

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL**

Case No: CHI/45UC/LIS/2010/0032

Between:

Mr Douglas Edward Wawman (Applicant)

and

Mr David John Westwood (Respondent)

In the matter of an Application under Section 27A Landlord and Tenant Act 1985

Premises: Flat 1 Ada House, 24 Norfolk Road, Littlehampton, West Sussex BN17 5PN ("the premises")

Date of Hearing: 28 July 2010

Tribunal: Mr D Agnew BA LLB LLM Chairman
Mr A O Mackay FRICS (Valuer member)
Ms J K Morris (Lay member)

DETERMINATION AND REASONS

DETERMINATION:

1. The Tribunal determines that for the reasons set out hereafter none of the service charges claimed by the Applicant from the Respondent for the years 2006-2009 inclusive are yet due and owing by the Respondent to the Applicant nor is the Respondent yet in breach of covenant in respect of non-payment of service charges for the aforesaid years.
2. If the Applicant remedies the defects which currently render the service charges in question unenforceable the Applicant will not be precluded from making a further application to the Tribunal for a determination as to the payability and reasonableness of the service charges in question.
3. The Leasehold Valuation Tribunal does not have jurisdiction to deal with alleged non-payment of ground rent.

Background

4. On 2 March 2010 the Applicant made an application under Section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination by the Tribunal as to the liability for and reasonableness of service charges rendered by the Applicant to the Respondent in respect of the Respondent's lease of Flat 1 Ada House, 24 Norfolk Road, Littlehampton, West Sussex BN17 5PN (the Premises) for the years 2006 to 2009 inclusive.
5. On 18 April 2010 the Applicant made a further application to the Tribunal for an order that a breach of covenant or condition in the Respondent's lease of the premises had occurred due to non-payment of insurance, ground rent and building maintenance.
6. On 29 April 2010 the Tribunal issued directions which required the Applicant to file and serve a statement of case by 24 May 2010 together with a bundle of documents including copy service charge demands, any documents which accompanied the said demands, and copy invoices for expenditure incurred.
7. The directions also provided that the Respondent must file and serve a statement of case by 14 June 2010.
8. The Applicant failed fully to comply with the direction with regard to filing a statement of case and the Respondent failed to respond to the application in any way whatsoever.

Inspection

9. The Tribunal inspected the premises immediately prior to the hearing on 28 July 2010. Neither the Applicant nor the Respondent attended. The Tribunal could obtain no response from the Respondent's flat and so the inspection was carried out from the exterior of the building only.
10. The premises comprise a three-storey semi-detached Victorian villa in a fairly quiet residential side road close to the seafront in Littlehampton. The premises also have a basement and the lease of the Respondent's flat comprises one room in the basement as well as accommodation on the ground floor.
11. The exterior walls of the building are rendered and painted. The windows are single glazed wooden sash windows in good condition. There is plastic guttering which appears to have been replaced recently. The external decoration of the building is in good order and again appears to have been carried out in recent times.
12. There is a small paved courtyard to the front of the building and a passageway down the side of the building which leads to external

staircases to flats 2 and 3. A single storey extension to the rear of the main building houses "Ada Cottage" which appears to be a separate unit from the other three flats in the main part of the building. To the rear of Ada Cottage is a small paved yard area with some well tended bushes and shrubs and beyond that a parking area leading to a rear access road which is unmade.

13. The whole of the exterior of the building appeared to be well maintained and in good order.

The Hearing

14. The hearing took place at Littlehampton. Neither the Applicant nor the Respondent were in attendance. The Tribunal office had received a telephone call from the Applicant to say that he would be abroad on holiday when the hearing was due to take place and would not therefore be attending. He said that he would be sending in written representations. He did not ask for the hearing to be adjourned. There had been no communication from the Respondent.
15. The Tribunal was satisfied that the parties had been given appropriate notice of the hearing and therefore proceeded to determine the application on the evidence before it which it was entitled to do under Rule 13 (8) of the Leasehold Valuation Tribunal's (Procedure) (England) Regulations 2003 which states that: "If a party does not appear at a hearing, the Tribunal may proceed with the hearing if it is satisfied that notice has been given to that party in accordance with these regulations."

The Applicant's case

16. As stated above, the Applicant did not file a proper statement of case. All the Tribunal had to go on was the brief details contained in the application form and bundle of documents comprising some correspondence largely between the Applicant and the Respondent's mortgage lender, some documents purporting to be rent and service charge demands for the years 2006 to 2009 inclusive and a document dated 14 May 2010 signed by the Applicant purporting to show that the figure for building maintenance included all exterior paintwork, drains, cleaning of common areas, gardening, cleaning of gutters and roof maintenance. No figures were given for the individual categories mentioned and there were no invoices in support of expenditure.
17. From the foregoing documentation the Tribunal gathered that the amounts being claimed by the Applicant from the Respondent for the years in question were as follows:-

		£
for 2006:-	One third buildings insurance	191.52
	Ground Rent	50.00
	Administration charge	50.00

	Building maintenance	500.00
for 2007:-	One third buildings insurance	192.74
	Ground Rent	50.00
	Administration charge	50.00
	Building maintenance	500.00
for 2008:-	One third buildings insurance	202.78
	Ground Rent	50.00
	Administration charge	50.00
	Building maintenance	500.00
for 2009:-	One third buildings insurance	228.47
	Ground Rent	50.00
	Administration charge	50.00
	Building maintenance	500.00

18. The Applicant stated in his application form that the Respondent had paid no service charges since moving into the property in 2003. Initially the Applicant obtained payment from the Respondent's mortgage lender but from 2006 onwards, after the Respondent's mortgagee had changed, the Applicant had been unable to secure payment of the outstanding charges from the lender.

The Respondent's case

19. As stated above the Respondent filed no evidence whatsoever.

The Lease

20. By clause 1 of the lease dated 18 March 2003 between the Applicant as landlord and Respondent as tenant the Respondent covenanted to pay by way of further or additional rent the maintenance contribution more particularly referred to in parts 1 and 2 of the fourth Schedule to the lease. Further, by clause 2 of the lease the tenant covenanted with the landlord to observe and perform the obligations on the part of the tenant set out in the fourth and fifth schedules to the lease.
21. By clause 3 of the lease the landlord covenanted with the tenant to observe and perform the obligations on his part set out in the fourth and sixth schedules to the lease and to provide the services referred to in clause 2 of part 1 of the fourth schedule to the lease.
22. By part 1 of the fourth schedule to the lease headed "Maintenance contribution" the tenant is obliged to pay one-third of the annual maintenance expenditure incurred by the landlord computed in accordance with part 2 of the fourth schedule. One hundred pounds of the said annual maintenance expenditure is to be paid in advance by two equal instalments each year and the balance is to be paid within

one month of the receipt by the tenant of a statement of account referred to in clause 3 of part 2 of the fourth schedule to the lease.

23. By clause 2 of part 1 of the fourth schedule to the lease the landlord holds the maintenance contribution on trust to maintain the exterior walls and structure of the property including the roof and foundations gutters and rainwater pipes of the building in good and substantial repair and condition, to provide for the payment of all legal and other costs incurred by the landlord or by the managing agents if any including management fees in the running and management of the property and the enforcement of covenants conditions and regulations contained in or affecting the leases of other flats in the building and keeping the property insured.
24. By part 2 of the fourth schedule to the lease the annual maintenance expenditure by the landlord in any year is to be computed as soon as practicable after the beginning of January in the year immediately succeeding the year in question.
25. The annual maintenance expenditure shall consist of:- "all such sums required or estimated to be required (whether in respect of the current or future years) to provide any services or carry out any maintenance repairs renewals reinstatements re-building or re-decorations on or in relation to the property ... and in particular ... including ... all sums so required in respect of any of the following:
 - (i) effecting and maintaining any policy or policies of insurance that the landlord or managing agents if any may decide ...
 - (ii) the costs and expenses of supplying statements of account of the annual maintenance expenditure including the charge and remunerations of a qualified accountant employed for the purposes of preparing auditing and providing copies of such account.
 - (iii) the cost of enforcing or attempting to enforce against the tenant or the lessees of the other flats in the property the observance of any covenant.

The Law

26. By Section 27A of the 1985 Act it is provided 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 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, improvement, 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 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.

27. By Section 47 of the Landlord and Tenant Act 1987:-

“(1) where any written demand is given to a tenant of premises to which this part applies the demand must contain the following information, namely -

- (a) the name and address of the landlord and
- (b) if that address is not in England and Wales an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

(2) where –

- (a) a tenant of any such premises is given such a demand, but
- (b) it does not contain any information required to be contained in it by virtue of subsection (1),

then (subject to subsection (3)) any part of the amount demanded which consists of a service charge or an administration charge shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant.”

28. By Section 48 of the Landlord and Tenant Act 1987:-

“(1) a landlord of premises to which this part applies shall by notice furnish the tenant with an address in England and Wales at which notices (including notices and proceedings) may be served on him by the tenant.

(2) where a landlord of any such premises fails to comply with subsection (1), any rent, service charge or administration charge otherwise due from the tenant to the landlord shall (subject to subsection (3)) be treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does comply with that subsection.”

29. By Section 168 of the Commonhold and Leasehold Reform Act 2002:-

“(1) the landlord under a long lease of a dwelling may not serve a notice under Section 146 (1) of the Law of Property Act 1925 (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) this subsection is satisfied if:

- (a) it has been finally determined on an application under subsection (4) that the breach has occurred,
- (b) the tenant has admitted the breach, or
- (c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

...

(4) a landlord under a long lease of a dwelling may make an application to a Leasehold Valuation Tribunal for a determination that a breach of covenant or condition in the lease has occurred."

30. By section 169 (7) of the Commonhold and Leasehold Reform Act 2002 it is provided that "Nothing in section 168 affects the service of a notice under Section 146 (1) of the Law of Property Act 1925 in respect of a failure to pay -
- (a) a service charge (within the meaning of Section 18 (1) of the 1985 Act), or
 - (b) an administration charge (within the meaning of part 1 of schedule II to this act)."
31. By section 21B of the Landlord and Tenant Act 1985, inserted by the Commonhold and Leasehold Reform Act 2002, it is provided that "a demand for payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges." The Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007 set out the detail of the information to be given in such a notice.

The Consideration

32. It was unclear to the Tribunal whether what the landlord had classified as an administration charge was in fact an administration charge within the meaning of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 or whether it was meant to refer to a management charge made by the landlord for effecting the insurance, organising maintenance and repairs and sending out service charge demands and collecting the same. If the former then the fee of £50 per annum that the applicant has been charging for each of the years in question would be a charge applicable only to the Respondent and not to the other lessees in the block and would have to have been in connection with the attempts to collect the ground rent and service charges due each year from the Respondent. If the latter, then it would have been a charge which would have been levied against all three tenants in the block and would properly have been charged by the Applicant as a management fee. As the Applicant has not made an application under Schedule 11 of the Commonhold and Leasehold Reform Act for the Tribunal to consider the liability to pay and reasonableness of an administration charge as defined in that Act the Tribunal proceeded on the assumption that this particular charge called an administration charge by the landlord was in effect a management fee chargeable as a service charge equally to all three tenants in the building.
33. The Tribunal was also puzzled as to why the Applicant should have made an application under both Section 27A of the 1985 Act and Section 168 of the Commonhold and Leasehold Reform Act 2002.

Section 169 of the 2002 Act makes it clear that Section 168 has no application to cases of non-payment of service charge. Consequently an order under Section 168 is not required before a Section 146 notice required as a pre-cursor to forfeiture proceedings is served. All that is required is for a determination to be made under Section 27A of the 1985 Act as to the amount of service charges that the tenant is liable to pay.

34. Even if the application under Section 168 were not otiose, the Tribunal determined that the Respondent is not yet in breach of covenant for failing to pay service charges for the years 2006 to 2009 inclusive because, on the evidence furnished by the Applicant, the service charges have not yet been properly demanded. The copy service charge demands furnished by the Applicant which were presumably copies of those served upon the Respondent do not contain a statement giving the address of the landlord in England and Wales at which documents may be served under Section 48 of the Landlord and Tenant Act 1987. Furthermore, as from 1 October 2007 a landlord has to provide to the tenant with any service charge demands a notice of prescribed information as required by Section 21B of the Landlord and Tenant Act 1985 which was inserted into that act by the Commonhold and Leasehold Reform Act 2002 Section 153. The said regulations are contained in the Service Charges (summary of rights and obligations, and transitional provision) (England) Regulations 2007. They are too detailed and extensive for the Tribunal to set them out in these reasons but the parties can obtain a copy of the regulations which have SI number 2007/1257. The evidence supplied by the Applicant does not show that such a statement of prescribed information was served with the service charge demands for the years 2007- 2009 inclusive. Again, where a landlord fails to supply such a notice the service charge in question is not due and payable until such time as an appropriate notice is served.
35. It follows, therefore, that as the Applicant has failed to comply with the various statutory requirements as set out above on serving the service charge demands the Respondent is not liable to pay them. If, however, the Applicant remedies the situation by serving service charge demands accompanied by the required statutory notices then the service charges will become due and payable. At that point the landlord can apply to the Tribunal under a fresh application for the Tribunal to consider afresh the liability for and reasonableness of the service charges in question.
36. It would be appropriate for the Tribunal to take matters no further because it has found that for the reasons stated above that none of the service charges in question are yet due and payable. However, in order to assist the parties the Tribunal makes the following observations:-

(a) if the Applicant makes a fresh application to the Tribunal under Section 27A of the Landlord and Tenant Act 1985 once he has remedied the defects in the service charge demands served to date he should bear in mind that if, as is likely to be the case, the Tribunal directs him to file and serve a statement of case supported by documentary evidence it will be incumbent upon him to produce evidence of the expenditure that he has actually made in respect of the premises. If he fails to do so then the Tribunal has no evidence as to the amount of that expenditure to enable it to consider whether the expenditure is or is not reasonable.

(b) if the landlord has expended monies on any particular item of expenditure (for example exterior painting) which has resulted in a service charge to an individual tenant of more than £250, then before incurring that expenditure the landlord should have gone through a consultation procedure with each of the tenants as required under Section 20 of the Landlord and Tenant Act 1985 or he must have applied to the Tribunal for dispensation from the consultation procedures under Section 20ZA of the 1985 Act. If he fails to do so he is likely to be restricted to recovering £250 only for that item of expenditure.

(c) in this Tribunal's view it is not sufficient for the landlord to rely on the provisions in the lease enabling the landlord to seek a payment on account of future expenditure and claim the same year after year without accounting to the tenants for what their payment on account has been used for (as would appear to be so in this case).

(d) if service charge demands are properly made and the landlord makes a further application to the Tribunal under Section 27A of the 1985 Act in the future and the Respondent as in this case makes no attempt to challenge the service charges claimed then he runs the risk of the tribunal simply endorsing the landlord's claim, provided the Tribunal is satisfied that the claim appears to be reasonable.

(e) in the case to which this determination and reasons refers the actual amounts claimed by the Landlord for insurance do not on the face of it appear to be unreasonable. If the "administration charges" are in fact management costs incurred by the landlord then £50 per annum would appear to be a very reasonable figure. If buildings' maintenance covers all the items referred to in the document mentioned in paragraph 16 above then £500 may be a reasonable figure but it is up to the landlord to prove that it is reasonable and the Tribunal can only make such a determination if it is furnished with details as to what the expenditure of £500 has been expended upon. The Tribunal would also expect to see a statement of account so that if the landlord has actually spent less than £500 in the year on buildings maintenance then there should be information as to how much of a surplus has accumulated from previous years.

Ground Rent

37. The Tribunal has no jurisdiction to make any determination with regard to Ground Rent under Section 27A of the 1985 Act. As far as the 2002 Act is concerned the Tribunal's jurisdiction to make a determination as to breach of covenant is contained in Section 168 (4) of the Act. Section 168 refers to the conditions necessary before a landlord can serve a forfeiture notice under Section 146 of the Law of Property Act 1925. It is not necessary for a Section 146 notice to be served where the breach concerned is failure to pay rent. Consequently this Tribunal considers that Section 168(4) has no application to a breach of covenant for non-payment of rent and therefore has no jurisdiction to make a determination as to whether a tenant is in breach of covenant for non-payment of rent.

Conclusion

38. The Tribunal concludes that the tenant is not yet liable to pay the service charges demanded by the Applicant for the years 2006-2009 inclusive as the landlord has not yet complied with the statutory requirements for the service for service charge demands. It follows that the Respondent is not yet in breach of covenant in respect of those said service charges and the Tribunal therefore makes a determination that the Respondent is not in breach of covenant for non-payment of service charges and the Tribunal has no jurisdiction to determine as to whether there has been a breach of covenant for non-payment of rent.
39. The Applicant will no doubt appreciate from the foregoing that the law relating to the letting of residential premises on long leases is fraught with traps for the unwary and that there are a considerable number of statutory requirements that must be complied with and in respect of which he should consider taking legal advice. The Tribunal was impressed with the standard of repair and maintenance of the building at Ada House and it is only right that the tenant should pay an appropriate and reasonable amount as his contribution to that repair and maintenance as well as to the insurance of the building and the cost of managing it. The Tribunal, however, is bound to apply the legislation which has been enacted for the protection of tenants and that is what it has done in this case.

Dated this 9th day of August 2010

Signed

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D. Agnew BA LLB LLM
Chairman