PROPERTY UPDATE

Can a residential leaseholder challenge the reasonableness of service charges after having made a payment ?

Introduction

A leaseholder that wishes to challenge whether any element of a service charge is payable must to so by making an application through the First Tier Tribunal in order to procure a determination within the provisions contained in s.27A of the Landlord and Tenant Act 1985

Timing of application

The issue of when an application may be made and whether it is possible to do so even after any payment has been made is of particular importance to practitioners and leaseholders respectively.
An application may indeed be brought even if payment of the service charge had been made several years ago by the leaseholder. Theoretically, a leaseholder could submit an application 10 or 15 years after having paid his contribution towards the service charge although, this could present obvious logistical problems in instances where redress cannot be obtained where for example, a contractor has absconded or is no longer trading. The issue of any limitation periods that may apply when seeking a determination under section 27A has been considered by the tribunal on a number of occasions.

The law

By virtue of section 27A(1) of the Landlord and Tenant Act 1985, an application may be made to the tribunal for a determination as to whether a service charge is payable and, subsection (2) provides that this is indeed the position irrespective of whether payment has been made.
It should be noted that section 27A(4)(a) prevents the tribunal from dealing with any matter where the service charge "has been agreed or admitted by the tenant" although, section 27A(5) qualifies this by providing that "the tenant is not to be taken to have been agreed or admitted any matter by reason only of having made any payment".

Recent case law

The case of *Peter Cain v Islington London Borough Council (2015) UKUT 542 (LC)* presented the tribunal with the task of determining whether the leaseholder was time barred from being able to challenge the actual reasonableness of the service

charges which he had discharged in respect of the periods 2001/2002 to 2006/2007. The First Tier Tribunal held that, given the leaseholder had not challenged the service charge payments over circa a ten year period, the leaseholder should be regarded as having agreed or admitted the constitution of the service charge and that the application was barred by virtue of section 27A(4). Following on from this, an appeal to the Upper Tribunal was made on the grounds that this was not correct given that, section 27A(5) specifically provides that payment of the service charge due cannot establish an admission or agreement.

The Upper Tribunal *disagreed* with this and was adamant that the leaseholders lack of action was sufficient to amount to an admission that the sums which he had paid over several years were in fact due. Consequently, the tribunal had no jurisdiction to allow an application under section 27A.

The Upper Tribunal rejected as "misconceived" the First Tribunal's interpretation of the section 27A application from the context of the Limitation defences and, went on to explain that a claim for a determination under section 27A is not in fact a claim to recover rent, arrears, service charges or damages and as a consequence, subsection 8 and 19 of the Limitation Act 1980 did not apply.

Conclusion

This case demonstrated that the conduct of the leaseholder must be sufficiently clear, to imply or infer that the payment of service charges are agreed or admitted. As a consequence of the threat of forfeiture by the landlord, a solitary payment by the leaseholder towards the service charges is not sufficient to establish an agreement or admission. There must be other circumstances or indeed facts such as several payments being made without protest, over a period of some time to imply agreement or admission by the leaseholder of the service charges, particularly if it is a long period of time.

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