

BARRINGTON-V-SLOANE PROPERTIES (26 February 2007)

-SERVICE CHARGE CERTIFICATE NOT FINAL

The Message: Service Charge Certificates may not be binding as they can be challenged by tenants if the Surveyor or Accountant who had provided the Certificate has misinterpreted the lease provisions.

The Case: The Lands Tribunal has upheld an Appeal by a tenant against a finding of the Leasehold Valuation Tribunal that she was bound to pay service charges as certified by her Landlord's accountant (Barrington-v-Sloane Properties Limited (26/2/2007)).

The Appellant is the tenant of a flat at 10 Kensington Park Gardens in London. Between 2000 and 2003, substantial building works were undertaken to the building under contracts supervised by an architect who would value the work from time to time and then issue certificates for payment. A retention of 5% was retained and the balance of each certificate was then payable 14 after issue of the contractor's invoice.

The Lease provided that the tenant would pay 24.24% of the "actual cost" to the Landlord of providing all the services set out and for such sum to be certified annually by the Landlord's accountant and for such certificate to be conclusive.

The service charge year ran to 30 September and the works under the contracts straddled across the service charge years for 2000 to 2003. Rather than calculating exactly how much had been charged and become payable in each service charge year, the Landlord's accountant apportioned and certified the cost of the building works for each year on the basis of an estimate of the value of the works carried out in that year.

The tenant claimed that the certificates were not binding on her as the accountant had not actually taken account of the actual cost incurred in each of the years i.e. the net amount the landlord was actually liable to pay pursuant to the certificates issued and payable during each year.

The first question the tribunal had to answer was what was meant by "actual cost"? Was it limited to sums that had fallen due for payment in the year in question or could it include works undertaken but not payable until later? The Landlord argued it made practical sense to apportion the costs between the years but the tribunal disagreed and held that only costs which the Landlord had been required to pay could be included. Accordingly, the Landlord's accountant should only have included the net sums payable under the architect's certificates in any given year.

The second question the tribunal had to answer was whether the accountant's certificates were conclusive and binding anyway? Courts and tribunals will not ordinarily interfere with an expert's decision unless the expert has either not acted independently and in good faith or has failed to comply with his instructions. The fact that the expert may have made the wrong decision is not sufficient in itself to invalidate his certificate.

The tribunal considered that the certificates were not binding as the accountant had gone outside the limits of his decision-making authority by acting upon the wrong meaning of "actual cost". He was prevented from certifying in any year any costs that had not actually become payable, such as the retention monies and works not yet certified, and it was therefore open to the tenant to successfully challenge his wrong interpretation of the Lease.

Interestingly, the tenant had actually paid all the service charges by the time of the hearing but the matter proceeded to establish which party was liable for the costs of the dispute.

The ability to challenge service charge certificates is of general importance to both residential and commercial leases and the issue as to whether costs not actually incurred can be claimed can be of significant importance where a landlord is not yet liable to pay for works undertaken shortly before the end of a Lease.