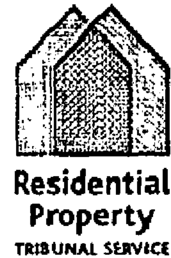
RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL



Section 27A Landlord and Tenant Act 1985

Application for a Determination of Liability to Pay Service Charges

DECISION AND REASONS

Case Number: CHI/18UE/LSC/2009/0130

Property: The Flat, 5, The Square, Braunton, Devon, EX33 2JD

Applicant : Simon Tattersall and Karen Tattersall (The Applicant, Landlords)

Respondent : Martin Clive Ward (The Respondent, Tenant)

Inspection 27th November 2009

Date of Hearing: 27th November 2009

Tribunal Members: Siobhan Casey LLB (Hons) Lawyer Chair

Mr J. S McAllister Valuer Member FRICS

Mr P. Groves Lay Member

Attending Case Officer Mr A. J. Peach

Date of Decision: 7th January 2010

1. Definitions and Interpretations used throughout these reasons:

2. 'the Applicant' refers to the Lessors / Landlords

3. 'the 'Respondent' refers to the Lessee / Tenant

4. 'the Act' refers to the Landlord and Tenant Act 1985

5. 'the Lease' refers to the Lease dated 30th September 2003 Between Simon Derek Tattersall and Karen Patricia Tattersall the Lessors of the one part and Martin Clive Ward the Lessee of the other part.

6. 'the Premises' refers to 5 The Square, Braunton, Devon EX33 2JD

7. 'the Application' refers to the application made to commence these proceedings dated 7th September 2009

8. This decision is based upon written submissions of both parties and oral evidence given at the hearing held on 27 November 2009. The Tribunal determined that pursuant to section 27(4) of the Act they had no jurisdiction to hear this application.

9. It was agreed by the parties at the start of hearing that there is provision in the Lease to demand a yearly service charge payment in Clause 2 of the Fifth Schedule .

10. The Application was for a determination of a number of issues relating to service charges payable to the Applicant by the Respondent in 2009 and future years. The Application requested that the Tribunal determine that the Respondent is liable to pay a service charge of £500.00 per annum in accordance with the terms of the Lease. Further, that there are service charges monies in the sum of £329-96 outstanding for the year to the end of 2009 and these should be paid immediately. These issues had been raised in the Application and were set out in more detail by a letter from the Applicant dated 2 September 2009 [p.8].

11. Finally, that the Tribunal determine that all future years of service charge should be fully paid up on 1st January and 1st July half yearly as per the terms of the Lease.

12. The relevant part of the Lease is Clause 2 of the Fifth Schedule p.9 [p.18]

13. The Tribunal members inspected the Premises on 27 November 2009. In attendance with the Tribunal members were Mr Simon Tattershall and Mr Martin Ward. The Premises were situated on a corner plot with a shop premises on the ground floor and the Premises comprised a first floor self-contained flat above. Entry was gained via a ground level side door, leading immediately to a small hall area with stairs facing which led directly up to the flat. The flat also had a living room, kitchen/dining room, a bedroom and a bathroom. There were no common parts nor any external garden or land with the flat. The building or premises was end-terraced, traditionally built of brick and rendered walls under a slate covered roof and was probably about 150-200 years old.

14. Following the Inspection the Tribunal and the parties reconvened to The Barnstaple Hotel, Barnstaple for a hearing.

15. The Tribunal commenced the hearing by reminding the parties of the matters to be dealt with as set out in the written application;

16. There were no service charges for past years to be considered only charges for current and future years;

17. For the current year 2009 the sum £329-96 was claimed as the balance due;

18. A determination that payments of £500-00 p.a. should be made in all future years as per the leasehold document;

19. And finally, £50-00 to be reimbursed to the applicant being the fee to cover the cost of this application.

20. The Applicant at the commencement of the hearing then made a further application that, the Tribunal also consider reimbursing the Applicant the Hearing fee of a further £150-00.

Applicant's Evidence

21. The Applicant's case was set out in the documents contained in the bundle of papers prepared in response to the directions given at the Pre-Trial Review which was held on 16 September 2009, together with his evidence given at the hearing.

22. As authority to demand the service charge the Applicant relied upon the Lease made between himself, his wife and the Respondent on 30th September 2003 for a term of 999 years from 1st January 2003, rent payable £75-00 per Annum adjusted in line with RPI as per the Lease and an annual payment on account of maintenance charge of £500-00 or such lesser sum as the Landlord may require. The First Schedule defined the maintenance year as the twelve month period commencing on 1st January in any year, the maintenance charge is the amount or amounts from time to time payable under clause 2 of the Fifth Schedule and the Maintenance Fund is the amount from time to time unexpended from the payments of Maintenance Charge made to the Lessor.

23. The Tribunal were referred to The Fifth Schedule, of the Lease containing the Lessees covenants, clause 2 which reads, [The Lessee] To pay the Lessor a Maintenance Charge being equal to one half of the expenses mentioned in the Eighth Schedule which the Lessor shall reasonably and properly incur and expect to incur in each Maintenance year the amount of such payment to be certified to the Lessors' Managing Agent or Accountant acting as expert and not arbitrator as soon as conveniently possible after the expiry of each Maintenance Year and further on the first day of January and the first day of July in each Maintenance Year to pay on account of the Lessee's liability under this clause one half of the annual payment on account of Maintenance charge stipulated in the particulars or the estimated maintenance charge attributable to the Demised Premises for the current Maintenance Year whichever shall be the greater. The Eighth Schedule detailed costs and Expenses charged upon the Maintenance Fund [p.27]

24. The Applicant stated that it was a requirement in the Lease for the Respondent to pay a sum of £500-00 per annum for the maintenance charge and that the Respondent had failed to do so. The Applicant was becoming increasingly concerned about future maintenance commitments. It was clear that the roof would need considerable work carried out upon it over the next couple of years to put it in good order and the Respondent's failure to pay the required maintenance charge each year prevented plans being made to proceed with planning the roof repairs. In previous years the Applicant had only demanded from the Respondent the half share of expenses actually incurred carrying out repairs in that year. In 2005 he had decided to demand the full £500-00 maintenance payment provided for in the Lease to enable a reserve fund to be built up and then organize repairs to the whole roof. The Applicant's intentions were set out in a letter to the Respondent dated the 13th February 2005[not paginated as it was submitted after bundle had been filed] and 14th February 2005[35]. Provision is made in the Lease for the accumulation of a reserve fund in the Eighth Schedule clause 10 [29]. The Applicant notified the Respondent of this change by a letter dated 20th December 2007 [p.36].

25. A schedule of repairs and maintenance during 2007 [p.37] was sent with the letter of 20th December 2007 this contained a demand for two instalments of the maintenance charge of £500-00, to be paid as follows, in January 2008 £250-00 and July 2008, £250-00.

26. Throughout 2008 the Respondent failed to make full payment of the sums demanded and a number of letters were sent to him requesting that he settle the outstanding sums. These letters were dated, 4th March 2008, 6th July 2008 and 14 October 2008.

27. On the 17th December 2008 a demand was sent to the Respondent for payment of repairs and maintenance during 2008. This included payments for annual insurance and the annual maintenance payment of £500-00 again split into two instalments for January and July.

28. A letter dated 8th February 2009 was sent to the Respondent [p.43] dealing with continuing failures to make full payment and offering the Respondent the opportunity to pay outstanding sums by instalments by way of standing order on the first day of each month so that a maintenance fund could be built up. On 7th April 2009 the Applicant sent a reminder letter [p.46] to the Respondent because the standing order had not been set up even though the Respondent had agreed to do so. Further reminder letters were sent on 8th May 2009, 29th June 2009 but the situation remained unresolved.

29. The Applicant explained he was becoming increasingly frustrated by the situation. The Applicant had been keen since 2005 to attend to the whole roof and had discussed these plans with the Respondent - see letter 13th February 2005 [no bundle reference].

30. In January 2009 the roof suffered storm damage at the front elevation and the bedroom. A roofing company funded by the insurance company, were called in to repair the damage. At the time of carrying out the works the roofers advised that the whole roof should be repaired. This was discussed between the Applicant and the Respondent and the applicant made particular reference to the advantage of proceeding at this point in time whilst the scaffolding was already in place as a result of rectifying the storm damage to the front elevation. The obstacle to proceeding to deal with repair to the whole roof was the Respondent's failure to provide his share of the costs.

31. The Applicant sent a number of letters to the Respondent throughout 2009 [pages 44 to 48] detailing sums outstanding, costs paid by the insurance company, and sums which were still due to the maintenance fund

Respondent's Evidence

32. In his evidence the Respondent did not dispute there was authority in the lease to impose a maintenance payment and he agreed there was provision for £500-00 p. annum on account thereof to be paid to the Applicant. Furthermore he accepted that the work to the front elevation was a proper maintenance charge in so far as costs were not covered by the insurance claim. In his written submission the Respondent did not argue that he owed monies to the Applicant.

33. The Respondent raised other issues, which he wanted the Tribunal to consider, namely the fact he had attended to roof repairs himself over the years without reference to the Applicant and at his own expense he believed that he should be given 'credit' for these payments. The Respondent was dissatisfied that the Applicant had not proceeded to repair the whole roof when the storm damage was repaired on the front elevation in January 2009. He recognized that the work needed to be done and he advised that at the present time he had 'no money' to contribute to the cost.

34. The Respondent accepted that in the past he had arranged repair works to the roof without reference to the Applicant or authority from him. The Respondent claimed to have spent approximately £1000-00 on the cost of roof repairs. The Respondent said that he did not contest the claim in the Application for the balance of £329.96 for the 2009 maintenance payment and added that he did feel that this charge was reasonable for the work which had been done. He confirmed that there was provision in the Lease to demand the maintenance payment and that he did sign an agreement on 6th March 2009 to pay the outstanding sum in monthly instalments.

35. The original agreement signed by both parties was shown to the Tribunal during the hearing. It was the signed original of the document in the bundle [p.45]. The Respondent accepted that he had signed it and there had not been any duress. The Respondent agreed that the sums claimed by the roofers were reasonable for the works carried out, he made it clear that if he did have the money he would pay the landlord .The Respondent simply put it that at this point in time he did not have the means to pay.

36. The Respondent at the end of the evidence was invited to consider whether he wished to make an application under s20(c) of the Act. It was explained to him that there was provision in the Act for a tenant to make an application to the Tribunal to obtain an order that the applicant/landlord cannot recover all or part of his costs in bringing proceedings through any future service charge. The Respondent replied he felt the fees claimed were reasonable but his current financial circumstances prevented him from paying. The Respondent did not raise any argument that it would be unfair or unreasonable for the costs or any proportion of them to form part of any future service charge demand.

The Law

37. Section 18 (1) of the Landlord and Tenant Act 1985 ("the Act") defines a service charge as:

"...an amount payable by a tenant of a dwelling as part of or in addition to the rent – which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management and the whole or part of which varies or may vary according to the relevant costs..."

38. Section 19 of the Act provides that:

39. " (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

40. Only to the extent that they are reasonably incurred, and

41. Where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

    i. And the amount payable shall be limited accordingly"

42. Section 20C of the Act provides 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 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.

43. Section 20(C)(2) provides 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.
    b. In the case of proceedings before a residential property tribunal, to a lease hold valuation tribunal
    c. In the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal.

44. Section 27(4) states; The LVT may not hear any application concerning a service charge which:

    (a) Has been agreed or admitted by the tenant........

45. (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

The Tribunal's Decision

46. Upon hearing the evidence of both parties, jurisdiction to hear the matter was considered by the Tribunal in the light of s27 (4) of the Act as it appeared after hearing the evidence that the parties had reached an agreement on 6th March 2009.

47. The mere act of payment of a service charge does not amount to an admission that the charge is accepted and therefore does not preclude the Tribunal's jurisdiction. In this particular case the Respondent accepted a process for making monthly payments in accordance with the terms set out in the letter he signed on 6th March 2009. The signed document was examined by the Tribunal members during the Hearing and noted it had not been seen before and in particular was not seen/ disclosed at the pre-trial review. The Respondent during the hearing said he agreed the charges were reasonable for the works carried out and the standard of the works were reasonable. Further the Respondent agreed there was provision in the Lease to claim for maintenance work of this type to be carried out and finally there was provision for the Applicant to demand twice yearly contributions towards the maintenance/ service charge. The Respondent explained that he had not paid the sums due because he did not have the financial means to do so.

48. The decision of the Tribunal was that an agreement had been made between the Applicant and the Respondent on 6th March 2009 accordingly they had no jurisdiction for them to hear this application.

49. The failure of the Respondent to pay the sums due for 2009 was because he simply did not have the means to pay.

50. The Tribunal accepted that the Respondent did not wish to peruse an application under section 20(c) of the Act for the landlord's costs in these proceedings to be limited or disallowed in any future service charge demand.

51. The Tribunal found there was an agreement between the parties as of 6th March 2009 and by virtue of s27 (4) of the Act the Tribunal did not have jurisdiction to hear the Application.

52. The Tribunal did observe and thought it useful to mention in these reasons that there had not been evidence presented to them to prove, on a balance of probabilities, that the consultation process required under section 20 of the Act had been carried out by the Applicant. The Act requires landlords to carry out a consultation on any 'major works' to the premises the cost of which will be recovered from the tenant through the service charge bill. There were some significant reforms to the consultation provisions made by the Common hold and Leasehold Reform Act 2002. It was felt that the consultation process was something the Applicant needed to familiarize himself with.

53. Further for information purposes; works covered as 'insured risks' and all monies reimbursed by the insurance company could not form part of any service charge demand. In such a situation the Applicant would need to set out a clear schedule of what charges fell outside the insurance claim to establish the Respondent's precise liability to contribute to service charge payments supported by copies of invoices, correspondence, claim forms, payment information from the insurance company and service charge demands together with proof of the dates of service of the same upon the Respondent prepared in accordance with the prescribed form in the Lease.

54. The Respondent must ensure that he consults with the Applicant before carrying out any works of repair. To comply with the terms of the Lease the Respondent needed to observe which works were the responsibility of the Applicant and to realise that under the provisions expressed of this lease, the Respondent is not authorized to attend to repair works without the prior authority of the Applicant.

SIGNED; Siobhan Casey

on 07 January 2010

LAWYER CHAIRMAN APPOINTED BY THE LORD CHANCELLOR.