Section 27A and estoppel waiver

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In Brittany's last article (**here**) she considered how a landlord might respond to a section 27A application where the tenant seeks to set-off part of his liability when the cost of works has increased due to inaction, in circumstances where the tenant's non-payment is one reason for the delay. This article continues the section 27A theme by considering how a landlord might grapple with its failures to serve contractually valid demands. In a recent case, she successfully argued that, even if service charge demands were contractually invalid, the tenant was barred from arguing the point, by virtue of estoppel by convention and/or waiver.

Valid service charge demands

In order to be valid, service charge demands must comply with the lease terms (contractual validity) and statutory requirements (statutory validity). Particularly when the landlord is not a professional company, Brittany frequently comes across instances of statutory invalidity; typically, such failures can be remedied. However, contractual validity often emerges as an issue when tenants self-manage property, usually dealing with matters on a common-sense basis, rather than in strict accordance with the lease.

The case

A semi-detached Victorian townhouse had been divided into four apartments, each of which was let on a long lease. For many years, each tenant was involved with the management company. The leases were poorly drafted, did not permit payment to be sought on account in respect of service charges and did not provide for a sinking fund. Strictly, demands should have been made for payment in arrears. Proceeding on a common-sense basis, the tenants made a regular, fixed payment to the service charge

fund. The sums agreed upon allowed a substantial sinking fund to be established, the tenants all being aware that this fund would be put toward costly maintenance works that would soon be required in respect of the property's exterior.

The tenants' relationship broke down, and a disgruntled tenant issued a section 27A application, with the tribunal limiting the inquiry to a six-year period. A myriad of issues were in dispute, including the contractual and statutory validity of service charge demands, the reasonableness of many items and the validity of the section 20 process, initiated in respect of the impending exterior works. As a parallel to the case discussed in her previous article, the management company found themselves unable, and unwilling, to embark on costly works absent the contribution of the aggrieved tenant, with the delay leading to an increase in the anticipated cost of works.

The landlords succeeded on all counts: the demands were all valid (with any irregularities as to statutory validity being capable of retrospective correction), the sums reasonable and there was no criticism of the section 20 process.

The arguments concerning contractual validity

It was evident that the demands (such as there were) did not comply with the lease terms. Firstly, for the most part there were no written demands, rather oral, informal agreements (scantly evidenced) as to what would be paid. Secondly, the "demands" requested regular payments to be made on account and thirdly, it was intended that approximately half of the sums being demanded would form a sinking fund. The lease simply did not permit the service charges to be levied in such a manner.

If the demands were deemed invalid this would have had considerable ramifications for the parties: each tenant would be entitled to reimbursement of the significant sums paid in respect of that period; the landlord company had insufficient assets and would likely have become insolvent. In the short term, practical difficulties would likely have arisen as to the discharge of relevant expenses.

The landlords' argument was as follows: even if the demands were invalid, by making the monthly payments on a regular basis, without issue, the tenant had waived any right to challenge the practice, alternatively an estoppel by convention had arisen.

If, by words or conduct, Party A has agreed, or led Party B to believe, that he will accept performance in a different manner, then he has waived any right to challenge the practice and he will not be able to claim damages on the ground that performance did not take place in accordance with the terms of the original contract. An estoppel by convention may arise where both parties to a transaction act on an assumed state of facts or law, the assumption being shared by both or made by one and acquiesced in by the other. The parties are then precluded from denying the truth of that assumption if it would be unjust or unconscionable to allow them, or one of them, to go back on it.

The argument ran that there had been mutual conduct arising out of a shared assumption and/or agreement that monthly payments could be made on account, and therefore the tenant was now barred from arguing that this was a contractually invalid method of demand. The same factual matrix, together with the fact that for much of the relevant period the tenant had been involved with the landlord company and had failed to raise any objection in other proceedings, was deployed to argue that the sums had been agreed by virtue of section 27A(4)(a), thus ousting the tribunal's jurisdiction. The landlords' arguments were wholly accepted.

Wider relevance

There will be many instances, particularly where residents self-manage, of demands being issued which are contractually invalid for want of strict compliance with the lease terms. It is unsurprising that, down the line, these can become the focus of section 27A applications. Landlords would do well to consider whether they can rely on waiver and/or the doctrine of estoppel by convention in response and should collect as much

contemporaneous evidence as they can that illustrates agreement (directly or by conduct). Typically, such evidence can usually support a section 27A(4)(a) argument.

To conclude on a precautionary note, it is worth being aware that if there has been waiver or estoppel by convention historically, this will not permit a landlord to take a laissez-faire attitude to demands going forward; if the lease terms are practically unworkable, formal variation will be required.

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