

SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

CASE No: CHI/00HN/LIS/2007/0009

BETWEEN :-

BARRIE EDMUND-WHITE

Applicant/Lessee

AND

TRUSTEES OF THE ROYAL LONDON LONG TERM FUND

Respondent/Landlord

PREMISES: 5 Richmond Chambers
The Square
Bournemouth
BH2 6EE ("the Premises")

HEARING: 31st May 2007

TRIBUNAL: Mr D Agnew LLB, LLM (Chairman)
Mr K Lyons FRICS
Mr A Mellery-Pratt FRICS

DETERMINATION AND REASONS

1. Background

- 1.1 on 1st February 2007 the Applicant applied to the Tribunal under Section 27A of the Landlord & Tenant Act 1985 for a determination as to the reasonableness of service charges in respect of the Premises for the years 2003, 2004 and 2005. The Applicant also made an application under Section 20C of that Act that the costs of the Tribunal proceedings should not be added to any future service charge demands.
- 1.2 On 13th February 2007 Directions were ordered requiring the Respondent or its managing agents to file and serve a response to the matters raised in the Application by 16th March 2007 and, in particular, to provide copies of all service charge notices and demands together with all documents in support. The Applicant was then given until 13th April 2007 to file and serve his full written response.
- 1.3 The Respondent failed to comply with the Directions and so, doing the best he could with the information and documentation available the Applicant's surveyor, Mr Derek Bruce, assembled a bundle for use of the Tribunal at the hearing, a copy of which he sent to the Respondent's managing agents.

2. Inspection

- 2.1 The Tribunal inspected the Premises immediately before the hearing on 31st May 2007. In attendance were the Applicant and Mr Bruce.
- 2.2 The Premises are one of about thirty flats. The number is only an approximation because the Applicant believes that some flats have been sub-divided. The block is situated right in the centre of Bournemouth overlooking The Square and close to large department stores and other shops. Indeed there are restaurants and other food outlets and shops on the ground floor of the block containing the Premises.
- 2.3 The block is complicated because at one time alterations were carried out when a multi-storey car park was constructed to the rear of the Premises. There is now a walkway and stairs connecting the flats to the car park and also to the back entrances of the restaurants on the ground floor and it is difficult to see where the retained parts of the landlord's title end and the adjacent title or titles begin.
- 2.4 As a result of the alteration of the block referred to in paragraph 2.3 above there is now a very convoluted way of approaching the Premises. It is necessary either to enter the front of the building from the street, go to first floor level, then out of the building to the rear, walk across a walkway to enter another part of the block and then either take the stairs or a lift to the Applicant's flat, or alternatively arrive at the aforesaid walkway from the car park.
- 2.5 Most of the flats are let out on Assured or Assured Shorthold Tenancies by the Landlord. There are only about four long leasehold owners in the block.
- 2.6 The building seemed to be maintained in a reasonable state of cleanliness but a broken window pane, a broken down pipe and some chipped stair treads showed some evidence that maintenance of the fabric of the building required some attention.

3. The hearing

- 3.1 This took place at The Royal Bath Hotel Bournemouth on 31st May 2007. Present were the Applicant and Mr Bruce. Neither the Landlord nor the Landlord's managing agent attended the hearing but the agents had asked the Landlord's letting agent to attend purely as an observer and to report back. This was Mr Christopher Parker of Countrywide Property Management.

4. The Applicant's case

- 4.1 Mr Bruce, for the Applicant, said that the non-compliance of the Respondent with the Tribunal's directions and its non-attendance at the hearing was typical of the difficulties he had had in trying to sort out the Applicant's service charge liability for a number of years and under different managing agents.
- 4.2 He directed the Tribunal to a document in the bundle which recorded a settlement of a previous dispute. Under this agreement dated 31st May 2002 the Landlord agreed to waive all existing service charge arrears and agreed not to charge any service charge until after the year ending 31st March 2003. Further, the service charge would be capped as far as the Applicant was

concerned for the years to 31st March 2004, 2005 and 2006 respectively, at £500 including VAT. Ground rent and insurance charges were to be dealt with separately and "in the usual way".

- 4.3 Thereafter, the Applicant received no service charge certificates, as required by the lease, save for one relating to the year to 31st December 2003. Mr Bruce did not receive this, on behalf of the Applicant, until July 2006 and then only after serving a notice under Section 21 of the 1985 Act and threatening criminal proceedings. The certificate when it arrived was for a contribution towards expenditure totalling £613.13. This was £113.13 over and above the agreed figure of £500 and it was for a whole years expenditure to 31st December 2003 and not for nine months as it should have been in accordance with the agreement aforesaid. This certificate, which was dated 15th November 2005 set out a list of expenditure under the heading "Schedule 1". It is not clear to the Applicant what Schedule 1 costs are. The Applicant's surveyor has been unable to examine any documentation to support these costs and the Respondent has failed to produce them to the Tribunal, as ordered. Mr Bruce confirmed that there had been no budget for 2005. The only budget that had ever been submitted by the managing agents was for the year to 31st December 2004 which came with a letter dated 19th November 2004, almost at the end of the year for which the budget was supposed to apply.
- 4.4 Thereafter no certificate had been supplied and no accounts, audited or otherwise. What was sent to the Applicant was a series of invoices seeking payment of service charges seeking payments well in excess of the agreed cap of £500 per annum and, for 2004 for which a late budget had been received, the amount sought seemed to bear no relation to the budget.
- 4.5 Mr Bruce asked the Tribunal to say that under Section 20B of the 1985 Act the Landlord is now unable to recover items of expenditure incurred more than 18 months previously as no demand for payment of expenditure has been made. The certificate for the 2003 year was two years late and the landlord has failed to justify any expenditure for the year to December 2004. Consequently the landlord should not be able to recover anything for the years 2003-2005 inclusive.
- 4.6 After the hearing had seemingly finished and Mr Parker had departed, Mr Bruce remembered that he wished to make an application that the Respondent should pay the Applicant's Tribunal fee and also a contribution towards his costs of employing Mr Bruce to deal with the Tribunal application and hearing, which costs amounted to approximately £1,600 plus VAT. He was aware that the Tribunal had power only to award up to £500 in costs. He submitted that the landlord had been frivolous in totally ignoring the Tribunal's directions and failing to attend the hearing or to produce written evidence. As Mr Parker was only in attendance as an observer the Tribunal decided that it could proceed to hear and determine that application notwithstanding that he had already left the premises.

5. The Law

- 5.1 Section 27A of the Landlord & Tenant Act 1985 ("the 1985 Act") states as follows:-

The Leasehold Valuation Tribunal may determine whether a service charge is payable and, if it is, determine:

- (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
- (e) the manner in which it is payable.

5.2 By Section 19 of the 1985 Act service charges are only claimable to the extent that they are reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

5.3 Section 20B of the Landlord and Tenant Act 1985 states as follows: -

"(1) if any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)) the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the term of his lease to contribute to them by the payment of a service charge."

5.4 Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 states:-

"(1) A Leasehold Valuation Tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where:-

(a)

(b) he has in the opinion of the Leasehold Valuation Tribunal acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings."

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed: -

(a) £500

(b)

5.5 By Regulation 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 (S1 2003/2098) " a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings."

6. The Lease

6.1 This is dated 25th June 1982 and made between Minsham Properties Limited (1) and Mary Collins (2).

- 6.2 By Clause 4(4) of the lease the lessee covenanted to "Pay the interim charge and the service charge at the times and in the manner provided in Schedule 5 both such Charges to be recoverable in default as rent in arrear."
- 6.3 By paragraph (2) of Schedule 5 the Lessee is liable to pay the "service charge" which means "per cent (sic) attributable to the flat as set out in the Seventh Schedule of the Total Expenditure"
- 6.4 "Total Expenditure" is defined by Schedule 5 paragraph 1(1) as "the total expenditure incurred by the Lessors in any Accounting Period in carrying out their obligations under Sub-Clauses 5(5)(a) to 5(5)(n) inclusive of this lease and any other costs and expenses reasonably and properly incurred in connection with the Building" "
- 6.5 By paragraph 6 of Schedule 5 it is provided that: "As soon as practicable after the expiration of each Accounting Period there shall be served upon the Tenant by the Lessors or their Agents a certificate signed by the Lessors or such Agents containing the following information:-
- a) The amount of the Total Expenditure for the Accounting Period
 - b) The amount of the Interim Charge paid by the Tenant in respect of that Accounting Period together with any surplus accumulated from previous Accounting Periods
 - c) The amount of the Service Charge in respect of that Accounting Period and of any excess or deficiency of that Service Charge over the Interim Charge"
- 6.6 By Schedule 7 to the Lease the percentage of the Total Expenditure payable in respect of the Premises is 4.85%.

7. The determination

- 7.1 As far as the year to December 2005 is concerned there has been no budget and no service charge certificate confirming expenditure which has been received by the lessee. Any expenditure incurred during that year up to the end of November 2005 is more than 18 months prior to the hearing. No demand for payment of that expenditure can now be made which will not offend against the requirement set out in Section 20B of the Landlord and Tenant Act 1985 that a demand for payment in respect of the expenditure must be made within 18 months of the costs being incurred. Consequently the Landlord is unable to recover any costs incurred for 1st January 2005 to 30th November 2005. As for the month of December 2005, the Landlord had produced no evidence to show that any costs had been incurred during that month and also no evidence as to their reasonableness. Consequently, the Tribunal decided that the Landlord should not now be able to recover any costs incurred during December 2005.
- 7.2 The same applied to any costs incurred by the Landlord during 2004. He had plenty of opportunity first to deal with Mr Bruce's queries concerning the service charge and also to produce evidence to the Tribunal but he failed to do so. The costs were incurred more than 18 months before any demand for payment of those costs was made and therefore they are not recoverable by the Landlord.
- 7.3 As for the year to December 2003, in this case there has been a certificate of service charge expenditure produced and sent to the Applicant's representative together with an invoice dated

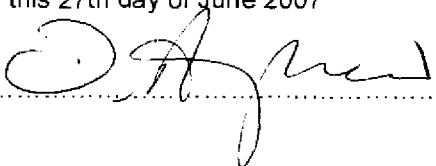
November 2005 but not received by Mr Bruce until July 2006 considerably more than 18 months after the end of the service charge year. Consequently, under Section 20B of the 1985 Act this is unrecoverable by the Landlord also.

- 7.4 The Tribunal did consider whether, if the Landlord's agent sent out invoices every quarter for an amount on account of service charge, that meant that he would always have complied with Section 20B even though no accounts for actual expenditure were produced (as required by the lease) either at all or within 18 months of the end of the service charge year. Having considered the wording of Section 20B carefully the Tribunal decided that it was not sufficient for the Landlord's agent to do that if Section 20B were to be satisfied. The Tribunal considered that the mischief that this section was seeking to overcome is precisely what has happened in this case where the tenant receives no information as to what expenditure has actually been made after a reasonable period (eighteen months) from the time when the expenditure is incurred. If the section were to be satisfied just by the Landlord sending out regular demands for service charge payments on account then the Landlord would never be required to produce accounts after the year end and show to the tenant the costs that have actually been incurred to enable the tenant to challenge those costs through the Leasehold Valuation Tribunal if he or she so wished.
- 7.5 Even if the Tribunal is wrong in its interpretation of Section 20B of the 1985 Act, in this case the Landlord has, in any event, failed to show what costs have been incurred for 2004 and 2005 let alone that they are reasonable and so he should not be able to recover the same. Although there is a certificate of expenditure for 2003 the Landlord has produced no evidence as to the reasonableness of those costs and therefore even if the Tribunal were wrong in its interpretation of Section 20B in respect of the 2003 year, again it would disallow those costs because they have not been justified by the Landlord.

8. Conclusion

- 8.1 The Tribunal therefore determines that the Applicant is not liable to pay to the Respondent any sum whatsoever in respect of service charges for the years 2003, 2004 and 2005.
- 8.2 The Tribunal agrees that by failing to deal with the Applicant's surveyor's requests for information fully and properly, by failing to even attempt to comply with the Tribunal's directions or to produce evidence and participate in the hearing, it has acted frivolously or otherwise unreasonably in connection with the proceedings and that it would be just and equitable to order the Respondent to pay to the Applicant £500 in respect of his costs and in addition to reimburse the Applicant's Tribunal application and hearing fees totalling £250.00.
- 8.3 The Tribunal also makes an order under Section 20C of the Landlord & Tenant Act 1985 preventing the Landlord from claiming its costs of the Tribunal proceedings in future service charges.

Dated this 27th day of June 2007



..... D Agnew LLB, LLM Chairman