

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/24UJ/LSC/2009/0135

DECISION AND REASONS

Application : Section 27A of the Landlord and Tenant Act 1985 as amended (“the 1985 Act”)

Applicant/Landlord : Camden Hurst (Milford) Management Co Ltd

Respondent/Leaseholder : Mrs Pamela Marlow (Flat 40)

Building : Camden Hurst, Milford on Sea, Hants, SO41 0WP

Flats : the flats in the Building

Date of Application : 17 September 2009

Date of Directions : 21 September 2009

Date of jurisdiction hearing : originally set down for hearing on the 24 November 2009, but, at the parties’ request, determined on the papers without a hearing

Members of the Tribunal : Mr P R Boardman JP MA LLB (Chairman), and Mr S Griffin LLB

Date of Tribunal’s Reasons : 24 November 2009

Introduction

1. The Applicant/Landlord stated in the application form and in a letter dated the 30 September 2009 from the Applicant/Landlord’s solicitors, Scott Bailey, that :
 - a. the Building comprised approximately 90 apartments and Flats
 - b. service charges of £1,092 for the first half of the year 2009/2010 were due from the Respondent/Leaseholder on the 25 June 2009
 - c. on the 27 July 2009 the Respondent/Leaseholder paid the sum of £92.31 in settlement of the service charge, having offset a sum for damp which she claimed had resulted from lack of repair by the Applicant/Landlord
 - d. the Applicant/Landlord had commissioned a surveyor’s report which stated that the damp in the Respondent/Leaseholder’s Flat had been caused by condensation
 - e. the Applicant/Landlord wished the Tribunal to decide :
 - whether the Respondent/Leaseholder was entitled to set off damages for any claim she might have against the Applicant/Landlord against the service charge
 - whether there was a breach by the Applicant/Landlord of its repairing covenants, ie:
 - whether the damp complained of was caused by a want of repair on the Applicant/Landlord’s part, and, if so

- when did the Applicant/Landlord have notice of the need for repairs, and did the Applicant/Landlord have reasonable time to carry out such repairs
- if the Respondent/Leaseholder's claim were successful, what would be the quantum of that claim

Letter from Coffin Mew 26 October 2009

2. The Respondent/Leaseholder's solicitors submitted that the Tribunal did not have jurisdiction in this matter. This was not a dispute "whether a service charge is payable" for the purposes of section 27A of the 1985 Act. The Respondent/Leaseholder did not dispute the amount of the service charge or her liability for the service charge. It was understood that the Applicant/Landlord did not dispute the Respondent/Leaseholder's right to set off against the service charge a valid claim that she might have. The issue was whether the Applicant/Landlord was liable for breach of a covenant in the lease relating to disrepair, and, if so, the damages which should be awarded for that claim. The Respondent/Leaseholder's claim was for breach of covenant. It was not a claim that the service charge was in any way open to challenge because of a failure to repair, or because of any other breach of the lease by the Applicant/Landlord. The Respondent/Leaseholder has merely set off her claim against the entirely separate liability under the service charge. The service charge was therefore not relevant to any issue between the Applicant/Landlord and the Respondent/Leaseholder. The issues of disrepair, the heads of damages which could be awarded and the quantum to be awarded did not relate at all to the service charge, and were matters which were properly dealt with in the county court. The Tribunal should decline jurisdiction

Respondent/Leaseholder's submissions attached to letter from Coffin mew 17 November 2009

3. Additional submissions were that the dispute between the parties was about the facts of the claim for set off, not about any aspect of the service charge or about the right to set off. None of the paragraphs of section 27A (1) (a) to (d) of the 1985 Act needed to be determined, because they were not in dispute, and, in relation to paragraph 27A(1)(e), that issue was not in dispute because the Applicant/Landlord agreed that the right of set off existed and that the service charge need not be paid by a transfer of money from the Respondent/Leaseholder to the Applicant/Landlord
4. The parties had agreed to submit and exchange written submissions instead of attending the hearing before the Tribunal, in order to save costs

Applicant/Landlord's submissions attached to letter from Scott Bailey 19 November 2009

5. The Applicant/Landlord submitted that the Respondent/Leaseholder did dispute the amount payable. Her position was that a substantially lower figure was payable because she had a right of set off in relation to the Applicant/Landlord's lack of repair pursuant to the Applicant/Landlord's covenants in the lease
6. In order to address the issue of the amount of the service charge which was payable, the Tribunal would need to address the following matters :
 - a. was the Respondent/Leaseholder entitled to set off rent under paragraph 5(1) of the lease, since, if not, the Respondent/Leaseholder case would fail
 - b. if the Respondent/Leaseholder was entitled to set off rent, what were the Applicant/Landlord's obligations under the covenants contained in paragraph 4(1) of the

lease and had the Applicant/Landlord complied with those covenants, since, if so, the Respondent/Leaseholder's case would fail

c. if the Applicant/Landlord had not complied with its covenants under the lease, what sums was the Respondent/Leaseholder entitled to set off against the service charge

7. These matters related to whether a service charge was payable as the Respondent/Leaseholder was claiming a right of set off against the service charge
8. The Tribunal was far better suited to deal with these matters, due to its specialist knowledge and expertise, than the County Court. If the Tribunal were to decline jurisdiction, the County Court would simply refer the matter back to the Tribunal for determination
9. In the interests of minimising costs, neither party would be attending the hearing before the Tribunal

Statutory Provisions

10. Section 27A of the 1985 Act provides as follows :

27A Liability to pay service charges: jurisdiction

(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 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.*

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

- (a) has been agreed or admitted by the tenant,*

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter

Authorities

11. In the Lands Tribunal decision in **Continental Property Ventures Inc v Jeremy White** LRX/60/2005 heard on the 10 February 2006 (A1) the LVT had decided that the works to a flat costing £17,114.15 had been made necessary because the landlord had neglected to carry out repairs to a leaking pipe within a reasonable time; that, if the landlord had complied with its repairing covenant, the cost would have been only £3,525; and that that was the only sum which had been reasonably incurred
12. The Lands Tribunal decided that :
 - a. there was a distinction between :
 - reasonableness, which affected whether work should have been carried out, whether it had been carried out properly, and whether the costs were reasonable, and
 - payability, which included reasonableness, but also included whether the cost should be included in a service charge
 - b. breach of a landlord's covenant to repair would give rise to a claim in damages
 - c. if the breach results in further disrepair imposing a liability on the lessee to pay service charge, that is part of what may be claimed by way of damages
 - d. at least to that extent it would give rise to an equitable set-off, and, as such, constitute a defence
 - e. it would not mean that the costs of remedying the further disrepair were not reasonably incurred, but would mean that there was a defence to their recovery
 - f. the LVT's decision, that the costs were not payable under section 27A of the 1985 Act, was correct, but not because the costs had not been reasonably incurred
 - g. so far as the LVT's jurisdiction to determine such claims for damages is concerned,
 - the LVT has jurisdiction to determine whether a service charge is payable
 - the fact that the costs have been unreasonably incurred is only one reason why it might not

be payable

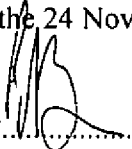
- the LVT has jurisdiction to determine claims for damages for breach of covenant only in so far as they constitute a defence to a service charge in respect of which the LVT's jurisdiction under section 27A of the 1985 Act has been invoked
- where the LVT holds jurisdiction concurrently with the County Court, the LVT may, as a matter of discretion, think it inappropriate to exercise its jurisdiction, at least where one party asks it not to do so

13. The Tribunal has also taken account of the decision in **Loria v Hammer** [1989] 2 EGLR 249, Chancery Division

Tribunal's findings and reasons

14. Having considered all the submissions by both parties, the Tribunal finds that :
- a. the Respondent/Leaseholder has agreed and admitted not only the amount of the service charge claimed by the Applicant/Landlord, but also the Respondent/Leaseholder's liability to pay it
 - b. on the face of it, the Tribunal accordingly has no jurisdiction in relation to the payability of that service charge by virtue of section 27A(4)(a) of the 1985 Act
 - c. the Respondent/Leaseholder's claim to set off relates to a claim for breach of the Applicant/Landlord's repairing obligations under the Respondent/Leaseholder's lease
 - d. there is no evidence before the Tribunal that the items included in the service charge in question themselves bear any relation to the subject matter of the Respondent/Leaseholder's claim to set off
 - e. the facts of this case are accordingly to be distinguished from the facts in the case of **Continental Property Ventures Inc v Jeremy White**, where the subject matter of the tenant's claim to set off was directly related to the landlord's claim for service charge
 - f. contrary to the submissions on the part of the Applicant/Landlord, the Respondent/Leaseholder's claim to set off accordingly does not relate to or affect the payability of the service charge in question for the purposes of section 27A of the 1985 Act, and a claim by a tenant that a landlord is in breach of covenant under a lease is not as such a matter which the Tribunal can otherwise determine in an application under section 27A of the 1985 Act
 - g. the Tribunal therefore does not have jurisdiction to consider the Respondent/Leaseholder's claim for breach of covenant and for set off, which, in the absence of agreement between the parties, and if the parties are so advised, will be a matter for the county court

Dated the 24 November 2009



.....
P R Boardman
(Chairman)

A Member of the Tribunal
appointed by the Lord Chancellor

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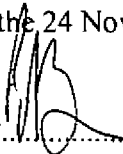
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- where the LVT holds jurisdiction concurrently with the County Court, the LVT may, as a matter of discretion, think it inappropriate to exercise its jurisdiction, at least where one party asks it not to do so

13. The Tribunal has also taken account of the decision in **Loria v Hammer** [1989] 2 EGLR 249, Chancery Division

Tribunal's findings and reasons

14. Having considered all the submissions by both parties, the Tribunal finds that :
- a. the Respondent/Leaseholder has agreed and admitted not only the amount of the service charge claimed by the Applicant/Landlord, but also the Respondent/Leaseholder's liability to pay it
 - b. on the face of it, the Tribunal accordingly has no jurisdiction in relation to the payability of that service charge by virtue of section 27A(4)(a) of the 1985 Act
 - c. the Respondent/Leaseholder's claim to set off relates to a claim for breach of the Applicant/Landlord's repairing obligations under the Respondent/Leaseholder's lease
 - d. there is no evidence before the Tribunal that the items included in the service charge in question themselves bear any relation to the subject matter of the Respondent/Leaseholder's claim to set off
 - e. the facts of this case are accordingly to be distinguished from the facts in the case of **Continental Property Ventures Inc v Jeremy White**, where the subject matter of the tenant's claim to set off was directly related to the landlord's claim for service charge
 - f. contrary to the submissions on the part of the Applicant/Landlord, the Respondent/Leaseholder's claim to set off accordingly does not relate to or affect the payability of the service charge in question for the purposes of section 27A of the 1985 Act, and a claim by a tenant that a landlord is in breach of covenant under a lease is not as such a matter which the Tribunal can otherwise determine in an application under section 27A of the 1985 Act
 - g. the Tribunal therefore does not have jurisdiction to consider the Respondent/Leaseholder's claim for breach of covenant and for set off, which, in the absence of agreement between the parties, and if the parties are so advised, will be a matter for the county court

Dated the 24 November 2009



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P R Boardman
(Chairman)

A Member of the Tribunal
appointed by the Lord Chancellor