Y Tribiwnlys Eiddo Preswyl
Residential Property Tribunal Service (Wales)
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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.

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

**DECISION OF LEASEHOLD VALUATION TRIBUNAL**

1. This case followed a preliminary decision as to the jurisdiction of the Tribunal.

2. In the preliminary decision we decided that the indemnity charge met all the criteria of a service charge and that therefore we had jurisdiction. We now consider the case proper – a decision as to the reasonableness and payability of service charges pursuant to s 27A Landlord and Tenant Act 1985.

3. 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 term is for 99 years from the 29th September 2002. The Respondents are the freeholder of the building.

4. Following the preliminary decision the Respondent re-served its service charge demands with a compliant notice. The Respondent conceded that its original demands upon the Applicant did not comply with the requirements of s.21B LTA 1985 or Schedule 11 Paragraph 4 of the Commonhold and Leasehold Reform Act 2002 because they did not include the correct prescribed statutory notice for premises located in Wales.

**The Lease**

5. The Fourth Schedule to the Lease contains the following covenants by the Applicant:

i) At para 2.1, to indemnify the Respondent and MANCO against sums charged or imposed against the Property or occupier.

ii) At para 4, to indemnify the Respondent and MANCO against charges for utilities for the Property.

iii) At para 9.3, to pay MANCO any sum due in respect of the Applicant's proportion of insurance premium for the building.

iv) At para 16, to pay a Service Charge in respect of the provisions of the Seventh Schedule to the Lease.

6. The Fifth Schedule to the Lease contains at para 4 a covenant by the Respondent in the following terms:

> *In the event that the [MANCO] fails to discharge its obligation under this Lease the [Respondent] shall forthwith discharge the same subject to the [Applicant] indemnifying the [Respondent] in advance against all costs incurred in so doing.*

7. The Sixth Schedule to the Lease defines the 'service costs' as including, inter alia, "the carrying out of the works and the provision of services specified in the Seventh Schedule of the Estate".

8. Part Two of the Seventh Schedule to the Lease defines the 'works and services' as referred to in the Sixth Schedule as (by para 6) including insurance. Para 6 provides that the MANCO shall arrange insurance via such insurer as is nominated from time to time by the Respondent.

9. The Respondent seeks to rely on para 4 of the Fifth Schedule to assert that the charges it seeks to recover in respect of the insurance it has obtained are recoverable from the Applicant by way of an indemnity.

10. The Applicant relies on a number of aspects of the Lease, including that in its view the Respondents have never nominated an insurer to the MANCO despite being asked to do so, that the MANCO insured the building (so performing its obligation) and that the sums due for insurance are, by para 9.3 of the Fourth Schedule, payable to the MANCO rather than the Respondent.

**The hearing**

11. Mr Bradshaw outlined the Applicant's submissions:

*The Limitation argument*

12. The demands were at least in part statute-barred, and that the claim for interest and administrative expenses must fall away in light of the defective original service of them. Even if the demands have now been effectively served, the Respondent did not have a

cause of action under them until 14th June 2023. Nor would it have had any legitimate basis to incur administrative costs in pursuing such alleged overdue charges, as by law they were not owing or due. Accordingly, the Respondent is not entitled to any interest, nor to any charges for administration said to arise from late payment. Further by Clause 2.1 the Lease reserves the service charge as rent and so pursuant to s.19 Limitation Act 1980 such rent is not recoverable more than 6 years after the date of claim. Accordingly, even though the demands were re-served on 14th June 2023, any sum allegedly due on or before 14th June 2017 would not be recoverable by the Respondent. This excludes the following demands:

a. 24th August 2015, £377.54.
b. 23rd August 2016, £410.55.

*The insurance argument*

13. There was no basis upon which the Respondent could seek to recover the sums it incurred in insuring the Property because it was in breach of its own obligation to nominate an insurer.

14. Mr Bradshaw said that the sums relied on (the insurance premiums) were not reasonably incurred as service charges, because the Property was already insured by the MANCO. Paragraph 6 of Part 2 of Schedule 7 of the Lease defines the responsibility for arranging insurance thus: Insurance at all times in the joint names of the [Respondent] and [MANCO] …against [list of losses] and such other risks (if any) as the MANCO shall from time to time think fit in such insurance office of repute as is nominated from time to time by the [Respondent] in such sum as the MANCO shall from time to time think fit…

15. Arranging insurance was thus the joint responsibility of the Respondent and the MANCO, but the wording of paragraph 6 makes it clear that the Respondent is responsible for nominating an insurer. Accordingly, the Applicant says MANCO is responsible for placing the insurance. The MANCO sought nominations from the Respondent but, as set out in its letter dated 16th August 2016 it did not receive any such nomination. Without such nomination, but fixed under the lease with responsibility for arranging insurance, the MANCO went ahead and selected an insurer, and took out appropriate insurance and had done so for a number of years previously. Therefore, there was no basis on which the Respondent could rely on paragraph 4 of the Fifth Schedule to the Lease to itself insure the Property and then seek payment from the Applicant.

16. Mr Simon said that the lease was clear in requiring insurance to be in the joint names of the management company and the Freeholder. There had never been a policy in joint names. Accordingly, the management company were in breach of the lease. Therefore, the indemnity kicked in and the charges to the leaseholders were due. He accepted however that the original demands were deficient.

17. In response to the breach argument Mr Bradshaw said that the breach if there was one was not a material breach. The main aim was to get the property insured not to insure in joint names. There was no evidence that the landlord made a nomination.

**Determination**

18. None of the sums claimed (£3098.32) are due. It is clear that the Respondent did not engage at all with the insurance process. The Respondent showed no interest in nominating an insurer despite prompts from the managing agents. The managing agents faced with this lack of engagement did the right thing and insured the building. The fact that the insurance was in their name alone is not surprising in light of the non - engagement by the Respondent. It was not open to the Respondent to seek service charges from the Applicant in these circumstances. If the building was double insured this was the fault of the Respondent.

19. None of the other charges are due as they all relate to failed attempts to recover sums from the Applicant which were not due in the first place. It was not necessary to decide the limitation issue, but had it been necessary the Tribunal would have decided it in favour of the Applicant.

20. The parties are invited to make any further submissions in relation s.20C Landlord and Tenant Act 1985 within 14 days of the date of this decision.

**Dated this 29th day of April 2024**

**Tribunal Judge Shepherd**