

Property 8 Gospel Gardens
Hartcliffe Road
Bristol
BS4 1AS

Applicants: Paul Lawrence
Jane Palmer
Mr and Mrs T Yeo
Mrs C and Miss A Walden
Mr S Willmott
Mr I Cooley

Respondents: Eminence Property Developments Ltd

Case Number: CHI/00HB/LSC/2007/0089

Applications: Application under s27A Landlord and Tenant Act 1985
(determination of liability to pay a service charge)
Application under s20 Landlord and Tenant Act 1985
(Notice to be given before qualifying works are undertaken)

Application to determine the level of the Respondent's costs payable by the Applicant (s60 of the 1993 Act)

Tribunal: Kay Firth-Butterfield, Lawyer chair
Peter Harrison FRICS, Valuer member
Martyn Cook, Lay Member

Representatives: Mr Lawrence, on behalf of the Applicants
Ms Lineger, on behalf of the Respondent

Date of Hearing: 16th January 2008

DECISION

Introduction

1. The Applications before the Tribunal were:
 - a. A determination under s27A of the Landlord and Tenant Act 1985 as to whether the Respondent could raise a service charge to recoup money it had spent on a night watchman between 30th May 2007 and 17th June 2007.
 - b. An application under s20 Landlord and Tenant Act that the Respondent had been required to follow the consultation process prescribed by s20 but had not complied with such procedure.

- c. An application under s20C to prevent the costs of the hearing being added to the service charge

The Property

The Tribunal inspected the property. We were shown the block of flats, curtilage and the interior hall, stairs and landing. We were able to see the walls and railings surrounding the property, the electric gates (broken), the key code entry system for the garden gate, the alarms for each flat and the immediate area.

Summary of Facts

The flats have all been purchased subject to the same lease. A sample was provided to us. The Lease provides, inter alia, for

- a. Fifth Schedule (Service Charge)
 - 1.1 "...incurred by the Landlord ...reasonably and properly incurred...without limitation
 - 1.1.2 "employment of Estate Staff, if any"
 - 1.1.9 " the costs and expenses of employing...builders tradesmen...and other professionals as may be necessary or desirable for the proper maintenance and administration of the building"
- b. Clause 6.5.2 asserts that the Landlord has no responsibility for any "damage to or loss of any goods or property sustained in the building or on the Estate except so far as any such liability may be covered by insurance effected by the Landlord
- c. Clause 5.4.1 requires the Landlord to "use all reasonable endeavours to procure the insurance of the Building"
- d. Clause 5.6.3 allows the Landlord to "vary the services from time to time if it reasonably deems it desirable to do so for the more efficient management of the building or for the benefit of the tenants".
- e. Clause 4.19.1 and 4.19.2 require the Tenants to " maintain ...comprehensive insurance. For all contents and equipment in the premises from time to time for full replacement value"

These terms of the lease are capable of circumscription by ss19 and 27A of the Landlord and Tenant Act 1985. Thus the service charge is only recoverable if it is reasonably incurred in whole or in part.

It seems that the Respondent had sold the block to Property for Life and did not expect to have to deal with the handover of the various flats on completion. Completion took place over a couple of days, 29th and 30th May 2007. A night security guard was then maintained on the site until 17th June 2007. The Applicants say that such employment was not authorised by the lease and, if it was, was unreasonable. They further say that the employment was a "qualifying work" and thus subject to notice provisions and that such notice was not served.

The Hearing

The Tribunal heard evidence from Mr Lawrence, Mr Yeo and Mrs Yeo from the Applicants, and Ms Linegar for the Respondents.

Mr Lawrence told the Tribunal:

That his Statement of case was prepared by him and its contents were true. He referred us to the other statements of truth which he had filed from other Applicants and said that it was clear from the evidence he had placed before the Tribunal that there had been no consultation between the Landlord and Tenants about the employment of the night watchman and that no notice of such employment had been given. He said that, looking at the police logs produced on the day of the hearing by Ms Linegar the previous burglary seemed to be an "inside job"; indeed it was reported as such. He explained how he had purchased through Property for Life and he believed they have continued to be involved in the project. He told us that he had a business in the area and he used security cameras there. He did not believe that the area was as "lawless" as its reputation. He told us that he and the Yeos had taken out insurance upon completion and that covered everything in the flat, including the boilers. He informed us that he had not been told of the burglary until after he received his service charge invoice and he was not informed that he would be liable for the costs of a night watchman. He claimed the employment of the night watchman was ill-defined and open-ended. Mr Lawrence explained that each flat has its own burglar alarm and the block has "attentive neighbours" at the sheltered housing estate next door. As to the lease he told us that the Applicants do not believe that the night watchman was a service permitted under the lease. He was not cross-examined by Ms Linegar.

Mr and Mrs Yeo confirmed that they had insured their flat on completion, they had not agreed to the employment of a night watchman. Indeed Mrs Yeo said she was careful with her money and knew nothing about the employment of the night watchman.

Ms Linegar told us that she had talked to all the Applicants (or one of them if they were buying in partnership) and that all had agreed to the employment of a night watchman. She explained that she had not expected to be involved in handing over the keys etc on completion because she thought that Property for Life would do that. In the event, she told us, they washed their hands of the whole project. It appears that what had happened was that the developers had sold the flats to Property for Life but still kept the Freehold. She showed us the police log of the burglary at the site which had made her feel it was necessary to offer to provide the security whilst the building was empty. Ms Linegar told us of other thefts from sites with which she was involved in the area and said she took a different view of the area than Mr Lawrence. Despite the fact that the Police Station was only down the road it took them 2 days to come to investigate the burglary. Ms Linegar was cross-examined by Mr Lawrence and maintained that she had obtained consent from the tenants to the employment of the night watchman but had not given proper notice nor made an application to dispense with notice. She told us that as Landlord she had the right to pass the cost of the night watchman on to the Tenants under the 5th Schedule of the Lease. Ms Linegar told us that she had obtained numerous estimates from security companies at the start of the development but the night watchman was employed through a company with whom her business partner had had previous dealings. She produced a piece of paper on which, she told us, she had kept a record of her dealings with the Tenants. By each name was recorded in red "security – yes". As to insurance she felt it was necessary to prevent burglary rather than just react and claim the insurance. The insurance her company had in place was for the buildings as required by the lease.

Ms Linegar gave evidence before lunch. Mr Lawrence was able to study the extra documents produced by Ms Linegar over the break for lunch and did not cross-examine Ms Linegar further in the afternoon.

Decision

a. S27 Landlord and Tenant Act

The Applicants dispute the sums on the basis that the employment of the night watchman was unnecessary and the costs excessive. In considering this matter the Tribunal must first have regard for the terms of the lease. We have considered in detail all the provisions of the lease, some of which we have set out above. We have not heard detailed argument upon the lease but we are required to give a literal construction of the lease. We find that the lease does not provide for the Landlord to be able to employ a night watchman at the premises. It is therefore unnecessary for us to determine if the costs are reasonable and where the truth of the evidence lies. However if we are wrong about the true construction of the lease then we further find that the employment of the night watchman was not reasonable and nor were the costs incurred by so doing. We find that it may have been reasonable to employ a night watchman during the building process but once the property was finished and alarmed the property did not, in all the circumstances, need further protection. Additionally, on completion of the purchase by the Applicants the flats were covered by the Applicants insurance.

b. Consultation requirement

The Applicants say that the correct consultation procedure was not followed. The Respondent contends that it did consult and that all the Applicants agreed. For a consultation requirement to be enforced the works which were undertaken must be "qualifying works to a building or any premises". Our decision is that the employment of the night watchman is not a qualifying work and thus the consultation requirements under s20 Landlord and Tenant Act 1985 were not necessary.

c. Application under s60 of the 1993 Act

This is allowed and therefore the Respondent is prevented from including its costs of this Tribunal in the service charge.

Dated 21.01.08

Signed

Miss K Firth-Butterfield