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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0031/11/22

In the Matter of Flat 3, 67 Penylan Road, Cardiff, CF23 5HZ

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

DECISION OF LEASEHOLD VALUATION

Landlord and Tenant Act 1985

Applicant: Katie Clarke – Represented by Mr Bradshaw

Respondents: Residential Freeholds Limited – Represented by Mr Simon

Tribunal members: Judge Shepherd
Roger Baynham FRICS
Carole Calvin-Thomas

1. This is a preliminary decision as to the jurisdiction of the Tribunal. A hearing took place on 22nd September 2023. Mr Bradshaw represented the Applicant and Mr Simon the Respondents. The Applicant has made an application for a determination as to the payability and reasonableness of service charges. The Respondent challenged the application on the basis that the Tribunal did not have jurisdiction because it did not concern service charges as defined in s.18 Landlord and Tenant Act 1985.

2. By way of background the case concerns a block of flats at 67 Penylan Road, Cardiff CF23 5HZ ("the building"). The building comprises 5 Flats. The Applicant is the leaseholder of Flat 3, pursuant to a lease, dated 13 January 2006 between (1) Susan Valerie Jones and Bernard Russell Jones (whose interest is vested in the Respondent), (2) Lloyd Robert Parsons and the Applicant (whose interest is vested in the Applicant) and (3) MANCO- the managing agent ("the Lease").The Respondent is the freeholder of the Building.

3. Pursuant to paragraph 6 of Part Two of the Seventh Schedule of the Lease, MANCO is obligated to insure, at all times, in the joint names of the Respondent and MANCO, 'in such insurance office of repute as is nominated from time to time by the Landlord'.

4. The Respondents allege that since 7 November 2006, MANCO has failed to discharge its obligations under paragraph 6 of Part Two of the Seventh Schedule of the Lease and that to be certain that the building is properly insured, the Respondent insures the building and recharges the cost to the leaseholders, including the Applicant ("the indemnity charge").

5. The Applicant denies that MANCO has failed to insure the building and says the payments to the Applicant in default are service charges which can be challenged in the Tribunal.

6. The Respondents' argument runs as follows:

   a) Service charges are amounts payable for services, repairs, maintenance, improvements, insurance or the landlord's costs of management,

   b) Under the terms of the Lease and in particular, paragraph 16 of the Fourth Schedule thereto, the Applicant is obligated to pay the Interim Service Charge, the Service Charge and the Supplemental Interim Charge to MANCO.

   c) Further and pursuant to Part One of the Seventh Schedule of the Lease, the Applicant must pay MANCO a Service Charge and Interim Service Charge, 'to enable the Management Company to recover from the Tenant the Tenant's due proportion of all expenditure, overheads and liabilities which the Management Company may incur in and in connection with carrying out works on the Building or the Estate and providing present and future services to its occupiers'.

   d) Pursuant to paragraph 1.12 of Part One of the Seventh Schedule, "Service Charge" is defined as 'the Tenant's Proportion of the amount of Service Costs for each accounting period' and "Service Costs" refers to the Sixth Schedule that states, 'The Service Costs of any Accounting Period are all the expenditure, liabilities and overheads (including Value Added Tax to the extent to which it is not recoverable by the Management Company as input tax) paid or incurred by or on behalf of the Management Company during or in respect of that Accounting Period'.

   e) The sums demanded by the Respondent cannot be service charges because there is no mechanism under the lease for service charges to be recoverable by the Respondent.

   f) The Respondent's recovery of its costs is neither a service charge nor an administration charge. Rather, it is the recovery of sums promised by way of an indemnity, given by the Applicant to the Respondent, in consideration of the Respondent discharging obligations that MANCO has failed to discharge.

7. The Applicant on the other hand argues the following:

The sums demanded by the Respondent are plainly service charges within the meaning of s.18 LTA 85:

a. They are payable (so the Respondent says) by a tenant, the Applicant.

b. They are payable for insurance, which is a matter specified at s.18(1)(a).

c. They are variable in amount, being the premium applicable at the relevant time.

d. They are costs incurred on or behalf of the landlord (the Respondent).

8. The Applicant relies on the decision in *Chuan-Hui v K Group Holdings Inc* [2021] EWCA Civ 403 where the Court of Appeal considered the application of s.18 LTA 85, which is set out at para 48 of the judgment. As noted by Henderson LJ at para 49 of the judgment, the effect of s.18 is that a service charge must satisfy the following conditions:

a. it must be payable by a tenant of a dwelling, whether as part of or in addition to the rent;

b. it must be payable for one or more of the matters specified in s.18(1)(a) (which specifically include insurance);

c. it must be variable in amount, according to the "relevant costs"; and

d. the relevant costs must be "the costs or estimated costs incurred or to be incurred by or on behalf of the landlord" in connection with the relevant matters.

9. Henderson LJ held (paras 50 – 56) that the effect of s.18 was that any charge which met these criteria was a 'service charge' for the purpose of ss.18 – 30 LTA 85 (and thus s.27A, under which this application is made).

10. In *Chuan-Hui* the charges in question arose not under the terms of the lease but rather had been imposed by the Tribunal. Henderson LJ held at para 51 that it would be "absurd" if such charges were not subject to the "detailed scheme enacted by Parliament in relation to service charges".

The hearing

11. Mr Simon accepted that the indemnity charge could be an administration charge but the wrong application had been made to challenge the charges. Mr Bradshaw said that the building was double insured as the management company had been insuring the building as well as the Respondents. The management company had invited nominations by the landlord but none had been forthcoming.

Determination

12. This became a narrow and rather technical dispute because of the acceptance that the indemnity charge could be an administrative charge. The Tribunal explained to Mr Simon that the mischaracterization of an administration charge challenge as a service charge challenge would not normally lead to a finding of non - jurisdiction.

13. In any event it is clear to the Tribunal that the indemnity charge meets all the criteria of a service charge as defined by Henderson LJ above. The fact that under the lease the duty lies initially on MANCO to administer the service charge does not mean that charges made by the freeholder direct to the leaseholder are not service charges if they meet the criteria for such charges. Accordingly, we find that the Tribunal does have jurisdiction to make a determination pursuant to s 27A Landlord and tenant Act 1985.

14. The **parties** should seek to agree directions for the further hearing of the substantive application and submit these to the Tribunal no later than **4pm Friday 1st December 2023**.

Dated this 15th day of November 2023
Judge Shepherd