

LON/00AC/LSC/2005/0157

DECISION BY THE RESIDENTIAL PROPERTY TRIBUNAL
SERVICE
ON APPLICATION UNDER SECTION 27A OF THE LANDLORD
AND TENANT ACT 1985 (AS AMENDED)

Applicant(s): Mr F Amoroso

Respondent(s): Hulton Court Residents Company Ltd

Re: 4 Griffin Lodge
31 Woodside Avenue
London
N12 8AZ

Application date: 16 June 2005

Hearing dates: 7 July 2005 and 18 November 2005

Appearances: Mr F Amoroso

For the Applicant

Mr Richard Hayes, counsel
Mr Steven Melzack, solicitor, of Parker Thomas solicitors
Mr K Harris, company secretary

For the Respondent

Members of the Residential Property Tribunal Service:

Mrs F R Burton LLB LLM MA
Mrs S S Friend MBE JP

4 GRIFFIN LODGE, 31 WOODSIDE AVENUE, N12 8AZ

BACKGROUND

1. On 14 June 2005 the Applicant Leaseholder made an application to the Leasehold Valuation Tribunal pursuant to Section 27A of the Landlord and Tenant Act 1985 for determination of liability to pay service charges for the service charge years 1980 to 2005 and for an order under Section 20C of the Act. The issues concerned the unauthorised retention of funds in a reserve not permitted by the terms of the lease, estimated by the Applicant lessee to be now standing at approximately £1,518, which he required to be returned to him.
2. On 11 July 2005 the LVT issued directions following a Pre-Trial Review on 7 July 2005 at which the Applicant appeared in person and the Respondent's management company did not appear and had apparently left a telephone message requesting an adjournment on the grounds of closure of the London Transport system. The Tribunal nevertheless decided to proceed in the absence of the Respondent since it was accepted that amendments could, if necessary, be made to the Directions since the hearing was only of a procedural nature.
3. On 1 September 2005 the hearing set down in the Directions commenced with only the Applicant present; unfortunately he was not represented and in the absence of the Respondent management company was without sufficient documentation for the Tribunal to make any determination. The Tribunal therefore treated the hearing as a further preparatory appointment, since it appeared that the Respondent had ignored the Directions of 11 July 2005 and the Applicant was appearing in person, apparently having received no advice or assistance in the preparation of his case from any person familiar with the Tribunal's service charge jurisdiction. A further hearing date was set down in supplementary Directions for 12 October 2005 (subsequently amended to 18 November 2005).
4. On 2 September 2005 the Respondent's management company (by its Secretary, Mr K Harris) contacted the LVT to confirm that the company had not had sight of the papers sent by the Tribunal at its registered address (that of the company's accountants) and the LVT amended the address for service at their request. On 20 October 2005 solicitors for the Respondent lodged with the LVT papers in connection with the hearing date of 18 November, referring to previous proceedings brought by the Applicant against the Respondent, and on 21 October offered a copy of the LVT's earlier determination in such proceedings. On the same date they gave notice of their intention to apply for dismissal of the Applicant's claim on the basis (inter alia) that it was frivolous, vexatious, or an abuse of process, in accordance

with regulation 11 of the Leasehold Valuation Tribunal (Procedure) etc Regulations 2003, and requested the Tribunal to give notice to the Applicant in accordance with that regulation.

5. On 26 October the Applicant requested the Tribunal to add the issue of the building insurance to his applications and on the same day the Tribunal notified the parties that this matter would be dealt with at the hearing on 18 November 2005.
6. On 8 November solicitors for the Respondent wrote to the LVT notifying them that it was not considered that the LVT had jurisdiction to determine the issues raised by the Applicant in connection with the building insurance and stating that the Applicant had been provided with a copy of the current certificate, policy and receipt for payments.

THE HEARING

7. On 18 November 2005, at the hearing set down on amendment of the Supplementary Directions referred to at paragraph 3 above, the Applicant again appeared in person and the Respondent was represented by Mr Richard Hayes of Counsel, together with Mr Steven Melzack of Parker Thomas, his instructing solicitors who had provided a helpful skeleton argument.
8. It was Mr Hayes' submission that the Applicant's present application covered the same ground as that on which a determination had already been made in earlier proceedings under reference LON/00AC/LIS/2004/0107, when the LVT had on 17 May 2005 dismissed his application and on 8 June 2005 had also refused his application for leave to appeal to the Lands Tribunal. He submitted that the freehold of the subject block was owned by the Respondent and the shares in the Respondent's management company were wholly owned by the long Lessees of the block of which the Applicant was also a Lessee, and a shareholder and Director of the Respondent company; thus he had throughout been aware of the matters complained of. Mr Hayes conceded that the strict terms of the Lease had not been followed for many years, for reasons of economy and by express agreement of the other 11 Leaseholders. He submitted that the Applicant had made no objection to this until 2003/2004 when he had brought proceedings for repayment of the retained funds in the reserve fund not authorised by the lease but considered by all the other leaseholders to be a prudent accumulation, since a few years previously there had been no such funds to hand when expense was incurred for repairs. Mr Hayes submitted that the present proceedings were therefore either an abuse of process (as they sought to reopen the earlier case before the LVT), or that they were barred by limitation or want of jurisdiction due to the general presumption against retrospectivity because the relevant years' service charges had been paid before Section 27A had amended the 1985 Act or, alternatively, that the Applicant had been stopped from bringing proceedings in relation to his inaction or waiver of action in the years in which the strict terms of the Lease had not been strictly enforced. Mr Hayes said that the Applicant had been under a duty as a Director to speak out at a

much earlier stage if he had not been willing to acquiesce in the policy adopted by the other Directors and Shareholders.

9. The Applicant submitted that he had not been aware of the facts and circumstances in which an unauthorised retention in a reserve fund had been operated until he had read a newspaper in about 2003. He considered that he had at least 3 years from that time to make his claim for reimbursements. He said that he had found all his copies of the management company accounts for the year 1990 to 2003 (but not his service charge demands or payments) and had produced them to substantiate the rough calculations he had brought to the hearing on 1 September 2005 which had not been found sufficient and had led to the supplementary Directions of that date. He had at that hearing also mentioned that he had not had any of the documents such as copies of the block buildings insurance policy nor a copy of the annual certificate, documents which a Lessee expects to receive from the management company, and that he never received properly certified service charge accounts although the Lease required these to be "prepared and audited by a competent chartered accountant who shall certify the total amount of the said costs charges and expenses" (Clause 10 of the 7th Schedule of the standard form of Lease in the block). He thought it fair that he should receive back one twelfth of the amount now standing to the credit of the reserve fund as he had held his Lease for one of the longest periods of any Lessee still owning a flat in the block.
10. For the Respondent Mr Hayes was unable to agree to this proposal. While he agreed that the maximum that could possibly be owing to the Applicant was £1500, he submitted that the witness statement of Mr K Harris, the company secretary (which had been served on the Applicant and supplied to the Tribunal) disclosed that it was impossible to ascertain how much of the reserve was contributable to payments from the Applicant as such records did not exist before the year 2000. Moreover some lessees had paid more annually by way of advance service charge (in particular 2 two bed flats paid £720 each per year at present, whereas the 10 one bed flats paid £600 each) and therefore a larger portion of the reserve fund was referable to payments by those lessees. Further, in years where there had been a shortfall in lessees' advance payments, that shortfall had been made up from the reserve fund. He said there had been no formal service charge demands, but instead the annual advance service charge was fixed at the management company's AGM. The Applicant was a director and would have received minutes if he had not attended.
11. The Applicant further submitted that he was unhappy with the insurance arrangements for the block as the certificate did not record his interest in his flat and he had been prejudiced in applying for repair of a broken window following an attempted burglary on 9 September 2005. For the Respondent Mr Hayes submitted that the company secretary had sent a claim form to the Applicant on 28 September 2005 and had yet to receive it back for processing. Mr Hayes produced a letter dated 16 November 2005 from the insurance brokers effecting the policy, which recorded that they recognised that the block was a multi-tenured property thus enabling a resident to

demonstrate an interest under the policy, either through the managing agents or directly with the brokers. The Applicant agreed that he was satisfied with that record of his interest, although technically the Lease required insurance to be effected in joint names of the Lessor and Lessee.

12. Following questioning of the Tribunal, it was established that the amount in the reserve fund at 30 September 2005 was approximately £20,000 but that this would be required within 1-2 years for repairs to the roof and that some Lessees had bought into the building on the understanding that such funds were held. Mr Hayes submitted that, since the management company had been aware of the Applicant's desire to have any excess paid by way of his advance service charge refunded, they had reconciled his account in the last two years. In 2004 there had been an excess due to him of £60.58, but in the current year there had been a shortfall of £207.21 so that £146.63 was owing by the Applicant at the present time and they therefore proposed to set off the two sums.

DECISION

13. The Tribunal drew the parties' attention to their current Service Charge Dispute Pilot Mediation Scheme and suggested to them that a resolution by mediation might be more appropriate in the present case given that it appeared impossible to make an accurate determination of such sums as might be returnable to the Applicant, and especially as it appeared that any such sums might be disproportionately final. The parties were nevertheless not minded to avail themselves of this service, and the Applicant, who had had his attention drawn to the existence of the LVT's Free Student Representation Scheme at the hearing of 1 September 2005 and again at the full hearing of 18 November 2005 repeated that he was not minded to obtain any such external advice. In the circumstances, the Tribunal invited the Applicant to withdraw his application in respect of the years 2000-2004 (in respect of which these had already been a determination under case reference LON/00AC/LIS/2004/0107) and in respect of the earlier years 1980-1999 (of which insufficient records remained and it was contended that the Applicant had waived any objections to the management company's decision not to adhere to the strict terms of the Lease) and this he agreed to do upon the condition that there would be proper observance by the Respondent company in the future of the precise terms of the Lease and in consideration of the likelihood that the reserve funds would contribute significantly to the costs of the projected roof repairs in 1-2 years time from which he along with the other Leaseholders would benefit. The Applicant repeated that he expected strict adherences to add the terms of the Lease, in relation to insurance, accountant's certificate and annual balancing of excess expenditure and overpayments by way of advance service charge. Mr Hayes repeated that since September 2004 this had been done and would continue to be done. The only respect in which they were unable to accede to an outstanding request of the Applicant was to provide a copy of the Head Lease which could not be found and was thought not to have any material relevance, owing to the enfranchisement of the block.

14. In relation to the remaining year not already the subject of a determination under reference LON/00AC/LIS/2004/0107, there appeared to the Tribunal no issue to be decided since the management company had demonstrated adherence to the terms of the Lease in this service charge year and had produced the relevant insurance documents in respect of which the Applicant took no objection to the sums charged. The Tribunal therefore determines that the service charge for the current year is reasonable and duly payable by the Applicant.

COSTS AND FEES

15. Mr Hayes submitted that the Applicant should pay the Respondent's costs up to the statutory maximum of £500 on the grounds that the second application of 14 June 2005 had not been necessary for all the reasons set out in his skeleton argument. He further stated that as the lease did not permit legal fees to be charged to the service charge, there was no need for a Section 20C order.
16. The Applicant submitted that he should have his application and hearing fees reimbursed by the Respondent on the grounds that he should not have had to come to the LVT to obtain redress for the unauthorised retention of his excess funds and the production of insurance documentation.
17. The Tribunal is not minded to accede to either of these applications. It is clear that there have been faults on both sides and that some of the issues which have been generated have resulted from poor communication and overly informal management. Even the management company of a small block which comprises a majority of the Lessees where they have bought their freehold is subject to the law and good practice and set out in the RICS Residential Management Code. It does not appear to the Tribunal, for example, that the employment of the current chartered accountants is overly expensive or that there was any reason why the Applicant could not always have been given a duly certified notice of his proper annual contribution and it is clear that in the case of a block of the size of the subject, the Code requires this and makes the requirement clear. Nor is there any reason why insurance documents could not have been duly produced before the current month. Further, the employment of both solicitors and counsel appears to be excessive for a simple overhaul of the underlying service charge documentation and the statement by the company secretary that no records (including apparently the former Head Lease) could be produced prior to 2000. While there are few specific rules of procedure at the LVT, tribunals operate on parallel lines to the prevailing culture of the courts, in which costs are controlled and alternatives sought to confrontational litigation as a first resort. This must be especially so where an unrepresented party is concerned, and especially where the initial fault is to fail to manage a property properly in accordance with both the terms of the Lease and good residential property management.
18. With regard to the Applicant's desire to recover his application and hearing fees, the Tribunal is of the view that where the Applicant could have raised the year's service charge for 2005 on the 2004 application, if he chose to leave

that year for a fresh application incurring further fees, there is no reason why he should not pay himself for the service the LVT provides, especially as had he used the Free Representation Service this option would have been pointed out to him.

Chairman..... *F.R. Smith*

Date..... *24.12.05*