

**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/2007/0012

In the matter of Flats 1,2,5 and 6 Colben Court, 17 Rafati Way, St. John's Road, Bexhill, TN40 2EX

Applicant (Landlord): HRB Construction Ltd

Respondent: Mrs. K M C K R Gordon

Date of Application: 16th February 2007

Date of Hearing: 17th May 2007

Tribunal Members: Mr. S Lal LIM (Legal Chairman)
Mr. B H R Simms FRICS MCI Arb
Ms. J A Morris (Lay Member)

Date of Decision:

Application

1. The Applicant applied to the Tribunal on the 16th February 2007 under section 27A of the Landlord & Tenant Act 1985 (as amended) ("the Act") to determine her liability to pay a service charges in respect of Flats 1,2,5 and 6 Colben Court, 17 Rafati Way, St. John's Road, Bexhill, TN40 2EX ("the property") for the year 2006. Provisional Directions were issued on the 20th February 2007 becoming substantive directions ("the Directions") on the 2nd March 2007. The Respondent replied to Directions in so far as the Tribunal were concerned on the 29th March 2007 by service of a Bundle ("the Bundle") consisting of 67 pages divided into five separately tabbed sections. They had not supplied the Applicant with a copy of their Bundle of the same date. This matter is discussed below.

The Law

2. The statutory provisions primarily relevant to applications of this nature are to be found in section 18, 19 and 27A of the Act. The Tribunal has of course had regard in making its decision to the whole of the relevant sections as they are set out in the Act, but here sets out what it intends shall be a sufficient extract from each to assist the parties in reading this decision. Section 18 provides that the expression "service charge" for these purposes 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, improvements or insurance or the landlord's costs of management, and
- b. the whole or part of which varies or may vary according to relevant costs."

"Relevant costs" are the cost or estimated costs incurred or to be incurred by the landlord in connection with the matters for which the service charge is payable and the expression "costs" includes overheads.

3. Section 19 provides that :

"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 reasonable standard

and the amount payable shall be limited accordingly."

4. Subsections (1) and (2) of section 27A of the Act provide that :

"(1) 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 to whom it is payable
- b. the person by 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.

The Inspection

5. The members of the Tribunal inspected the properties prior to the hearing. Colben Court is a recently constructed 2 storey block of eight flats being part of a small residential development called Rafati Way. The block is constructed of brick with cement rendered panels under a pitched tile-covered roof. There are two common access hallways and stairs serving four flats. The subject properties are grouped around a single common way. We were able to inspect the interior of two flats. In front of the block is a paved parking area.

Background

6. The hearing was convened and held at the Horntye Park Sports Complex, Bohemia Road, Hastings. The Applicant Company was represented by Mr. Rafati who is the owner of the company. The Respondent was represented by Miss. Emma Sothern who is a solicitor with Menneer Shuttleworth, Solicitors based in Bexhill on Sea. The Respondent lessee, Mrs. Kennedy Redmile-Gordon was in attendance.
7. The hearing commenced at 11 am and after introductions but before the receipt of evidence the Applicant confirmed he had not received the Bundle served by the Respondent. Miss. Sothern confirmed that she had not sent it to the Applicant and that it was an oversight on her part. The Tribunal were anxious that the Applicant was given an opportunity to consider the Bundle and he was given a period of 15 minutes to see whether he felt able to proceed or needed more time to consider the documents before him. It is perhaps appropriate to mention that the Bundle consisted of 67 pages divided by 5 tabbed sections. These consisted of:

Tabbed Section One: The Applicant's s.27A Application form

Tabbed Section Two: The Respondent's Statement in Response, this consisted of six short paragraph in which the Respondent stated that she did not dispute either her liability to pay the service charge or the amount but only to whom it was payable.

Tabbed Section Three: This consisted of the lease

Tabbed Section Four: This consisted of the Certificate of Incorporation of Colben Court Residents Limited ("hereinafter CCR Ltd")

Tabbed Section Five: This comprised 30 pages of correspondence between the Applicant and Respondent.

8. Having had an opportunity to consider the Bundle the Applicant confirmed that the contents of Tabbed Sections 1, 3 and 4 were matters he was fully familiar with, indeed they comprised in the main his own application form and the lease he had appended to it as part of his original application. He recognised the essentially narrow nature of the dispute as per the Respondent's statement in response but would have liked to put in his own correspondence to reply to the contents of Tabbed Section Five above. It should be said that the Applicant did recognise the correspondence at pp38-68 as much of it had been written by him in the first place.
9. Miss. Sothern, who clearly admitted it was her error that the Bundle had not been served in accordance with Directions, indicated that her client was anxious that the Tribunal determine to whom the service charge was payable and if it assisted the Applicant, she would not rely on any of the contents of Tabbed Section Five of the Bundle as in her words it was "largely irrelevant."
10. In the circumstances the Applicant indicated that he was content for the matter to be determined by the Tribunal and the Tribunal were satisfied that documents in Tabbed Sections 1-4 were either documents that the Applicant had himself supplied or in the case of the Respondent's reply were matters the Applicant could readily respond to.

The Issues

11. The only matter in dispute was to whom the service charge was to be paid. Miss. Sothern confirmed that her client did not dispute either the amount to be paid or indeed the fact that she had to pay it.

Evidence

Applicant's Evidence in Chief

12. The Applicant gave evidence as follows. He stated that the property was built by him in about 2006. The intention was that a management company be set up; this was called Colben Court Residents Ltd ("CCR Ltd") in which any incoming tenant would be involved in. This Company was duly set up but because the property needed to be managed at the outset, he Mr. Rafati the landlord, opened a bank account in the name of "17 Rafati Way" under what he described as the "umbrella" of Hastings and Rother Property Services Ltd (HRPS). This is a company that belongs to the Applicant. The Applicant stated that the bank required a fixed address hence his own company carried out this arrangement. The Applicant confirmed that CCR Ltd was a dormant company and it was easier for HRPS Ltd to be used for the receipt of correspondence.

13. He compared the residents of the subject property to members of a sports club. By this the Tribunal understood that he meant an association of individuals with the best interests of the club at heart. He confirmed that he had been advised by his solicitor that he would control the way the property was managed and as a landlord he was allowed to organise a system after he had sold the properties, in effect to manage them. The Applicant was of the view that everything was managed effectively and efficiently and that it was essentially irrelevant to whom monies were paid. He described this as a “petty thing.”
14. The Applicant referred the Tribunal to the Seventh Schedule of the lease and in particular the Heading of the Seventh Schedule which referred to “Covenants enforceable by the Landlord and or/ the Management Company.” He stated that his understanding was that the heading of the Seventh Schedule conferred on him as landlord the right to effectively manage the property. The Applicant was also able to produce cheque books for Hastings and Rother Property Services Ltd each designated as “Colben Court” or “Rafati Way” but under the overall customer designation of HRPS Ltd.
15. Following the Applicant’s evidence the Tribunal adjourned for lunch at 1pm. When the Tribunal reconvened at 2pm the Applicant indicated that he now wished to apply for an adjournment as he wished to have legal representation in respect of the lease. The Tribunal retired and considered the matter in accordance with the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003. Regulation 15 states that the Tribunal shall not adjourn except where it considers it is reasonable to do so. We did not consider the granting of an adjournment at this stage of hearing for the reasons advanced was reasonable. The Applicant had indicated at the outset of the hearing and after the issues had been explained to him, that he wished the matter to proceed and secondly the lease was a document that the Applicant himself had put forward at the time of his initial Application.

Cross-Examination

16. Miss. Sothern asked a few questions only but Mr. Rafati, on behalf of the Applicant, did confirm that if the Respondent wrote out a cheque for the outstanding amount to CCR Ltd he would accept that.

The Respondent's Case

17. Miss. Sothern pointed to the following clauses in the lease as supporting her contention that payment could only be made to Colben Court Residents Ltd. Specifically she referred to the description of the same as the "Management Company" in terms of the parties to the lease. She referred to Clause 4.3 specifically that the Landlord will only observe and perform the Management Covenants at the request of the tenant if the Management Company is in breach of the any of the covenants. She specifically referred to Paragraph 6.4 of the Sixth Schedule which states that:

"6.4 The Tenant shall pay to the Management Company the Tenant's Proportion and of the Maintenance Expenses in manner following that is to say."

18. Miss. Sothern's case was that the lease defines the Management Company as being Colben Court Residents Ltd specifically as opposed to any other entity created by the Landlord.

Cross-Examination

19. The Applicant put the question to Miss. Sothern whether her client had ever operated an account for The Kennedy Association. Her client confirmed that she had not. The Applicant confirmed he had no further questions.

The Lease

20. The Tribunal was provided with a copy of the lease dated the 30th September 200 and has regard to all the terms of the lease in coming to its decision but highlights here those clauses which it believes are specifically relevant to the payment of service charges. The lease can be described as a tri-partite lease, meaning that the parties to it are HRB Construction Ltd "the Landlord", Colben Court Residents Limited "the Management Company" and the Respondent "the Tenant."

21. The Sixth Schedule sets out the Tenants proportion of the Maintenance Expenses and specifically at Paragraph 6.4 states that:

"6.4 The Tenant shall pay to the Management Company the Tenant's Proportion and of the Maintenance Expenses in manner following that is to say."

22. The Sixth Schedule throughout refers to payment as being to the Management Company as opposed to a management company or managing agent generally. The only part of the lease where payment is to be to the Landlord is if the Management Company is in breach of any of the covenants assigned to it, specifically Clause 4.3 which states that the Landlord will only observe and perform the Managements Covenants at the request of the tenant if the Management Company is in breach of the any of the covenants.

Consideration

23. 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 who the monies are to be paid to.

24. The Tribunal is of the view that the lease could not be clearer on this matter, specifically Clause 6.4 requires the Tenant to pay the Management Company which can only relate to Colben Court Residents Ltd. The latter is defined in the lease. The only exception to this is where the Management Company has breached its covenants (Clause 4.3). We find in this matter that no question of breach arises as the Management Company has effectively been kept in a dormant state by the Applicant. We find that the Applicant has conflated the concept of a management company as defined by the lease and a company carrying out management tasks. Put another way, Colben Court Residents Ltd could quite legitimately ask another entity to manage the property, but it has not. The Tenant's obligations under the lease are only to Colben Court Residents Ltd. The Tribunal appreciates that the Applicant no doubt used a system that worked for him, in effect getting the tenants to pay to a bank account that was under the control of his own company of Hastings and Rother Property Services Ltd or HRB Construction Ltd. Some tenants may have been perfectly happy with this as long as the maintenance was carried out. We found that the Applicants own evidence that he was advised by his solicitors that he would "be in control" suggests that this was indeed the intention. We are unable to attach the meaning given to the Seventh Schedule by the Applicant as this refers to covenants enforceable by either the Landlord or the Management Company in respect of the behaviour of tenants and the general up keep of the property. It does not relate to the issue of to whom the service charge is payable. Be that as it may the lease only lawfully requires a tenant to pay to the Management Company as defined by the lease which in this case is Colben Court Residents Ltd. In that regard the Tribunal determines that Maintenance Expenses (service charge) be paid to Colben Court Residents Ltd.

The Tribunal's Decision

The Tribunal therefore determines

- (1) The Maintenance Expenses for flats 1,2,5 and 6 Colben Court for the year in dispute (2006) is payable to Colben Court Residents Limited as the defined Management Company in accordance with Paragraph 6.4 of the Sixth Schedule of the lease.
- (2) The total amount of Maintenance Expenses for the year in question (2006) are as follows
 - (a) Insurance for the subject properties at £178.25 per flat making a total of £713 plus an administration fee of £25
 - (b) Communal Charges of £100 per flat making a total of £400 for the four flats

Total Maintenance Expenses (service charge): £1138

- (3) The Tribunal has no jurisdiction in respect of the payability of ground rents.

Chairman... 

Date... 30/5/07