

Leasehold Valuation Tribunal: reasons

Landlord and Tenant Act 1985 section 27A

Address of Premises

The Committee members were

4 Addisland Court,

Mr Adrian Jack

Holland Villas Road,

Mrs S Coughlin

London W14 8DA

Mrs R Turner JP

The Landlord:

Addisland Court Company Ltd

The Tenant:

Edward Mallorie

Procedural

1. By an application made 30th March 2010 Mr Mallorie sought determination of his liability in respect of the service charge years 2007-08, 2008-09 and 2010-11. (The service charge year under the lease ends on 24th March.)
2. The respondent named in the application as Pemberton Residential Ltd was the managing agent until they were replaced by Douglas & Gordon early this year. This was a technical error, in that the appropriate respondent to the application was Addisland Court Company Ltd.
3. It had an unfortunate consequence. The Tribunal held a pre-hearing review on 5th May 2010. Because of the misnomer of the respondent, the application had been served only on Pembertons, who, because they were no longer the managing agents, did not appear. Equally for the same reason Pembertons did not pass the application on to the landlord, so no one from the landlord was aware of the application until shortly before the hearing of the case before us on 19th August 2010.
4. In these circumstances, the landlord came to the Tribunal without having complied with the Tribunal's directions. This was, however, justifiable, because the landlord had never been formally added a party to the proceedings. The Tribunal can only add a party to proceedings on that party's application. The Tribunal has no power to add parties of its own motion or on the application of an opposing party: see Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 reg 3.
5. At the hearing, the landlord was represented by Mr Lange, a director, and Mr Thompson, a chartered accountant. With them in the morning were Mr Thwaites and Mr Maunder of Pembertons and Miss Holmes of Douglas & Gordon with Mr Horowitz as an observer. The tenant appeared in person accompanied by his wife.

6. At the hearing Mr Lange applied for the landlord to be joined as a respondent and the Tribunal granted the application. This was, however, in the context of the parties having agreed a sensible way forward.
7. The background of this matter is that the landlord company is owned by the tenants of the block and the tenants act as directors. Indeed Mr Mallorie had been a director himself. Mr Thompson had been the accountant responsible for the accounts for many years and Mr Mallorie knew him well.
8. During the morning the tenant explained his concerns about various items in the accounts and in particular where he said that there was insufficient of a paper trail for him to be satisfied that the accounts were accurate. The landlord for the reasons set out above was not able at the hearing fully to explain the discrepancies identified by the tenant. The parties agreed that Mr Mallorie and Mr Thompson would meet in the second week of September 2010 and go through the accounts in order that the matters in dispute (except for the following items) could, if possible, be agreed.
9. The three items which the parties asked the Tribunal to determine were:
 - a. whether the landlord exercised a reasonable business judgment in appointing "Jack" as a salaried relief port and in giving the other (residential) porter a mobile phone;
 - b. whether the costs thereby incurred were reasonable; and
 - c. whether the penalties incurred for late payment and reconnection of the telephone and a summons for non-payment of council tax were properly recoverable through the service charge.
10. In relation to all the other matters in dispute, the parties agreed that these be withdrawn from the current application, but without prejudice to the parties' right to issue a fresh application to determine the withdrawn matters.
11. No party requested an inspection and none was held.

The lease

12. The flat is in a purpose-built block with some 41 flats plus the porter's flat. The lease was in a standard form with the usual provisions for payment of service charge on account with a balancing payment once the final amount was ascertained. Provision was made for a residential porter, who occupied one of the flats. There was no dispute that the three items in dispute could in principle be payable under the terms of the lease, but this was subject of course to the expense being reasonably incurred and reasonable in amount.

The law

13. The Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002 provides as follows:

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent-
- (a) which is payable directly or indirectly for services, repairs, maintenance, improvement or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord or a superior landlord in connection with the matters of which the service charge is payable.
- (3) for this purpose
- (a) costs includes overheads and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred or to be incurred in the period for which the service charge is payable or in an earlier period

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-
- (a) only to the extent that they are reasonably incurred; and
 - (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

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 any 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."

The three issues: porter

14. In relation to the porter, there was very little dispute of fact. Under the terms of the lease there was to be a porter who had a flat in the block. The gentleman who had been the porter for many years became elderly and needed help. It would have been possible to retire him, but (as the tenant accepted) "no one wanted to wield the hatchet". Mr Lange said that the directors also valued the extensive knowledge which the porter had of the building, although again he accepted with the benefit of hindsight the knowledge was perhaps not as irreplaceable as they thought at the time.
15. At any rate, the landlord had been employing relief porters to assist the permanent porter. The relief porters came through an agency and were comparatively expensive. Moreover there was little continuity and there were complaints about particular individuals who were sent to assist.
16. In consequence the directors decided that the better course would be to employ a relief porter directly. One of the temporary porters had impressed the directors. He was a Polish man called "Jack" (no one could remember his surname). Jack took the post, but the landlord then had to pay the agency a finder's fee for having introduced Jack to the block.
17. It was common ground that Jack was initially good, but that as time went on his performance became less satisfactory and there were complaints of rudeness by some tenants (including Mrs Mallorie). In the event Jack left voluntarily after about a year to go and work with his brother.
18. In our judgment a landlord has a measure of discretion in how the functions entrusted to it are carried out. With the benefit of hindsight, Jack did not prove a success, so the money spent on him and on the agency could have been better spent. However, without that benefit of hindsight, it does not seem to us that the decision to offer permanent employment to Jack was unreasonable or one to which no reasonable landlord could have come.
19. We bear in mind that this is a block owned and run by the tenants. Unlike some cases in our experience where different factions among the tenants vie for control, in the current case it was gratifying to see that both Mr Lange and the Mallories got on well with each other. We have little doubt that the directors in making their decisions about Jack were acting in what they thought was the best interest of the block.
20. Similar considerations apply to the decision not to retire the existing porter. Where one has an employee who has performed well over many years but who gets old, it is always a difficult decision when to ask that employee to retire. Again, although a different decision could have been reached, in our judgment the directors of the landlord acted within the reasonable bounds of their discretion in deciding not to retire the existing porter.
21. Accordingly we disallow nothing.

Telephone

22. The porter who was in residence had a landline telephone provided. Subsequently the directors decided to give him a mobile phone as well. In each case the whole of the cost was paid by the landlord and there was no attempt to recoup the cost of personal calls from the porter.
23. In our judgment, a porter is now expected to have a mobile phone, so that residents can contact him wherever he might be in the building. It is true that the porter was able to use both phones for personal calls. The use of the landline seems to have been negligible. On the mobile there was a small excess over the call plan, but there is no evidence that the porter was abusing the facility. Although in theory it might have been possible to try and recoup the cost of the personal calls, in practice the administrative burden would have outweighed any modest financial gain. In our judgment the ability to use the phones for a small number of personal calls could reasonably be considered one of the perks of the porter's job.
24. Accordingly we disallow nothing.

Penalties


25. There were various penalty charges which were incurred. These included late payment charges and reconnection charges for the telephones and the costs associated with a Magistrates Court summons for non-payment of council tax.
26. In our judgment all of these charges could and should have been avoided. The managing agents should have set up appropriate direct debits or other systems to ensure the payment of these bills. At all times the landlord had funds to meet these expenses. (The landlord has a income from other sources than service charges.) The incurring of these penalty fees and costs was a result of the managing agents' failure and it is unreasonable that the tenant should meet these costs. Mr Lange was happy with this result and said that the landlord would raise this matter with the managing agents.
27. We were not asked to quantify the sums (such an issue is for the further application to be made in the event of the parties not agreeing terms), but in principle we disallow the penalty charges.

Costs

28. The Tribunal has a discretion as to who should pay the fees payable to the Tribunal by the tenant. In our judgment the landlord has won two of the issues in dispute and did not challenge the result on the third issue. The balance of success is thus with the landlord. Accordingly we consider that the costs should lie where they fall, so we make no order for costs.

DECISION

The Tribunal accordingly determines the three issues as set out above and makes no order for costs.

A handwritten signature in black ink that reads "Adrian Jack". The signature is written in a cursive, slightly slanted style.

Adrian Jack, chairman

15th September 2010