Y Tribiwnlys Eiddo Preswyl

Residential Property Tribunal Service (Wales)

Leasehold Valuation Tribunal (Wales)

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DIRECTIONS OF LEASEHOLD VALUATION TRIBUNAL (WALES)
Schedule 11 to the Commonhold and Leasehold Reform Act 2002
Landlord and Tenant Act 1985 s. 20C

Premises:	37 Glan Gors, Harlech ("the property")
LVT ref:	LVT/0051/10/13Glan Gors
Hearing:	25 June 2014
Applicant:	Mr James Scott
Respondent:	Glan Gors Management Limited
Members of Tribunal:	Mr R S Taylor – Lawyer Chairman Mr Roger Baynham FRICS Mr Bill Brereton

ORDER

1. The Applicant is not liable to pay any amount in respect of the invoice for £3,640 dated 21 June 2013.

2. The Respondent shall not be entitled to claim his costs of this application via the service charge account in respect of the Applicant, pursuant to s.20C of the Landlord and Tenant Act 1985.

Dated 5 August 2014

Procedural Chairman

REASONS

The Application.

1. This is an application dated 23 September 2013 (dated stamped into the tribunal office on the 25 September 2013) for a determination of the reasonableness of an administration charge in the sum of £3,640.

Background.

2. The sum of £3,640 is contained in an invoice dated 21 June 2013 and was issued by the Respondent purporting to exercise its rights of management under a management agreement with the Lessor, Purpose Properties Ltd. The freeholder is not involved in this application.

3. The sum of £3,640 relates to the costs of legal advice taken by the Respondent in response to the Applicant's wish to install a wood burning stove at his property. The Respondent claimed that this would be a breach of the Applicant's lease, sought advice and threatened an injunction to stop him unless the Applicant desisted. The costs amount to £1,000 for Keith Varley, a director of the Respondent. This relates to the time he has spent on dealing with this matter. A further £1,200 relates to an invoice from a firm of solicitors, Smith Partnership for their advice in the matter. A further £1,440 relates to the fee note of counsel who was instructed by Smith Partnership for advice.

4. At the hearing the Respondent was represented by Nicholas Isaac (counsel). We are very grateful for the assistance he gave to the tribunal. He put the Respondent's case calmly and attractively. We heard evidence from Mr Varley on behalf of the Respondent. The Applicant was assisted by his brother, Mr Robert Scott. We are grateful for his assistance as well. Mr Robert Scott is not legally qualified and it was no doubt a daunting experience to bring and then present the case. The Applicant called 3 witnesses in addition to himself, namely, Henry Thomas, his partner Susan Court and Mr Ian Morgan. All gave evidence about the circumstances of the Glan Gors Residents' Association AGM on the 25 April 2011. We are grateful for the time that they have taken in so doing, but our decision does not turn upon the disputed circumstances of that meeting which we do not therefore need to resolve conclusively.

The law.

5. Under paragraph 5, Part 1 to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 the tribunal has jurisdiction to consider the payability of administration charges.

    a. An administration charge is defined in paragraph 1(1), Part 1 to Schedule 11, as being "an amount payable by tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly – (a) for or in connection with the grant of approvals under his lease, or applications for such approvals … (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

    b. By paragraph 1(3) a "variable administration charge" means an administration charge payable by a tenant which is neither specified in his lease nor calculated in accordance with a formula specified in the lease.

    c. By paragraph 2 "a variable administration charge is payable only to the extent that the amount of the charge is reasonable."

The lease.

6. The property is held under a lease dated 4 January 1973, which includes at paragraph 4(1) the Lessee's covenant "Not to make any structural alterations or structural additions to the demised premises nor to erect any new buildings thereon or to remove any of the landlord's fixtures without the previous consent in writing of the Lessor."

The relationship between the Lessor and the Respondent.

7. The lease is a bipartite agreement with no provision for a manager. At some point in 2002 (although we were never shown an executed agreement, which has now been lost) the Lessor appointed the Respondent to discharge the management functions under the lease. It is not fatal to the Respondent's case that the executed agreement has not been produced; it seems, on the balance of probabilities, that there was once an executed agreement which has now been lost or if the agreement was never actually signed off, both the Lessor and the Respondent have understood the agreement to govern the terms of their original relationship. The draft agreement, which we did see,

provides for the Respondent to discharge the Lessor's management functions under the lease for a period of 5 years from the 1 July 2002. The agreement sets out the responsibilities of the Respondent but at paragraph 5(C) the Lessor expressly "… retains the sole power to give consents to Lessees where sought under the Leases expect as mentioned in Clause 5(A)." We do not find anything in paragraph 5(A) which is germane to this dispute.

8. The agreement expired in 2007 and the failure by the Lessor and/or the Respondent to execute a fresh agreement has been the cause of much unhappiness for leaseholders. This has been reflected in numerous applications to court and an application to the LVT where the authority (or otherwise) of the Respondent to discharge management functions under the lease has been a continuous bone of contention. We were shown various extracts of transcripts of previous decisions decided at both the district and circuit bench which deal with this point. This tribunal derives little assistance from any of them as they do not bind this tribunal and it is not totally clear what documents were before the various tribunals when decisions were made. We have to decide this case as we find it to be.

9. The Applicant's case is that the agreement came to an end in 2007 and therefore the Respondent has had no authority to act as manager since that date. In particular, the Applicant produces a letter from a solicitor's firm known as Case Forman Kelly dated 7 October 2008. This firm was acting on behalf of the Lessor at this stage. After noting the agreement and complaining about the manner in which the Respondent is conducting itself, the letter states, "Pursuant to clause 19B, the agreement continued for a period of five years and automatically expired on the 31 July 2007. There has been no renewal of your agreement and, therefore, you are currently acting without authority." Clause 19B notes, "Subject to earlier termination this agreement shall continue in form until five years from the Commencement Date when it shall terminate automatically by expiry unless renewed by prior agreement."

10. Further, before us was a signed authority from the Lessor dated 12 July 2013 granting the Respondent (therein described as "our managing agents") permission to conduct litigation against Henry Thomas and Susan Court (witnesses in this case). There is an argument to say that, the Respondent's actions in seeking out the authority, confirms that it did not have authority to act save with the express permission of the Lessor in that instance. Against

this, it was pointed out by Mr Isaac, who was counsel in that case, that HHJ Jarman QC had required the authority to be given and that the fact it had been sought did not, *per se*, evidence a lack of authority. Mr Isaac also drew a distinction between an authority to conduct litigation and the authority to perform management functions under the lease. Further, the authority itself refers to "our managing agents."

11. Mr Isaac also produced recent correspondence sent by MSB Solicitors, on behalf of the Lessor, in which the Lessor is undertaking a survey of leaseholder satisfaction with the Respondent. One of the letters refers to the Respondent as "appointed by [the Lessor] some years ago to deal with the collection of service charge and the maintenance of the Estate." It is said by Mr Isaac that this is evidence of a continuing relationship between the Lessor and Respondent and that the 7 October 2008 letter must be seen in the later context. The 7 October 2008 letter was referred to as a "wobble" in the relationship between the Lessor and Respondent at a time when the Lessor was unhappy with the Respondent's management of the site.

12. The tribunal finds that there must be some kind of continuing, implied, authority by the Respondent to perform certain management functions under the lease. Whatever the precise basis for this authority, it is a most unsatisfactory and ragged arrangement. It leaves leaseholders in a confused position and has spawned much argument in other litigation. We note that, aside from this application, the Lessor, Respondent and Applicant are seeking to resolve these issues with a fresh management agreement, clearly setting out rights and expectations. This comes about after the tribunal set an Appointment of Manager application, brought by the Applicant, down for a 5 day hearing (at a directions' appointment on the 26 June 104), which has now been withdrawn

13. The terms of any implied authority at the time of this dispute, however, must surely mirror the terms of 2002 agreement, which includes clause 5(C) which reserves the issue of consents to the Lessor. On these facts the Respondent cannot have his cake and eat it. Mr Isaac drew a distinction between the granting of a consent, clearly reserved to the Lessor, and the Respondent's right to enforce breaches of the lease, which were not so reserved.

Relevant chronology.

14. Mr Isaac provided a helpful chronology at the hearing. It was clear in October 2010 that the Applicant wished to install a wood burning stove and that the Respondent was declining permission for the Applicant to do so. In a letter dated 15 November 2010 to CFK legal (the Lessor's solicitor) the Applicant referred to the Respondent's refusal and asked, ".. is it possible to appeal to Purpose Properties directly to discuss my situation with a view to waiving the restrictions." This elicited a response dated 11 February 2011 from MSB Solicitors (the tribunal notes that throughout the period the Lessor's solicitor has been a Mark Foreman, who must have moved from CFK to MSB during this time) enclosing a response from the Lessor dated 4 February 2011 in which it is stated "You have my permission to install a wood burning stove. The fact that the local council has granted you planning consent is acceptable to me."

15. Upon considering the dates carefully, it is clear that as at the 4 February 2011 the Applicant did not, in fact, have planning permission. He had been in discussion with the planning authority and had been given the impression that an application would be looked upon favourably if made. The application was made on 21 March 2011 and then subsequently granted on or about 10 May 2011. Mr Isaac says that the "consent" granted by the Lessor in its letter on the 4 February 2011 can, therefore, not amount to consent as it was predicated upon a material inaccuracy; namely, that planning had been granted when, in fact, planning had not yet been granted. Mr Isaac described the 4 February 2011 letter as "fruit from a poisoned tree" which should not be treated by the tribunal as consent.

16. Although attractively put by Mr Isaac, the tribunal cannot accept his submission on this point. Whilst it is correct to say that no consent was in fact granted as at 4 February 2011, it was later granted. The tribunal prefers, when assessing the reasonableness of the parties' respective behaviour, to view this document as a conditional consent which later matured into full consent. It was at worst an amber light for the Applicant which the Respondent should have taken into account in the manner in which it subsequently conducted itself.

17. We have already referred to the AGM on the 25 April 2011. By all accounts it was a thoroughly unpleasant meeting for all concerned. However, we do not need to resolve the particular factual assertion of the Applicant, namely, that he shouted across to Mr Varley, whilst brandishing the 4 February 2011 consent, that he had the Lessor's permission, whilst there was an exchange between the two about the wood burning stove. Given the time which has elapsed since 2011 the tribunal may well have found it difficult to find that particular assertion proved on the balance of probabilities.

18. However, the Applicant wrote to the Respondent's solicitor on the 15 September 2011 stating, "For your clients information: the multi-fuel burner … Permission has been approved by the freeholder Purpose Properties which I believe overrides their existing leaseholder privisoes (sic)" Further, on the 4 October 2011 the Applicant wrote to the Respondent stating, "I would also be obliged if you could also furnish me with the details of your objection to the multi fuel stove being put in. As you know by now I've permission from the freeholder, i.e. Purpose Properties and Snowdonia National Parks [the planning authority]." It was agreed by the Respondent at the hearing that all relevant costs claimed as part of the disputed administration charge were incurred after the 20 September 2011 i.e. when the Respondent already had notice that the Applicant was saying that he had permission from the Lessor.

19. The Applicant's conciliatory correspondence, referring to the consent he had obtained, was met with a letter from the Respondent's solicitor dated 10 November 2011 in which it was stated, "We aver that by installing a wood burner at the Property, you would be in breach of the above provisions contained within the lease. Should you fail to adhere to the terms of the Lease, our client shall be left with no option other than to make an application to court to obtain an injunction preventing you from installing and/or keeping the wood burner at the Property and to recover the costs incurred."

20. The Applicant wrote on the 21 November 2011 that he had no intention of installing a multi fuel stove at the property and when asked to do so he confirmed this again in writing.

The tribunal's determination on reasonableness

21. The tribunal has considered the supporting evidence for the quantum of £3,640 and, had the Respondent's actions been reasonable in the round, we do not consider that the actual costs claimed are unreasonable in amount.

22. However, the tribunal, having listened to the parties give evidence all day, has come to the firm view that the Respondent did not behave in a reasonable manner after it was confirmed to it and/or its solicitor in writing that the Applicant had the consent of the freeholder. As we have already stated, the only reasonable interpretation of the terms of the relationship between the Lessor and the Respondent in 2011 is to import the terms of the original written agreement which expired in 2007. Having come to this conclusion, the Respondent should have been well aware that the Lessor had reserved to itself the right to grant consents and costs should not have been incurred seeking to enforce a breach of the lease in circumstances where the Respondent was on clear notice that there was consent.

23. We agree with the Applicant that the reasonable response to his letters of the 15 September 2011 and 4 October 2011, was to ask for a copy of the consent and/or to contact the Lessor for a copy of the same. We have formed the view that the Respondent acted in a dictatorial and unreasonable manner given the factual circumstances confronting it. It was too quick too seek confrontation and legal advice when a consensual way forward might easily have been achieved. This reflects poorly upon Mr Varley and his style of management and communication.

24. For these reasons we find that the incurring of £3,640 was unreasonable and should not be recoverable as an administration charge.

Landlord and Tenant Act 1985 s.20C

25. We were addressed briefly upon the issue of s.20C Landlord and Tenant Act 1985 on the morning of the 26 June 2014. The hearing on the 25 June had gone on very late (until about 6pm) and everyone had overlooked oral submissions on s.20C. The same parties and the Lessor were before us on the 26 June 2014 in directions on the Applicant's Appointment of Manager application, and before the hearing commenced we asked for submissions on

s.20C. Mr Isaac realistically submitted that the substantive decision in this matter "might feed into" our decision on s.20C.

26. Under s.20C the tribunal has the jurisdiction to block contractual recovery of the Respondent's costs of contesting the application under the Applicant's service charge account "as it considers just and equitable in the circumstances." No cases were cited to us on the point on the 26 June 2014, but it is well established that in exercising this jurisdiction we are not just bound to consider the outcome of the case, but the manner in which it has been contested. We find that the Applicant was eminently justified in bringing this application and that he has succeeded before us. Accordingly, we find it just and equitable to make an order pursuant to s.20C.

Dated 5 August 2014

Procedural Chairman