

10388



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : LON/00BE/LSC/2014/0372

Property : 275 Tabard Street London SE1 4UR

Applicant : Robert James Knight
Catherine Knight

Representative : Both parties in person

Respondent : London Borough of Southwark

Representative : Mr Cremin solicitor

Type of Application : Liability to pay service charges

Tribunal Members : Judge P Leighton LLB
Mr T Sennett MA FCIEH

Date and venue of PTR : 10 Alfred Place, London WC1E 7LR

Date of Decision : 8th October 2014

DECISION

INTRODUCTION

- 1** The Applicants applied to the tribunal for a determination of their liability to pay service charges in respect of the property at 275 Tabard Street SE1 4UR of which they are leasehold owners and of which the Respondent is the freeholder. The lease is for a term of 125 years at a ground rent of £10 per annum and contains covenants requiring the landlord to provide services and for the tenant to contribute to the costs of the services by way of a service charge.
- 2** At a case management conference held on 12th August 2014 the tribunal directed that two specific issues should be heard as preliminary matters, as either could effectively dispose of the proceedings. The first issue was whether the tribunal had jurisdiction to determine the application on the ground that the Applicants had reached an agreement with the Respondent whereby they agreed to enter into a legal charge to secure the payment of the balance of service charges in the sum of £4797.11.
- 3** The second issue raised by the respondent was that the sum of £4797.11 was not payable as the Respondent had failed to serve a demand or a notice within 18 months of the sums being incurred.
- 4** At the hearing the Applicants appeared in person and the Respondent was represented by Mr Cremin of the legal department of Southwark.
- 5** The property is a one bedroom flat on the first floor of a purpose built block of flats comprising part of the Haddonhall Estate. The Respondent decided to carry out refurbishment works on the estate in 2008 and the work was carried out by Apollo Construction, the main contractors, and lasted for a period of 46 weeks.
- 6** Section 20 notices were served in 2007 and the cost of the work was estimated at approximately £10,962.98 and demands were sent out for that amount to the Applicants on 10th October 2008.
- 7** A further demand was sent to the Applicants in the sum of £4,797.11 in March 2013. Following discussions with Mr Scott Thomas of the Leasehold Management section Mr Knight made it clear he was unhappy with the additional demand and was minded to challenge it in the tribunal. Southwark threatened legal proceedings and Mr Knight agreed with them to accept a charge on his flat for a term of 10 years in order to repay this sum. However he did not agree that it was due and asked for details as to how he could apply to the tribunal to challenge the amount claimed.
- 8** At the time of the conversation and in the emails which followed in June and July 2013 no mention was made that the Council considered that the grant of the legal charge would deprive the jurisdiction of the tribunal to determine the application.

Issue 1 Jurisdiction

- 9** Mr Cremin on behalf of the Respondent submitted that the grant of the legal charge was incompatible with the right to challenge the service charge demand for that amount. He relied upon s27A(4) of the 1985 Act (see below) as constituting an agreement. He accepted that there had been no specific agreement but said it was implied from the facts. He accepted that the decision in **Daejan –v- London Leasehold Valuation Tribunal 2001 EW Civ 1195** had been reversed by virtue of the provisions of Section 27A (5) of the 1985 Act (see below) but stated that the situation could be distinguished between mere payment and the acceptance of a legal charge by the creditor since the latter granted a proprietary interest and was therefore only compatible with a concluded agreement.
- 10** Mr Knight submitted that no difference should apply as between a legal charge and an unsecured payment if the debtor made clear that he was reserving the position as to the payability of the debt. If Southwark wished to rely on the provision that the legal charge would preclude an application to the tribunal they should say so at the time. In fact they did not make that stipulation but provided him with a copy of the leaflet for making the application.

The Tribunal's Decision

- 11** The tribunal is of the opinion that it has jurisdiction to determine the application. In the absence of authority to the contrary it would in our view be unfair to allow the Respondent to rely upon such a point in the absence of a specific clause to that effect in the agreement. There was no such clause and Mr Knight was never told that Southwark intended to take this point against him if he entered into the charge. He stated that had they done so he would not have entered into it but simply made the application. No evidence was called to rebut his account of the conversation with Mr Scott Thomas and the tribunal therefore accepted it.

Issue 2 Section 20B Defence

- 12** The Applicants contend that the landlord's claim for £4797.11 is barred save for the sum of £374 by virtue of the provisions of Section 20B of the Landlord and Tenant Act 1985 (see below) on the grounds that the demand for the additional monies was not made until 11th March 2013 more than 18 months after the sums were incurred by the landlord.
- 13** The Respondent produced a schedule of payments made to the contractor totalling 13 in all between 2008 and September 2011. Seven of the certificates were issued before the completion of the works and the remainder in late 2008, 2009 and one final certificate in September 2011.

- 14** The demand for payment was received by the Applicants on 11th March 2013 and it is common ground between the parties that since the date of the original demand in 2008 (which suggested that some adjustment might arise at the conclusion of the contract) that no communication or notice was sent by the landlord indicating that further sums would be likely to fall due and would result in further charges.
- 15** The demand sent in March 2013 is significantly higher than the original estimate and exceeds the original costings by about 40% since they include the items from the later certificates.
- 16** Mr Cremin submitted that the demand was issued in time albeit only 6 days before the expiry of 18 months from the date of the final payment in September 2013. He said that the Respondent was entitled to aggregate the payments and that the time should run from the date when the last payment accrued in September 2011.
- 17** Mr Knight referred to the decision of the Upper Tribunal in **OPM Properties Ltd-v- Burr (2012)UKUT 2(LC)** in which the Court held that the word "incurred" meant the time when an invoice was issued for the works or services or the time when they were paid for.

The Tribunal's Decision

- 18** The tribunal is satisfied that the demand for payment made in 2013 was within the time limit for the 13th invoice paid by the Respondent in September 2011 but that it was not within the period of 18 months from the dates of the three invoices delivered and paid after the date of the original payment by the Applicants in 2008.
- 19** In the view of the tribunal the Respondent is not entitled to aggregate the four invoices from the contractor and simply demand payment on receipt of the final invoice. The course which the landlord should pursue where there is a large contract and there are many later invoices which will be paid after the date of the original interim estimate or payment, is to serve a notice in accordance with Section 20B(2) of the Act to put the tenant on notice that further sums will be demanded in the future. On receipt of the final account the landlord can then demand payment within the 18 month period in accordance with Section 20B(1).
- 20** Unfortunately the landlord failed to give a further notice in this case but merely issued the second demand almost 18 months after the receipt of the final account. In the view of the tribunal this is not an adequate compliance with Section 20B as a result of which the landlord is barred from recovery of any additional sum over and above the £347 which is admitted by the tenant.
- 21** Accordingly the tribunal determines that the sum of £347 is due from the tenant in respect of the additional works and it is not necessary to determine the reasonableness of the additional cost over and above that sum.

22 There is no claim by Southwark to add the costs of the proceedings on to the service charge account. Had they sought to do so the tribunal would have considered it appropriate to make an order under Section 20C of the 1985 Act

23 The Applicants have incurred fees in the sum of £315 for the application and hearing and the respondent is ordered to reimburse these fees to the Applicants within 21 days of receipt of the decision

Name Peter Leighton Date 14th October 2014

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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, improvements 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 for 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 or later 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 provisions 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

- (1) An application may be made to the appropriate 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 the appropriate 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.

Section 20

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
- (a) complied with in relation to the works or agreement, or
 - (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
- (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
 - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
- (a) an amount prescribed by, or determined in accordance with, the regulations, and
 - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount

prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

- (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

- (1) 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 the Upper Tribunal, or in connection with arbitration proceedings, 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.
- (2) 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;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
 - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.