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HM Courts & Tribunals Service

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

S.27A Landlord & Tenant Act 1985 (as amended) ("the Act")

Case Number:	**CHI/21UD/LSC/2012/0101**
Property:	**Caple Court Albany Road St Leonards on Sea East Sussex TN38 0LL**
Applicants:	**Mrs R. Pooley - Flat 23 Mrs B. Still - Flat 25 Mrs. A. Lyons - Flat 15**
Respondent:	**Caple Court Residents Association Limited**
Date of hearing/Inspection	**23rd January 2013**
Tribunal:	**Mr. Robert Wilson LLB (Lawyer Chairman) Ms. Elizabeth Morrison LLB JD (lawyer Member)**
Date of the Tribunal's Decision:	**11th February 2013**

THE APPLICATION

1. The application required the Tribunal to make a decision on a preliminary issue as to whether or not it had jurisdiction to make a determination of the Applicants' service charge liability for the years 2007 to 2012.

THE DECISION IN SUMMARY

2. The Applicants are barred from proceeding with their application for the years 2007 and 2008.

3. The Applicants may proceed with their application in respect of the years 2009, 2010, 2011 and 2012 save only for the issue of directors' fees, which are outside the jurisdiction of the Tribunal.

THE PROCEDURAL BACKGROUND

4. On 15th January 2009 the Applicants applied to the Tribunal under S. 27 of the Act for a determination of their liability to pay service charges for the years 2005 to 2008 inclusive. ("the First Application")

5. On 24th February 2009, a pre-trial review of the First Application was held which identified the issues in dispute for the contested years and set the First Application down for a hearing. Sometime after the pretrial review the Respondent applied to the Tribunal under S.20ZA of the Act for an order to dispense with the consultation requirements in respect of works carried out in 2009. It appears that this Application and the First Application were consolidated and set down for hearing on the same date.

6. On the 15th June 2009 a hearing of the two applications took place and the Tribunal issued its decision on the 1st July 2009. That decision recorded that the Tribunal was satisfied that it was reasonable to dispense with all of the consultation requirements in respect of the past works and dispensation was granted. The decision further recorded that in the light of the Tribunal granting dispensation, the Applicants considered that there was no point in disputing the small amounts involved in their application under S.27 and that the Applicants wished to withdraw their application. For reasons that are not clear the Applicants subsequently sought leave to appeal this decision but leave to appeal was not granted.

7. On the 12th July 2012 the Applicants made a second application ("the Second Application') in which they seek a determination of their service charge liability for the years 2007-2012 inclusive.

8. On the 16th August 2012 the Tribunal directed that there should be a preliminary hearing to determine if, and the extent to which, the Second Application should be allowed to proceed.

THE HEARING

9. The hearing of this preliminary issue was held in Bexhill on the 23rd January 2013. The Applicants attended and appointed Robina Pooley as their spokesperson. The other applicants confirmed that they endorsed all that she had to say and, aside from a brief comment by Mrs. Lyons, had nothing further to add. Mr D. Eglington, a director of the

Respondent Company, represented the Respondent and gave evidence on its behalf assisted by Linda Humphreys the secretary of the Company.

THE EVIDENCE

10. In accordance with the Tribunal's directions, the Respondent had filed a statement of case with a bundle of supporting documents including extracts of the legal authorities and legislation on which they relied. The Applicants had filed a statement in reply and copies of documents on which they relied also accompanied this statement. The Applicants' bundle included copies of demands raised by the Respondent.

THE RESPONDENT'S CASE

11. At the hearing the Respondent developed its submissions which can be very briefly summarised in the following way. Firstly they consider it to be an abuse of process for the Tribunal to hear the Second Application for 2007 - 2008 on the grounds that the Tribunal has already considered these years in the First Application and its findings were delivered on the 1st July 2009. The Respondent maintains that if the Applicants were dissatisfied with the determination made on the First Application then their remedy was to appeal this decision. They had attempted to appeal but were refused leave to appeal and had made no further application to the Upper Tribunal. The Respondent therefore contends that it is an abuse of process for the same years to be revisited which would allow the Applicants "a second bite of the cherry".

12. Secondly the Respondent contended that the Tribunal had no jurisdiction in respect of any of the years because no service charge demands had or would be made for these years. The funds needed for the property were not collected as service charge but collected pursuant to liability imposed on members by the articles of association of the Company. Mr Eglington contended that the members of the Company (which is a Company limited by guarantee) were liable under the guarantee for the annual losses incurred in running the building under the terms of the articles of the Company. Furthermore, a Special Resolution passed in July 2009 and other amendments to the articles, specifically provided for the service charges under the lease, together with additional charges, to be paid by the Company members in an amount determined by ordinary resolution on an annual basis. Mr Eglington submitted that sums due in this way were not sums due under the lease and did not constitute service charges within the definition of S.18 of the Act. For these reasons he contended that the Tribunal had no mandate or authority to investigate or make determinations over the running of the Company or sums due under the articles of association.

13. Mr Eglington drew the Tribunal's attention to the documents in the hearing bundles, which he said demonstrated that since 2005 all demands for money from the Applicants had been amounts agreed under resolutions passed by a majority of the members of the Company. Since 2009 demands were not called service charge demands but Recovery Fund charges, and the money collected had been placed in a fund called the Recovery Surplus Fund. This system enabled to Company to collect monies on account and to establish a reserve fund, neither of which were provided for by the leases.

14. On being questioned by the Tribunal, Mr Eglington confirmed that the yearly demands made to the members of the Company were based on the anticipated costs to be incurred on the property and in complying with the landlord's obligations under the residential leases in the forthcoming year. He confirmed that the directors of the Respondent Company produced an annual budget of anticipated expenditure and this budget was put to the vote by members who were free to approve or reject it. Mr

Eglington told the Tribunal that regardless of how much expenditure was subsequently incurred in the year there would be no further calls for funds in that year and therefore the charges were fixed. He said this certainty suited the members.

15. Mr Eglington referred the Tribunal to the Court of Appeal case of Morshead Mansions Ltd v Di Marco [2008] EWCA Civ1371 which the Respondent relied on. When this case had come to the attention of Mr Eglington in 2009 he had relied on it to propose changes to the Company's articles, so as to set up the same system of Company charges as used by Morshead Mansions. He accepted that in Morshead the Company in question was limited by shares whereas the Respondent Company was limited by guarantee but he contended that there was no difference between the two types of company (save in the case of liquidation). The facts in Morshead were very similar to their own position. Morshead collected funds for the maintenance of their building in exactly the same way, labeling the monies collected as contributions to the Recovery Fund. In this case the Court of Appeal upheld the contractual nature of the charges and it rejected the defence of the leaseholder based on S.18 when sued by the Company. Mr Eglington contended that this case was binding on the Tribunal and as a consequence the Tribunal should decline jurisdiction.

THE APPLICANTS' CASE.

16. The Applicants accepted that the First Application had been concerned with the years 2007 and 2008 but argued that the hearing had been mainly taken up with considering the application for dispensation. Once that application had been granted there had been little opportunity or point in pursuing their main concern that the terms of the lease were being ignored. Their concerns were not so much the actual charges made in 2007 and 2008 but as to the manner in which the charges were being demanded which was a different issue. On being questioned by the Tribunal they agreed that their concerns applied equally for the years 2009 to 2012 and on the basis that these years had not previously been before the Tribunal, and that they would be able to plead their case for these years, they offered no further evidence for the years 2007 and 2008.

17. In respect of the years 2009 to 2012 the Applicants submitted that they had the right to make an application to the Tribunal because they were long leasehold tenants required to pay service charges under the terms of their leases. They contended that the Respondent was attempting to frustrate the protection offered to lessees under the Landlord and Tenant Act 1985 by making unconstitutional or unlawful changes to the articles of association. They did not accept that they were bound by the 2009 Special Resolution, which increased their liability to pay money to the Company contrary to provisions of the Companies Acts. They did not accept that any part of the Morshead Mansions case had any relevance to Caple Court and they did not accept that any contractual relationship that may exist between the Company and the members could override the terms of their leases and the protection afforded to leaseholders under the Act.

18. They drew the Tribunal's attention to the copy demands served on them in the years 2009 to 2012 from which it could be seen that the amounts demanded directly referred to their obligations to pay service charges under the terms of the lease. They contended that even though the demands were not stated to be service charge demands - but given another name - in reality that is exactly what they were and in these circumstances it was both reasonable and right that the Applicants should have the protection afforded to leaseholders by the Act and be able to challenge the demands in the Tribunal.

THE DECISION

19. The Tribunal is in no doubt that the Applicants are barred from proceeding with the Second Application as far as the years 2007 and 2008 are concerned as the Applicants have already had the opportunity to raise their concerns for these years by virtue of the First Application and have had the benefit of a Tribunal determination which was not successfully appealed. The Applicants were not obliged to withdraw their application for these years but did so of their own free will.

20. In these circumstances it is no longer open to the Tribunal to make a further determination for the same years thereby enabling the Applicants to raise further matters in these years which were not pursued to their conclusion in the First Application. The Tribunal has already preformed its function to make a determination for these years and therefore the legal doctrine of *functus officio* applies. The Tribunal is satisfied that it no longer has the legal authority to make a further determination in respect of the years 2007 or 2008 as the Applicants are 'issue estopped' from revisiting these years by virtue of their withdrawal at the First Application.

21. However the situation is different in respect of the years 2009-2012 as no judicial determination has yet been made in respect of these years. The Tribunal has considered very carefully all the evidence and authorities brought to its attention in respect of these years and has concluded that it does possess the jurisdiction to determine the majority of charges made in years 2009 -2012.

22. The Tribunal's jurisdiction to determine service charges arises out of S.18 and S.27A of the Act and the sections relevant to this application are set out below.

18. Meaning of "service charge" and "relevant costs".

(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 purposes—

(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.

27A. Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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.

23. Under S.27A of the Act the Tribunal has a wide discretion to determine if a service charge is payable and if it is by whom, to whom, the amount, the date, and the manner in which it is payable. Service charge is defined in S.18 and the Tribunal first reviewed the content of the demands to see if they complied with the requirements of S.18.

24. Copies of the demands are contained in the Applicants' bundle. There is a demand dated 16th April 2009 which is headed, *'Replacement invoice for payments due for the year ending 31st December 2009'.* The demand contains an item entitled *'service charge (clause 4(19)(b) of the common lease) including management and administration costs: £833.34'.* There is also in the bundle a further demand dated 9th October 2010 which is headed, *'Invoice for service charge payment due for the year ending 31st December 2010'.* The demand states, *'your service charge under clause 4 (19) of the lease being your proportionate share of the total amount of £5,440 decided by the membership at the AGM held on 8th October 2010, including the fixed charge of £24 (clause 4(19)(a) of the lease): £212.16'.* At page 31 of the bundle there is a letter from the secretary of the Respondent Company which states that, *'At the AGM ...members decided that, in the calculation of the total amount to be collected as service charges for 2010, an allowance should be made for members' individual liabilities for the necessary fire safety adaptions to our flats..... A majority decision of the membership then determined that the total to be charged to leaseholders should be, as recommended by the directors, £5,440..... This amount is directly related to expenditure during the period 13th May to 31st December 2009. We consider that all of this expenditure is properly chargeable as service charge costs in accordance with clause 4 (19) of our Lease. Your invoice for 2010, which accompanies this letter, details your proportionate share of the total amount to be collected. Also attached is a statutory notification of your rights as a leaseholder. Clause 4(19)(b) of the Lease requires you to pay the amount due within twenty-eight days...'*

23. In the bundle there is a further demand dated 10th October 2011 headed, *'Invoice for charges due in 2010 and 2011'.* The content makes a number of references to additional charges under clause 4 (19) of the lease. The Tribunal notes that clause 4(19) of the lease is the clause which contains the obligation on the part of the lessees to contribute towards the costs incurred by the Respondent in carrying out its obligations under the occupational leases.

24. Turning to the requirements of S.18, to fall within the definition of service charge the amounts demanded must firstly be an amount payable by a tenant of a dwelling as part of or in addition to the rent. This requirement is fulfilled in respect of each money demand contained in the bundle. The demands have been raised on the members of the Company, which comprise exclusively the tenants of the flats at Caple Court, each of which is a residential property i.e. a dwelling.

25. Next the amounts must be payable directly or indirectly, for services, repairs maintenance, improvements or insurance or the landlords costs of management. The Tribunal is in no doubt that although the amounts demanded by the Respondent are engineered to constitute contractual demands to the members of the Company, they are also service charge demands because the figures bear a direct relationship to the costs incurred by the Respondent in fulfilling its obligations under the occupational leases. These obligations include repair, maintenance and the provision of buildings insurance. Mr Eglington conceded this point when questioned by the Tribunal. In the Tribunal's judgment there is sufficient nexus between the amounts of the demands and the lessee's liability to contribute towards the services pursuant to clause 4(19) of the occupational leases so as to fulfill the requirements of S.18 (1)(a).

26. Finally the amounts must be payments "the whole or part which varies or may vary according to the Relevant Costs". Relevant Costs are defined in S.18 (2) as costs or estimated costs incurred or to be incurred by a landlord in connection with matters for which the service charge is payable. The Respondent Company is a landlord and the Tribunal is satisfied that although the amounts demanded may be fixed for one year, they are capable and indeed do vary from year to year according to the work to be carried out on the property as recommended by the directors and ratified by the members. In this way cash flow can be managed by a resolution that the members' contribution for the year should be for an amount in excess of the amount anticipated to be required in that year. Be that as it may the Tribunal is satisfied that the contributions are payments which vary according to the relevant costs and that they fall within S.18.

27. Thus the Tribunal is satisfied that all of the requirements of S.18 are met with the consequence that the Tribunal does have jurisdiction to hear the Applicants' claim under S.27A of the Act, save for the amounts required for directors fees which do not satisfy the requirements of S.18. This is the case whatever the intention of the parties, and even if the demands are also contractual liabilities arising under the articles of the Respondent Company. In the judgment of the Tribunal the substance of the demands takes precedence over the form. In coming to this conclusion the Tribunal is fortified by the judgment in the House of Lords case of Street v Mountford [1985] AC 809, where Lord Templeman stated as follows: *In the present case,* the agreement ..... *professed an intention by both parties to create a licence and their belief that they had in fact created a licence. It was submitted on behalf of Mr Street that the court cannot in these circumstances decide that the agreement created a tenancy without interfering with the freedom of contract enjoyed by both parties. My Lords, Mr. Street enjoyed freedom to offer Mrs Mountford the right to occupy the rooms comprised in the agreement on such lawful terms as Mr. Street pleased. Mrs. Mountford enjoyed freedom to negotiate with Mr. Street to obtain different terms. Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.*

28. In this case the Tribunal is satisfied that the effect of the demands is to create a service charge liability giving the Applicants the right to challenge the recoverability and reasonableness of the demands pursuant to S.27A of the Act.

29. Neither is the Respondent assisted by the case on which it seeks to rely namely Morshead Mansions Limited v Di Marco. Although some of the underlying facts may be similar the Court in Morshead had to decide a quite different and narrow point. The conclusion contained in Morshead illustrates this distinction at paragraph 31 as

follows: *This appeal is concerned only with the question of law whether Morshead is entitled under article 16 and pursuant to the resolutions to be paid the money which it claims from Mr Di Marco as member of the Company. The judge did not decide and was not asked to decide whether Section 18 applies to Mr Di Marco as a tenant. He was not deciding whether Morshead could avoid altogether statutory protection which Mr Di Marco might enjoy as a tenant if he were sued under the provisions of the lease or if he invoked the terms of the lease and the statutory provisions in his capacity as tenant.*

30. In contrast, in the case before this Tribunal the Applicants do seek to invoke the statutory provisions in their capacity as tenants and the Tribunal is being asked to decide whether S.18 of the Act does apply to the Applicants as tenants. These are different questions and for all of the reasons stated above this Tribunal is satisfied that S.18 does indeed apply and as a result it does have jurisdiction to hear their case.

31. For the avoidance of doubt, the Tribunal's decision does not have any bearing on the validity of the Company's demands against the Applicants as members, and any dispute as to that liability is for the Civil Courts, (most probably the High Court because of the specialist nature of the applicable law) to decide.

27. Accordingly, the Tribunal determines that the Second Application shall be confined to the charges that the Applicants wish to challenge in respect of the years 2009, 2010, 2011 and 2012 excluding director's fees. At the conclusion of the appeal period or, if this decision is appealed, 28 days after the Upper Tribunal has handed down its judgment, the application will be referred to a procedural chairman for directions to be made covering any matters which remain to be determined by the Tribunal.

Signed _____
R.T.A.Wilson LLB chairman

Dated 11th February 2013