002 an enquiry was made of the Landlord's then managing agent as to whether any substantial expenditure was anticipated in the current or any future accounting year and the answer she received was: "none foreseen". She says this was a misrepresentation because the Landlord had had a structural survey carried out on the fire escape in 1998. She says that had she been made aware of the problems she would not have bought the property.

3.2 Next, she says that she should not be liable to pay for the works in question because the Landlord, being aware of the need to carry out the repairs in 1998, was then in breach of its covenants in the lease. Had it complied with those covenants the property would have been

repaired before she purchased the property and so she should not be liable to pay for works which should already have been carried out before she purchased.

3.3 Thirdly, she says that if she is liable to pay for the works at all, she should not have to pay for any additional cost that has been incurred as a result of the Landlord's delay in carrying out the work which delay has resulted in a worsening of the physical condition of the property.

3.4 The Applicant acknowledges that the Landlord's agent has been keeping the lessees informed of developments and thus far complied with the Section 20 procedure.

4. The Lease

4.1 By clause 3(D) of the lease made the 10th February 1984 between Brian George Turnbull and Margaret Jean Turnbull (1) and Philip William Edward Kerslick (2) the Lessor covenanted to maintain and keep in good and substantial repair and condition the main structure of the Building including the walls and fire escape.

4.2 The Lessee covenanted by clause 2 (S) to pay such sums of Service Charge as are payable in accordance with Schedule 6 of the lease.

4.3 By the Sixth Schedule, clause 1(C), an interim charge of £100 can be demanded on account of the service charge. The service charge covers "expenditure on services" which means the expenditure of the Lessor in complying with the obligations set out in the lease. A service charge statement is to be drawn up itemising the expenditure on services for each year ending on the 31st December (clause 1(D) and Clause 2 of the Sixth Schedule). The Lessee is then liable to pay the service charge forthwith upon service of the service charge statement. (Clause 4 of the Sixth Schedule).

4.4 It follows (and it was accepted during the hearing) that the Landlord cannot seek in advance, under the lease, a payment on account of future expenditure. It would be necessary, in the absence of agreement from the lessees for the Landlord to pay for the works (by borrowing the money if required) and then to re-coup the same from the Lessees together with the interest incurred on any borrowing, (Clause 1A of the Sixth Schedule) by way of the service charge.

5. The Landlord's case

5.1 The Landlord's case was that no service charges had yet been demanded for the matters that the Applicant wished the Tribunal to determine, that full consultation had taken place and the Section 20 procedure complied with and an explanation was given as to the delay.

6. Inspection

6.1 The Tribunal inspected the Premises prior to the hearing on 20th October 2006.

6.2 The Premises comprise a large semi-detached Victorian villa in a residential area close to the centre of Southsea and the seafront comprising four flats – one on each storey.

6.3 An iron fire escape serves the three upper floors of the four storey building and is attached to the flank wall of the building. There are very obvious signs of corrosion to the fire escape and the brickwork at the point where the fire escape is tied into the building is in a poor state.

7. The hearing

7.1 In attendance at the hearing were:-

a) the Applicant accompanied by Mr John Ravenscroft and some of the Applicant's family as supporters and Mr Keegan (Basement Flat)

b) Mr Gooch, a Director of the Respondent Company and Mr Faulkner and Ms Beston of the Managing Agents, Labyrinth Properties.

7.2 The Tribunal considered that it was first necessary to deal with a preliminary issue, namely whether the Tribunal had jurisdiction to hear the case as no service charge demands had yet been made for the years 2006, 2007, 2008 and possibly 2009 referred to in the Application and sought representations in respect of this point from the parties.

7.3 The Respondent submitted that the Tribunal did not have jurisdiction as no demands had yet been made and it was unknown at this point what the new figure would be for the cost of the work. The Tribunal had no jurisdiction to deal with the allegation of misrepresentation or whether or not there should be no liability because of the alleged breach by the Landlord of its repairing obligations.

7.4 The Applicant submitted that it was clear there would be a charge and that an indication of the amount that would be sought could be taken from the tenders which had previously been

obtained. Even if the precise amount could not be ascertained the Tribunal could proceed to deal with the question of liability to pay the anticipated charges, it was submitted.

8. The Law

8.1 Section 18 of the Act states

"(1) In the following provisions of this Act "service charge" means an amount payable (emphasis supplied) by a tenant of a dwelling as part of or in addition to the rent –

(a) which is payable (emphasis supplied) directly or indirectly for services, repairs, maintenance, improvements or insurance for the landlord's cost of management...

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord ... in connection with the matters for which the service charge is payable."

8.2 Section 19(2) of the Act states:-

"Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable ..."

8.3 Under section 27A of the Act, headed: "Liability to pay service charges: jurisdiction" it is stated:-

(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 amount which is payable

d) the date at or by which it is payable and

e) the manner in which it is payable

(2) Subsection (1) applies whether or not a payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to

a) the person by whom it would be payable,

b) the person to whom it would be payable

c) the amount which would be payable

d) the date at or by which it would be payable and

e) the manner in which it would be payable.

9. The determination

9.1 The Tribunal decided that in this case it did not have jurisdiction to decide the Application because not only had there been no demand for a payment in respect of the service charge years in question (namely 2006, 2007, 2008 and possibly 2009) but the amount of any future service charge demand was not yet ascertainable. Either the Section 20 consultation procedure would have to be gone through afresh and new tenders received or an application would have to be made to the Tribunal to dispense with the Section 20 requirements to which the lessees could consent, if they were so minded.

9.2 The Tribunal considered that the wording of Sections 18 and 19 of the Act quoted above made it clear that references to service charges in the following sections only related to amounts payable by a tenant, whether already incurred or estimated. In this case the charges were not "payable" until demanded and had not yet been estimated because the work would have to go out to re-tender. The Tribunal could not make a decision as to what would be a reasonable cost without knowing what the cost was likely to be. Whilst it might be said that Section 27A (3) of the Act gives the Tribunal jurisdiction to make a determination in respect of the liability of a tenant to pay a service charge which might be demanded at some future date, the Tribunal considered that this was too wide a construction. It did not consider that it gives a leasehold valuation tribunal jurisdiction to determine liability where no service charge has been demanded or even determined but simply draws a distinction with Section 27A (1) between instances where the cost has already been incurred (as contemplated under Section 27A (1)) and where the costs already determined, or at least estimated, were about to be incurred (as contemplated by Section 27A(3)).

9.3 Having decided that the Tribunal cannot proceed to deal with the Application for want of jurisdiction, that is the end of the Tribunal's role in respect of this particular application. In order to assist the parties, however, the Tribunal makes the following observations which it must emphasise would not be binding on any future Tribunal"

a) the issue as to whether or not there was a misrepresentation made by the Landlord's former managing agent on Miss McDermott's purchase of the property and the consequences thereof

would not be a matter within the jurisdiction of the Tribunal but would be a matter for the County Court.

b) the question as to whether or not the Commonhold and Leasehold Reform Act 2002 gives it jurisdiction to determine the liability of the lessee to contribute towards the cost of the fire escape and associated works in circumstances where it is alleged that the works should have been carried out before a lessee purchased their flat would be for a future Tribunal to decide having heard submissions on the point.

c) If the lessees wish to argue that costs have increased due to the building deteriorating as a result of the Landlord's delay in putting the necessary works in hand, they will need to produce evidence (probably expert evidence from a surveyor) to support that contention.

9.4 Finally, the Tribunal is mindful of the work that has gone into the preparation of the case on behalf of the Applicant and Respondent and regrets that it considers constrained by the legislation to find that it cannot proceed to deal with the issues raised by this case at the present time.

Dated this 30th October 2006

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D Agnew LLB LLM
Chairman