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IN THE WANDSWORTH COUNTY COURT

CASE NO: 9ZA00561

By the order of District Judge Gittens on 22 June 2009:
Liberty Place (Sheepcote Street) Management Company Limited's claim is referred/transferred to the Leasehold Valuation Tribunal of the Rent Assessment Panel

MIDLAND RENT ASSESSMENT PANEL

CASE NO: BIR/00CN/LSC/2009/0036

Landlord and Tenant Act 1985
Commonhold and Leasehold Reform Act 2002

DETERMINATION OF THE LEASEHOLD VALUATION TRIBUNAL ON A DISCRETE ISSUE OF LAW WITH OUTSTANDING MATTERS RESERVED IF NOT AGREED

In the matter of

Liberty Place (Sheepcote Street) Management Company Limited (the Applicant)
and
Jasbir Singh (the Respondent)

on the Applicant's application for a determination of reasonableness of service charges under section 27A(1) 1985 Act

Property: Apartment 196, Liberty Place, 26-38 Sheepcote Street, Birmingham B16 8JZ

Pre-trial Review heard at: The Panel Office

On: 3 September 2009

Followed by: A procedure without an oral hearing with sequential submissions

REPRESENTATIVES:

For the Applicant: Mr C Kelly, Solicitor advocate, Higgs and Sons

The Respondent: Mr J Singh in person

Tribunal members:

Mr T F Cooper FRICS FCIArb (Chairman)

Mr W Hatcher, Solicitor

Date of determination: - 9 MAR 2010

The section 27A(1) Application:

- 1 By particulars of claim 4 February 2009 issued in the Banbury County Court Case No 9ZA00561 **Liberty Place (Sheepcote Street) Management Company Limited (the 'Applicant')** claims service charges from **Mr Jasbir Singh (the 'Respondent')** for Apartment 196, Liberty Place, 26-38 Sheepcote Street, Birmingham B16 8JZ (the '**Apartment**') under section 27A(1) Landlord and Tenant Act 1985 (the '**1985 Act**'), inserted by section 155 Commonhold and Leasehold Reform Act 2002 (the '**2002 Act**').
- 2 By the order of District Judge Gittens in the Wandsworth County Court on 22 June 2009 the Applicant's claim (the '**Application**') is referred/transferred to the Leasehold Valuation Tribunal of the Rent Assessment Panel.

The Pre-trial review and subsequent Directions:

- 3 A Pre-trial review was held on 3 September 2009 at which **Mr C Kelly**, solicitor advocate, Higgs and Sons (for the Applicant) and **Mr Singh** in person appeared.
- 4 The subsequent Directions are for a procedure to resolve two discrete issues of law (the '**Issues**') without an oral hearing with sequential submissions. That procedure has been completed and neither party has requested an oral hearing.
- 5 Helpfully, following a Pre-trial Review, the discrete issues (the '**Issues**') to be determined by the Leasehold Valuation Tribunal ('**LVT**') are narrowed by Mr Kelly and Mr Singh to:
 - (a) **Issue One:** Whether the terms of the lease (the '**Lease**') dated 23 December 2003 made between Crosby Homes Limited (1) (the Landlord), Liberty Place (Sheepcote Street) Management Company Limited (2) (the Managers) and Jasbir Singh (3) (Tenant)) render Mr Singh liable to make payment for any element of service charges that comprises costs incurred in respect of the maintenance and/or provision of lifts within the Estate (by reference to the Lease), it being accepted that Mr Singh's Apartment is at first floor level (mindful Mr Singh's Apartment is within a Building which does not have a lift); and
 - (b) **Issue Two:** Whether Mr Singh is liable to pay the Applicant's costs of proceedings to determine liability of service charge prior to service of a section 146 notice.

The Apartment:

- 6 The Apartment is at first floor level and is within one of the Buildings on the Estate (defined in the Lease). The Building (defined in the Lease) in which the Apartment is situated does not have a lift.

No inspection:

- 7 No application has been made to inspect the Apartment and we do not deem an inspection necessary.

Jurisdiction:

- 8 Our jurisdiction is not contested and we are satisfied that we have the jurisdiction to determine the Issues as discrete Issues within the Application.

Issue One (see para 5(a) above):

- 9 It is common ground that Mr Singh's Apartment is on the first floor and not the third floor as stated in the First Schedule of the Lease, his Apartment is above a commercial property, the Building in which the Apartment is situated does not have a lift and the Buildings which do have lifts are detached from his Apartment's Building.

- 10 Mr Singh submits that, as his Apartment is in a Building without a lift, he does not directly benefit from the provision of lift facilities within the Estate and, therefore, it is unfair and unreasonable that he pays any expenses that properly arise from the lift facilities; especially because other not dissimilar leases for apartments on the Estate do not distinguish, in their service charge provisions, between 'with' and 'without' lift facilities. He refers to the history of his attempts, without success, to have his alleged unfairness rectified by the Landlord and the Respondent. Mr Kelly submits Mr Singh's history of communications with the Landlord and the Respondent does not assist us. We agree.
- 11 Mr Kelly submits that the provisions in leases other than the Lease do not assist us. We agree. We decide the Issue is the meaning of the service charge provisions in the Lease alone.
- 12 Mr Kelly submits that the summary judgment of Deputy District Judge Smart, 12 June 2006 in the Wandsworth County Court (claim no SWR03687) ordering judgment for the Landlord in the absence of Mr Singh (the Defendant) and striking out Mr Singh's counterclaim, raises the principle of *res judicata* whereby Issue One before us has already been judicially decided. Mr Kelly relies on the speech of Lord Bingham in *Johnson v Gore Wood & Co* [2000] UKHL 65 referring, in protecting the interest of justice, to finality in litigation and that a party 'should not be twice vexed in the same matter'.
- 13 In Issue One before us Mr Singh did not appear to pursue his counterclaim, in the court, for non-liability to pay for lift charges and, therefore, the merits of his counterclaim were not considered. Issue One is whether Mr Singh does have an obligation, pursuant to the Lease, to pay for lift charges. We hold that *res judicata* does not apply to Issue One because, despite summary judgment in the County Court, its merits have not been litigated and we hold that without a merits-based judgment the principle does not apply.
- 14 Mr Kelly refers us to the relevant wording of the lease, read as a whole: the Second Schedule (in particular para 1 as to Mr Singh's rights to use the Common Parts and the definition of "the Common Parts") saying it is accepted that Mr Singh does not have the right to use the lift(s) in other Buildings. This is not contested by Mr Singh and we hold that, on the evidence, there are no Common Parts to which Mr Singh has rights of use which necessitate or justify the use of a lift(s) in the context of para 1 Second Schedule '... in connection with the use and enjoyment of the [Apartment]'. In essence, Mr Singh has no right to use a lift(s).
- 15 Mr Kelly submits that, despite no rights by Mr Singh to use a lift(s), there are express terms in the Lease, providing for Mr Singh to contribute to the services which include, at para 3 Sixth Schedule, 'lifts shafts and machinery and other plant in the [Buildings]'. Mr Singh stresses the unfairness of a service charge payment for a lift(s) which he does not use, referring us, but not particularising his submissions, to: (a) *RICS Service Charge Residential Management Code* (the '**Code**'), approved under section 87 *Leasehold Reform, Housing and Urban Development Act 1993*, a Code applicable to service charges in the case before us; and (b) his submission that there has been a total failure of consideration insofar as him having to make a contribution to the lift(s). Mr Kelly does not accept non-compliance with the Code and does not accept there has been mutual mistake as the Lease expressly provides for Mr Singh's service charge to include the cost of the lift(s); and Mr Kelly submits the only issue before us is the construction of the relevant clauses in the Lease.
- 16 We accept Mr Kelly's proposition of the 'only issue'. On the issue of the construction of the Lease we derive no assistance from the Code and do not accept that there has been a mutual mistake in the context of Mr Singh's alleged total failure of consideration. In our interpretation of the Lease we have considered the principle of *contra proferentem* - which would benefit Mr Singh - whereby a term should be construed against the interests of the party (the Applicant) who imposed it. But we hold that the principle does not apply in the Issue before us because we hold the relevant provisions in the Lease are explicit and not ambiguous. Applying *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28 (referred to by Mr Kelly), ascertaining the common intention of the parties objectively from the relevant provisions of the Lease and recognising the Lease is a formal document, we hold that the service charge provisions in Mr Singh's Lease include payments, by him, that relate to lift services within the Estate.

- 17 We accept that there is a tension between section 19 *Landlord and Tenant Act 1985* 'reasonableness' of the lift services service charges and the express provisions of the Lease. Nevertheless, we hold that, on the facts of the Issue and the applicable law, an implication of unreasonableness is not established as it is not consistent with the express service charge provisions in the Lease.
- 18 In making our decision consistent with the law, it occurred to us that the *Unfair Terms in Consumer Contracts Regulations 1999* might assist Mr Singh, as a consumer. But Mr Singh is not a 'consumer', protected by the regulations, because he is not a person acting outside his trade, business or profession.
- 19 As to the reasonableness of Mr Singh's obligation to pay 0.45% of the services set out in the Sixth Schedule of the Lease - we hold that the percentage is an express service charge provision in the Lease which is not subject to a test of reasonableness for the reason we give in para 17 above.
- 20 We, therefore, hold and find on Issue One that the terms of the Lease render Mr Singh liable to make payment for any element of service charges that comprises costs incurred in respect of the maintenance and/or provision of lifts within the Estate (by reference to the Lease).

Issue Two (see para 5(b) above):

- 21 Mr Kelly says the Applicant intends to seek forfeiture proceedings pursuant to section 146 *Law of Property Act 1925*, following the LVT's determination of Mr Singh's liability to pay service charge. Mr Kelly relies on clause 4.8 of the Lease in support of the Applicant's entitlement to legal costs and expenses incurred in relation to the LVT's proceedings to determine liability for service charge, contested by Mr Singh. Mr Kelly stresses the Applicant's entitlement owing to the wording in clause 4.8: 'To pay ... the Managers [the Respondent] all costs charges and expenses including Solicitors' ... costs and fees ... in or in reasonable contemplation of any proceedings [being issued for forfeiture]' Mr Singh does not specifically challenge Mr Kelly's contention but says that if the Applicant succeeds on Issue Two the charges should be reviewed as they are excessive.
- 22 In making our decision consistent with the law, we hold that, on a true construction of clause 4.8 of the Lease, clause 4.8 does not include the costs and fees of these proceedings (before a LVT) because the proceedings before a LVT are not a section 146 procedure. The costs and fees concern a claim for a disputed service charge liability (where the basis for the dispute was, *prima facie*, not unreasonable) not in reasonable contemplation of forfeiture proceedings. In so doing we hold that the principle of *contra proferentem* does apply in this Issue Two whereby a term shall be construed against the interests of the party (the Applicant) seeking to impose it.

In summary:

- 23 We hold that:
- (a) On Issue One: The terms of the Lease render Mr Singh liable to make payment for any element of service charges that comprises costs incurred in respect of the maintenance and/or provision of lifts within the Estate (by reference to the Lease); and
 - (b) On Issue Two: Mr Singh is not liable to pay the Applicant's costs of proceedings to determine liability of service charge prior to service of a section 146 *Law of Property Act 1925* notice.

DATE: - 9 MAR 2010

T F Cooper
Chairman

