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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AU/LSC/2015/0518**
Property	:	**2nd & 3rd Floor Flat, 322 Upper Street London N1 2XQ**
Applicant	:	**Daniel Reinaldo Aranda**
Representative	:	**Waldrons Solicitors**
Respondent	:	**Rosemary & Christopher Currell and Dolphin Land Limited**
Representative	:	**Fry & Co Property Management**
Type of Application	:	**For the determination of limitation in relation to the issue of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge N Haria** **Mrs A Flynn**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**4 April 2016**

DECISION

Decisions of the Tribunal

(1) The Tribunal makes the determinations as set out under the various headings in this Decision.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years 2005 to 2015 and future years, however prior to a determination of the service charges a determination of a preliminary issue as to the limitation period applicable to the service charge has arisen.

2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. A Case management hearing took place on the 15 January 2016. The Appellant was represented by Mr Verduyn of Counsel and the Respondent was represented by Mr Fry of Fry & Co Property Management. Following the case management hearing Directions were issued setting the application down for a hearing on the 16 June 2016 and requiring submissions from the parties on the issue of limitation. The Directions provided that the Tribunal will make a preliminary determination on the issue of limitation on the papers.

4. This decision is on the preliminary issue of limitation.

The background

5. The property which is the subject of this application is a 2 bedroom flat in a building converted into 2 apartments, 1 house and 1 commercial unit with a basement.

6. The Applicant holds a long lease of the Property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. Rosemary & Christopher Currell are the freeholders and landlord of the property. The specific provisions of the lease and will be referred to below, where appropriate. The Lease is dated 7 November 2005 and made between the Rosemary & Christopher Currell and Dolphin Land Limited (1) and Daniel Reinaldo Aranda (2) and is granted for a term of 125 years.

The issues

7. The issue for determination is follows whether the Appellant should be permitted to pursue his case in respect of service charges from the commencement of the Lease from the 7 November 2005 or whether he is prevented from challenging the reasonableness of any service charge for periods more than 6 years under section 27A of the Landlord and Tenant Act 1985 ("the Act").

8. Having considered the evidence and submissions from the parties and considered all of the documents provided, the Tribunal makes the following determination on the issue.

The Applicant's case

9. The Tribunal had before it Submissions made on behalf of the Applicant by Mr Verduyn as well as the witness statement of the Applicant.

10. It is submitted that in this case the Applicant cannot be said to have admitted or agreed any of the Service charges as on the facts he has been protesting for years and the delay in making an application to the Tribunal is not a reason under Section 27A(4) for the Tribunal to deny itself jurisdiction.

11. Mr Verduyn submits that the judge in **Cain** was not referred to Section 6(c) of the Interpretation Act 1978 which states *"In any Act, unless the contrary intention appears .....words in the singular include the plural and words in the plural include the singular"* and so the reasoning of the judge in **Cain** was therefore "*per incuriam*". This is a latin expression meaning literally, "through lack of care", in relation to a decision of a court it means it was decided without reference to a statutory provision or earlier judgment which would have been relevant. The significance of a judgment having been decided *per incuriam* is that it does not then have to be followed as precedent by a lower court.

12. Mr Verduyn argues that it follows that Section 27(5) should be read as stating "*"..the tenant is (or tenants are) not to be taken to have agreed or admitted any matter by reason only of having made any payment (or payments).".* Therefore mere payment or payments cannot count against a tenant as agreement or admission. Mr Verduyn submits that the judge in Cain did not rely on delay in making challenges as the reason for the decision but only as reinforcing the reasoning for treating a series of payments as an implied or inferred admission. Mr Verduyn submits that since in this type of case the point on jurisdiction is related to the concept of limitation (where delay would have to be considered) some analogy is appropriate and furthermore Mr Verduyn

submits that the Limitation Act 1980 provides the solution to stale claims.

13. Mr Verduyn submits that the Judge in **Cain** was not referred to the Court of Appeal decision in **Collins v Duke of Westminster [1985] QB 581** on the Leasehold Reform Act 1967 which held that *"any cause of action which the applicant had under the Act of 1967 derived only from that statute and as such was a claim upon a specialty; and that accordingly the appropriate period of limitation was that of 12 years provided by section 8 of the Limitation Act 1980...."*.

14. The Applicant contends that the approach put forward by the Respondent would preclude charges demanded from the Applicant up to and including the year ending 31st March 2008. The year ending 31st March 2009 would not be excluded, because the accounts for that year were not signed off until 17 December 2009 (i.e within 6 years of the Application). The Applicant could not have taken issue until receipt of these accounts because they crystallise the amount due from the Applicant (clause 3.23(b) of the Lease).

The Respondent's case

15. The Tribunal had before it the submissions made on behalf of the Respondent by Mr Fry as well as the witness statements of Mr Fry and Mr Currell.

16. The Respondent relies on the case of **Cain** and submits that the reasoning in the decision in **Cain** applies to this case and the Applicant cannot pursue a claim for service charges more than 6 years prior to the date of the Application. The Respondent refers to paragraph 25 of the decision in Cain which states as follows:

"In my judgment, the F-tT was entitled to so find based purely upon the series of payment in respect of the demanded service charge throughout this six year period, and subsequently, without reservation, qualification or other challenge or protest. That of itself is sufficient. The is, however, reinforced by the sheer length of time which has elapsed before challenge was first made – between eight years in respect of the 2006/07 service charge and 12 years for the 2001/02 service charge. Whilst distinctions can be made between the nature of the different service charge items being challenged, the F-tT is entitled to look at matters in the round and find that where there has been substantial delay in making any challenges to the items now in dispute, and most if not all of which have long-since been paid, that the tenant has agreed or admitted the amounts claimed which, after all, have long-since lain dormant without challenge."

17. The Respondent argues that since all the correspondence between the parties have been in connection with leaks from the Applicant's flat, structural issues caused by the Applicant or letters from the Applicant's legal representatives in relation to a proposed sale and the payment of service charge without complaint is such that it should be considered that the Applicant has agreed or admitted the service charges and the limitation period applies. The Respondent does not specifically state which years it considers are excluded by this approach.

The Tribunal's decision

18. The Application before the Tribunal is made under Section 27A of the Act which gives the Tribunal jurisdiction to consider the liability to pay service charge.

19. The Tribunal's jurisdiction stems from the Act and as such falls under the accepted meaning of "speciality" which includes causes of action based on statute.

20. Sections 8, 9 and 19 of the Limitation Act 1980 provides as follows:

*"**8Time limit for actions on a specialty.***

(1)An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.

(2)Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

9Time limit for actions for sums recoverable by statute.

(1)An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.

(2)Subsection (1) above shall not affect any action to which section 10 of this Act applies.

19Time limit for actions to recover rent.

No action shall be brought, or distress made, to recover arrears of rent, or damages in respect of arrears of rent, after the expiration of six years from the date on which the arrears became due."

21. The Upper Tribunal in the case of **Cain v Mayor and Burgesses of the London Borough of Islington [2015] UKUT 0542(LC)**

considered the extent to which a tenant on an application under section 27A of the Act could pursue proceedings in respect of Service charge relating to a period more that 6 years prior to the date of the application.

22. The Judge in **Cain** stated that the view that Section 8 of the Limitation Act 1980 applies to a claim for re-payment of service charge so that it is statute barred as a six year limitation period applies is misconceived. He explains that the Application is "*...a claim for determination as to the reasonableness of the service charge made under section 27A of the 1985 Act. It is not a claim to recover rent or arrears or service charge (both brought by the landlord) or damages in respect thereof (brought by the tenant). If successful, it would result in a determination as to the reasonableness of the amounts claimed and nothing more.*"

23. The Applicant relies on the Court of Appeal decision in **Collins v Duke of Westminster** in support of the proposition that the provisions of the Section 8 of the Limitation Act 1980 apply in this case.

24. Section 38(1) of the Limitation Act 1980 provides *"action" includes any proceeding in a court of law, including an ecclesiastical court;".*

25. The proceedings before the Tribunal under Section 27A of the Act are proceedings in a court of law and therefore *"...an action.."* under Section 8 of the Limitation Act 1980. The Tribunal's jurisdiction under Section 27A of the Act is to determine whether a service charge is payable and the determination is made bearing in mind the provisions as to the reasonableness under Sections 18 and 19 of the Act.

26. The Tribunal accepts that submissions made on behalf of the Applicants and finds that in principle Section 8 of the Limitation Act 1980 applies to proceedings under Section 27A of the Act. Therefore potentially all the service charges from 7 November 2005 to date could be challenged by the Applicant. However this is subject to the provisions of Sections 27A(4) and (5) and the effect of those provisions. Under the Section 27A (4)(a) no application may be made in respect of a matter which *"has been agreed or admitted by the tenant".* This is qualified by Section 27A(5) as follows: *".....the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment."* So although in principle the applicable limitation period in respect of an application under Section 27A is 12 years (by virtue of Section 8 of the Limitation Act 1980), this is subject to the proviso that tenant has not agreed or admitted any of the service charges in which case the tenant may not make an application in respect of these service charges under Section 27A.

27. The Upper Tribunal in **Cain** at paragraph 14 considered the meaning of an agreement or admission and stated that *"An agreement or admission may be express, or implied or inferred from the facts and circumstances. In either situation the agreement or admission must be clear, the finding being based upon the objectively ascertained intention of the tenant which may be express or implied or inferred from the conduct of the tenant – usually an act or a series of acts or inaction in the face of specific circumstances or even mere inaction over a long period of time or a combination of the two."*

28. The Upper Tribunal in **Cain** stated at paragraphs 16, 17 and 18 that *"What is required is some conduct which gives rise to the clear implication or inference that that which is demanded is agreed or admitted by the tenant. The relevant question, therefore, is: are there any facts or circumstances from which it can properly be inferred or implied that the tenant has agreed or admitted the amount of service charge which is now claimed against him?"*. The effect of Section 27A(5) is to preclude such a finding *"by reason only of having made any payment.....The reference to the making of "any payment", and "only" such payment, indicates that whilst the making of a single payment on its own, or without more, will never be sufficient to found the finding of agreement or admission, the making of multiple payments even of different amounts necessarily over a period of time (because that is how service charges work) may suffice..... But the reason why a series of unqualified payments may, depending on the circumstances, suffice is because the natural implication or inference from a series of unqualified payments of demanded service charges is that the tenant agrees or admits that which is being demanded. Putting it another way, it would offend commonsense for a tenant who without qualification or protest has been paying a series of demanded service charges over a period of time to be able to turn around and deny that he has ever agreed or admitted to that which he has previously paid without qualification or protest. Self-evidently, the longer the period over which payments have been made the more readily the court or tribunal will be to hold that the tenant has agreed or admitted that which has been demanded and paid. It is the absence of protest or qualification which provides the additional evidence from which agreement or admission can be implied or inferred."*.

29. Accordingly the Tribunal proceeded to consider whether on the facts the Applicant (tenant) could be considered to have agreed or admitted any of the service charges.

30. The Applicant in his witness statement relies on various letters in support of his claim that although he has paid the service charges he has not admitted or agreed liability for any of the service charges for the years 2005 to date. The Tribunal considered each of these letters.

31. Letters of the 17 and 21 March 2006: The Applicant states he wrote to both the freeholder and the managing agents (Fry & Co) regarding the

proposed roof terrace to the Property and the reduced valuation by Foxtons and as a result of which he claimed a payment of £15000 was due to him. The Applicant states he received no response and so he sent a letter chasing a response on the 21 March. These letters make no mention of any dispute as to the service charge.

32. Letter of the 25 January 2007: The Applicant had on the 27 December 2006 written to Fry & Co a letter requesting a copy of the insurance but as he did not receive a response he wrote again to Fry & Co requesting a response. There is no mention of any issue in relation to the service charge in this letter and a copy of the letter of the 27 December 2006 has not been produced.

33. Letter of the 19 February 2007: This letter seeks clarification as to the sinking fund balance and states that the Applicant wishes to make " ....further enquiries regarding the sinking fund balance....". The Applicant has not provided a copy of any previous enquiry regarding the sinking fund balance and although this letter could be reiterating an earlier enquiry it is just as likely that the reference to "....further enquires.." is a reference to this enquiry being a enquiry in addition to other enquires regarding other matters. Either way this letter is clearly an enquiry about the sinking fund which forms part of the service charge and so it is an enquiry about the service charge. In addition this letter raises an issue as to the contribution by the courtyard house owners now that they are using the communal entrance. This is a clear indication that the service charge is not agreed or admitted.

34. Letter of the 18 June 2007: This letter is a complaint about a leak and not a challenge or dispute as to the service charge.

35. Letter of the 25 June 2007: This letter refers to breaches of covenants to maintain and repair the common parts and refers specifically to the various covenants under the Lease. This amounts to a challenge to the service charge including the sinking fund.

36. Letter of the 23 July 2007: This letter is a letter of complaint regarding the internal decoration works and imploring the managing agents to honour the commitments under the Lease. This letter cannot be considered as agreeing or admitting liability for the service charge.

37. Letter of the 5 August 2007: This is a clear challenge to the service charge as it seeks a copy of the estimates obtained for internal decorations and an explanation as to the charge of £300.00.

38. Letter of the 12 August 2007: This a challenge to the service charge it specifies the periods challenged as follows:

29/09/06 – 24/12/06

39. The Respondent states that they do not have a record of this letter, given that Mr Fry at the case management hearing informed the Tribunal that this company did not maintain records going back further than six years, the fact that the Respondent does not have a copy of the letter does not mean it was not sent by the Applicant and received by the Respondent. The Respondent challenges the authenticity of this letter purely on the basis that the Applicant has produced a fresh print out of the letter as opposed to a copy of the letter unlike the other letters. The Tribunal considers that such an allegation ought to be supported by something more than what amounts to mere suspicion based on an assumption. The Tribunal rejects the allegation and finds the letter to be a challenge to the service charge.

40. Letter of the 13 August 2007: This is a challenge to the service charge as it repeats the request made in earlier correspondence for documentation of the sinking fund account, the charge of £300 for the internal decoration and an estimate for the redecoration of the hallway.

41. Letter of the 8 September 2007: This letter requests a response to the numerous letters sent previously, it states that he has not received any accounts whatsoever and although he does not have the funds to challenge the matter in court he reserves his right to do so. The letter claims the Applicant has had no response to his letters but this is in direct contradiction to the Applicant's letter of the 13 August 2007 in which he acknowledges that he received a letter from the managing agent dated 6 August.

42. Letter of the 5 July 2008: This is not a challenge to the service charge.

43. Letter of 14 April 2009: This is not a challenge to the service charge.

44. Letter of the 27 December 2010: This is not a challenge to the service charge.

45. The Tribunal accepts the Respondent's statement at paragraph 15 of Mr Fry's witness statement that the Applicant has made contradictory statements about not receiving any response from Fry & Co.

46. The Tribunal having taken all the evidence into account finds the Applicant challenged the contribution to the courtyard house and the sinking fund in his letter of 19 February 2007, although in this letter he did not specify the period to which his challenge relates, but it is reasonable to assume that his challenge relates to the preceding accounting year (Clause 3.23 of the Lease provides that each year commencing 24 June is to be referred to as the Accounting Period). Had the challenge to the sinking fund charge been in respect of earlier

years (ie the period from 7 November 2005 to 24 June 2006) the Tribunal would have expected some correspondence prior to 19 February 2007.

47. The letter of the 25 June 2007 is a challenge to the service charge as is the letter of the 5 August 2007.

48. In addition finds that the Applicant in his letter of the 12 August 2007 challenged the service charge for the periods:

29/09/06 – 24/12/06

25/12/06 – 23/06/07.

49. The Tribunal had no evidence as whether there are any service charge payments due which have not been paid by the Applicant, it is assumed that he has paid all service charges demanded.

50. The Tribunal finds that although the Applicant has paid all the service charges demanded as a result of his challenges to the service charge dating back to at least the 19 February 2007 the Applicant is entitled to pursue all service charges from 7 November 2005 onwards as although he has continued to pay the service charge he has not done so without challenge or protest. The Tribunal finds the letters of the 19 February 2007, 25 June 2007, 5 August 2007 and 12 August 2007 are clear rebuttals of any inference that the payments made in respect of the service charges demanded are agreed or admitted by the Applicant.

51. The Tribunal accepts the submission of Mr Verduyn that it is bound by the decision of the Court of Appeal decision in **Collins v Duke of Westminster [1985] QB 581** and the applicable limitation period is 12 years. The lack of evidence of any continued to challenge the service charge in every subsequent year from 2007 onwards together with the continued to payment of the service charges demanded does not without more amount to an agreement or admission by the Applicant.

The next steps

52. The Application is listed down for a hearing of on the 16 June 2016 as provided in the Tribunal Directions dated 15 January 2016, the parties are reminded of the need to comply with the Directions in anticipation of the hearing.

Name: N Haria **Date:** 4 April 2016

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.