Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

**Reference: LVT/0034/11/15**

**IN THE MATTER OF: 8 Whitegates Court, Old Road, Skewen, Neath SA10 6AS**

**AND IN THE MATTER OF SECTIONS 19 and 27A OF THE LANDLORD AND TENANT ACT 1985**

**Tribunal:**

**Mr. E.W. Paton (Chair)**
**Mr. P. Tompkinson (Surveyor)**

**Inspection date: 23rd February 2016**

B E T W E E N:

DAVID RHYS EVANS

Applicant

-and-

NPT HOMES LIMITED

Respondents

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ORDER

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UPON considering the application dated 9th November 2015, with an inspection of the property on the above date and (by agreement) determination on papers only with no oral hearing

IT IS ORDERED AS FOLLOWS:

1. The sum of £196 charged by the Respondent to the Applicant by way of service charge for the service charge year 1st April 2014-31st March 2015, representing 1/18 (one-eighteenth) of the Respondent's costs of erecting a steel palisade fence in July 2014, is not recoverable from the Applicant under the terms of his lease dated 13th September 1993.

2. The total service charge payable by the Applicant for that year is therefore £190.81.

3. There is no order on the other matters raised by the Applicant's application.

Chair, Residential Property Tribunal (LVT)

Dated this 24th day of February 2016

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DECISION

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1. This is an application made by Mr. Evans, the leasehold owner of Flat 8, Whitegates Court, Old Road, Skewen, Neath SA10 6AS ("the demised premises"), under sections 19 and 27A of the Landlord and

Tenant Act 1985, challenging certain amounts of service charge levied on him by his landlord and the current freehold owner of Whitegates Court, NPT Homes Limited. The application was made on 9th November 2015, and the Tribunal gave directions on 18th November 2015. By agreement of the parties, the application was determined on papers only, without a hearing, although the Tribunal did inspect the property and meet both parties at the site on 23rd February 2016.

2. The Applicant Mr Evans holds his property on the terms of a lease dated 13th September 1993 granted by Neath Borough Council for a term of 125 years ("the lease"). The application bundle lodged contained only excerpts from the lease but the Tribunal subsequently requested and received from the Respondent a complete colour copy of it. The Respondent NPT Homes is the Council's successor to the freehold reversion and title and is therefore the Applicant's landlord.

3. By his application Mr. Evans raised three issues, but in our judgement only one of these is properly before the Tribunal. First, he initially complained of being charged, via the service charge statement issued by the Respondent, for repairs to a wall damaged by a third party on 27th July 2014. That issue has, however, been resolved as he has received a full refund and credit for the sum charged, upon the Respondent having recovered the cost of the works from the third party's insurers.

4. Second, he also complains of the lack of "fire retardant flooring" in his block. The floors and staircases of the building in which the demised premises are situated are of bare concrete and uncovered. This is not, however, a matter arising from any service charge demand made to him. If his claim is that the Respondent is liable under some repair or other covenant to provide some particular type of flooring, then such a claim is more properly brought in the County Court. This Tribunal has no jurisdiction over such claims.

5. This leaves one matter which does lie within the Tribunal's service charges jurisdiction. In the service charge accounting year 1st April 2014-31st March 2015 (it appears in about July 2014) the Respondent spent £3528 (including VAT) on the construction of a steel palisade fence along or close to the eastern boundary of its freehold land. The fence begins by abutting the wall of the currently derelict former public house, The Cross Keys Hotel, and an open area of Whitegates Court used as a car park. It then runs northward along an area on which (it is agreed) there used to be a section of post and wire fence but which otherwise appears to be rough scrub land. It continues along the eastern edge of a concreted area on which some 'whirlie' clothes driers, used by all the residents of Whitegates Court, are situated. It terminates near the highway, where it partly abuts an enclosed electrical sub-station. The works were carried out by ASW Property Services Limited, and the above sum was invoiced to the Respondent on 16th July 2014, then presumably paid.

6. A charge for a share of that work then appeared in the Applicant's service charge statement for that year. The item "Day to Day Repair" on the annual certified statement comes to £230.83, out of a total annual service charge of £386.81. The repair figure is further broken down in a table, in which it is shown that the Applicant has been charged with the sum of £196 out of the £3528 incurred: a fraction of 1/18.

7. The Applicant challenges the recoverability of that charge. That being so, the burden is on the Respondent to show that the charge is recoverable, and if recoverable, that it was reasonably incurred and is in a reasonable amount. There is, however, no serious evidential challenge in this case to the quality or price of the work done. Nor, in our judgement, is there really an issue over the Respondent's good faith or reasons for erecting the fence. It says that it did this in response to residents' complaints about overgrowth at the boundary but also trespass by intruders using Whitegates Court as a short cut. We have no reason to disbelieve that on the papers. We add that it is common ground that Mr. Evans, the Applicant, did not specifically request or agree to the erection of this fence.

8. The sole issue is, in reality, whether the Respondent was entitled at all to recover a contribution via service charge for the cost of these works. However reasonable it might seem to build such a boundary fence to its freehold land, for it to recover part of the cost of this via service charge from the Applicant it must show that such expenditure falls within one of the categories of work or services under the Applicant's lease for which service charge is properly recoverable. If it cannot show this, then it cannot recover this sum.

9. It is therefore necessary to consider the service charge provisions of the Lease. At clause 4(2) of the lease the tenant covenants to pay:

   "..a proportionate part of the reasonable expenses and outgoings incurred by the Council [which expression also includes its successors in title] in the repair maintenance renewal and insurance of the Building and in respect of the other matters specified in the Third Schedule hereto together with such sums as the Council or its Borough Treasurer may demand by way of reasonable provision for anticipated expenses and outgoings not yet incurred or paid for all such further sums ("the service charge") being subject to the terms and provisions in the Fourth Schedule hereto."

10. The "building" is shown coloured green on the Plan A attached to the Lease, and is the eastern half of block containing the Applicant's flat. This block contains, as we understand it, flats 2, 5 and 8. The "flat" is also defined in the lease by reference to a plan, and the expression "the demised premises" is defined as "the flat" [clause 1(v)].

11. The Lease does contain some other covenants by the Tenant to pay sums. For example, clause 4(3) is a covenant to pay "rates taxes assessments and outgoings" imposed on the demised premises. Clause 4(4) is of interest because it appears that the Respondent has expressly relied upon it in this case. It is quoted at paragraph 7 of its statement in response to the application:

    "From time to time during the said term to pay all costs charges and expenses incurred by the Council in abating any nuisance at the demised premises or in executing any works which may be necessary to abate any such nuisance and whether in obedience to a notice served by some competent authority or otherwise."

12. We must therefore take it that this is the clause upon which the Respondent relies in this case. In any event, we can find no other relevant clause of the Lease or the Third Schedule under which the above works - the erection of the steel palisade fence on the site boundary - would fall. First, it is not of course a work of "repair maintenance renewal or insurance" to "the Building" - as stated above, "the Building" means just the block containing flats 2, 5 and 8.

13. Looking in the Third Schedule (which includes the matters for which service charge may be levied), and without setting out each of its provisions in full:

    - paragraph 1 deals with repairs etc. to the "structure and exterior" of only "the flat" and "the building"

    - paragraph 2 concerns the cleansing and decoration of the building and its exterior stairways and balconies

    - paragraph 3 concerns sewers, drains, pipes and other service conduits

    - paragraph 4 concerns the maintenance and repair of pathways, driveways and forecourts

    - paragraph 5 concerns the entrance way and common parts (i.e the parts which are not flats) in "the building". This also refers to floor coverings, but as we have stated, the issue of whether the Respondent is obliged to provide a floor covering is not one with which we can deal

    - paragraphs 6,7,8, 9 and 10 deal with (respectively) insurance, rates and the like, the costs of managing agents, accountancy costs, and interest on any borrowed monies.

    - paragraph 11 concerns, broadly speaking, costs incurred in response to any statutory requirements imposed in relation to the building.

    - Paragraph 12 concerns legal costs and fees

- paragraph 13 is a residual list of services which the landlord might provide and charge for, including laundry facilities, a caretaker, TV aerials and any passenger lifts.

14. As stated, none of those provisions appear to be us to be relevant to the charge imposed in this case. There is no paragraph in the Third Schedule which expressly covers and authorises what might be called expenditure on the external freehold 'estate' on matters such as walls, fences or other structures. The one reference to such structures in the Lease is a tenant's covenant at clause 4(9) imposing repairing obligations on the tenant in relation to:

   "...any wall fence hedge or gate on any boundary of the garden (if any) shown marked with a "T" within the boundary on the said drawing annexed hereto and to pay a fair proportion of the cost of maintaining and keeping in repair any wall fence or hedge bounding the garden (if any) which is shown on the said drawing with a 'T' marked on either side thereof"

   This looks like a 'generic' covenant inserted by the Council into such 'right to buy' leases without particular reference to the property being leased. In this case. the Applicant's flat has no "garden", nor is any area which might be classed as a "garden" marked with any 'T' on the plan.

15. The Respondent, as suggested by its statement in response, therefore relies on clause 4(4) as quoted above. Does that clause entitle it to recover from the Applicant 1/18 of the costs of building this steel boundary fence?

16. We do not think that it does, on its plain words and ordinary meaning.

17. First, this clause is directed to ".abating any nuisance at the demised premises or in executing any works which may be necessary to abate any such nuisance". The reasons given by the Respondent for the fence - the overgrown nature of the land in that area, and the occasional trespass by unknown third parties onto its freehold estate at Whitegates Court - do not amount to a "nuisance at the demised premises". "The demised premises" in the Lease means no more and no less than the Applicant's flat. Trespass by others onto the parking area or driveway of Whitegates Court does not amount to a nuisance "at" his flat.

18. Second, and in any event, it seems to us that this clause is concerned with the landlord intervening, and incurring costs, where there is a nuisance emanating from the tenant's flat, causing damage to or interfering with the property of others e.g. if there were noxious smells coming from a flat, or other some nuisance-causing activity was being conducted at or from that flat, and the landlord had to (in default of the tenant himself doing so) step in and abate it in response to a complaint

by the Council or another party. It is not concerned with nuisances caused to the tenant of that or any other flat. But even if that were a possible reading of the clause, there is no basis upon which it could be said that the matters relied on by the Respondent even amounted to a nuisance to the Applicant's own flat.

19. The Respondent says that ".a decision was taken to erect fencing along the boundary to benefit the tenants and leaseholders of Whitegates Court". As stated, we have no reason to doubt the good faith of that decision, and we can see that having a fence is of some benefit to the owners and occupiers of Whitegates Court. It might be something on which they could reasonably agree money ought to be spent. It is not, however, expenditure which falls within any of the service charge matters for which the Applicant as tenant of flat 8 is liable to pay under the provisions of his lease. If he did not agree to pay a contribution to the cost of this fence - which he did not - then he can not be made to pay such a contribution via service charge.

20. We therefore find, and decide, that the Applicant is not liable to pay to the Respondent the sum of £196 included in the service charge demand made to him for the year 2014/2015, which means that the total service charge contribution recoverable from him for that year is £190.81 (£386.81-£196). As stated, the other two matters raised in the application do not arise for our consideration.

E. W. Paton (Chair)

Dated this 24th day of February 2016