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RESIDENTIAL PROPERTY TRIBUNAL (WALES)

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0041/09/13

In the Matter of Apartment 51, Doc Fictoria, Caernarfon, Gwynedd, LL55 1TH

In the Matter of an Application under S19 Landlord and Tenant Act 1985

TRIBUNAL AVS Lobley Chair
C Williams FRICS

APPLICANT WJ Developments (Gwynedd) Limited

RESPONDENTS Mr RG Heath and Mrs EM Heath

ORDER

1. We were duly convened as a Leasehold Valuation Tribunal on 26th March 2014 at the offices of the Tribunal. We had before us an application transferred from the Kingston-upon-Thames County Court by Order of District Judge Smart dated 20th August 2013. We had inspected the development at Doc Fictoria, in which Apartment 51 (the Property) is situated, on 27th January 2013. The hearing had not proceeded on that date due to the unavailability of the Respondents. Doc Vitoria is a mixed residential and commercial development on the water front in Caernarfon. The residential premises comprise 50 flats (there is no flat 13). The development was completed in 2008.

2. The development has the benefit of an onsite office with a representative of the management company on site from 8:30 to 5:30 Monday to Friday. The common parts are cleaned weekly or fortnightly depending on what is requested by the residents. The lift phone is tested daily. The external windows are cleaned six times a year. The gutters are cleaned annually. The site is covered by CCTV, checked hourly. The fire alarms are checked six monthly. The emergency lighting is checked annually. The estate manager carries out a monthly lighting test. Meter reading is done monthly and there is an annual health and safety audit. Some of the grounds are landscaped, such services provided by an external contractor. The development has the benefit of street lighting

TERMS OF LEASE

3. The Respondents purchased the leasehold interest (a 150 year term from 1st January 2006) on 28th September 2010. Provisions as to the service charges payable are provided for in clauses 8, 6.4 and the 7th and 8th schedules. The Lease defines the Service Charge Proportion as being

> *£1 per sq ft of the dwelling in the first year and thereafter as shown on the Eighth Schedule in accordance with the calculation and payment of the Current Service Charge as defined in the Seventh Schedule hereto*
>
> (the Eighth Schedule attached a draft budget).

4. The Landlord's obligations are provided in clause 9.3 and are to "keep the main structural parts of the Residential Area....all fixtures fittings and additions thereto (including the roof foundations and external walls) and all cisterns tanks sewers drains pipes cables mains wires ducts and conduits...in good substantial repair decoration and condition..."

5. Clause 9 makes provision for cleaning and gardening and clause 9.7 for external painting. Clause 9 allows the landlord to "employ such surveyors builders engineers tradesman and other professional persons as may be necessary or desirable for the proper maintenance safety or administration of the Residential Area".

6. The Seventh Schedule provides as follows:

> *"1. The Current Service Charge shall subject to Clause 6.3 of Lease consist of the Service Charge Proportion of the actual costs to the Landlord of providing all or any of the services set out in Clauses 9 and 10 and defraying the charges and expenses set out in Part 2 of this Schedule ("the Service Costs") in each accounting year ending on 31st December in each year.*
>
> *2. The Landlord shall as soon as convenient after the end of each accounting year (other than the last year of the Term) prepare an account showing the amount of the costs incurred by the Landlord in the immediate preceding year and shall supply the Tenant with a copy of such account and shall calculate the Current Service Charge which shall be final and binding on the Tenant.*
>
> *4. The tenant shall pay for the first (Service Charge Account Year of the Term) the provisional sum which is the Initial Service Charge and shall pay an apportioned payment on the signing of this Lease*
>
> *5. The Tenant shall pay for each subsequent accounting year of the term the Service Charge Proportion of the Service Costs for the preceding year of the term but until such sum for any one year shall be ascertained and calculated as aforesaid the Tenant shall continue to pay the Initial Service Charge or the Current Service Charge payable for the preceding year but one of the term as the case may be.*
>
> *….*
>
> *7. At the end of the Term....the Landlord shall prepare an account of the costs of the Current Service Charge payments to that time from the commencement of that accounting year and upon such account being certified as aforesaid any sum due or payable by the Tenant shall be settled by means of a single payment within 21 days following the date of the demand."*

COUNTY COURT PROCEEDINGS

7. In February 2013, the Applicant issued proceedings in the Northampton County Court, claiming unpaid services charges in respect of the Property for the period 1st October 2011 to 30th September 2012. £1,705.70 in respect of arrears was claimed together with administration charges, interest and legal costs. On 15th March 2013, the Respondents served a defence denying they had failed to pay the Service Charge and stating that they had expressed to the claimant that they did not accept that the Service Charge was reasonable and was therefore in breach of S 19.1 of the Landlord and Tenant Act 1985 (the Act).

8. Following an Order by the District Judge, an amended defence was served on 11th July 2013. This raised issues as to the construction of the lease, in particular it was claimed that the service charge proportion was expressed to be £1 per square foot, or

2.55% of the total service charge. The service charge for the period in issue equated to £1.59 p square foot and the Respondents had not been consulted in relation to the anticipated increase in the service charge and had never received audited accounts for the period in issue. Without having received properly audited accounts, they could not determine whether the claim for service charge was correctly made and an increase of 59% in the space of 12 months was unreasonable. The costs of insurance, cleaning and electricity had all risen substantially compared to the previous year. It was also claimed that the contracts for the provision of the above services were qualifying long terms agreements within S 20 of the Act and the Respondents had not been consulted before they were entered into so that the additional cost was unreasonable. The same point was made in respect of the contract for the maintenance of the lift and lift phone. It was said there was no provision for charging for other items including centre management, rent head office and management fee.

9. The Applicant served a Response to the amended defence on 7th October 2013 asserting the Service charge for the period 1st October 2011 to 30th September 2012 were reasonably incurred. It was said that due to delays caused in reconciling the 2010/11 year end reconciliation, the Applicant agreed to settle, as a gesture of goodwill, a large proportion of the expenditure which had been incurred. This had been agreed with the residents' committee so that the Respondents and other leaseholders were only liable to pay the amount set out in the original budget attached to the Lease. It was asserted the Respondents were fully aware of this. The Leaseholders had received far greater services than they had paid for. After the reconciliation was completed, a new budget was finalised for the year 2011/12 and this was agreed by the Leaseholders. It was asserted the words referred to in the lease and quoted at paragraph 2 above made it clear any reference to £1 per sq ft is redundant after the first year. The service charge was variable and not fixed with reference to £1 per sq ft. The increase of 59% referred to by the Respondents was the difference between the 2008 budget compared to the budget for 2011/12 and it was anticipated there would be further maintenance in year 3 of a development which might not be required in the first year. The fact of an increase in the amount charged 3 years after the initial charge was not of itself grounds to allege the service charge was unreasonable. It was pointed out the Lease did not expressly provide for the Respondents to pay a specified proportion of expenses but it was indicative from the provision in the Eighth Schedule and the calculation of the first charge that the charges would be based upon square footage and the Applicant continued to apportion the service charge expenses in line with square footages. It was pointed out there was no reference to audited accounts in the lease. Invoices for all expenditure for the year in question were disclosed with the Response to show the expenditure had been incurred. Details were given of how increases in electricity, insurance and cleaning had arisen. It was denied contracts for insurance, electricity and lift maintenance came within S 20 of the Act as none of them were for a term longer than 12 months so that the need to consult did not arise. The lift phone did not come within S 20 of the Act as the contract value was less than £100 per leaseholder. The cleaning contract was on a rolling basis so was not a contract for 12 months or more.

10. The Respondents prepared a response to this on 12th November 2013. It was not accepted that £1 per square foot was redundant after the first year. When the Respondents took possession, the service charge continued to be £1 per square foot. It was asserted the Applicant had failed to show that variable charges and actual expenditure have been met as they have failed to provide accounts to the tenants and therefore could not charge more than the Initial Charge. It was said that the Applicant had failed in their obligation under the lease to provide accounts for the service charge so they can only charge the initial service charge as the current service charge is defined by the preparation of certified accounts of the service charge. The Applicant had stated in the Response that there was no obligation to prepare audited accounts. The Respondents referred to Schedule 7 paragraph 7 which states that the accounts must be certified and therefore examined by an accountant. The

Respondents required certified accounts showing the charges were properly incurred. The Respondents had asked for certified accounts which were not forthcoming.

11. Immediately before the hearing, the Tribunal was handed a skeleton argument prepared by Mr Brooks of counsel on behalf of the Applicant. The Respondent, Mr Heath (Mrs Heath being unable to attend due to ill health) had not had an opportunity to consider the skeleton before the hearing. The skeleton had been sent by registered post to the Tribunal the day before the hearing. It set out Mr Brookes' position on the points raised by the Respondents in the amended defence. A short adjournment was granted to give Mr Heath an opportunity to consider the skeleton and discuss it with his solicitor (who did not attend the hearing).

12. Accompanying the skeleton was a service charge reconciliation for 2011/12 and details of the sinking fund which had been set up. Also attached were documents described as allocation check, residential activity, commercial activity and estate activity. The front page had been signed by Julian Browne, a Chartered Certified Accountant and who certified the document to be a true and fair record of the service charge account.

13. After the adjournment Mr Heath commented that had he been give this at the time, the hearing would not have been necessary and it was rather annoying to be given it 20 minutes before the hearing. Mr Brooks said the document had only been certified earlier this week and his advice had been that certification was not necessary, he was adopting a belt and braces approach. Mr Heath did not intend to challenge any specific invoice he did not consider a 50% increase in one year to be reasonable. Mr Brooks pointed out the information which had now been certified was not new, it had been sent to Mr Heath in October 2013 (attached to the Response). Certification was not required under the Lease. Mr Heath said that the reasonableness of the actual sums involved had never been the issue he had merely wanted an accountant to certify the sums had been spent, if there was a large increase he would have to accept that. He now conceded he would pay the Service Charge and did not wish to pursue his claims in respect of the reasonableness of the service charges.

14. In the light of Mr Heath's concession, the Tribunal found the sums claimed in the county court proceedings in respect of the services charges were reasonable.

COSTS

15. As the District Judge had transferred the proceedings to the Tribunal of his own volition, there was no application before the Tribunal (save the County Court pleadings) and thus no application under S 20C of the Act.

16. S. 20C of the Act provides as follows:

> *"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…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 other person or persons specified in the application".*

17. The Tribunal may make any such order on the application as it considers just and equitable in the circumstances.

18. The Tribunal asked Mr Heath whether he wished to make such an application. His response was that the matter had been overwhelming for him and had involved a great deal of paperwork when it was a very simple point, for the Applicant to provide certified accounts. As a result of them not doing their job properly he had been put to a great deal of expense and did not think he should have to pay their fees for these proceedings as well, in fact he was of the view they should pay his costs.

19. Mr Brooks in response opposed an order under S 20C of the Act. He stood by his written submission which was that the lease did not provide for certified accounts. The Lease required the Applicant to prepare an account, a summary of the charges incurred. This had been provided by the latest in October 2013, Mr Heath had everything apart from the certification produced now. The fact that he had asked for the certification did not mean it was required and in fact it had been Mr Brooks' advice that the accounts should be produced in order to play it safe. He referred to the case of *Morshead Mansions limited v Mactra Properties Limited (2013) EWHC 224*, in which Warren J had held that the requirement for "accounts" did not mean full accounts but a requirement to produce a list of sums expended for the particular service charge year in question, and that was what the documents produced at page 299 did.

20. Mr Heath asserted that clause 7 of the seventh schedule of the Lease says that accounts should be certified. The Leasehold advisory Service advised accounts should be certified and the Act provides for it to be a summary offence not to certify accounts. Mr Brooks pointed out such a provision had been proposed but never implemented in the Act.

21. Notwithstanding the reference to "certified as aforesaid" in Clause 7 of the Seventh Schedule to the Lease, nowhere in the preceding clauses is there any other reference to certification. Clause 2 provides that the Landlord prepare an account, provide a copy to the tenant which then becomes binding on the Tenant. Full details of the sums expended had been provided in October 2013 and no new information, other than the signature referred to in paragraph 12 above had been provided. As soon as this signature was provided, Mr Heath abandoned any other point and accepted the service charge. The Tribunal did not accept that certification was required under the lease. In these circumstances, the Tribunal made no order under S 20C of the Act.

Dated this 7th day of May 2014

Signed

Chair