

MAN/00CG/LAC/2009/0010

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL
OF THE
NORTHERN RENT ASSESSMENT PANEL**

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

COMMONHOLD AND LEASEHOLD REFORM ACT 2002 – SCHEDULE 11

Property: AG1 Apartment 22, 1 Furnival Street, Sheffield, S1 4QS
Applicant: Mr Antoni Sarich
Respondent: AG1 Homes Management Company Limited
Tribunal: P J Mulvenna LLB DMA (Chairman)
Mrs E Thornton-Firkin BSc MRICS
Date of Hearing: 11 February 2010

INTRODUCTION

1. By an application dated 22 November 2009, the Applicant applied for the determination of liability to pay an administration charge.
2. The Respondent is responsible for the management of the building within which is situated the Property to which the application relates. The Respondent has engaged managing agents, Mainstay Limited, to undertake work on its behalf.

THE PROPERTY

3. The Property is a second floor, self-contained, apartment in a purpose built block of 68 apartments of recent construction in Sheffield City Centre.

THE HEARING

4. Directions were issued by Mr A Robertson, procedural chairman, on 26 November 2009.
5. The substantive hearing of the application was held at the Panel's offices, 5 New York Street, Manchester, on 11 February 2010 at 9.30a.m. The parties had agreed to a determination on papers and neither was present nor represented.
6. The Tribunal had before them the written evidence and submissions of the Applicant and the Respondent. After the hearing but before the preparation of this determination, the Tribunal received a further communication from the

Applicant which had been copied to the Respondent. The communication contained no information which was material to the Tribunal's deliberations and has not been taken into account in reaching any conclusions or findings.

THE ISSUE FOR DETERMINATION

7. The Respondent had applied administration and other charges arising from non- or late payment of the service charge in respect of the Property. The Applicant alleged that the demands for the service charges had not been served on him, having been sent to the wrong address, and that it was, therefore, unreasonable to apply the administration charges.

THE LEASE

8. The Property is held for a term of years expiring on 31 December 2204 under a Lease ('the Lease') made between Amco Developments (Arundel Street) Limited (1) AG1 Homes Management Company Limited (2) and Antoni Sarich (3). It is to be observed that the Respondent and the Applicant are, respectively, the second and third parties to the Lease.
9. The Tribunal has read and interpreted the Lease as a whole but in reaching its conclusions and findings has had particular regard to the following matters or provisions contained in the Lease:
 - (a) The address of the Applicant (described as 'the Tenant') is recorded as 'c/o Dai Saz & Co Enterprises, 7 Prince Street, Port Talbot, SA13 INB'.
 - (b) Clause 1 contains definitions, in particular, of 'Prescribed Rate' (1.8) and 'Service Charge' (1.19).
 - (c) Clause 2 provides for the payment of the Service Charge to the Management Company.
 - (d) Clause 3.1 contains a covenant by the tenant '...to pay to the Management Company the Service Charge on the days and in the manner set out in this Lease and not to exercise or seek to exercise any right or claim to withhold the Service Charge and to pay on demand to...the Management Company interest for late payment of any sums due hereunder at the Prescribed Rate from the date such sum is due until the date such sum is actually paid.'
 - (e) Clause 3.28 contains provision for the payment of 'costs fees charges disbursements and expenses (including without prejudice to the generality of the above those payable to counsel solicitors and surveyors) properly and reasonably incurred by...the Management Company in relation to or incidental to' applications for consent or licences, forfeiture notices and rent, rents and other sums expended by the Landlord.
 - (f) Clause 3.29 contains a covenant by the tenant 'to be responsible for and to keep...the Management Company indemnified against all damage damages losses costs expenses actions demands proceedings claims and liabilities made against or suffered or incurred by...the Management Company arising directly or indirectly out of:
 - 3.29.1 any act or omission or negligence of the Tenant or any Persons at the Premises expressly or impliedly with the Tenant's authority and under the Tenant's control or

3.29.2 any breach or non-observance by the Tenant of the covenants conditions or other provisions of this Lease or any of the matters to which the demise is subject.

- (g) The Fifth Schedule has provisions relating to the service charge, including paragraph 12.2 which, effectively, provides for the recovery as part of the service charge of the cost of employing agents to collect and enforce payment of, amongst other things, the service charge.

THE LAW

10. Schedule 11 to the Commonhold and Leasehold Reform Act 2002 provides, insofar as it is material to the present case –

‘Meaning of “administration charge”

1 (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

2 A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

4 (1) A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.

(2) The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of an administration charge which has been demanded from him if sub-paragraph (1) is not complied with in relation to the demand.

(4) Where a tenant withholds an administration charge under this paragraph, any provisions of the lease relating to non-payment or late payment of administration charges do not have effect in relation to the period for which he so withholds it.

5 (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) 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.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
- (a) in a particular manner, or
 - (b) on particular evidence,
- of any question which may be the subject matter of an application under sub-paragraph (1).

11. The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 provide -

‘2.(1) Subject to regulation 4, these Regulations apply where, on or after 1st October 2007, a demand for payment of a service charge is served in relation to a dwelling.

(2) Subject to paragraph (3) these Regulations apply to dwellings in England which are subject to a lease.

(3) These Regulations do not apply where—

(a) the lease is not a long lease within section 26 of the Landlord and Tenant Act 1985; and

(b) the landlord is a local authority, a National Park Authority or a new town corporation.

3. Where these Regulations apply the summary of rights and obligations which must accompany a demand for the payment of a service charge must be legible in a typewritten or printed form of at least 10 point, and must contain [a statement prescribed by the Regulations].’

12. The Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007 provide -

‘1(2) These Regulations apply where, on or after 1st October 2007, a demand for payment of an administration charge is served in relation to a dwelling in England.

2. The summary of rights and obligations which must accompany a demand for the payment of an administration charge must be legible in a typewritten or printed form of at least 10 point, and must contain [the information prescribed by the Regulations].’

THE DETERMINATION AND DECISION

13. The Tribunal considered the evidence and submissions made by and on behalf of both parties and exercised their own professional judgement and found as follows.
14. The dispute between the parties has arisen because demands for the payment of service charges were sent to the Property address rather than to the Applicant's home or correspondence address. The Applicant asserts that he did not receive the demands. The Respondent has not directly challenged the Applicant's assertion but maintains that the demands were sent to the property address 'in the absence of notification of an alternative.' The Respondent further maintains that the Applicant notified the correspondence address on 23 February 2009 and that, thereafter, demands and other correspondence was sent to that address.
15. The Tribunal has carefully considered the position. The Respondent and the Applicant were, respectively, the second and third parties to the Lease. The Applicant's address (as the Tenant) is expressed in the Lease as being 'c/o Dai Saz & Co Enterprises, 7 Prince Street, Port Talbot, SA13 1NB'. The Tribunal finds, as a matter of fact, that this was adequate notice to the Respondent of the Applicant's correspondence address. The communication of 23 February 2009 was a reminder of the correspondence address rather than notification.
16. The Tribunal had before it a copy of the service charge demand dated 3 June 2009. It is addressed to the Applicant's correspondence address, but there is no evidence of service. The Applicant has referred to the use of manually addressed envelopes and has denied having received the demand. The Respondent has not directly challenged the Applicant's denial of receipt of the demand, but has denied the use of manually addressed envelopes, maintaining that all demands are machine generated and mechanically put into window envelopes. The Applicant has provided a copy of a manually addressed envelope franked on 11 September 2009 with Mainstay's details. Having considered all the evidence and submissions, the Tribunal is not satisfied that the demand was served on the Applicant. In reaching this conclusion, the Tribunal has accepted the Applicant's unchallenged assertion of non-receipt and notes that the Respondent's position is based on an apparently erroneous premise (the non-use of manually addressed envelopes) and, in any event, is evidence of a general procedure rather than evidence in relation to this particular demand.

17. The dispute between the parties has been continuing for some time and has related both to the Property which is the subject of the application and to the Applicant's other tenancy in the same building (Apartment 31). It appears that the position in relation to Apartment 31 has been resolved. There is some difficulty in establishing precisely what is currently being demanded from the Applicant. The Applicant's application refers to administration and other charges pre-dating the demand issued on 3 June 2009. The Respondent appears only to be addressing charges allegedly made or incurred after 3 June 2009.
18. The position is not of critical importance, however. The Tribunal is satisfied that, before 23 February 2009, demands for service charges were addressed to the Property address. They were not served on the Applicant. The service charge demand dated 3 June 2009 was addressed to the Applicant's property address but there is no evidence of service. None of the service charge demands, on the evidence before the Tribunal, were demonstrably served on the Applicant. It follows that the payments did not become due on the dates claimed by the Respondent.
19. Moreover, there is no evidence that the service charge demands complied with The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 or that the administration charge demands complied with Schedule 11 to the Commonhold and Leasehold Reform Act 2002 or The Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007. None of the demands, therefore, gave rise to an obligation to pay.
20. In the light of all these matters, the Tribunal finds that the administration and other charges made to the Applicant by the Respondent were not payable.
21. In any event, it is by no means clear that the charges could have been recovered directly from the Applicant in the way claimed by the respondent. The Lease provides for the cost of service charge recovery and enforcement to be charged as part of the overall service charge (see paragraph 12.2, Fifth Schedule). Whilst it would be open to the Respondent to claim costs in an action before the Court or in a reference to a leasehold valuation tribunal, there appears to be nothing in the Lease which gives discretion to apply administration and other charges for non- or late payment to a particular tenant.

COSTS

22. Neither party asked for an order for costs to be awarded against the other. The Tribunal did, however, consider the power to award costs under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 which provides:

'(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—

(a) £500, or

(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.'

23. The Tribunal did not consider that any of these circumstances arose in this particular case and concluded that it would not be appropriate to award costs to either party.

24. Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 provides:

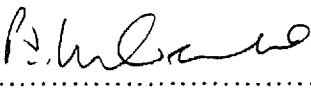
'(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).'

25. The Tribunal has reviewed all the evidence in this case and is satisfied that the Applicant was willing and able to pay the material service charges. The Respondent was unwilling to enter into proper negotiation and, in fact, returned payments on the basis that they were made 'in full and final settlement.' Whilst the Tribunal can accept the reasons for this stance, there is no evidence that the payments were made on that basis. The Tribunal makes no finding on the point but does observe that a reasonable management Company would, at that stage, have offered to accept the payment without prejudice to the dispute about the administration and other charges. In choosing to continue to pursue the matter in the way they did, incurring further and unnecessary costs and applying further administration charges which, in all the circumstances, were avoidable, the Respondent acted unreasonably. In these circumstances, the Tribunal directs that the Respondent reimburse the Applicant's fees in full.

ORDER

26. That the administration and other charges and costs imposed on the Applicant are not payable by the Applicant and not recoverable by the Respondent.
27. That the Respondent reimburse the whole of the fee paid by the Applicant in respect of this reference.

Signed..... 

P J Mulvenna

Chairman

15 February 2010