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REF LON 00AG/LSC/2009/0607 and 0712

IN THE LEASEHOLD VALUATION TRIBUNAL

IN THE MATTER OF THE LANDLORD AND TENANT ACT 1985

SECTIONS 27A and 20C

AND IN THE MATTER OF 14 Wolcot House Aldenham Street
Lodnon NW1 1PP

Applicants

London Borough of Camden

Respondent

Thomas Rory O'Hara

The Tribunal

Mr P Leighton LLB (Hons)

Mr J Avery BSc FRICS

Mr A Ring

Hearing Dates

15th and 16th April 2010

Date of Oral Decision

16th April 2010

Date of Written Decision

26th April 2010

Introduction

- 1 This matter comes before the tribunal arising from an application by Mir O'Hara under section 27A of the Landlord and Tenant 1985 and a similar application by reference from the Central London County Court in proceedings commenced by the London Borough of Camden against Mr O'Hara for arrears of service charges. Both sets of proceedings have been consolidated and Camden have been treated as Applicant and Mr O'Hara as the Respondent.
- 2 At the directions stage both sets of proceedings were consolidated. A preliminary hearing was held on 16 December 2009 when the Tribunal decided that because of the limitation period, claims in relation to the service charge years 2001/2 and 2002/3 could not be heard by the Tribunal. The issues between the parties relate to the service charge year's 2003 to 2008 following the determination of the preliminary issue by the Tribunal.
- 3 In the course of the hearing of the application an objection was taken by Camden to the jurisdiction of the Tribunal to consider allegations raised by Mr O'Hara in connection with the Unfair Terms in Consumer Contract Regulations 1999. Mr Cremin who appears on behalf of Camden submitted to the Tribunal that under the regulations the "court "is defined in Paragraph 3 of the regulations as meaning "a County Court or the High Court and in relation to Scotland the Sheriff Court or the Court of Session" and Mr Cremin submitted that under the terms of the act the under the terms of the regulations the court was the only body which could exercise the functions under those regulations.
- 4 A number of functions are specified mainly of an enforcement character in particular involving grants of injunctions under regulation 12 and powers to require the disclosure of documents. The bodies which are permitted to enforce the regulations appear to be limited to (1) the Director of the Office of Fair Trading and (2) 12 specified bodies under schedule 1 of the regulations. These are there described as qualifying

- bodies and include a Weights and Measures Authority which it was agreed between the parties is a function of the local authority itself
- 5 The issue before the Tribunal, however, is not limited to the question of enforcement but a determination as to whether or not a clause or series or clauses in the lease or the lease itself falls foul of the regulations
- 6 Regulation 5 of the regulations states that a contractual term which has not been individually negotiated shall be regarded as unfair if contrary to the requirements of good faith it raises a significant imbalance in the parties rights and obligations arising under the contract to the detriment of the consumer Regulation 5(2) provides that a term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term
- 7 By Regulation 5(4) it shall be for the seller or supplier who claims that the term was individually negotiated to show that it was. These regulations were considered by the Court of Appeal in the case of **London Borough of Newham –v- Khatun and others 2004 EWCA Civ 55** in which the Court of Appeal held in connection with an application regarding homelessness that a clause in a lease is subject to the regulations and that the regulations applied to leases generally
- 8 As a result of this authority Mir O'Hara submitted that the Tribunal has jurisdiction to consider the unfairness of a clause or clauses in a lease if they relate to the question of whether a service charge is recoverable if it is unfair within the meaning of the regulations
- 9 The jurisdiction of the Tribunal is governed by section 27A of the Landlord and Tenant Act 1985 which provides as follows
- (1) an application may be made to a Leasehold Valuation Tribunal for a determination of whether a service charge is payable and decide 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 all by which it is payable and

(e) of the manner in which it is payable

10 The matter was considered by the Lands Tribunal as it then was now the Upper Tribunal in the case of Canary Riverside PTE Ltd and others v Dr and Mrs Schilling LRX/65/2005 when His Honour Michael Rich QC considered on appeal the question of whether the leasehold valuation tribunal was correct in its determination that it had jurisdiction to consider the application of the 1999 regulations.

11 The matter was considered in detail by the judge at paragraphs 40 to 45 of the decision. Having set out the regulations at paragraph 40 and having considered the Newham case the judge considered the course which had been taken by the tribunal namely that it had jurisdiction to consider the application of the regulations whereupon the landlord had indicated that they would seek a declaration from the High Court that the Leasehold Valuation Tribunal either had no jurisdiction or should not be permitted to try the issue under the regulations. As a result the respondent Dr Schilling withdrew the objection and the tribunal was not in the event invited to consider the application of the regulations. However Judge Rich considered the matter in some detail at paragraphs 43 to 45 in which he said as follows:-

' There is no doubt that if a party to proceedings before an LVT takes proceedings for the determination of such an issue for what the LVT accepts is a more appropriate court the LVT will as it did in the course of the service charges application adjourn its proceedings pending such determination. It has power to do so under its inherent jurisdiction to regulate its own procedure. That this would be a reasonable and proper course if an issue were raised to take Mr Fancourt's example as to voidability for mistake forgery or misrepresentation I do not doubt. Such matters are better determined under court procedure and by judges rather than by specialist tribunals encouraged to adopt comparatively informal procedures I should take the same view when the LVT has jurisdiction to

determine only one aspect of the matter better determined as a whole. The LVT although as I think entitled to decide whether a term is not binding but has no jurisdiction thereupon to make a determination whether the lease shall continue in existence without the alleged unfair term. It may well therefore be regarded as convenient if other proceedings are brought to determine whether a service charge is payable and return and not to be binding buckles under fair to adjourned an application within each jurisdiction pending such determination

12 Again in paragraph 45 he says

"I can see no basis however saying that the LVT lacks jurisdiction to determine any issue not expressly the subject of some other tribunal's exclusive jurisdiction if determination of the issue is essential to determining whether a service charge is payable. that is the issue which section 27A gives the LVT jurisdiction to consider how to determine that must include any issue necessary for or incidental to such determination I therefore agree with the LVT they did have jurisdiction to determine the issue of the effect of the 1999 regulations although I think they might have been wiser to encourage the landlord to follow the course which they had adopted in regard to the service charges application and to seek a declaration from the court."

13 It is clear from those words that the Tribunal does indeed have jurisdiction to consider under section 27A whether or not a service charge is recoverable if it is based upon an unfair clause in a contract. It is agreed that the challenge in this case relates to a lease which is in standard form which the Tribunal is informed applies to some 10,000 or so leaseholders in the London Borough of Camden and the form of which was approved by the former Department of the Environment now the Department of Communities and Local Government. This is a lease with clauses widely used in right to buy cases

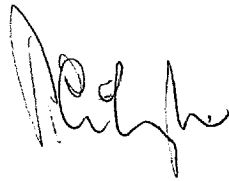
- 14 The implications of a decision relating to a lease of this kind has enormous ramifications for leaseholders and local authorities not only in Camden and in London but probably in the country as a whole
- 15 In considering the question which Mr O'Hara wished to raise the Tribunal invited him to identify the clause or clauses which he stated to be unfair and the reasons why he maintained that they should be unenforceable. In most cases where he was able to identify a clause (e.g. in the Fourth Schedule of the lease) it appears that his main complaint is that the clauses which he challenges are unintelligible or difficult to understand, he has not in the view of the Tribunal clearly and sufficiently identified with a degree of particularity which the local authority could answer, the clauses which he challenges. His challenge is more of a general nature and as such brings into question the whole character of the lease itself
- 16 Consequently in deciding whether to exercise jurisdiction the Tribunal must have regard to the following factors namely first the importance of the questions which fall to be determined and whether those issues are more appropriately determined by a court rather than a tribunal. The Tribunal has no hesitation in concluding that the issues which Mr O'Hara seeks to raise are more appropriate to be dealt with in court preferably by a senior circuit judge in the County Court or indeed a High Court judge. The implications of the decision affect thousands of leaseholders potentially numerous local authorities and involve very large sums of money. In the view of the Tribunal it would be quite inappropriate for it to make that determination particularly since the local authority in question would probably wish to be represented by leading counsel and indeed the Department of Communities and Local Government might well wish to be added or at least appear as *amicus curiae* since they might consider that they had an important interest in the outcome of such a challenge
- 17 Secondly in addition to the legal questions it would be more appropriate for such important questions of fact to be the subject of sworn evidence

subject to cross examination rather than the more informal procedure of the tribunal.

- 18 The consequence would be that the matter could not possibly rest in this tribunal even if it were to attempt to reach a conclusion on the lease. The issues themselves are lengthy and complicated and would take some time to consider. The inevitable result would be that if a decision adverse to the local authority were made that there would inevitably be an appeal, that the costs of such an appeal would be payable by the unsuccessful party and that there is a real risk that the proceedings would be extended for an unacceptably long period of time
- 19 In his submission to the Tribunal Mr Cremin proposed that if the Respondent wished to pursue this question the appropriate course would be to remit the matter to the County Court so that it could be considered by a judge and that upon conclusion of that determination the matter then return to the Tribunal for its consideration of the remaining service charge issues. The Tribunal considers that that is a sensible proposal.
- 20 That issue, however is ultimately a matter for Mr O'Hara to submit to the Tribunal the most appropriate course. For the purposes of this decision, however, it is sufficient that the Tribunal rules that while it possesses jurisdiction to hear the issue under the 1999 regulations, for the reasons stated above it declines to do so.

Chairman Peter Leighton

Date 26th April 2010



Following this ruling which was given orally the parties asked for a short adjournment during which they were able to reach an agreement and in consideration of Mr O'Hara withdrawing his application to the Tribunal the Applicant agreed to discontinue the county court action with no order as to costs .