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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Ref: LVT/0033/09/16

In the matter of s.27A and s.20C of the Landlord and Tenant Act 1985

In the matter of Flat 5, 42 Oakfield Street, Cardiff CF24 3RE

Tribunal: Andrew Sheftel (Chairman)
Kerry Watkins (Surveyor)
Carole Calvin-Thomas (Lay Member)

Applicant: JULIAN KEOGH

Respondent: PAUL EVANS
Represented by: Mr Joss Knight (Counsel)

DECISION

The decision in summary

1. For the reasons set out below, the Tribunal determines that no service charges are payable by the Respondents as the purported demands relied on by the Applicant do not comply with section 21B of the Landlord and Tenant Act 1985.

Background

2. The Tribunal is concerned with applications brought under s.27A of the Landlord and Tenant Act 1985 (the "1985 Act"). At the hearing, the Respondents also asked for an order under section 20C of the 1985 Act.

3. The Applicant is the landlord of 42-44 Oakfield Street, Cardiff. The Respondent is the lessee of Flat 5.

4. The Tribunal inspected the premises on 3 March 2017 following which a hearing took place at the Tribunal offices, Wood Street, Cardiff. The Applicant and his daughter, Ms Keogh attended. The Respondent did not attend, although his wife, a Ms Olsen was in attendance. In addition, the Respondent was represented by a Mr Knight of counsel.

5. The proceedings concern service charges for the years 2013, 2014 and 2015. In the initial application, the Applicant had claimed a total of £3,421.93 from the Respondent. At the hearing, this had been revised down to £2,801.97 in light of the Respondent's submissions regarding section 20B of the 1985 Act, which are addressed further below. This sum also includes additional later expenditure which were not included in the original claim and has not been the subject of a purported demand.

6. The Respondent argued that nothing was payable because the purported demands were invalid as they were not in accordance with section 21B of the 1985 Act and or, the sums had not been demanded in accordance with the terms of the lease. In addition, the Respondent also challenged various items of expenditure on grounds as set out in more detail below but which included challenges as to whether certain sums were time-barred contrary to s.20B of the 1985 Act and also whether the costs were reasonably incurred in accordance with s.19.

7. At the start of the hearing, it was argued on behalf of the Respondent that the 'knock-out' challenges, namely the Respondent's submissions in relation to section 21B and whether the purported demands complied with the terms of the lease, should be determined as a preliminary issue. However, in view of the fact that the parties had filed evidence of all issues, including as to the reasonableness of the service charges, in accordance with earlier directions, and that no prior application had been made for any questions to be determined by way of preliminary issue, the Tribunal determined that it was appropriate to hear submissions on all matters and issues in dispute.

The premises

8. Flat 5 forms part of a substantial pair of semi-detached houses (42-44 Oakfield Street) owned by the Applicant. It is one of 11 flats in the building and occupies part of the top floor to the right hand side (observing from the front of the property).

9. The building was constructed circa 1900 and has been converted into flats some time later. It is situated on a corner plot and in an area of similar types and ages of property. Local shops and amenities are close by with Cardiff City Centre being approximately one mile away.

10. The front elevation is constructed primarily from stonework which continues up to form parapets above the main roof coverings. Feature dressed stonework is provided around window and door openings with a first floor string course. Projecting out from the front elevation there are two bays which again are constructed from stonework. The side and rear elevations are finished with a painted render. There is a flat roof over the front bays which may have a covering of lead, but these could not be seen to be confirmed.

11. The main roof, where seen, is of multi-pitched design having a covering of a slate material. Windows are of a mixture of uPVC double glazed units and single glazed vertically sliding timber sashes. The main front entrance doors are

of half glazed timber construction with glazed side screens and fanlights above. There is a small front forecourt and rear garden, together with off street parking at the rear of the property.

The lease

12. Flat 5 is let pursuant to a lease dated 24 August 1990 for a term of 99 years (the "Lease"). The Respondent acquired the leasehold interest in December 1994.

13. The service charge provisions are set out in The Third Schedule to the Lease. The Respondent's contribution to the total expenditure is 1/11 in respect of insurance and 1/14 in respect of other charges. This was not challenged by the Respondent.

14. It appears that since 2007, no service charges were demanded for a number of years by the Applicant, until relatively recently.

The specific challenges

Insurance

15. The Respondent argued that charge in respect of the 2014 insurance was not recoverable because it was time barred.

16. Two documents which were provided to the Tribunal were relevant to this question:
(1) a letter from the Appellant to the Respondent on 5 May 2015 (the "May 2015 Letter") which made reference to various works as well as insurance premiums from 2007 to 2016 and in respect of which £362.56 was demanded from the Respondent; and
(2) a letter dated 26 April 2016 (the "April 2016 Letter") which attached a schedule of charges including £1,314.03 in respect of the 2014 insurance – equating to £119.46 for the Respondent.

17. The Applicant now accepts that earlier premiums prior to the one in dispute are not recoverable because of the operation of section 20B(2).

18. While the Tribunal is satisfied that the April 2016 Letter satisfies section 20B(2) of the 1985 Act in respect of costs incurred by the Applicant (leaving aside whether it is a valid demand in accordance with section 21B), the Respondent argued that the May 2015 Letter did not satisfy section 20B(2). If not, it would follow that the 2014 insurance would be time barred.

19. By s.20B of the 1985 Act:
"(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

20. The Respondent submitted that the May 2015 Letter did not satisfy the above requirements on the basis that no separate figure was given in respect of the 2013 insurance and the total in respect of insurance £362.56, was significantly less than the sum claimed in the April 2016 Letter.

21. Section 20B(2) of the 1985 Act was considered in detail in the case of *Brent London Borough Council v Shulem B Association Ltd* [2011] 4 All ER 778, which was referred to the Tribunal by counsel.

22. In summary, in order to comply with section 20B(2) there must be: (1) written notification stating a figure for the costs which have been incurred; and (2) such notification must tell the lessee that the lessee will subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge – although it need not state what proportion will be passed on to the lessee. If the landlord is unsure of the costs incurred, the notification should specify a figure for costs which the lessor is content to have as a limit on the cost ultimately recoverable.

23. The difficulty in the present case is that the May 2015 Letter does not in fact specify any figure for the 2014 insurance but instead a global insurance figure of £362.56. Even if that were to be apportioned equally across the years claimed (which has not been argued), it would give a figure of £40.28, far less than the £119.46 now claimed. However, this would be a somewhat speculative and arguably artificial exercise as there has never been any evidence that the premiums remained the same throughout the entire period and the Applicant has not suggested as much. On balance, the Tribunal takes the view that the May 2015 Letter would not have satisfied section 20B(2) of the 1985 Act with regard to the 2014 insurance and accordingly, that sum would not have been recoverable in any event.

Management fees

24. The Applicant claimed management fees of £2,000 for each service charge year in question (then apportioned to the lessees). The Applicant's position was that the actual management was done by the Applicant and his daughter and in the Applicant's submission, this meant that the overall cost was considerably less than if an external party had been engaged. The Respondent argued that the cost was too high. In the Tribunal's view, although the evidence of the Applicant as regards management of the building was rather limited, the Tribunal accepts the Applicant's evidence that services were provided and would accordingly have been prepared to allow this cost, noting the lack of evidence from the Respondent as to what would have been an appropriate figure (subject to the findings on validity of demands as set out below).

25. However, the Tribunal would not have allowed the two additional expenses said to be associated with management namely: £43 said to be in respect of the filing of dormant accounts and £75 described in the demand as "Preparation of the service charge". As regards the former, the Applicant could not explain to the satisfaction of the Tribunal why this was payable under the terms of the Lease. As regards the latter, although, as noted above, the Tribunal was prepared to accept the annual charges of £2,000, the Tribunal accepted the Respondent's submissions that this should have been sufficient to include preparing the service charge demands. Accordingly, and noting that as set out below, the service charges were not properly demanded in any event, the Tribunal concludes that the additional cost of £75 was not reasonably incurred.

Cleaning

26. The Respondent raised a challenge to the cleaning costs in the service charge demand. The expenditure to the end of 2015 totalled £680 (the most recent statement also shows a figure of £360 for the period Jan-Dec 2016, although that has not been the subject of a purported demand and was not included in the original sum of £3,421.93 sought from the Respondent). Following the inspection and after hearing from the parties, the Tribunal accepts that cleaning was and is carried out, and carried out to a reasonable standard, and the Tribunal would accordingly have concluded that the cleaning costs had been reasonably incurred.

2013 charges

27. In addition to the general matters highlighted above, the Respondent challenged the sum of £3,100 said to be in respect of works to the two bays at the front of the property.

28. The Respondent first highlighted the fact that there had in fact been two invoices addressed to the Applicant, one for £850 dated 20 November 2013 and one for £3,100 dated 25 November 2013. The Applicant explained that the original invoice (which related to work on one of the bays in March 2013) was in fact cancelled and the second, (which covered works to both bays), was the only one for which the Respondent was charged.

29. This led to a discussion that insofar as the works to the first bay were carried out in March 2013, the Respondent argued those charges (£850), but not the remainder, were time barred. In response, the Applicant's evidence, which is accepted by the Tribunal, was that the first he was invoiced for those works was in November 2013. Accordingly, the Tribunal rejects the Respondent's argument on this point and finds that for the purposes of section 20B(2), those costs were incurred in November 2013, and that accordingly, such sum would have been allowed by the Tribunal.

2014 charges

30. Aside from the matters identified above, the Respondent challenged the sum of £1,802.66, described as 'Fencing' in the Appellant's demand. It transpired that this was in fact the cost of a gate to restrict entry to the car parking area at the rear of the property. The Applicant's evidence was that there had been a number of break-ins and various residents had asked the Applicant to place a gate across the entrance to the car park. It was also commented that the area had become subject to fly-tipping. However, after purchasing the gate in 2014, it has never in fact been put up by the Applicant. One of the reasons for this was that there is no dropped kerb immediately in front of the entrance to the car park and a concern was raised that people would park across the entrance to the car park. In the circumstances, the Tribunal accepts the submissions of the Respondent that insofar as the gate has never been installed at site, the costs were not reasonably incurred and should not be passed on to the Respondent by way of service charge.

2015 charges

31. Aside from the general matters above, the Respondent's principal challenge was to four items described in the demand as:
(1) Paint of exterior area - £5,500
(2) External patchwork and rendering - £1,200
(3) Scaffold hire - £4,320
(4) Various works - £6,250

32. In the Respondent's submission, they constituted a single set of works. Further, the Respondent's submission was that the value of the works was such that they were qualifying works and engaged the consultation requirements set out in the Service Charges (Consultation Requirements) (Wales) Regulations 2004.

33. The Respondent submitted that the consultation requirements had not been complied with and that accordingly, the Respondent's liability was capped at £250.

34. Due to the size of the sums claimed and the Respondent's obligation under the terms of the Lease to contribute 1/14 of the total costs, each of items (1), (3) and (4) would have engaged the Consultation Regulations in their own right. Accordingly, to the extent that the consultation requirements had not been complied with, the Applicant would be limited to recovering £250 for each item, subject to any application for dispensation. However, as referred to above, the Respondent argued that items (1)-(4) were in fact a single set of works, such that the Applicant was limited to recover £250 from the Respondent for all of them.

35. In response, the Applicant argued that works were not in fact a single set of works and also denied that the consultation requirements had not been complied with.

36. As to the first question, the Tribunal was referred to the letter from the Applicant to the Respondent dated 15 May 2015 regarding works that he planned to carry out. This included:
    - Painting of timber facia boards around the building
    - Painting of both mortar sides of the building (floor to roof height) and the rear
    - Pointing and patching render in some areas of the building that require attention
    - Scaffolding
    - Stone masonry works to the top left two arch bay windows

    The letter also provided various quotes for the works.

37. Further, the Applicant accepted at the hearing that there was nothing in the charges identified above which was not in the proposals in the May 2015 Letter.

38. In the Tribunal's view, in light of the fact that the May 2015 Letter: makes reference to all of the works; provides quotes; and states that Keogh Builders were "proposing to do the works ourselves (less the masonry)…" (which the Respondent does not contend were part of the same works), the Tribunal takes the view that the above items should be treated as a single set of works for the purposes of the Consultation Regulations.

39. Further, the Tribunal accepts the Respondent's submission that the Applicant failed to comply with the consultation requirements. The Respondent made reference to the fact that the Applicant failed to specify a relevant period in which responses should be given on the proposed works. The Tribunal accepts this submission and indeed, there were other examples of non-compliance which could also have been referred to.

40. Accordingly, subject to any application for dispensation, the Applicant would be limited to recovering £250 from the Respondent for the above items.

The general challenges

Validity of demands

41. In the Respondent's submission, nothing was owed by way of service charge because the Applicant had not served a valid service charge demand in accordance with section 21B of the 1985 Act.

42. Section 21B of the 1985 Act provides that:
    (1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.
    (2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.
    (3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

43. For Wales, the applicable regulations referred to in s.21B(2) of the 1985 Act are the Service Charges (Summary of Rights and Obligations and Transitional Provisions) (Wales) Regulations 2007. The Regulations provide a mandatory statement (in both English and Welsh) which must accompany service charge demands.

44. The Tribunal accepts the Respondent's submissions that these are mandatory provisions. The Respondent also referred to the case of *Tingdene Holiday Parks Ltd v Cox* [2011] UKUT 261 as authority for the proposition that even failure to include the correct title is enough to render the notice invalid.

45. Having regard to the Applicant's purported demands, dated 5 May 2015 and 26 April 2016, they do not attach the summary of rights and obligations as required by Regulation 3 of the Regulations. Accordingly, the purported demands are not valid and the sums claimed are not payable.
Were the demands in accordance with the terms of the Lease?

46. The Respondent made reference to paragraph 6 of Schedule 3 to the Lease which provides as follows:
"*As soon as practicable after the expiration of each Accounting Period there shall be served upon the Lessee by the Lessor or its managing agents a Certificate signed by such agents containing the following information:-*
(a) the amount of the Total Expenditure for that Accounting Period
(b) the amount of the Interim Charge paid by the Lessee in respect of that Accounting Period together with any surplus carried forward from the previous Accounting Period
(c) the amount of the Service Charge in respect of that Accounting Period and of any excess of [sic] deficiency of the Service Charge over the Interim Charge
(d) the amount of the Reserve Fund at the commencement of the Accounting Period the expenditure therefrom during the Accounting Period and the contributions thereto during the Accounting Period in accordance with clause 5(g) of this Lease"

47. The Respondent argued that no such signed Certificate had been provided. In contrast, the Applicant submitted that the statement of expenditure which accompanied the Applicant's purported service charge demands satisfied the requirements of paragraph 6 of Schedule 3.

48. At the hearing, the Respondent made reference to the absence of a signature. While it can be noted that the statement accompanied a letter which was signed by the Applicant, the Respondent submitted that a signature on the statement itself was required. In addition, the Respondent argued that the statement made no reference to interim demands or reserve funds: it was submitted that even if neither existed, the certificate should still refer to each, with a zero figure if necessary. In response, the Applicant also denied that a signature was required, submitting that there were no managing agents who could have signed the statement. The Applicant also submitted that there was no need to stipulate a zero figure for interim charges or a reserve fund, if neither existed as was the case here.

49. In light of the Tribunal's finding as to the validity of the demands, it does not need to determine this question.

50. The Tribunal would nevertheless comment that as regards the absence of a signature, the drafting of the clause is not as clear as it might have been. The clause refers to the signature of managing agents. The Applicant's evidence was that there are no separate managing agents who could have signed (as the management is carried out by the Applicant himself, with his daughter). In the Tribunal's view, there is certainly an argument that the reference to signature is only to the signature of a managing agent, not the lessor, and that as a matter of construction, in the absence of managing agents, no signature is required. Had the Tribunal been required to determine this question it would have been minded to hold in favour of the Applicant on this point – albeit the Applicant could have avoided this argument by signing the document itself.

51. As to the absence of reference to interim charges and Reserve Fund, the language of paragraph 6 of Schedule 3 stipulates that the Certificate provide information as to 'the amount' for each. In the Tribunal's view, the language of the clause is clear in that four pieces of information are required. The purpose of such Certificate is to provide the tenant with information about expenditure. Although on the facts, there is no Reserve Fund and there have been no interim payments, the Tribunal would have concluded that each should have been referenced, even if just to specify a zero figure.

Section 20C

52. At the hearing the Respondent made an application for an order under section 20C of the 1985 Act. The application was opposed by the Applicant.

53. It may be that this issue is largely academic, as the Applicant did not have legal representation and moreover, the Applicant submitted that there was nothing in the Lease that permitted legal costs to be put through the service charge (although as the Tribunal does not need to determine that issue, it was not taken to the provisions of the Lease).

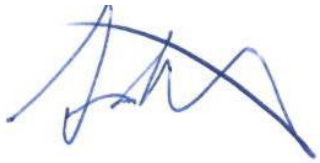
54. Section 20C of the 1985 Act provides:
"*20C (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration 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 tenant or any other person or persons specified in the application.*
(2)The application shall be made—
(a)in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa)in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b)in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
(c)in the case of proceedings before the Upper Tribunal, to the tribunal;
(d)in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
(3)The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

55. Pursuant to s.20C of the 1985 Act, the Tribunal may make such order as it considers just and equitable in all the circumstances, albeit guidance as to the exercise of the Tribunal's discretion has been given in a number of cases.

56. Looking at the present proceedings, the Respondent has been successful. That is, of course, only a part of the consideration under section 20C, although in the present case, the Tribunal would not raise criticism of the conduct of either party in the course of the proceedings. Having regard to all the circumstances and noting in particular that the application was brought by the lessor but has been unsuccessful, the Tribunal concludes that an Order under section 20C would be appropriate.

Dated this 18th day of April 2017



Chairman