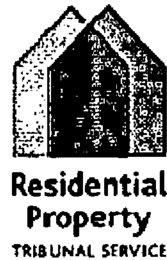
RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL



Residential Property
TRIBUNAL SERVICE

Sections20(C) Landlord and Tenant Act 1985
Application for an order preventing the Landlord from recovering the costs of the Leasehold Valuation Tribunal's proceedings

DECISION AND REASONS

Case Number: CHI/00HG/LLC/2009/0001

Property: 22 Walker Terrace The Hoe Plymouth

Applicant : David John Dickens (Flat A)

Respondent : 22 Walker Terrace Management Company Limited

Date of Application: 21st December 2009

Date of Hearing: 16th February 2010

Appearances: Dan Dyson (Counsel for the Applicant)

Charles Knapper - Fursdon Knapper (Solicitor for the Respondent)

Witnesses: None

In Attendance: Jon Ward (Trobridges) (Solicitors for the Applicant)

Tribunal Members: Cindy A. Rai LLB Solicitor (Chairman)

Michael Woodrow MRICS Chartered Surveyor

(Valuer Member)

Date of Decision: 28th March 2010

SUMMARY OF DECISION

1. The Tribunal determined that the lease of the Property does not contain any provision which enables the Respondent to claim the cost of proceedings before a leasehold valuation tribunal as part of the service charges and therefore disallows the Respondent from recovering the costs incurred in the Previous Application (as defined in paragraph 3 below) and in this application as part of the service charges for the Property.

The Background

2. Following an earlier decision made by another leasehold valuation tribunal ("LVT") in respect of the same property as the Property which is the subject of this application the Applicant has now applied to the LVT for an order preventing the Respondent from recovering its costs in connection with those earlier proceedings.

3. The other LVT had heard an application ("The Previous Application") made by the Respondent under section 27 of the Landlord and Tenant Act 1985 ("the LTA 1985") on the 25th March 2009 which sought a determination as to the reasonableness of service charges. The Applicant in this case had been one of four respondents in the Previous Application. The Property comprises three flats and two of the four respondents had jointly owned one of the flats. No application under section 20(C) had been made by the respondents in the Previous Application. In fact the Respondent in this case, (the Applicant in the Previous Application) had asked the other LVT to make a determination rejecting a notional application. Mr Dyson referred in the course of the hearing to this request as being "bizarre".

4. Following receipt of this application which was dated 21st December 2009, directions were issued by John Tarling a president of the Southern Panel of the Leasehold Valuation Tribunal, on the 11th January 2010. In his directions he had proposed that the application should be determined "on paper", without a hearing but the Respondent subsequently requested a hearing, as it is entitled to do.

5. Prior to the hearing grounds of opposition had been received from the Respondent and the Applicant had asked for an adjournment of the hearing. It appeared that due to what Mr Dyson refers to as an "administrative oversight", the Applicant failed to comply with the directions. A request for an adjournment, made on behalf of the Applicant, before the hearing, was rejected by the Tribunal.

The Hearing

6. At the hearing Mr Dyson represented the Applicant and Mr Knapper represented the Respondent.

7. Mr Dyson produced a paginated bundle at the hearing (the hearing bundle) together with his skeleton argument. It was accepted by Mr Knapper that the bundle did not contain any new evidence. However Mr Knapper expressed his dissatisfaction that the Applicant had not complied with the directions or indeed presented anything to the Tribunal or the Respondent prior to the date of the hearing. Mr Dyson said that

the papers in the bundle contained details of the forfeiture proceedings which the Respondent had brought against the Applicant. The proceedings had been adjourned and the Applicant is required to file a defence following the determination of the Application. One of the items claimed is the disputed Respondent's costs referred to below.

8. It was agreed that the costs which the Applicant sought to dispute were set out at Page 43 of the hearing bundle and amounted to £2,784.00 and at Page 44 and amounted to £1,420.58 Mr Dyson went through the items line by line. The costs all related to the work that the Respondent's lawyer had carried out in respect of the Previous Application. Following the hearing of the Previous Application the tribunal who heard it had issued a determination certifying that the service charges for the years 2007, 2008 and 2009 were reasonable. In the course of the hearing it was confirmed by Mr Knapper that he was director of the Respondent.

9. What emerged at the hearing was that there appears to have been a long running dispute between the Respondent and the Applicant. The Applicant claimed that he was not in arrears to the same extent as the other respondents to the Previous Application and that he had not disputed the reasonableness of the service charges. What he does dispute, and what has apparently prompted this application, is the amount of the costs which the Respondent now claims from him alone and not from any of the other respondents to the Previous Application.

The Law

Section 20(C) of the LTA 1985 is set out below:-

S20C "Limitation of service charges: costs of proceedings.

(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 or leasehold valuation tribunal, or the Lands 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;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(c) in the case of proceedings before the Lands 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.

The Lease

10. Mr Dyson referred the Tribunal to the schedule and to Part 5 Paragraph 1 of the Applicant's lease which is dated the 7th December 1993 and made between Messrs Pennington and Bartlett (1) and Mr Pease (2) and relates to Flat A at the Property.

"The Service Charge shall be the sum the Landlord or his authorised agents estimate and certify in writing to be the reasonable costs and expense to the Landlord of (a) performing his obligations under Clause 6 and (b) collecting the ground rent and service charges in relation to all the flats in the building ..."

It is his submission that a proper construction of this clause does not include litigation costs; he cited the "contra proferentem" rule which would mean that in cases where the lease may be unclear or ambiguous the tribunal should interpret it in favour the tenant and not the landlord. He also quoted the case of <u>Sella House v. Mears [1989] EGLR 65</u> and in particular referred to the plaintiff's argument, (it was the applicant in that case), that a general clause in a lease which enabled a firm of managing agents and accounts to manage the building and discharge all proper fees incurred including the cost of computing and collecting the rents and service charges would enable the plaintiff to recover inter alia solicitors costs incurred in the collection of rent arrears. The judges in that case, which was an appeal to the Court of Appeal by the plaintiffs, upheld the first instance decision because there was no specific reference in the clause in that lease to lawyers' costs, proceedings or legal costs. Taylor L J said ..."I should require seeing a clause in clear and unambiguous terms before being persuaded...." and in the absence of such a clause in the lease failed to find that the costs incurred by the managing agents were recoverable.

11. Mr Dyson asked the tribunal to compare the clause in that lease with the relevant clause in the Applicant's lease. He said construed literally the only cost recoverable would be those the Respondent had incurred and costs would not extend to his solicitors cost. Only clause 5(22) of the lease contains an express reference to solicitor's costs. In fact Mr Dyson also referred to clause 4 (b) (i) assuming that in the absence of any express reference in his written response to the Application the Respondent would claim reliance on that clause. Both clauses are set out below:-

Clause 4 (b) (i)

"The Tenant shall pay to the Landlord by way of further or additional rent an annual sum amounting to thirty three per cent of a service charge (hereinafter called "the service charge") to be calculated in accordance with the provisions set out in Part Five of the Schedule for each and every year of the term and proportionately for any part of the year by one instalment in advance on the First day of January in each year the first of such payments to be seventy five pounds and to be paid on the execution hereof"

Clause 5 (22)

"The Tenant covenants with the Landlord :-

"To pay all expenses including Solicitors' costs and Surveyors' fees incurred by the

Landlord in connection with the preparation and service of a Notice under section 146 of the Law of Property Act or incurred in or in contemplation of any proceedings under section 146 and 147 of that Act notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court"

Mr Dyson stated that since the lease did specifically refer in clause 5(22) to solicitors' costs, such costs would properly be recoverable only in the circumstances of the service of the notice referred to in that subsection.

12. This application has been made solely to seek a determination to disallow the Respondent's legal costs in the Previous Application. He suggests that the scope of part 5 paragraph 1 of the lease is concerned only with the management of the Property and not with litigation in relation the Property. If the Tribunal were to allow the recovery of the Respondents costs in the Previous Application all tenants would be prejudiced in that they could be asked to subsidise landlords who chose to pursue actions against one of its tenants who might be in breach of their leasehold obligations notwithstanding that others were not.

13. The purpose of the Previous Application was to determine whether or not the service charges were reasonable. The Respondent has chosen to pursue only the Applicant and is therefore seeking to recover all his costs from one tenant.

14. In summary Mr Dyson said on a literal reading of the Lease the landlord's costs cannot include his solicitors' costs. The only solicitors costs which would clearly be recoverable were in relation to an action under section 146 which is covered by section 5(22) of the lease, and by applying the contra proferentem rule his submission is that the litigation costs cannot be included.

15. Furthermore he said that the claim for costs was not just and equitable. He referred to the Lands Tribunal decision in the case of The tenants of Langford Court v. Doren Limited LRX/37/2000. Judge Michael Rich QC considered in that case the principles in which the discretion referred to in section 20(C) should be exercised in some detail. In paragraph 28 of his judgement he said:-

"In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise"

16. From that statement it is clear that the outcome of any proceedings should not provide the only guidance as to whether it is just and equitable to disallow an applicant from recovering costs and the proper consideration of what is just and equitable in all the circumstance does enable the Tribunal to consider the overall application and the conduct of the parties to it.

17. Mr Dyson also argued about the amount of the costs but the Tribunal has no jurisdiction beyond the very narrow jurisdiction set out in section 20(C) of the LTA 1985and advised both parties of this on each of the occasions each sought to argue about wider issues.

18. In response Mr Knapper said that his client the Respondent was entitled to recover his costs. In 1989 when the Sella House case had been determined the regime under the Housing Act was different. He said it was now a prerequisite to any application for forfeiture that a certificate of reasonableness is obtained. A county court judge will simply transfer the jurisdiction to the LVT.

19. Secondly he said that the Court of Appeal in that case looked carefully at the lease provisions as they referred to management agents. He said that Paragraph 2 of Part Five of the schedule implies that the reasonable costs of the Landlord are recoverable. When Sella House was decided it was not necessary to obtain a certificate of reasonableness. Now that it is, it must follow that the costs incurred by the Landlord in getting the certificate are recoverable, since it is reasonable (or at least it must be) for the Landlord to incur such costs. He says that section 5 (22) of the lease should be interpreted to include all solicitors costs and that would include the Respondents costs in obtaining a certificate of reasonableness.

20. In this lease the service charges are recoverable as additional rent. He referred to section 4 (b) (i) of the lease part of which is set out below and which was also previously referred to by Mr Dyson.

    "The Tenant shall pay to the Landlord by way of further or additional rent an annual sum amounting to thirty three per cent of a service charge (hereinafter called "the service charge" to be calculated in accordance with the provisions set out in Part Five of the Schedule ...... "

21. Mr Knapper said that as the Respondent cannot now take any proceedings without having first obtained a certificate of reasonableness that it must follow that the Respondent should be entitled to consider the recovery of its costs is a contractual obligation since it would be reasonable for the Respondent to incur these costs to enable the proper performance of its obligations under the lease.

22. Prior to the submission of the Previous Application there were three defaulters (all of the leaseholders). Mr Knapper told the tribunal that one of the other leaseholders had paid the outstanding service charges, and that one of the other flats in the Property had been repossessed and the arrears due from the owner of that flat had been paid (presumably by the mortgagee but he did not say this). By the date of the Previous Hearing only the Applicant had been in arrears and he had not communicated with the Respondent or the LVT prior to the hearing of the Previous Application; He therefore does not accept Mr Dyson's statement that his client had not opposed the Previous Application. He said he could have simply indicated that to the tribunal but he had not.

23. Mr Knapper said that he had had to assume that the Applicant's case was only as set out in the application letter to the tribunal. His interpretation of the contractual position is different. Section 20(C) of the LTA 1985 was imported into the act after 1985. He believed that the Applicant to be the only tenant who had contested the Previous Application. The chairman of the tribunal who had heard the Previous Application had taken a long time to examine the detail of all of the service charges claimed and therefore it was just and equitable that the Respondent should be

allowed to recover its costs. Whilst it is within the jurisdiction of the tribunal to disallow the costs, the decision in the Previous Application should influence the Tribunal. Mr Knapper accepts that the case of Doren does offer guidance and suggests that the conduct of the Applicant is also relevant and that taking this conduct into account would enable the Tribunal to exercise its discretion in favour of the Respondent.

24. Finally he enquired if he should address the Tribunal on the reasonableness of the litigation costs and was advised that whilst he could if he chose consideration of such were not within the jurisdiction of this Tribunal.

25. Mr Knapper said that because "Parliament" has deemed that a certificate of reasonableness is necessary it would be nonsensical to suggest that the Respondent's costs are not recoverable.

26. In response to questioning from the Tribunal, Mr Knapper confirmed that he was a director of the Landlord (for the sake of convenience) and a director of the Managing Agent and the managing partner of Fursdon Knapper. He said that he had insisted upon a hearing because of the potential complexities of the argument and because he was in the dark as to the Applicant's grounds as he had not complied with the directions. He also complained about the late submission of the Applicant's papers

27. In his summary Mr Dyson said that the Court of Appeal decision in Sella House was binding on the Tribunal. He does not accept Mr Knapper's submissions that subsequent legislation would affect the interpretation of the lease. Even if was a correct submission, it is irrelevant because the lease would not enable the tribunal to find that the costs were allowable.

The Decision

28. The only jurisdiction of the Tribunal in this application is contained in section 20(C) of the LTA 1985 which was in fact inserted by the LTA 1987 and not by the Housing Act as claimed by the Respondent's solicitor. It enables the Tribunal to make an order and make such order as it considers just and equitable in the circumstances. Having examined the wording of the lease and considered the case law which the parties each referred to in their arguments the Tribunal has not found any wording within the lease which would enable the landlord to recover costs of proceedings such as those before the tribunal and those costs which were incurred in relation to the Previous Application

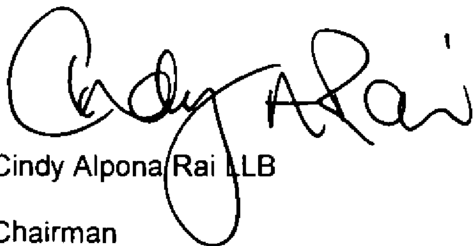
29. It accepts that the decision in Sella House requires that the Tribunal interpret the lease against the landlord unless there is clear and unequivocal wording that makes it patently clear that the Landlord is entitled to recover his legal costs. Even if such wording had existed the Tribunal would still have to find it just and equitable not to disallow the recovery of the Respondent's costs.

30. The arguments and evidence put before it, whilst not all relevant to its jurisdiction, revealed that the parties were involved in other disputes and that this application has emerged and was consequential upon other proceedings.

31. The Tribunal determines that in the absence of any clear unequivocal provision within the lease enabling recovery neither the costs of the Previous Application nor the costs of these LVT proceedings may be added to the service charges relating to the Property and charged back to the tenants.

32. Whilst not relevant to its decision in this case the Tribunal states that if it or any Tribunal determined that legal costs (or other costs) could be claimed as part of the service charges such a decision could not of itself be a decision on the reasonableness or otherwise of those allowable costs which could still be challenged by an application under made under section 27 of the LTA 1985

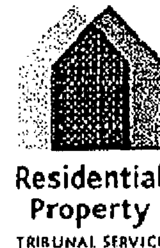
33. Furthermore, although the Respondent claimed to have been disadvantaged by the non compliance with the directions, the Tribunal would be very unlikely, however frustrated its own members may occasionally feel, to take such non-compliance into account with regard to its decision not least because it often considered applications from parties without legal representation who did not always fully understand what was required with regard to directions. It would have therefore been quite inappropriate for it to accept the Respondent's suggestion that the Applicant's failure to comply with the directions should result in him foregoing its opportunity to present his case at the hearing. The Tribunal had already refused the Applicants request to adjourn the hearing and considered that that was the appropriate way in which to deal with the Applicant's omissions.



Cindy Alpona Rai LLB

Chairman

RESIDENTIAL PROPERTY TRIBUNAL SERVICE



LEASEHOLD VALUATION TRIBUNAL

Case Number: CHI/HG/LSC/2009/0001

In the matter of the Landlord and Tenant Act 1985 (as amended) ("the Act")

And

In the matter of 22 Walker Terrace The Hoe Plymouth (the Property)

David John Dickens (Flat A) (Applicant)

22 Walker Terrace Management Company Limited (Respondent)

And on an application by 22 Walker Terrace Management Company Limited for leave to appeal against a decision of the Leasehold Valuation Tribunal dated 28th March 2010.

Dated 26th April 2010

Tribunal Cindy A. Rai LLB Solicitor (Chairman)

Michael Woodrow MRICS Chartered Surveyor (Valuer Member)

1 22 Walker Terrace Management Company Limited has sought leave to appeal against the decision of the Leasehold Valuation Tribunal dated 28th March 2010 by which it was disallowed from recovering costs incurred in proceedings before a leasehold valuation tribunal as part of the service charges for the Property. Its application for leave to appeal was dated 1st April 2010

2 Its first ground of appeal is that that in applying the decision made in the case of Sella House v Mears [1989] EGLR 65, and reaching that conclusion that the Applicant's lease does not provide for the recovery of solicitor's costs in pursuing a defaulting leaseholder the Tribunal has "misunderstood the effect of Sella and in making such a finding has erred in law". It went on to suggest the Tribunal erred by referring (in its decision) to a part of the judgement in the case of Sella House v. Mears and should have at the very least distinguished the decision in Sella from the case it was deciding.

The Tribunal reached its decision following a consideration of the arguments put forward by each party at the hearing; In its decision, the Tribunal has explained clearly the reason for its conclusions and the 22 Walker Terrace Management Company Limited's application does not contain evidence of such an error so this ground is rejected. It would refer 22 Walker Terrace Management Company Limited to paragraph 31 of its decision in which it clearly sets out its reason for reaching its decision.

4 The second ground of appeal is that the Tribunal failed to properly consider the effect of section 146 of the Law of Property Act 1925 insofar as it is effectively amended by section 81 of the Housing Act 1996.

The Tribunal's jurisdiction was confined to section 20(C) of the Landlord and Tenant Act 1985. It therefore did not consider it necessary to consider the effect of subsequent legislation on the way in which it would or might impact upon an application to a different court for forfeiture of the Applicant's lease and thus rejects this ground of appeal.

5 The third ground of appeal is that the Tribunal failed to consider the contra proferentum rule. In its decision the Tribunal stated that "it determines that in the absence of any clear unequivocal provision within the lease enabling recovery neither the costs of the Previous Application nor the costs of these LVT proceedings may be added to the service charges relating to the Property and charged back to the tenants". It therefore considers that this ground is without validity; Neither is it possible for the Respondent in an application for leave to appeal to set out new arguments in support of its previously heard case.

6 The fourth ground of appeal is the Tribunal, by denying a request made by the Applicant just prior to the date of the hearing to adjourn the hearing, and by allegedly ignoring what 22 Walker Terrace Management Company Limited describes as "fundamental failures" in relation to the compliance (or absence of compliance) with the directions previously issued by the Tribunal, the Respondent "could not

have a fair hearing" and that further more "the Tribunal should have confined the Applicant to those grounds" properly submitted to the Tribunal"

This ground is rejected. An application made by or on behalf of David John Dickens, the Applicant, to adjourn the hearing on the 12th February 2010 was rejected by the Tribunal. The solicitor acting for 22 Walker Terrace Management Company Limited wrote to the Applicant's solicitor on the same day opposing the application for an adjournment. However it its grounds for appeal it is suggesting that either the Tribunal should either have prevented the Applicant from putting forward a case details of which had not previously been filed or that the Tribunal should have recognised that the Respondent had been disadvantaged. No application was made at the hearing for an adjournment by or on behalf of 22 Walker Terrace Management Company Limited.

7 The Leasehold Valuation Tribunal does not accept that any of the grounds of appeal put forward by the Respondent demonstrate that the Tribunal:-

(a) wrongly either misinterpreted or applied the law or

(b) took account of irrelevant considerations, or

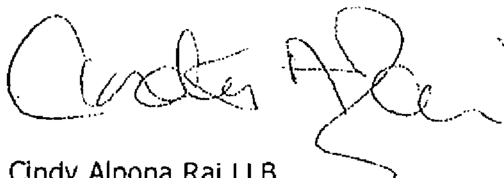
(c) failed to take account of relevant considerations or evidence, or

(d) that there was a substantial procedural defect;

Accordingly the Tribunal declines to grant leave to appeal. 22 Walker Terrace Management Company Limited, the Respondent, is entitled to renew its application for leave to appeal to the Lands Tribunal which is the Lands Chamber of the Upper Tribunal at 43 -45 Bedford Square WC1B 3AS but must do so within 14 days after the date of this decision.

A form of application for leave to appeal may be found on the Lands Tribunal website at

http://www.landstribunal.gov.uk/Documents/rules_procedures_and_forms/AprilNewForms/LR.pdfhttp:



Cindy Alpona Rai LLB

Chairman

26 April 2010