Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0065/01/14

In the Matter of 8 Lynwood Court Elm Street Roath Cardiff CF24 3RL (the Property)

In the Matter of an Application under Section 27A (and 19) of the Landlord and Tenant Act 1985 (the Act)

TRIBUNAL P H Williams, Chairman
NFG Hill FRICS
Dr A Ash

APPLICANT Ms Amanda Jane Martin

RESPONDENT Wales and West Housing Association Limited

Introduction

1. We were duly convened as a Leasehold Valuation Tribunal at the Tribunal's offices at Wood Street, Cardiff on the 15th July 2014 under the provisions of the Act

The Inspection

2. On the 2nd June 2014 we inspected the common parts of the development site at Elm Street Cardiff. The development comprised four blocks of flats which totalled one hundred and eight. The block known as Lynwood Court comprised a mix of twenty four one bedroomed and self contained studio flats and was built in the 1970s and covered three floors. The Property is a flat on the first floor of Lynwood Court and access to the Property is via a communal hallway and stairs. There is no lift in the block. There is a door entry system in operation and there is a vestibule with a meter cupboard and the water supply is metered. The development site is situated in a residential street within easy walking distance of Newport Road which leads into Cardiff City centre.
3. Lynwood Court has the advantage of off street parking, a communal refuse and parking area and individual sheds for each flat. There was also a Janitor's shed. The communal areas appeared to be well kept and there was no sign of litter. There were areas of lawn and shrubs around the development. We were accompanied at the inspection by Ms Alison Jones from Cardiff Law centre, on behalf of the Applicant, and by Ms Dorrett Evans, Property lawyer, Ms Shirley Burrows, Service Charge Team Leader, and Mrs Hazel Gray, Home Ownership Officer, on behalf of the Respondent. The hearing was adjourned to the 15th July 2014 at the request of both parties, through the illness of the Applicant.

The Lease

4. The Lease of the Property is dated the 17th August 1988 and made between the Respondent of the one part and Eirian Salisbury of the other part for a term of 125 years from the 1st July 1982 at the yearly rent of £10. In Clause 4 (b) of the lease the lessee covenanted to pay on demand

(1) the amounts specified in the first proviso to Schedule A and (2) a reasonable part of the costs incurred by the Respondent in carrying out repairs to the Property, to the remainder of the Building and the Scheme in accordance with the repairing obligations of the Respondent under Clause 6 of the lease, other than structural defects and under (3) and (4) a reasonable part of the costs of insurance and under (5) the costs incurred by the Respondent in improving the Property and under (6) a reserve fund. The Building is defined as "the block of flats of which the Property forms part" and the Scheme is defined as Lynwood Court. The Property is defined as Flat number 8 on the first floor of the Building edged in red on the lease plan together with the storage area coloured red on the lease plan. In Clause 6 of the Lease the Respondent covenanted, inter alia, to keep in repair, including decorative repair, the structure and exterior of the Property and the Building. Schedule A granted rights in accordance with Part 1 of the 6th Schedule to the Housing Act 1985

The Hearing

5. The hearing was attended by the Applicant, Ms Martin and her solicitor Ms Alison Jones. The Respondent was represented by the said Ms D Evans, Ms S Burrows and Mrs H Gray. At the hearing we considered the Scott Schedule and the Schedule of Service Charges. The Scott Schedule set out the service charges in dispute, the Respondent's comments, the Applicant's responses and the Respondent's replies for each of the years in dispute.

Service Charges 2013- 2014

6. Window Cleaning Charges. The Applicant stated that she had only seen the communal windows cleaned once and Ms Jones stated that the Law Centre paid £65 for a comparable number of windows an that it used a regular competitive tendering process and considered that there should also be regular tendering for this contract as it was a competitive market. Ms Evans responded that the Respondent had a large number of sites, and hence experience of charges, and that the prices had not risen since about 2010/2011 and that the Respondent considered the amount claimed to be reasonable. Ms Evans was not certain of the date that the contract was last subject to a tendering process.
7. Communal Utilities. Ms Jones queried the reference to individual flats and the Janitor's store in the invoices. The Applicant complained that electric light bulbs were not replaced promptly when they became broken. Ms Burrows explained that these references were to the meter locations and not the individual flats. Further, the Janitor store reference would include the external lights and not just the store. She was unable to precisely define which flats were served by a particular meter.
8. Gardening Services. Ms Jones stated that whilst there was no complaint over the standard of workmanship the Applicant did dispute that the site supervisor spent an average of 13.25 hours a week at the site. The Applicant acknowledged that the garden areas were mown and kept in order and that he swept and washed the communal floors. Ms Jones added that as no time sheets had been provided it was not possible for her to identify how many hours were spent on site and at Lynwood Court in particular. Ms Jones did, however, question whether two whole days a week was reasonable. Ms Burrows replied that time sheets were filled in by the site supervisor for the four Blocks and that the cost was then apportioned between the four blocks. Ms Evans added that the cost of items such as weedkiller, lawnmower fuel and transportation were included in the costs reclaimed by the Respondent.
9. Repairs. Ms Jones questioned whether the repairs to the door entry system and the doors themselves were being done properly given the number of repairs. Ms Evans replied that unfortunately the repairs were needed because of vandalism or damage caused by visitors or sometimes tenants. Ms Jones replied that the Applicant should not be responsible for anti -social

behaviour. Ms Evans explained that if a tenant caused damage then they were charged the cost. If the Respondent was unable or unwilling to recover the cost then it would meet the cost. However, if the miscreant could not be identified then the repairs would form part of the service costs. The burden of proof was on the Respondent and, in the absence of any CCTV, it could be difficult to prove responsibility.

10. Management Charge. The Applicant considered the charge to be excessive. Ms Evans replied that the charge covered the cost of managing and administering the services provided. Ms Burrows explained that the charges were assessed each year by reference to the Homes and Communities Agency Advice Note. She accepted that this only applied to England and that it related to Private Registered Providers who own or manage retirement leasehold accommodation. Further, as Lynwood Court was not a retirement home the Respondent reduced the guidance figure as there was no warden nor any emergency alarm services. The guidance figure, as from the 1st April 2013, was £394 and the Respondent had reduced the Management Charge to £330. Mrs Gray further explained that welfare rights advice was available from the Respondent to its tenants, although it did not seem that this service was widely advertised. Mrs Gray also explained that the Respondent resolved problems with the Digital TV aerial on behalf of the tenants. Ms Jones then indicated that the Applicant accepted these explanations and was content with the level of the charge.

Service Charge 2012- 2013, 2011-2012 and 2010-2011

11. The same general objections and responses applied for these years and there were no additional issues arising.

The Scheme

12. Ms Jones then referred to the Lease and the definition of the Scheme contained therein. She argued that the Scheme was defined as Lynwood Court and not the four Blocks taken together and that this, in turn, would impact on the level of service charges that the Applicant was liable to pay.
13. In particular she referred us to Section 4 of the Scott Schedule which contained four invoices relating to flooring with only one relating to Lynwood Court. Whilst the invoices for Lynwood Court, Ashwood Court and Elmwood Court were identical at £5201.08, the invoice for Norwood Court (which is a larger block) was £9778.21 and that as the Respondent had totalled same together this had prejudiced the Applicant. Ms Jones also referred us to Section 7 of the Scott Schedule and stated that the majority of entries related to Norwood Court and that the Applicant was again prejudiced. Ms Jones also referred us to Schedule 6 of the Service Charge Schedule for the year 2012-2013 and the capital cost of the Digital TV system. She argued that the figure for Lynwood Court was £5492.40p and that Norwood court had cost £8238.60p. Further, that by the Respondent totalling same, in the same way as for the flooring, the Applicant was being prejudiced. Ms Jones also referred us to Section 3 of the Scott Schedule and to an invoice from Cleaning and Hygiene Services limited for £148.63p which she said appeared to relate to Ashwood Court and not Lynwood Court.
14. Ms Jones then stated that the Applicant had not been allocated a shed. Mrs Gray responded that one was available for the Applicant. However, the Lease settles this question as there is a specific demise of a shed, which is shown coloured red on the Lease plan.
15. Ms Evans then stated that the Scheme covered the four Blocks and that the Lease only referred to Lynwood Court as this is what the whole development was called at the beginning of the development. Ms Jones did not accept that argument and stated that as the development was off Elm Street it would have been named Elmwood or Elm Street rather than Lynwood.

16. The Tribunal then considered the plan annexed to the Lease as contained in Section 8 of the Scott Schedule and noted that it only covered Lynwood Court. We then compared the plan with the copy filed by the Respondent's solicitors at HM Land Registry and noted that it was an extended version and covered Lynwood Court and the adjoining block.
17. Given the importance of correctly identifying the extent of the Scheme and given that the issue had not been raised previously by the Applicant's solicitor we adjourned the hearing for the parties to supply true copies of the plan attached to both the Lease and the Counterpart Lease and for the Respondent to consider its position and, if necessary, to prepare further arguments.

Adjourned Hearing

18. The adjourned hearing took place on the 18th August 2014 at the offices of the Tribunal with Ms A Jones and Ms D Evans in attendance on behalf of the Applicant and Respondent respectively. In the interim copies of the plan on the Lease and the Counterpart Lease had been produced which showed only 2 Blocks of flats on the plan.
19. Ms Evans stated that the 4 Blocks of flats had been erected in the 1970s and that originally they had all been on rental. Following the Right to Buy legislation ten units had been leased out and subsequently five had been bought back so that there were currently only five leases throughout the 4 Blocks. The first Lease she had traced was granted on the 6th December 1983 and related to 10 Lynwood Court. This Lease had defined the Scheme as "Elm Street Roath Cardiff" and she stated that this undoubtedly related to the 4 Blocks. The Lease of 19 Lynwood Court defined the Scheme as " Lynwood Court " as did the Lease of 21 Lynwood Court and the Lease of Ashwood Court defined the Scheme as "Ashwood Court". She pointed out that the definitions of the Scheme did not refer to the Lease plans so that there was nothing untoward in the 4 Blocks not being shown thereon. She further stated that, so far as the Housing Corporation and Welsh Office were concerned, the Scheme was known as the "Elm Street Roath Cardiff" and she could not be certain as to why the Lease draftsman had changed the definitions for the Lease of the Property nor the other three Leases. She did, however, maintain that the definition of the Scheme in the Lease of the Property was intended to cover the 4 Blocks. Ms Evans did not have a copy of the original planning permission but surmised that it would have referred to the "Elm Street Roath Cardiff" Scheme. She advised that this was the first time that the extent of the Scheme had been challenged and that the pooling of service charges had been accepted by all the tenants for the best part of 40 years. She stated that the Respondent would face considerable difficulties if the Scheme was redefined as all the existing financial controls and systems were based on a pooling arrangement. Ms Evans then produced a summary of the judgment in Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896 and the 5 principles set out by Lord Hoffmann and to which we shall refer later.
20. Ms Jones countered by stating that there were 4 distinct and separate Blocks of flats and that it was clear that the draftsman of the lease intended to define an individual Block – namely Lynwood Court – and not the 4 Blocks and that there was insufficient evidence to redefine the Scheme. She did not consider that the Respondent could argue that "Lynwood Court" was the same as "Elm Street Roath Cardiff" when one of the other Leases defined the Scheme as Ashwood Court and that by using the names of different Blocks the draftsman must have been referring to individual Blocks. She added that as one of the Blocks was considerably larger than the other, namely Norwood Court, it was inequitable to have a pooling arrangement and that this was illustrated by the far greater cost of reflooring that Block and the far higher Digital TV costs shown in the service charge accounts. She added that the wording in the Lease was paramount and that the Respondent had not rebutted this presumption. She agreed that the definition of "Lynwood Court" as the Scheme would include the front and rear forecourts and the parking bays at the front of the Building. Ms Evans concluded by stating that the Applicant

had always accepted the pooling arrangement and that even in her current Application her only concerns were over the level of the service charges.

Decision

21. As regards the Scheme, the matter that we have to decide is whether or not the definition of the Scheme was intended to extend to the 4 Blocks, and ,if not, what the intention was, and these are questions of interpretation.
22. We then considered the definition of the Scheme. We first looked at the situation from the viewpoint of the Applicant and noted the following :-
    (a) Lynwood Court is a separate Block and there are two vehicular and pedestrian access points serving both the rear and the front of the Building, although the latter is shared with the front of the adjoining Block
    (b) The Lease only defines the Scheme as "Lynwood Court"
    (c) The Lease plan does not cover the 4 Blocks although this does not overly assist us as the definition of the Scheme does not define same by reference to a plan.
    (d) The electricity supply is metered to the Block although it appears to include the Janitor's store and it is not known for certain whether the metering extends to the external communal lighting for the Block.
    (e) There are bin shelters for each of the 4 Blocks
23. We then looked at the position from the Respondent's viewpoint and noted the following :-
    (a) There are no physical boundaries separating the 4 Blocks. Further, there are pathways linking the 4 Blocks and the vehicular and pedestrian pathways to the front of Lynwood Court are shared
    (b) The external communal lighting may or may not separate for each Block but the communal Janitor's store seems to be connected to Lynwood Court.
    (c) The 4 Blocks were built at approximately the same time and the service charge arrangements seem to have been put into operation from the outset and certainly prior to the Applicant taking up residence.
    (d) There is no evidence that the principle of pooling has been disputed by the tenants
    (e) There are 108 storage sheds but these are located adjacent to the boundary walls and not separated out into blocks of 4
    (f) The Janitor's store is clearly for the benefit of the 4 Blocks and is located adjacent to Lynwood Court. If the Scheme is only defined as Lynwood Court we would have expected the Lease to have specifically provided for its maintenance.
    (g) The Lease of 10 Lynwood Court defines the Scheme as "Elm Street Roath Cardiff" and this would indicate that it extends to the 4 Blocks. It is also prima facie evidence that the draftsman of the Lease of the Property made an error as consistency in drafting for a Block is essential. The alternative would mean different service charge calculations for flats in the same Building and this would not be acceptable for a Landlord for obvious reasons. Having said this, the Respondent is arguing that the three different definitions given in the Leases are meant to have the same meaning and we do not find this credible either.
24. However, before reaching a firm conclusion we considered each of Lord Hoffmann's five principles. In essence they were principles intended to help those construing a commercial document from the viewpoint of a reasonable person.
    1. The first principle is that "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". We do not have any evidence from the original lessee. We think it likely that the lessee would have assumed that he or she was only contributing to

Lynwood Court but an inspection of the service charge accounts might have revealed the pooling arrangement. Further, it is not known why the Respondent signed the Lease with the Scheme definition when it had signed a Lease for 10 Lynwood Court with another definition, and yet a further one for Ashwood Court.

2. The second principle is "…….Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man ". This is a very wide principle and could be argued to extend to the fact that whilst the 4 Blocks are distinct they are not entirely self-contained because of the layout of the storage huts and the location of the Janitor's store.
3. The third principle is "The law excludes from the admissible background and their declarations of subjective intent…." No evidence was given regarding previous negotiations and so we do not find this principle of assistance to us.
4. The fourth principle is "The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words….The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even……..to conclude that the parties must, for whatever reason, have used the wrong words or syntax". In this case it is not the words that are ambiguous but rather the intention of the parties. As stated we suspect that the Respondent intended the Scheme to be defined as "Elm Street Roath Cardiff" and that the wrong words were used, although we can not be absolutely certain of this.
5. The fifth principle is "The rule that words should be given their natural and ordinary meaning reflecting the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, then the law does not require judges to attribute to the parties any intention which they plainly could have had……if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense it must be made to yield to business common sense." Again it is not the words themselves which are causing difficulty but the underlying meaning; but we entirely accept that the burden of proof lies with the Respondent to overcome the definition of the Scheme in the Lease.

23. Having considered the arguments and the principles set out above we are obliged to come to a conclusion. In the first place we disregarded the argument of Ms Evans that the consequences of finding against the Respondent would cause considerable difficulty as the consequences of any decision are not our concern.
24. We accept that the 4 Blocks were built at approximately the same time and that as the 108 flats were all rented out then a pooling arrangement would have been in place at that point in time and that the pooling arrangement continued when the first Lease was granted on 10 Lynwood Court. Whilst the 4 Blocks are, to some extent, individual buildings there are common features such as the 108 storage sheds and the Janitor's store and the Blocks are linked by communal pathways. We also cannot be certain that that the electricity supplies are not linked so far as the external street lighting is concerned and there is also uncertainty over the electrical supply to the janitor's store. We believe that it is linked to Lynwood Court as some of the electricity bills refer to it and this would be an inconsistency if Lynwood Court had to bear the sole costs of that supply, however modest the charge.
25. The lease of 10 Lynwood Court defines the Scheme as "Elm Street Roath Cardiff" and we cannot explain why the Respondent would intentionally define the Scheme in this manner and 5 years later give the Scheme an entirely different description, and indeed one further description, and neither can we be entirely certain that it was not a deliberate change of definition of the Scheme in the lease of the Property.

26. We are also being asked to decide that three different definitions of the Scheme mean the same thing, which is a proposition that, on balance, we cannot accept. We consider that the fact that there are four separate entrances is not persuasive of either definition of the Scheme, particularly as two entrances serve two of the Blocks and the other two the remainder of the Blocks. Neither do we find the lease plan persuasive of one or other of the alternatives as the Scheme definitions do not refer to a plan.
27. Having considered the above we concluded that it was impossible for us to interpret with any certainty what the parties actually intended and that accordingly the Respondent had failed to provide sufficient evidence to support her contention that the Scheme extended to the 4 Blocks. It therefore follows that we consider the Scheme to relate to the Block known as Lynwood Court.
28. We also consider that if there was a mistake in the drafting of the Lease it cannot be rectified by this Tribunal. If the Respondent considers that there was an error and requires rectification then it will have to make an Application to the Court who will determine the issue. It follows that as the presumption has not been rebutted by the Respondent the Scheme must refer to the Block known as Lynwood Court.
29. However, there is a degree of uncertainty as to what "Lynwood Court" actually means. Clearly it includes the Building itself and is likely to include the parking bays and pavement to the front of the Building, and possibly the whole of the serviced area to the rear. If this latter area is included then it would be a much larger serviced area than enjoyed by the other 3 Blocks and this would be a disadvantage, in cost of repair terms, so far as the other lessees of Lynwood Court are concerned. As it happens, none of the service charges in question relate to this rear serviced area and hence we do not need to decide this point; but it does have the potential to cause difficulties of interpretation in the future. The Janitor's store is clearly intended for the benefit of the 4 Blocks and needs to be treated as such so far as the service charges are concerned.
30. Section 19 of the Landlord and Tenant Act 1985 also requires us to consider whether relevant costs are reasonably incurred. In circumstances where there are 4 Blocks and with one being larger (Norwood Court) than the others then we do not consider that it is reasonable to pool the service charges. This is our second reason for deciding that Lynwood Court should be treated as a stand alone block.
31. We accordingly Order that the Respondent must recalculate the service charges for the relevant years on the basis that the charges are limited to the services benefiting Lynwood Court , and which means that the previous pooling arrangements are not now applicable. However, we do need to decide on the service charge issues raised at the hearing and these are dealt with below, and are subject to adjustment once the charges have been recalculated under our said Order.
32. Service Charges 2013-2014
    (a) Window Cleaning Charges. We note that the current charges have remained static for 5 years. Although Ms Jones is suggesting the sum of £65 as being reasonable she is basing this solely on the cost for cleaning the windows in her offices. We have not had the opportunity of comparing same with Lynwood Court to ensure that it is a true comparable. We do not consider this evidence sufficient to say that the charge is not reasonable and we accordingly confirm the service charge figures. We accept that, as Ms Jones suggested, it would be good practice to initiate a periodic tendering process.
    (b) Communal Utilities. We understand the concern of the Applicant over any failure to replace light bulbs but this is not something that would justify our finding that the charge was unreasonable and which in any event would be difficult to quantify. We also accept the Respondent's explanation concerning the metering arrangements and consider the charges reasonable.
    (c) Gardening Services. There was no evidence before us to suggest that the Site Supervisor was not spending two days a week on site and it is clear that the charges levied were

based on time sheets. We do not consider that two days a week is unreasonable and given that the site is kept in good order we confirm the service charge amount.

(d) Repairs. We accept the Respondent's evidence that if an individual is responsible for damage then they are either charged the repair cost directly or the cost is met by the Respondent. We also consider it reasonable for the repair cost to form part of the service charges if the miscreant is unknown. We accordingly confirm that this service charge is reasonable.

(e) Management Charge. We note that the Applicant accepted the reasonableness of this charge. It is not uncommon for Landlords to charge a percentage of both the rental income and the service charge expenditure and we also consider that the charge is reasonable. The Respondent stated that part of its service was to offer to assist tenants over Welfare Rights and Tenants' Support, although these services do not seem to be advertised to the tenants as the Applicant was unaware of this service.

Service Charges 2012-2013, 2011-2012 and 2010-2011.

33. The same general objections and responses applied for these years as for the year 2013-2014 and there were no additional matters arising. We note, however, that under the heading of "Maintenance Charge" for the year 2012-2013 the Applicant accepted the Respondent's explanation as to the Digital TV aerial costs.
34. Section 20 (C) of the Landlord and Tenant Act 1985
    (a) The Applicant has applied for an Order that the costs of the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant. In view of our perceived error in the Lease and the fact that we found the disputed service charges reasonable we determine that it is just and equitable for only one half of the costs in these proceedings to be treated as relevant costs and we accordingly so Order.
35. The parties shall be entitled to refer the matter of the services charges back to the Tribunal following receipt of the revised schedules of service charges if there is any dispute on the reasonableness of same.
36. This Tribunal made its decision on the 18th August 2014.

Dated this 30th day of September 2014

CHAIRMAN