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Residential
Property
TRIBUNAL SERVICE

LON/00BA/LCP/2011/0014
LON/00BA/LRM/2011/0037

LEASEHOLD VALUATION TRIBUNAL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002 PART 2 CHAPTER 1

Applicants:	**10 MITCHAM PARK RTM COMPANY LTD**
Represented by:	**Pro-Leagle**
Respondent:	**ASSETHOLD LTD**
Represented by:	**Conway & Co**
Premises:	**10 MITCHAM PARK MITCHAM SURREY CR4 4EG**

Appearances for Applicant: Mr Henry Webb of Counsel

Appearances for Respondent: Mr R Gurvits of Eagerstates Ltd, managing agents

Leasehold Valuation Tribunal: Mrs T I Rabin JP
Mr L Jarero BSc FRICS

Date of Hearing: 16th November 2011

Date of decision: 21st November 2011

10 MITCHAM PARK MITCHAM SURREY CR4

PRELIMINARY

1. The Tribunal was dealing with applications by the Applicant requiring the Tribunal to determine the following:
   (a) Whether the Applicant was on the relevant date entitled to acquire the right to manage the property known as 10 Mitcham Park Mitcham Surrey CR4 4EG ("the Property")
   (b) To determine the Respondent's costs under Section 88 of the Commonhold and Leasehold Reform Act 2002 ("the Act").
   (c) To join these proceedings with Section 88 costs proceedings brought by the Respondent under file number LON/OOBA/LCP/2011/0014 in relation to the costs of the First Notice

2. The applications have been made under Sections 84(3) and 88(4) of the Act

3. The Applicants had served a Notice of Claim dated 13th June 2011 ("the First Notice") on the Respondent stating that the Property was one to which Chapter 1 of the 2002 Act applied and that they intended to acquire the right to manage the Property dated 23rd October 2011. The Respondent served a counter notice dated 18th July 2011 ("the First Counter Notice") in which the Respondent denied that the Applicant had the right to manage the Property as they did not comply with the legislative requirements under the Act and/or the members of the RTM Company did not represent the leaseholders of half the flats in the Buildings.

4. The Applicant served a further Notice of Claim dated 27th July 2011 ("the Second Claim Notice") on the Respondent on the same terms as the First Claim Notice and the Respondent served a counter notice dated 31st August 2011 ("the Second Counter Notice") in which the Applicant's right to manage was denied

THE HEARING

5. The hearing took place on 16th November 2011. The Applicant was represented by Mr Henry Webb of Counsel and the Respondent was represented by Mr Ronni Gurvits of Eagerstates Ltd, the Respondent's managing agents. The Tribunal also heard from Ms Corinne Tuplin, solicitor of Pro-Leagle. The Tribunal was provided with a trial bundle and a bundle of authorities provided by the Applicant.

6. The Tribunal considered the question of whether or not the Applicant was entitled to exercise the right to manage and then went on to consider the

two applications for the determination of the costs in relation to both the First Notice and the Second Notice of Claim.

THE EVIDENCE IN RELATION TO THE RIGHT TO MANAGE

7. The First Notice was served in the Respondent responded with the First Counter Notice in which it was stated that the Applicant did not have the right to manage the Property for the following reasons:

   (a) The notice was not served on each person as required by Section 79(8) of the Act
   (b) That the notice incorrectly listed the details required by Section 80(3) of the Act
   (c) That the notice did not comply with the regulations as required by Section 80(8) of the Act
   (d) That the notice was not on the form prescribed in Section 80(9) of the Act.

8. The Applicant acknowledged that the First Notice was issued on the incorrect form, namely that prescribed by Schedule 2 of the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2003 whereas if should have been served on the form prescribed by Schedule 2 of the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010. Accordingly it did not comply with Section 80(9) of the Act. The address of the flat in the Property owned by two of the long leaseholders were not included thus failing to comply with Section 80(3) of the Act.

9. The Applicant served the Second Notice by recorded delivery to the registered office of the Respondent and Ms Tuplin stated that she had included a withdrawal of the First Notice in the same envelope but the Respondent denies having received this.

10. The Respondent served the Second Counter Notice on the Applicant in which the right to manage was denied for the following reasons:

    (a) The Applicant was not entitled to serve the Second Notice as the First Notice continued in force at the date of service contrary to Section 81(3) of the Act
    (b) That notice was not given to each person as required by Section 79(8) of the Act
    (c) That notice was not given to the Respondent as required by Section 79(6) of the Act. This ground was withdrawn at the hearing.

11. Ms Tuplin adopted her statement in the bundle. She stated that she was clear that she had prepared a notice of withdrawal and that had been

included in the envelope in which the Second Claim Notice had been served. She was clear that the letter had been included and was placed underneath the letter enclosing the Second Notice and above the Notice itself. She had included the withdrawal as a precaution, even though, in her view, there was no necessity to serve a notice of withdrawal. Ms Tuplin also produced an e-mail in which she reported to the long leaseholders and sent them each a copy of the Second Notice, and a copy of the letter withdrawing the First Claim Notice. Mr Gurvits was adamant that no such withdrawal had been included in the envelope. He produced an e-mail to Conway & Co from Mrs E Gurvits stating that no notice of withdrawal had been produced

12. Mr Webb dealt with each of the Respondent's objections separately. He relied on the case of **Sinclair Gardens Investments (Kensington) Ltd v Poets Chase Freehold Ltd [2008] 1WLR 768.** Although this case referred to a notice under the Leasehold Reform and Urban Development Act 1993 ("the 1993 Act") it was held that an ineffective notice did not need to be withdrawn. He submitted that, since the legislation under the Act was largely based on the 1993 Act and had the same qualification requirements that this premise would apply equally to a notice under Section 79 of the Act. It was found in paragraph 54

> "that if a mandatory contractual or statutory provision requires a party to give a notice in a particular form in order to achieve a result identified in the contract or statute and if a purported notice given by that party fails to comply with the mandatory, contractual or statutory provision, then the normal position is that the notice has no legal effect"

13. Mr Gurvits referred to case **LON/OOAY/LRM/2011/0012** issued by the Tribunal dealing with a withdrawal notice. The Tribunal determined that the withdrawal notice had not been properly served in this case. The notice of claim served had left insufficient time for the landlord to respond. The applicants decided to withdraw the original notice and effect service of a fresh notice of claim and served a notice of withdrawal of the original notice at the same time. The Tribunal found that the requirements of Section 86 of the Act had not been complied with and that the withdrawal was not effective. He also referred the Tribunal to a Lands Tribunal decision of **36-48A and 50-62A Edgewood Drive LRX/16/2007.** This related to Section 88 costs but Mr Gurvits relied upon paragraph 14 which stated:

> "I do not think that a claim notice, given as required by Section 79 (4), cease to be a claim notice for all purposes under the Act if it is later found to be invalid (most obviously, for example, if it fails to comply with the requirements of Section 80).

14. Mr Webb submitted that Section 79(8) of the Act did not specify a time by which a copy of the claim notice must be given to each of the qualifying tenants. He stated that the four qualifying tenants were acting together,

had all signed the two Notices and had been served with a copy of the Second Notice on 27th July 2011 and accordingly there was no breach of Section 79(8) of Act. Mr Gurvits made no comment. Mr Webb reminded the Tribunal that the Respondent no longer claimed there was a breach of Section 79(6).

THE TRIBUNAL'S DECISION ON THE RIGHT TO MANAGE

15. The Tribunal was not persuaded that either **36-48A and 50-62A Edgewood Drive LRX/16/2007** or **LON/OOAY/LRM/2011/0012** were relevant. **Edgewood Drive** was a claim relating to costs under Section 88 of the Act. The tenant attempted to argue that the fact there was an invalid notice meant there could be no claim for costs. The decision of the Lands Tribunal effectively stated that the invalidity of the notice does not apply as a blanket proviso for all purposes. The case is clearly distinguished from the present case. The Tribunal did not find **LON/OOAY/LRM/2011/0012** helpful as the issue related to service of the withdrawal notice and not the validity of the notice of claim, which was not before the Tribunal.

16. The Tribunal prefers the reasoning in **Sinclair Gardens** as it concludes that an invalid notice can have no effect where it is in relation to a statutory requirement. Although the decision relates to enfranchisement, the legislation under the 1993 reflects and mirrors the legislation in the 1993 Act and similar principles can be applied to the validity of notices. The Tribunal is satisfied that the First Notice was invalid and the Respondent and all of the qualifying tenants had acknowledged this, the Respondent by the service of the First Counter Notice and the Applicant by the service of the Second Notice. It therefore follows that the First Notice had no effect and notice of withdrawal was not required.

17. The Tribunal was also satisfied that the qualifying tenants had all been served with a copy of the Second Notice and there is no breach of Section 79(8) of the Act.

CONCLUSION ON THE RIGHT TO MANAGE

18. The Applicant can exercise the Right to Manage in accordance with the Second Claim Notice. This right cannot be exercised until after this determination becomes final in accordance with Section 84(7) of the Act

EVIDENCE IN RELATION TO COSTS

19. The Section 88 (1) of the Act states that a Right to Manage Company is liable for the reasonable costs incurred by a person who is:

    (a) landlord under a lease of the whole or any part of any premises

(b) not applicable
(c) not applicable

in consequence of a claim of notice given by the company in relation to the premises

20. By section 88(2) of the Act, the costs incurred by such person for professional services should only be regarded as reasonable –

> if and to the extent costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable to pay the costs.

21. Section 88(4) of the Act provides:

> Any question arising in relation to the amount of any costs payable by a RTM company shall in default if agreement be determined by a leasehold valuation tribunal

22. The Applicant asked the Tribunal to determine the reasonable costs of the Respondent under Section 88 of the Act. The Tribunal issued directions on 21st September 2011. The Directions made it clear that the applications related to the right to manage and a determination of the costs in relation to both the First Notice by the Respondent and to the Second Notice by the Applicant. Both claims relate to Section 88 of the Act. The Respondent was directed to produce a statement of case and any supporting documents by 4th November 2011.

23. There has been no communication from the Respondent in relation to the costs relating to the Second Notice. There has been no breakdown of the costs incurred or any supporting documentation as required by the directions. It is for the Respondent to demonstrate what costs have been incurred. The Tribunal cannot hazard a guess as to the level of costs incurred and Section 88(4) makes it clear that any questions arising is to be referred to the Tribunal in the case of a failure to agree. There are no costs to agree in this case and accordingly no question has arisen. In addition the Respondent has failed to comply with the Tribunal's directions. The Tribunal therefore cannot assess the costs incurred in relation to the Second Claim Notice and no order for costs under Section 88 is made. This is the Tribunal's determination.

24. In relation to the costs in relation to the First Claim Notice, there is a breakdown of the costs incurred by Conway & Co in relation to the First Claim Notice. The total was £710 64, including VAT and disbursements. The charging rate for Ms L Scott, the solicitor handling the case was £185 per hour plus VAT. She has two years post admission experience, although Mr Gurvits said that she was a non-practising barrister from 1999.

25. The Tribunal has considered the amount of work to be undertaken in relation to the issue of the First Notice and First Counter Notice. Conway & Co has claimed for over three hours work. However, the Tribunal takes the view that the flaws in the First Notice would be apparent as soon as it was reviewed. The errors were obvious and the fact that the wrong form was used should have led to a quick preparation of the First Counter Notice. There appears to have been an excessive amount of time spent in reviewing the documents and taking instructions. The matter was straightforward and the application had clearly failed. The Tribunal considers that two hours would have been sufficient to undertake the work required to consider the First Notice and prepare the First Counter Notice. The Tribunal agrees the hourly rate of £185 plus VAT and allows the sum of **£370 plus VAT and disbursements.**

26. Mr Gurvits submitted that the managing agents incurred costs of £200 plus VAT. The Tribunal is at a loss to understand how these costs were incurred. Mr Gurvits referred the Tribunal to a letter dated 11th October 2011 in which he set out the additional charges incurred by the managing agents in connection with the application for the Right to Manage. There included the following:

    (a) Notifying the parties that Notice has been served - By Mr Gurvits's own account both the Respondent and the managing agents have the same directors, the same registered office and operate from the same address. Indeed the directors of both the Respondent and the managing agents are Mr Gurvits's parents. He has described the First Claim Notice being sent by recorded delivery to the registered office and collected by either himself or one of his parents who were at that address at the time. It was then opened, either by Mr Gurvits or his mother and placed on her desk. His mother sent the First Notice to Conway & Co to deal with.
    (b) Provide assistance to the instructed solicitor - There was no indication of what assistance had been offered. Charges have been made for Conway & Co to advise the Respondent and these have been largely allowed
    (c) Instruct accounts team to review the file and assess for the implications of the Notice – This is not a consequence flowing from the service of the First Notice
    (d) Consult and meet with freeholder to advise of the ramifications of the First Claim Notice – There is no evidence of this. The only evidence is that the claim was placed on Mrs Gurvits's desk from where she sent it to Conway & Co to deal with
    (e) Review by the management team in relation to on going services and scheduled works – Since Mr Gurvits is holding himself out as a person able to advise the freeholder on the ramifications of the RTM process, he would have immediately been aware that the notice was invalid.

Review of the ongoing services is not, in the Tribunal's view, necessary as a consequence of service of the First Claim Notice

27. In short, the Tribunal cannot see any justification for the managing agents to seek payment of a fee when the legal work was undertaken by Conway & Co. The provision in Section 88(2) is that the costs should only be regarded as reasonably incurred if they would be expected to have been incurred by the Respondent if the circumstances had been such that they were personally liable to pay the costs. The Respondent would not have expected to pay additional costs in connection with the First Claim Notice other than those flowing directly from the service of a notice of claim. The Tribunal determines that the costs incurred by the managing agents are not reasonably incurred in connection with the First Notice. Accordingly this sum is disallowed.

SECTION 20C OF THE LANDLORD AND TENANAT ACT 1985 and SCHEDULE 12 PARAGRAPH 10 of the Act

28. There was an application for an order under Section 20C of the Landlord and Tenant Act 1985 to the effect that the costs of these proceedings are not proper costs to be included in the service charge. The Tribunal did not have a copy of any of the leases and Mr Webb stated that he thought there was no provision to collect such costs. However, the Tribunal has considered the question and, since the matter before it does not relate to service charges, finds that it would be appropriate to make such an order and accordingly makes an order under Section 20C

29. The issue before the Tribunal was not straightforward and involved consideration of both case law and statute. In view of this, the Tribunal does not think the Respondent has acted unreasonably in serving the Counter Notices and no order for costs will be made under Schedule 12 Paragraph 10 of the Act.

SIGNED .....

MRS T I RABIN JP

21st November 2011