Y Tribiwnlys Eiddo Preswyl

Residential Property Tribunal Service (Wales)

Leasehold Valuation Tribunal (Wales)

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DECISION OF LEASEHOLD VALUATION TRIBUNAL (WALES)
LANDLORD AND TENANT ACT 1985 s.27A and s.20C

Premises:	Flat 20, City Lofts, Cryws Road, Cardiff ("the property")
LVT ref:	1019479/City Lofts
Order:	21 February 2013 (hearing 19 and 20 February 2013)
Applicant:	City Lofts (Cardiff) Ltd (represented by Mr Douglas Haig of Seraph)
Respondent:	Mr Mohammad Wasif Munir (in person)
Tribunal:	Mr R S Taylor – Lawyer Chairman Mrs Ruth Thomas - MRICS

ORDER

1. The Applicant shall by noon on the 27 March 2013 serve upon the Respondent (1 copy) and file at the Tribunal (1 copy) amended service charge demands which shall reflect the reasons set out herein below.

2. The Respondent shall by noon on the 17 April 2013 serve upon the Applicant (1 copy) and file at the Tribunal (1 copy) a written notice as to whether the service charge demands are now accepted as payable or indicating what remains in dispute.

3. Upon compliance with these directions the procedural chairman will either give further directions or treat the matter as closed and provide for the matter to be restored to the County Court list for ultimate disposal.

4. In the event that the parties are able to resolve their dispute other than by way of compliance with these directions they are to each by noon on the 27 March 203 file at the Tribunal (1 copy) written confirmation of the same.

5. The application for an order pursuant to s.20C Landlord and Tenant Act 1985 is dismissed.

Dated 21 February 2013

Lawyer Chairman

REASONS

Applications.

1. This case involves two applications.

2. The first is an application by the Applicant for the determination of the payability of service charges, which started life as a County Court claim and was later transferred to this Tribunal. The claim, issued on the 13 March 2012, was for £4,032.15 and there was a court fee of £100. The Defence is a general defence complaining as to the lack of clarity in charging and accounting practice in respect of the management of service charges. It also put the issue of the quality of services in issue. The Defence did not seek to challenge any administration charge or interest payments. As for the latter, the case proceeded before us upon the basis that interest was a contractual matter in the lease and not one for us to determine.

3. The claim and the defence set out the parameters of the dispute. The order of District Judge Phillips dated 28 May 2012 transferred "the question of the determination of service and administration charge (if any)" to this Tribunal. At the outset of the hearing on the 19 February 2013, it was agreed that two items at £50 each had to come out of the figure claimed as these related to ground rents and were not a matter for us. There was also a claim for damage which was caused to the fire alarm in the property. This was for £78. It was agreed by all that this had not been charged as a service charge item and was not for us to determine. This left a figure of approximately £3,932.15 before us, which must have included a sum of interest but which was not particularised.

4. It was agreed between the parties that the Tribunal should determine the matters upon which the parties have joined issue in the application via Scott Schedules and that it would be for the Applicant, in the first instance, as part of our further directions, to recalculate what difference this made to service charge demands and ultimately the shape of the County Court claim. The Tribunal was clear that its jurisdiction in this case could not be beyond the County Court pleaded case.

5. The service charge years include to years ending 25th December 2006, 2007, 2008, 2009, 2010, 2011 and part of 2012 (up to the date the application in the County Court was issued, but not beyond)

6. The second application is an application made by the Respondent pursuant to s.20C Landlord and Tenant Act 1985. This gives the Tribunal jurisdiction "as it considers just and equitable in the circumstances" to block the Applicant's contractual right to recover the Respondent's proportionate part of the costs associated with these proceedings as a service charge under the lease. This application was made by the Respondent after discussion at the PTR on the 6 November 2012, when it became apparent that the Respondent would wish to pursue this argument and that the Tribunal, absent of a distinct application, would not have the jurisdiction to consider it on the back of the order which transferred matters to us.

7. The application had an unfortunate start in the Tribunal. Directions were given on the 27 June 2012 by a procedural chairman and when compliance with those directions was reviewed on the 27 September 2012 it was apparent that the directions had not been properly complied with and the papers were not in a state that would allow an adjudication of any dispute. A PTR was therefore listed on the 6 November 2012 and substantial directions given on that occasion which resulted in the issues being properly defined in Scott Schedules and paginated bundle of relevant documents being lodged.

Background.

8. The property is part of a 20 flat development ("the estate") which has had a very unhappy history. The estate was developed by Andton in about 2004 The developers appear to have acted as the managers until about 2005. In 2005 Cooke & Arkwright took over as the managing agents for about a year or so. There followed Seel & Co in September 2006 until they resigned in about December 2007. During 2008 there was something of a hiatus. Some people at the estate believed that a local solicitor, Thomas Simon, was acting as a manager. However, it has subsequently transpired that Thomas Simon never signed any management contract and they now do not accept they were ever appointed as managers. Thomas Simon do appear to have had some involvement, but the precise basis for this remained unclear and may not have extended far beyond seeking to resolve some issues, having been contacted by an owner occupier who was a long standing client of that firm. At some point service charge demands were also being sent by a Matthew Lloyd, a director of the Applicant, without the assistance of a professional agent. Mr Douglas Haig is a property manager with a company called Seraph. Mr Haig was and is a resident in a flat on the estate and he was drawn into assisting with the resolution of the unfortunate management history. This involvement matured into a formal

management agreement in January 2010 and Seraph has remained the appointed agent since that time.

9. The Respondent has for some time been unhappy with the quality of record keeping and accounting and has declined to pay some, but not all, of the service charge demands made of him in recent times.

10. An issue which we were not called upon to resolve was the validity of the service charge demands. There appeared to us to be issues as to compliance with s.47 and s.48 of the Landlord and Tenant Act 1987 and with the Service Charges (Summary of Rights etc) (Wales) Regulations 2007. However, mindful that these issues were not "pleaded" in the County Court case, and mindful of the warning given in *Beitov Properties Ltd v Elliston Bentley Martin* [2012] UKUT 133 (LC) at paragraph [13] that LVT should not, generally, be taking points of its own initative, the Tribunal merely drew the parties' attention to the point and indicated that it did not consider these arguments to be before it. It may be that the validity of service charge demands might affect the Applicant's contractual right to interest, but we are not dealing with this in light of *Beitov.*

11. On the second day of the hearing the Respondent was able to produce some historical demands for year ending 2006 with supporting service charge budget from Cooke & Arkwright. These had not been seen by Mr Haig before. These may call into question the opening balance of Mr Haig's service charge account for the Respondent. Whilst this point is not necessarily before us for determination, our jurisdiction being limited by the ambit of the County Court dispute, Mr Haig appreciated that the Respondent's service charge account required some further reflection and possible refinement.

Relevant provisions in the lease.

12. The lease of the property is for a term of 125 years from 24 June 2003, with a stepped ground rent being £50 for the first 25 years. The demise was assigned to the Respondent on the 11 May 2006 in return for the payment of £165,000.

13. The original parties to the lease were the Lessor, Knole Properties Limited and the Manager, City Lofts (Cardiff) Limited and the Respondent. The lease provides for the transfer of the freehold reversion to the Manager upon all 20 flats in the estate having been sold. (It is noted that the freehold was indeed transferred to the Manager in 2007 and thus the Lessor is now the Manager.)

14. The lease contains typical service charge provisions in that Lessor and/or Manager have a duty to “repair, maintain and insure” (we paraphrase) subject to the lessee’s covenant to pay for such works via service charge provisions in the lease. The service charge provisions here provided for the Respondent to pay 8.85% of the Building Expenditure, the Internal Expenditure and Additional Items Expenditure, all of which are described in detail in the Second Schedule to the lease.

15. The contractual mechanism for recovery is set out in clause 4.6, requiring sums to be paid on account on quarter days, based upon the Manager’s estimate (whose decision is final) with a balancing payment to be made or money credited to the leaseholder’s account at the end of the service charge year, the certificate of the Manager to be final, save in the case of manifest error.

16. The only point of contention before us in respect of the lease was whether clause 8 of Part Three of the Second Schedule allowed for the recovery of fines made for the late filing of accounts at Companies House. These were incurred by City Lofts (Cardiff) Ltd. i.e. the Manager.

17. Clause 8 provides for “The fees and disbursements paid to any managing agent accountant solicitor and/or other professional person in relation to ... 8.1 the preparation auditing or certification of any accounts and/or costs expenses outgoings and matters referred to in this schedule and/or ... 8.4 the performance of the Manager’s and the Lessor’s obligations hereunder...”

18. It is trite that the clause is to be interpreted strictly and that any ambiguity should be resolved in favour of the leaseholder, being the paying party. We do not find that this clause goes so far as to allow fines from Companies House in respect of late returns to be recovered as a service charge. Whilst we clearly understand Mr Haig’s point that the company returns in this case are prepared including full accounts of service charge activity, we are not persuaded that a fine falls within the clause as drafted. The “preparation auditing or certification of any accounts...” does not include the payment of a statutory fine for not having made a return to Companies House in time.

19. We did not explore what other avenues may be available to the Manager to seek to recover these monies. All leaseholders are also all shareholders in the Manager (who is now also the Lessor) and in that capacity they all have a vested interest in resolving this issue. However, that is not a question for us, who are tasked only with

the question of payability under the lease (see *Morshead Mansions Ltd v Di Macro* [2008] EWCA Civ 1371.)

20. Clause 9 of Part Three of the Second Schedule provides for the recovery, as a service charge, of costs and fees incurred by the lessor under or in relation to sections 18 to 30 of the Landlord and Tenant Act 1985 i.e. it provides for the recovery of the costs of these proceedings as a service charge item.

The inspection.

21. The Tribunal inspected the premises in the presence of Mr Haig, his assistant, Miss Evans and the Respondent. The Tribunal were shown the internal and external common parts including the car park areas, the landscaped borders, the gates, the pump room, meter room, gym and bin storage area. The Tribunal noted the location of the bin store at the lower car park level and its distance from the vehicular gate where the bins were collected. In the pump room, the Tribunal were shown the incoming water collection tank and the 3 electrically operated pumps. The window on the top floor landing, front elevation, was inspected. The Tribunal were also shown the lift panels, and the entry intercom system and fire control panel, aerial connection point and smoke release shute.

22. The building was constructed around 2004/2005 and comprises of 20 apartments over 8 levels. As the building occupies a sloping site, pedestrian access to the communal entrance is off Crwys Road at level 3 with 2 levels of undercroft car parking beneath accessed through a secure vehicular gate off Crwys Place. There are 5 apartments each at levels 3, 4 and 5, and 5 maisonettes or duplexes with their accommodation laid out over levels 6 and 7. The lift serves levels 1 to 6.

23. The building occupies an irregular shaped triangulated site bordered by a busy main road, a railway line and Mosque. It is constructed with a concrete sub frame with steel cantilevered extensions and balconies. The elevations are mainly of exposed concrete blockwork or glazed panels and the building components internally are left exposed to create a modern contemporary feel.

24. The building is constructed almost up to the boundaries of the site save for the vehicular access way and uncovered parking spaces at the rear.

25. There are also small communal decked areas on the north side.

26. There is a single meter for the water supply, the individual flats are not metered. The water pumps are fitted to circulate the water supply to the apartments. 2 of the pumps are in constant use and the 3rd is provided as a reserve.

27. The apartments have their own gas and electricity supply meters and there is a separate communal electrical supply. The landings, stairs and hallways are carpeted in the internal common parts from level 3 upwards, as was the gym.

The items remaining in contention.

28. At the outset of the hearing there remained 15 items of contention spread over the service charge years in question. However, after the Applicant had given evidence the Respondent conceded all but two items, namely the costs of cleaning in 2006 and the recoverability of fines for late submission to Companies House in year end 2007 and 2009.

29. We should also note here that the Applicant conceded between the PTR and the final hearing that the electricity costs charged in 2006 had been misposted as being £11,519 whereas the amended and corrected expenditure under this heading was £7,947.06. The Applicant invited us to "reallocate" the difference to the sinking fund. The Tribunal indicated that it has not jurisdiction to do so and that it appeared to us that any overpayment was required under the lease, as noted, to be credited to the lessee's service charge account.

30. The costs of cleaning accounted for in the manager's summary of expenditure [148] for year ending December 2006 was shown to be £7,200. Whilst the total invoices noted on the Scott Schedule at [429] are £7,935, it was conceded by the Applicant [237] that only £7,200 was paid out in this year. We take £7,200 as the figure in contention.

31. The Respondent's essential complaint was that the costs are way too high when compared with the costs which are now being charged and which might have been charged had they been reasonably incurred in 2006. The point appeared to boil down as to whether it was reasonable, as then, to have cleaners in the common parts twice a week, or as now, only once a week. The weekly charge in 2006 was £120 for two visits which included putting the bins out and their recovery. There was no substantial complaint made as to the rate for an attendance.

32. Under s.19 Landlord and Tenant Act 1985 the test is whether the costs have been reasonably incurred, not were they reasonable in amount (see *Forecelux Ltd v Sweetman* [2001] 2 EGLR 173). The question is therefore not whether the expenditure for any particular service charge item was necessarily the cheapest available but whether the charge made was reasonably incurred. To answer that question one must consider first whether the Manager's actions were appropriate and properly effected in accordance with the terms of the lease and then whether the amount was reasonable rather than being out of line with the market norm.

33. Applying the above test we find that it was not unreasonable for the Manager to be requiring a twice weekly attendance of the cleaners. As already noted, the common parts are spread over several carpeted levels and we cannot say that a Manager's decision to cause cleaning twice a week rather than once is unreasonable. In fact, Mr Haig informed us that once weekly cleaning was currently being conducted against the better advice of the contractor who had suggested twice a week. Whilst this is a cost conscious decision, it does not make the earlier approach unreasonable and Mr Haig referred, on occasion, to Seraph conducting a mini clean (which is not charged for) in between weekly cleans. WE DETERMINE that the figure of £7,200 was reasonably incurred in 2006 for cleaning charges.

34. The other item of contention was the fines incurred in 2007 and 2009. In 2007 the amounts were £1,100 and in 2009 £1,500. We do not need to delve into the history and hence the reasonableness of these items being incurred, as we have already explained above that we do not find that such items are recoverable as service charges under the lease. WE DETERMINE that nothing is recoverable for the Companies House fines.

35. As indicated the other items of dispute listed in the Scott Schedules are now conceded by the Respondent.

Section 20C Landlord and Tenant Act 1985

36. S.20C Landlord and Tenant Act 1985 gives the Court or Tribunal the power to make an order that the costs of 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." Such an order may be made if the Court or Tribunal "considers it just and equitable in the circumstances."

37. In his application pursuant to s.20C the Respondent asserts that there has been poor accounting, services have not been appropriately provided and that it has taken these proceedings in order to encourage production of documents and proper explanations of expenditure .

38. In determining this application this Tribunal primarily has regard to the wording of the statute which invests in us a wide discretion. However, there is some case law which highlights the approach taken in other cases.

39. In the case of *The Tenants of Langford Court v Doren Ltd* LRX/37/2000 (also known as *Sherbani v Doren Ltd)* HHJ Rich QC suggested that in guiding its discretion the Tribunal would consider, "the conduct and circumstances of all the parties as well as the outcome of the proceedings in which they arise." It was also suggested that the power to make a s.20C order should be used sparingly since it cuts down the landlord's express contractual rights. In the later case of *Schilling v Canary Riverside* LRX/26/2005 HHJ Rich QC further suggested that in analysing the outcome "weight should be given rather to the degree of success, that is the proportionality between the complaints and the determination, and the proportionality of the complaint, that is between any reduction achieved and the total service charges on the one hand and the costs of the dispute on the other hand."

40. In this case, upon receipt of the relevant information, the Respondent has conceded that much of what the Applicant has incurred was done reasonably. The reductions in overall service charge are relatively modest, being 8.85% of the difference between the original 2006 electricity bill and the amended figure and the removal of fines from the service charge account (although they will have to be dealt with elsewhere and are removed on the grounds that they do not fall to be considered in the lease).

41. The history of the management of this site has been most unfortunate, to say the least. However, since January 2010 Seraph has been, in our judgment, discharging the management functions competently. Mr Haig informed us that he and his colleague had put in excess of 250 hours in dealing with the Tribunal application and chasing down the old managing agents for historical supporting data. This has been impressively discharged in difficult circumstances.

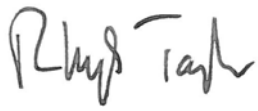
42. Throughout the hearing Mr Haig and his assistant impressed as individuals who were anxious to assist the Tribunal and Respondent and to correct historical problems. We also have a large degree of sympathy with the Respondent who was clearly sick and

tired of the historical problems on the estate. The Respondent was helpful throughout the hearing, reasonably conceding points after it had been explained to him how the costs had been incurred and the test which we are bound to apply.

43. We are left, however, with having to make a decision whether it is "just and equitable" to prevent the Applicant from its contractual right to recover costs as a service charge where the effort involved with these proceedings appears to us to be out of proportion for what it has achieved in the end. Whilst it is correct to note that the Tribunal process has forced the production of some documents (e.g. the electricity bill) we were left with the impression that it was most unfortunate that the parties could not have communicated with each other as clearly and as constructively as they did before us, prior to the commencement of proceedings.

44. In the final analysis, whilst we can see clearly the arguments both for and against, we are not persuaded, on balance, that it is appropriate to prevent the Applicant from recovering his costs from the Respondent The application pursuant to s.20C is therefore dismissed.

Dated 21 February 2013



Lawyer Chairman