RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

S.27A Landlord &Tenant Act 1985 as amended

DECISION AND REASONS

Case Number: CH1/21UD/LSC/2007/0024

In the matter of Flat 7, Helena Court, 9 Pevensey Road, St. Leonard's on Sea, East Sussex, TN38 OLY

Applicant (Landlord): Helena Court Resident's Association Limited

Respondent: Mr. Simon Duffin

Date of Application: 28th March 2007

Date of Hearing: 12th June 2007

Tribunal Members: Mr. S Lal LI.M (Legal Chairman)
Mr. B H R Simms FRICS MCIArb
Mr. N Cleverton FRICS

Date of Decision: 12th June 2007

Application

1. The Applicant applied to the Tribunal on the 28th March 2007 under section 27A of the Landlord & Tenant Act 1985 (as amended) ("the Act") to determine liability to pay service charges in respect of Flat 7, Helena Court, 9 Pevensey Road, St. Leonard's on Sea, East Sussex, TN38 OLY ("the property")for the year 2005, 2006 and 2007. Preliminary Directions were issued on the 11th April 2007 becoming substantive directions ("the Directions") on the 20th April 2007. The Respondent replied to Directions by service of a Bundle received on the 1st June 2007 ("the Respondent's Bundle) numbered from page 75 – 110. This helpfully followed on from Appellant's Bundle which consisted of pages 1-74. For ease of reference the two separate Bundles will be treated as one Bundle before the Tribunal ("the Bundle").

The Issue

2. Pursuant to the Application the Respondent's Solicitors, Messrs.Meneer Shuttleworth informed the Tribunal in their written response to Directions dated the 31st may 2007 that the "Respondent agreed to pay in full not later than 1st June 2007 all outstanding service charges, and further agreed that the service charges claimed were reasonable." However in turn they made an application pursuant to Section 20C of the Landlord and Tenant Act 1985 for an Order that all or any of the costs incurred or to be incurred by the Applicant in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent or any other Lessee or Lessees of the subject Property.

3. The issue therefore for the Tribunal is the narrow one as to whether the Respondent should pay the costs of the Applicant in bringing the s.27A matter before the Tribunal in the first place.

The Law

4. "(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court[, residential property tribunal] or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

[(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b).....

(c).....

(d).....

(3) The court or tribunal to which the application is made may make such order on the applications as it considers just and equitable in the circumstances."

The Inspection

5. The members of the Tribunal inspected the property prior to the hearing. The subject Property is in a large Victorian house built in 1884 on 5 floors including a lower ground floor converted into 15 self contained flats. The building is constructed of brick walls under a pitched roof covered with clay tiles. Flat 7 comprises a two bedroom flat on the third and fourth floors approached by means of an internal staircase.

Background

6. The hearing was convened and held at the Horntye Park Sports Complex, Bohemia Road, Hastings. The Applicant Company was represented by Mr George Okines. The Respondent was represented by David Collins who is a solicitor with Menneer Shuttleworth, Solicitors based in Bexhill on Sea. The Respondent lessee, Mr. Duffin is currently working in Iraq.

7. The hearing commenced at 2pm and after introductions but before the receipt of evidence the Applicant served on the Tribunal written submissions dated the 6th June 2007 in response to the S.20C Application of the Respondent. Mr. Collin's indicated that he had seen them but objected to their service because in his view they added to the "ping pong of litigation". By this the Tribunal thought he meant the back and forth exchange of documents. The Tribunal were not satisfied that they should be excluded, they were a written version of what Mr. Oakines would say in any event and as such it was helpful for the Tribunal to have them in that format as well. Mr. Collins indicated that he was happy for the matter to proceed.

The Procedure at the Hearing

8. The only matter in dispute was as to the cost of the s.27A Application and the Tribunal informed the parties that they wished to hear submissions first from Mr. Collin's and then from Mr. Oakines with a final right of Reply from Mr. Collin's. The Tribunal informed the Parties that they did not propose to hear cross-examination as such, essentially both Mr. Collin's and Mr. Oakines were advancing submissions in respect of the costs of the Application on behalf of their respective clients and they both indicated they were happy with this approach.

Submissions advanced by Mr. Collins

9. Mr. Collins adopted the written submission at pages 77-81 of the Bundle. He made the following oral submissions in addition.

10. His starting point and by way of introduction was Clause 5 of the Lease, which is the Landlord's obligations under Schedule 3 of the Lease. He cited Yorkbrook Investments Limited v Brown [1985] 2EGLR 100 for the well known principle that the prompt payment of, in that case a maintenance charge, was a condition precedent to the landlords liability to perform any obligation under the lease, was invalid.

11. He then turned to the first of his three submissions, inviting the Tribunal to consider the following question; did the Respondent act reasonably in withholding service charges? He turned initially to page 86 of the Bundle which was the Survey Report carried out on the 9th January 2007 by William Blake Associates which noted that damage was being caused by water ingress due to defects in the roof. Mr. Collins submitted that this was in breach as late as January 2007 of the Landlords obligations under Schedule 3 of the Lease. He then turned to the letter of Carol Hughes, Environmental Health Officer dated the 28th March 2007 at page 103 of the Bundle. He referred the Tribunal to paragraph 3 of the letter which noted inter alia "the wallpaper covering the lathes was lifting continuously illustrating this draught." Mr Collins submitted this was precisely the issue raised by Mr. Duffin in his letter of 3rd September 2006 at page 40 of the Bundle. His submission was that his clients position was reasonable in withholding service charges as it was clear, according to him, that the freeholders were aware of the problem with the roof as late as March 2007, their earlier response of the 19th January 2007 (page 89 of the Bundle) being dismissive of his concerns and indeed being part of what he descried as a "standoff between lessee and freeholder.

12. Mr. Collins then moved on to his second submission, namely whether the Applicant acted precipitately in bringing the s.27A Application? He said his firm were instructed on the 3rd January 2007 and they immediately wrote to the Applicant by way of letter dated the 8th January 2007 (page 37 of the Bundle). Mr. Collins advanced the suggestion that the correspondence between the Applicant and his client prior to the above date had not been helpful in terms of breaking the service charges down, for example the letter of the 4th December 2006 at page 9 of the Bundle gives a global figure only. He referred to his attempts to illicit further information from the Applicant (page 94 and 95 of the Bundle) and the limited nature of their response at page 96 received on the 28th March 2007.

13. He says that the Freeholder acted unreasonably in not allowing a reasonable opportunity for the Respondent to take legal advice the basis of proper and full information.

14. The last question Mr. Collins posited was whether the Application should have proceeded after the 24th may 2007? He referred the Tribunal to the letter of the 14th May 2007 (page 107 of the Bundle) where his client had agreed to pay the service and the letter of the 24th May 2007 at page 110 of the Bundle. He likened the actions of the Applicant to a "juggernaut rolling on," by this the Tribunal understood that he meant that the litigation had assumed a momentum of its own. He cited with approval the Civil Procedure Rules and how the "trigger happy" litigator is penalised in terms of cost, how his client was particularly vulnerable because he was out of the country and how the costs, particularly after the 24th May 2007 should not in any event be recoverable.

Submissions advanced by Mr. Oakines

15. Mr. Oakines helpfully adopted his written submissions of the 6th June 2007. He said that he did not have much more to add than what was already there but he did say that he thought the picture that had been created was that the Applicant had refused to do any repairs. He said he was always aware of the previous damage to the roof and had intended to look at the matter in late 2005 but was unable to do so because of the lack of funds. He said major works had been carried out in March 2006 but due to lack of funds had been postponed to the current year. He said that the Applicants were always aware of the problems with the skeillings and he pointed to another letter dated the 23rd March 2007 from Miss. Hughes which noted that the skeiling damage was not due to any defect in the roof. He said that the inside of the Property had been repaired in any event. He added that the Applicant had been trying to get the service charges since April 2006 and it was not until a matter of days before the hearing that the matter was near to resolution. He noted that Mr. Collins had still not paid the arrears regardless of the letter of the 24th March 2007, in any event no letter had been received that the Respondent had accepted that the charges were reasonable.

16. Mr. Collins made a brief reply where he reiterated the responsibility of the freeholder to carry out repairs. Mr. Okines, in response to a question from the Tribunal, was unable to confirm exactly what the cost of the S.27A Application had been. He intimated a figure of over £1500 in terms of costs.

Consideration

17. The issue for the Tribunal is a narrow one. Neither the amount nor the liability of the Respondent to pay is in any doubt, the only issue of contention is to the costs of the s.27A Application.

18. The Tribunal have considered with care the submissions put forward by Mr. Collins but remain unconvinced by them. The Tribunal may only make such Order as it considers just and equitable in the circumstances. The notion of just and equitable must mean equitable as between the parties. The Tribunal are of the view that the Applicant had no option but to initiate the S.27A Application in March 2007 because Mr. Duffin had shown a disregard to requests first initiated in April 2006. The fact that he may be out of the country for periods of time is essentially irrelevant in respect of his liability to pay the service charges.

19. Indeed nothing was heard from the Appellant after 4th April 2006 when he agreed to pay £200 per month in respect of arrears (page 4 of the Bundle) until December 2006 when the Applicant yet again had to write to the Respondent informing him he was in arrears (page 9 of the Bundle). In fact the Respondent had cancelled his standing order in August 2006. The picture created is that the Applicant's have behaved with a great deal of patience rather than having adopted in Mr. Collins words a "trigger happy" approach to litigation. The Tribunal remain particularly unconvinced that the Application should not have proceeded after the Respondent had instructed Meenner Shuttleworth in January 2007. The Applicant cannot be expected to further wait for the Respondent to instruct solicitors and for the latter to appraise themselves of the situation to a degree which satisfies themselves when to all extents the Applicant could reasonably assume that this was yet another delay caused by Mr. Duffin. Likewise the Tribunal rejects the suggestion that the costs after the 24th May 2007 be treated differently. The letters of the 14th May 2007 still refers to the need for a determination as to reasonableness and the letter of the 24th May 2007 still notes that they can do no better than to enclose copies of letters supplied by the Catholic Building Society to show where payments are coming from. As Mr. Oakines pointed out the Respondent still remains in arrears. The Tribunal considers that the issue is not whether it is reasonable to withhold service charges as part of what Mr. Collins described as a "stand off" but rather whether the costs of the S.27A Application, in whole or in part, should not be regarded relevant costs in determining the amount of any service charges in respect of what would be just and reasonable in the circumstances. The Tribunal is of the view that no order should be made limiting the recoverability of costs.

The Tribunal's Decision

20. The Tribunal is of the view that no Order is made under Section 20C of the Landlord and Tenant Act 1985.

Chairman.....

Date.....