Y Tribiwnlys Eiddo Preswyl

Residential Property Tribunal Service (Wales)

Leasehold Valuation Tribunal (Wales)

DECISION AND REASONS OF THE LEASEHOLD VALUATION TRIBUNAL

In the matter of an application under the Landlord and Tenant Act 1985 Section 27A

Premises:	**118 The Aspect, 140 Queen Street, Cardiff, CF10 2GP**
RPT ref:	**LVT/0025/09/21**
Applicant:	**Mr Joseff Gethin Morgan**
Respondent:	**Firstport Property Services Ltd**
Tribunal:	**Mr T Lloyd (Tribunal Judge)** **Mr R Baynham FRICS (Surveyor Member)** **Mrs Carole Calvin Thomas (Lay Member)**
Hearing:	**By remote video hearing on the Cloud Video Platform (CVP)**

Upon hearing from Mr Owain James of Counsel for the Applicant and Mr Stocks for the Respondent.

The Application

1. By an application dated 22nd day of September 2021 the Applicant applied to this Tribunal in relation to issues relating to the service charges during the period 1st September 2021 to 28th February 2022. Box 15 of the application form expands upon the items in dispute as being:
   i. cost of fire risk assessment/survey;
   ii. cost of fire door replacement;
   iii. cost of Waking Watch (fire wardens);
   iv. cost of insurance premium increase;
   v. cost of fire alarm upgrade; and

vi. cost of emergency lighting.

2. Under Section 15 (d) of the form, the reasons why the applicant is seeking a determination, the applicant states:
   i. "Legal obligation to pay the difference in service charge occasioned solely as a result of the defective fire safety appliances of the property."

   ii. In the alternative, the reasonableness of those charges.

   iii. The lack of any consultation as per Section 20 LTA before charges incurred/work undertaken.

3. A virtual hearing was convened on the 26th July 2022.

4. Mr James of Counsel appeared for the Applicant and Mr Stocks appeared on behalf of the Respondent.

5. Directions were made prior to the hearing and the hearing eventually culminated in a 1,142 page trial bundle which was filed and served in electronic format.

6. At the outset we were reminded of the Applicant's request to amend the initial Statement of Case due to having received the further six-months service charge claim. As a consequence, the Applicant then sought a determination for the service charge period from September 2021 to September 2022 whereas the initial application form related to service charges from September 2021 to February 2022.

7. In support of that application Mr James made the point that it was a pragmatic approach insofar as the same issues were being considered and it makes sense to consider the entirety of the period. He further submitted that no material prejudice would be caused.

8. In objection Mr Stocks makes the point that the Statement of Case stands and that the prejudice would have to be in order to "re-jig the maths". When asked by the Tribunal if this was possible, he confirmed that given time he could do so.

9. We retired to consider this preliminary application and thereafter decided that it would be proportionate to allow the amendment so as to deal with all outstanding matters in that current service charge year. In our view there was no real prejudice to the Respondent as it would have ample opportunity to amend the calculations if so required. As a consequence, we proceeded upon the basis of the amended application.

10. There then followed a further application in relation to the payability of the Waking Watch in terms of the ability to recover under the 6th Schedule. As this was not initially raised by the Applicant by way of the Application Form and in any event was covered by the provisions of the lease this part of the application was dismissed.

11. We then proceeded, as is normal in cases of this nature, to concentrate upon the comments in the Scott Schedule having indicated to the parties that we had previously considered all the written material including the Statements of Case and the Skeleton Arguments filed.

12. As a consequence, it was agreed by the parties that the matter would be dealt with by way of submissions and further agreed that in this context the Respondent would present its submissions first followed by the Applicant.

13. Dealing with the Points in contention as set out in the Scott Schedule in turn:

Surveys

14. Mr Stocks initially outlined the background by stating the Respondent's position following the Grenfell Tower incident was to review its entire portfolio and evaluate it on a risk basis. The Aspect building was one of many reviewed and was always in the pipe-line but the catalyst came when the fire officer visited.

15. We were taken to a report of the audit on the 24th September 2020 and referred to page 1048 and the reference in Mr Alexander Peck's Witness Statement to the fire officer's visit. That statement outlines the main reason for the visit being in respect of compartmentation. Paragraph 9 of the statement indicates that there was a conversation between Mr Peck and the fire officer at the time the fire officer viewed minor damage to a portion of the external outer surface of a large pillar within the carpark. At that stage it is the Respondent's case that the fire officer confirmed that the external façade issue would have to be addressed and an intrusive assessment undertaken.

16. We were then taken to the letter at page 110-112 from the fire officer, identifying 7 steps that needed to be taken. Mr Stock on behalf of the Respondent accepted that there was no reference to an intrusive external survey but the aforesaid conversation had taken place and they understood what was required. We were then addressed as to the reports received being namely the Tri-Fire Report. Prior to that the Respondent sought tenders from both Trinity FM and Stanley West & Sons which came in respectively at £33,124.64 and £10,230.00.

17. The Respondent obtained three quotes for the combined report from the Urban Change Group Ltd - £15,200.00, FRC - £8,500.00 with Tri-Fire assisting with the external wall fire review and Podium Surveying LLP - £5,850.00 (again with Tri-Fire assisting with the external wall review). The three quotes can be found at pages 253 and 242 and 252 of the bundle. The Respondent opted for the FRC Report being the second lowest as it had had positive experiences with them and had negative experiences with the cheaper quote from Podium.

18. Against the background as outlined, Mr Stocks submitted that given the fire officer's comments orally and written it was reasonable to incur the costs and that the updating for the 12-month period of the cost of the Scott Schedule was £117.42 per flat which was reasonable for two reports in terms of the Applicant's contribution.

19. Mr James in his submissions in response said that there was no requirement in writing for the external façade to be examined and furthermore there was no real evidence as to the pecking order as to why it was done in the manner it was done. There was an overlap between the reports and a single report would have been sufficient.

20. Mr Stocks was permitted to respond and he said that it was more cost effective to do the internal and external review at the same time. EWS 1 was a separate document in itself and was a stand alone form of rating the property.

Decision

21. Having considered both the written and oral evidence we accept that a review was in the pipeline as per the submissions made on the part of the Respondent. It is reasonable to accept that the catalyst here was the observations of the fire officer. Whilst we find it strange that there is no reference to the damage viewed by the fire officer in the actual written documentation that follows, as there was no request by the Applicant to call Mr Peck to cross-examine him on the content of his Witness Statement and specifically the comments at paragraph 7 on page 1048, that evidence was unchallenged. Furthermore, the evidence of damage to the exterior is substantiated by the picture at page 1053.

22. Whilst there is some overlap between the reports, we accept the submissions from the Respondent that the EWS 1 is a separate report. In terms of the reasonableness of acquiring the same, it is clear that the Respondent obtained three quotes. The Respondent explained why the lowest quotation was not chosen being due to having previous negative experiences with the company concerned. In our view the Respondent following the fire officer's inspection was in an invidious position, the

reports would have had to have been undertaken at some stage and that being the case we find that once alerted to the issue the Respondent became immediately proactive.

23. Taking all the above into account we consider that obtaining the reports and also the costs and same to be reasonable in the circumstances.

Insurance

24. Put briefly, the Applicant's case is that it was reasonable to renew with its previous insurers Zurich. There would in any event have been some increase in the premium due to the defects to the external façade (which were identified following the various reports). Further, in this regard we were referred to the Respondent's evidence commencing at page 969 in the electronic bundle and that in essence despite having appointed a wholesale insurance broker (Arthur J Gallagher) the Respondent failed to obtain any quotes. The reason in the main being due to the allocated B2 rating to the property.

25. We were also taken to the Witness Statement of Liza-Jayne Amies, the Head of Insurance at First Port, the Respondent's company and specifically taken to paragraphs 12 and 13 at pages 147. There she confirms that AXA UK, Aviva and Allianz were also asked to quote. AXA UK and Aviva simply responded to the enquiry with a "no" and Allianz would only consider quoting once the combustible material had been removed.

26. Mr Stocks concluded by saying that in his submission this was a completely reasonable approach when there was no alternative and no other options available.

27. Mr James on behalf of the Applicant submitted that the Applicant wished to raise two points being namely that only three companies had been approached and secondly, the information supplied was insufficient to enable them to adequately quote.

28. He submitted that paragraphs 12 and 13 at page 1047 makes good the Applicant's complaint. The Respondent should have gone to an insurance broker who provided the insurer with mitigation measures. There was no real evidence this had been done, only three insurance companies had been approached in addition to Zurich whereas there were others. We were then taken to page 679 and paragraphs 251-257 in respect of which Mr James submitted that all the information should have been provided to the insurers including information as to mitigation measures etc and it was unreasonable not to have done so.

29. Mr James was then asked by Mr Baynham, Tribunal Member, if a figure for alternative cover had been provided by the Applicant, the answer to that from Mr James was that the figure goes towards the second point of the reasonable argument, i.e. whether value for money had been achieved. The first point being that it was unreasonable not to have provided the full information and sought alternative quotes.

30. When asked why the Applicant had not provided an alternative figure the answer was that he had not been provided with sufficient information and that the insurance companies he contacted were not able to obtain quotes based upon broad brush approach.

Decision In Relation to Insurance

31. Having considered the evidence carefully we accept the Respondent's evidence that it contacted the three insurance companies via its broker. We find as a fact that they are large UK based companies and that the companies declined to provide any quotations. It is abundantly clear from the witness evidence of Liza Jayne Amies (paragraph 13, page 1045) that Allianz would not be prepared to quote until the combustible material had been removed.

32. In the circumstances we consider that the Respondent was in an invidious position and it was reasonable to have continued with the renewal of insurance cover with its previous underwriters Zurich. We also accept and find as a fact that identified defects in the external façade would have in any event resulted in an increased premium. For all those reasons we consider the Respondent's action in renewing the insurance policy as reasonable in all the circumstances and as such should be paid as part of the service charge.

Fire Compartmentation and Doors

33. Mr Stocks first submission was that the Respondent was the named manager and not the freeholder/developer. The Scott Schedule figure as adjusted to the current quote was £32,700.36 including VAT - £359.70 for 12 months per flat.

34. We were taken to page 119 and the quotation for the fire doors alone on the 30th Octber 2020 in the sum of £10,230.00 plus VAT. We were then referred to the West Devon Fire Protection quotation, page 125-127 in the sum of £38,703.60 and asked to compare that with the quotation from Black Sheep at page 1133 which identified £5,220.00 plus VAT for the fire doors, £15,488.00 plus VAT for the work to the risers and £2,684.00 plus VAT for labour and also the cost of the report. In terms of the allegation by the Applicant that the Respondent allowed deficiencies to build up, the

Applicant relies upon the Witness Statement of Mr James Williams, Operations Manager for the Respondent who makes the point that the Respondent was not responsible for the installation of the doors.

35. In terms of some issues being ignored, for example the hooks, indicating that the Respondent was ignorant to fire safety, the Respondent's evidence being that the hook was used on one single occasion on a fortnightly basis to open doors so that refuse bins could be removed. Thereafter in any event the hook was no longer being used.

36. Mr Stock submitted that in all the circumstances, given the quotations obtained by the Respondent the sums were reasonable in all the circumstances as the works were necessary.

37. Mr James in his submissions for the Applicant stated that there was historic neglect and disregard to the proper safety standards. The Applicant criticised the broad approach of the Respondent, for example, not making available the fire risk assessment. In addition, the best it could do was via the evidnce of its witness Mr Williams at page 1060 paragraph 21 which illustrated its failure to adequately manage earlier fire risks.

38. We were specifically referred to 2017, 2018 and 2019 Quantum Compliance Fire Rik Assessment and Action Plan and specifically pages 693, 719 and 758 of the electronic bundle as to recommendations to repair and replace inter alia, fire doors. There was a need to do so historically and it could not now be reasonable, in Mr James submissions, to do everything now. He further submitted that the same matters were again raised in 2021 by the Tri-Fire Report, on identifying the same issues and to have left it for four to five years was unreasonable. Furthermore, the use of the hook on a fortnightly basis was unreasonable. In summary the Applicant's case is that the Respondent has failed to do what ought to be done in relation to fire safety issues and it was not appropriate to rely upon the more recent reports. There were numerous delays and there was an absence of documentation in support of the same. In that regard we were taken to paragraph 31 of the Applicant's Statement of Case at page 639 which lists between 2017 and 2020 the missing reports.

39. When asked by Mr Baynham the Surveyor Member if there was any increase in the standard for fire doors over the years the answer was that new doors where fitted would be to a higher standard than the original doors.

Decision

40. Having heard all the evidence we find that in relation to the work to the fire doors and the other compartmentation works, the Respondent has acted reasonably. They sought a more competitive quotation as is evidenced by the Black Sheep quotation.

41. We accept the evidence on behalf of the Respondent that not all the same fire doors were being identified all the time, in other words there was no evidence of overlap. Whilst there were some failings the argument raised in relation to the presence of the hook for some time related only to one door within the entire building. That being the case, we are satisfied that the costs incurred in relation to this aspect of the application is reasonable in all the circumstances.

Alarm and Waking Watch

42. The Respondent made an application for a Section 20ZA Dispensation in relation to the consultation requirements regarding the installation/upgrade to the fire alarm system. That dispensation was granted and a copy of the preliminary decision can be found at page 1136 in the bundle. A substantive decision was handed down later on the 5th September 2022.

43. The cost to the Applicant is £913.06 per flat. The matter was raised in the fire officer's report. Three quotes were obtained and the tender and letters can be found at page 329 onwards. The quotation by Fire Protection Services Ltd was the lowest at £76,128.00 plus Vat.

44. Mr Stocks on behalf of the Respondent submitted that the Applicant did not deny the upgrade was required or seriously challenge the costs. Given the quotes received it was reasonable to proceed with the quote from Fire Protection Services Ltd.

Decision

45. Given that dispensation has been granted and the Respondent accepted the lowest tender and given the need for the upgrade which in turn resulted in the end of the Waking Watch, we consider the costs to be reasonable in the circumstances. This is especially so in the light of no real challenge from the Applicant in relation to this aspect of the service charge payments.

Waking Watch

46. Mr Stocks submitted that the Tri-Fire Report recommended the Waking Watch as an interim measure and we were taken to pages 196 and 339 of the bundle in relation to the recommendation at paragraph 18.2. Mr Stocks also made the point that the Applicant has confirmed at paragraph 4.43 page 642 that he did not take issue with the principle of a Waking Watch recommendation. The complaint related to the way the Respondent managed the property.

47. Mr Stocks then made further submissions in relation to the matters as raised in the Scott Schedule by the Applicant. He firstly referred to a suggestion that government guidance was being ignored and said that was not the case. The catalyst had been the fire officer's comments. It was only upon receipt of the report that the Waking Watch was required. There had been a long trail of correspondence and we were referred to pages 1099 – 1105 and thereafter to the e-mail to Mr Lazarou another leasholder who had previoualy been in correspoendence with the Respondent.

48. Mr Stocks further made the point that a query had not been raised by the applicant Mr Morgan but the e-mail exchanges and correspondence demonstrated engagement with the leaseholders. The Respondent also corresponded with the leaseholders and in that regard Mr Stocks referred us to the service charge estimate pages 623-630 about the detailed information as regards reasons and costs and the reasons for the insurance premium increase with page 629 showing the block costs as estimated. Thereafter the Respondent then arranged a Zoom call as evidenced by the letter at page 631 to discuss the service charge. This information, Mr Stocks submitted showed the Respondent had engaged and spent time in finding a way to fund the Waking Watch and Fire Alarm. Obtainin funds in advance from the leaseholders and then a survey was not required or practical. It had to be an evidence-based approach which the Respondent followed. The Statement of Support supplied by the leaseholders included with the application amounted to nothing.

49. The allegation that Mr Stocks had not made it clear that the service charge was needed for the Waking Watch and fire alarm was not supported and again we were referred to the evidence at page 599 and the estimated service charges.

50. As regards the fact that the Waking Watch was there for too long, Mr Stocks submission was it had to be there for as long as required, there was a parallel fire alarm planning that had been in place since April 2021. Any delay was due to materials, furthermore the Respondent acted reasonably as, due to lack of funds for the works carried out, ultimately they obtained an interest free corporate loan, this was done by the Respondent although it had no obligation to do so but had no option given the lack of funds.

51. The decision in **Blue Granary Wharf MAN/00DA/LDC/2020/0040** relied on by the Applicant and referred to at paragraph 122 page 655 was a first instance decision and very fact specific therefore not binding upon this Tribunal.

52. Furthermore, Mr Stocks submission related to consultation not reasonableness, as to the comments that it would have been prudent to seek quotes for fire alarm systems before it was apparent it was needed as per paragraph 120c(i) at page 655, Mr Stocks submission was that that had been done before the reports had been produced.

53. In relation to the costs of the Waking Watch Mr Stocks invited us to compare the cost charged by the Tritan Group which can be seen at page 410 with the Welsh Government cost guidance between £12.00 per hour and £13.00 per hour. Mr Stocks further submitted that the Respondent had sought other estimates as can be seen in the document at page 1023 which is an e-mail to Mr James Williams from Yvonne Kelmsley, and submits that as a consequence the Tritan service was reasonable in terms of rates.

54. In terms of whether there should be two or four personnel the recommendation which can be seen at page 1032 recommended three internal and one external after survey and site visit.

55. In relation to paragraph 227 at page 674 relating to the Applicant's case Mr Stocks did not shy away from the submission that suggesting the logs had been doctored as they showed four people on site whereas when the Applicant had visited on-site to show Prime Secure Guarding and Nation around there were not, was a serious allegation of fraud which was not based on any evidence whatsoever, its logs and other e-mails spoke for themselves. In terms of using the reserve fund, Mr Stocks made the point that it was in place to collect cyclical maintenance such as planned roof works and page 629 and even if the roof works were taken away there were not enough funds to carry out the alarm works. Given all the above Mr Stocks invited us to consider that the Waking Watch costs had been incurred in a reasonable manner.

56. Mr James submitted that the Applicant's core case is the way in which the work was managed and the general attitude towards risk. This was, in Mr James' submission, further shown by the fact that it was the Fire Officer who triggered the surveys despite there being Welsh Government guidance in place. Nothing was done in response to the guidance as it came out, it was a failure to consider alternative options and everything that followed must be considered to be unreasonable. The need for a Waking Watch element came at some period because of a bottleneck deadline and lack of funds.

57. The External Wall Fire Review (" EWS 1") was a point of no return and the Waking Watch was required from thereon. That position in Mr James submission, came from the unreasonable way in which the Respondent had managed the matters in the past, delay, increased costs, nine months of Waking Watch was unreasonable and the Respondent was trying to have its cake and eat it. Further, as the Respondent had ultimately decided to provide an interest free commercial loan, that should have been done earlier. The question and answers to leaseholders were too late in the day to make a material impact as the Waking Watch had been implemented.

58. An ancillary point raised by the Applicant was that as the gym had been closed as it was used by the Waking Watch officers there was no reason to dcemand a service charge in relation to the gym. Had matters been planned properly the timing of the Waking Watch would at least have been shorter.

59. Tribunal Judge Lloyd then questioned as to whether or not it would be clear that analarm would be required until the survey, to which Mr Stocks was allowed to comment and said that the no need of a fire alarm would have been highly unlikely. In support he took us to the e-mail on pages 1085 and 1086 which confirmed the view of the Respondent that there would not be a forward fund for a fire alarm before carrying out the intrusive survey work. In terms of the gym Mr Stocks submitted that it could not be used due to covid in any event and therefore it was not a direct result of being used by the Waking Watch staff and the cost of £8.80 per flat was a reasonable sum.

Decision

60. Having considered the matter in the round we find that the Respondent found itself in an invidious position. Whilst some of the timings could have been better placed we consider that given all of the circumstances it was reasonable for the Respondent to undertake its management role in the manner which it did in relation to both the fire alarm and the Waking Watch. In terms of the fire alarm the lowest tender was accepted and as is set out in our decision on the point the Applicant did not really take issue with this aspect. Despite what the Applicant says we find that the Respondent has taken reasonable steps to communicate with the leaseholders. The delay in the alarm being fitted was simply down to a lack of finance and funding. We do not accept the Applicant's submission that they could have pre-budgeted for the fire alarm. Whilst some time may have been won by applying some of the Welsh Government's guidance it would not in our view have made a significant difference given the amount of money required for the alarm and the immediate requirement for the Waking Watch.

61. In terms of the costs of the Waking Watch, we find these reasonable when it is compared and contrasted with the other quotations the Respondent has received. In addition, in terms of having four personnel on-site, we consider that reasonable given again the guidance.

62. In terms of the Applicant's allegation as to falsifying logs. This is a very serious allegation but is completely unsubstantiated by anything other than a reference to the Applicant visiting the building on a number of occasions (un-specified) when he and his contractor did not view four persons. No evidence at all before us suggested that the logs had been falsified in any way and in the circumstances, we are content as to the reasonableness of the Waking Watch costs in their entirety.

Section 20c Costs

63. The Applicant also applies for costs pursuant to Section 20c.

64. Mr James' submissions on this point were succinct insofar as the Applicant makes clear criticism in terms of the conduct and management in general. If we as a Tribunal were to uphold the conduct issues it would be a good ground to make out a Section 20c Order.

65. Mr James further submitted that it is only through the proceedings that the Applicant has been able to obtain basic and fundamental answers as a consequence the Respondents had been failing to answer questions until the proceedings were made and that automatically incurred costs. Accordingly in these proceedings it would be proper not to allow them to be recoverable in the whole or part and that would be especially so if the Applicant's application was successful.

66. Mr Stocks then addressed us and referred us to paragraph 56 of the Respondent's Statement of Case at page 56 in the bundle in relation to the principle of costs and fundamentally whether it was just and equitable in the circumstances to make a Section 20c Order where there is a clause within the lease to allow for recovery of the Respondent's legal costs via the service charge.

67. The Applicant's case he submitted all revolved around alleged conduct. The Respondent submit that they have not failed to engage or failed in any manner in relation to conduct and in that regard we were again referred to the correspondence with Mr Lazarou at page 1099 of the bundle and of the other correspondence as previously referred to during the earlier submissions. He also invited us to distinguish this case from the authority relied upon by the Applicant in the case of **Henley Homes CAM/00KA/LBC/2020/0029** referred to paragraph 261 of the Applicant's Statement

of Case as it dealt with the dispensation for consultation for requirements (i.e. 20ZA) rather than any issue of reasonableness. Mr Stocks concluded by saying that in his submission the Applicant had at all times behaved reasonably in relation to undertaking his function.

Decision

68. Mr James quite fairly says that to a great extent his application bearing in mind the Applicant has the burden of proof, will turn on the findings we make in relation to upholding or otherwise the issue of conduct. Having considered the matter on balance as is echoed in our decisions in relation to the various items in dispute that the Respondent has done the best it can in the circumstances. The failings do not in our view amount to misconduct.

69. The above being the case we do not feel this is a case which warrants interfering with the provisions of the lease in order to deprive the Respondent of recovery of legal costs in the usual manner via the service charge.

Dated this 26th day of October 2022

TRIBUNAL CHAIRMAN