Y Tribiwnlys Eiddo Preswyl

Residential Property Tribunal Service (Wales)

Leasehold Valuation Tribunal (Wales)

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DETERMINATION OF LEASEHOLD VALUATION TRIBUNAL (WALES)
Landlord and Tenant Act 1985 s.27A and 20C

Premises:	Golden Mile View, Rogerstone, Newport
LVT ref:	LVT/0026/11/17
Hearing:	15 May 2018
Order:	28 May 2018
Applicant:	Firstport Property Services Limited
Respondents:	Mr Kevin Daniels (and Leaseholders of Premises at Golden Mile View, Rogerstone, Newport).
Members of Tribunal:	Mr R S Taylor – Lawyer Chairman Mr Roger Baynham – FRICS Dr Angie Ash

ORDER

1. The Applicant is entitled, in principle, (and subject to future questions of reasonableness and compliance with s.20 of the Landlord and Tenant Act 1985) to recover the costs incurred, pursuant to service charge provisions, in respect of the wall/fence at Golden Mile View.
2. The application under s.20C is dismissed.
3. The application is adjourned generally, with liberty to restore if so required. If no further hearings are required with 9 months of the date of this order, this application shall be archived.
4. In the event of settlement of outstanding issues, each party shall forthwith write to the tribunal (and copy in the other) confirming the position.

Dated 28 May 2018

Lawyer Chairman

REASONS

Introduction

1. This hearing concerned an application dated 7 November 2017 for the determination of the payability of service charges which have yet to be incurred. The dispute involves the perimeter wall/fencing of the estate known as Golden Mile View ("the estate") and who should pay for works of repair in relation to it. The tribunal has jurisdiction to consider costs yet to be incurred by virtue of s.27A(3) of the Landlord and Tenant Act 1985 ("the Act").

2. Due to the level of costs for each leaseholder concerned with the estate charges, the Applicant intends to conduct a consultation, pursuant to s.20 of the Act. It was agreed between the parties that the tribunal, in this determination, is therefore being asked to answer the following narrow questions:-

    a. Does the wall/fence fall within the curtilage of the estate?

    b. Does the service charge mechanism, contained within the relevant leases, provide for the recovery of the costs of repair and maintenance to the wall/fencing?

    c. If the answer to (a) and (b) are in the affirmative, is it reasonable, as a matter of principle for the Applicant to seek costs incurred, pursuant to lease obligations, via service charges rather than elsewhere?

    d. s.20C of the Act.

3. The Applicant was represented at the hearing on the 15 May 2018 by Mr Adam Fotiou. Whilst there were a number of leaseholders present at an inspection of the estate, which we conducted on the 15 May just prior to the hearing, the only leaseholder to attend the hearing was Mr Kevin Daniels. Mr Daniels, whilst not formally representing other leaseholders, has, in effect, "led the charge" on behalf of concerned leaseholders. He has been the most vocal in his criticisms of the manner in which the Applicant has conducted itself, in correspondence and by being the most engaged leaseholder in these proceedings.

4. Ms Elizabeth Thomas also filed a letter in response to the procedural directions which were given. At the inspection a Mr Tilley expressed his frustration to tribunal members that we were not aware of an email he had written and due to the fact that we were

unwilling to accept representations from him in the car park of the estate. Mr Tilley was invited to attend at the hearing but stated he had not had proper notice of the hearing and had other arrangements that day. Upon our return to the tribunal office we were able to locate Mr Tilley's correspondence which had been lodged with the tribunal, but not inserted into a paginated bundle which the Applicant had prepared for the purpose of the hearing and therefore the focus of our attention. The Applicant stated that it had not inserted the letter as it had not been previously received. In any event, no objection was taken to the admission of some further documents, including the letter of Mr Tilley.

5. However, we are of the view that anything that could be said for or on behalf of concerned leaseholders has been made by Mr Daniels, in his fuller statement of case.

Description of the estate

6. The development at Golden Mile View is located in the Rogerstone area to the west of Newport.

7. It is located on part of the former Tredegar Park Golf Club on land which included the Club House which was demolished in 2001. The developers subsequently obtained planning consent and commenced construction in 2004 with the development being completed in 2006. It consists of 99 apartments comprising 15 blocks having 6 apartments and 1 block with 9 apartments. The properties are conventionally constructed with cavity brickwork and a tiled roof and have the benefit of double glazed windows and doors.

8. The development is located on a triangular site with the Bassaleg Road to the North, a railway line to the west and the M4 Motorway to the east.

9. Although the overall site is relatively flat there is a steep embankment adjacent to Bassaleg Road which is approximately 2.4 metres in height and the developers constructed a timber post retaining structure (variously referred to as a fence or a wall in the papers and hearing) in order to retain the earth at the top of the embankment and to form a wall at the edge of the car parking area.

10. Over the years, especially in the car park area to the north-west, a significant number of the timber posts have totally collapsed. The precise reason for this has yet to be determined. It has been necessary, for health and safety reasons, to have this area fenced off. The height of the embankment to the south is not as high but the fencing in this area also requires attention.

Is the wall/fence within the boundary of the estate?

11. The parties were each given permission to adduce an expert report as to the location of the boundary line, if they so wished. Each party also had permission to require the other's expert to attend at the hearing for cross-examination, in the event that the report was not agreed.

12. Only the Applicant filed an expert report. It is a report of Mr Michael Bull, who is an Associate Member of the Architecture and Surveying Institute, an Incorporated Member of the Chartered Institute of Builders and a Member of the Expert Witness Institute.

13. His report is dated 30 April 2018 and is of a very high quality in its explanations, reasoning, illustrations and conclusions as to why the wall/fence falls within the estate.

14. None of the leaseholders sought to adduce their own expert and Mr Bull was not required to attend at the hearing for his conclusions to be challenged. Upon this basis everyone at the hearing agreed, and in any event, we determine, that the wall/fence falls within the estate.

The service charge provisions.

15. The service charge provisions are set out in leases commencing on the 1 January 2004. We considered a sample lease. It is a tri-partite lease, with Lessor, Manager and Leaseholder having their conventional rights and obligations.

16. The detailed description of the service charge provisions was set out in a Statement of Case from the Applicant (signed by a Jonathan Warren on the 30 January 2018) and also orally described by Mr Fotiou at the hearing. We accept this analysis and determine that the service charge provisions do allow for the recovery of works of maintenance and repair to the estate, thereby requiring each leaseholder to contribute 1.01% of the estate costs under the obligations imposed upon them under the lease.

17. Mr Daniels was not prepared to accept that the service charge provisions allowed for the recovery of costs of maintenance and repair to the estate, but he was either unable or unwilling to articulate why he was not in agreement. His best point appeared to be that the works as previously proposed by the Applicant (but which may not be the works

which will be proposed via the forthcoming s.20 consultation) were estimated to cost £108,209 in total and were of such a nature as to amount to an "improvement" to the estate rather than merely works of "maintenance" or "repair." There may be an argument another day as to whether the Mr Daniels may have a point here, but in the absence of a hard proposal to consider, we are simply left saying that it appears to us that the conventional service charge provisions do appear to allow for the recovery of costs incurred in the maintenance and repair of the estate, which includes the wall/fence.

18. In the definitions section at the start of the lease "the Communal Areas" are defined as meaning ".. all gardens and grounds forming part of the Maintained Property."

19. In turn the "Maintained Property" is defined as meaning, "… those parts of the Estate which are more particularly described in the Second Schedule and the maintenance of which is the responsibility of the Manager.

20. In the Second Schedule "The Maintained Property" is said to "… Comprise (but not exclusively): 1.1 The Accessways the Parking Spaces the Communal areas…"

21. By the Sixth Schedule the "Estate Costs" (Part A proportion costs) involve "Keeping the Communal Areas generally in a neat and tidy condition and tending and renewing any lawns flower beds shrubs and trees forming part thereof as necessary and maintaining repairing and where necessary reinstating any boundary wall hedge or fence (if any) …."

22. So, we determine that the Applicant, as a party to the lease, has a duty to undertake the work of maintenance and repair to the wall/fence and the leaseholders have an obligation to make a contribution to those costs.

In principle, is it reasonable for the Applicant to seek to recover costs of maintenance and repair to the wall/fence?

23. Everyone is in agreement that "something must be done." The dispute is about who should pay for it.

24. Mr Daniels has variously argued that the Applicant should have tried harder with the NHBC guarantee scheme, the insurer or the developer to try and recover the costs of sorting out the wall/fence.

25. The Applicant was given permission to rely upon a witness statement of Sara Davies at the hearing. No direction had been given for this, but Mr Daniels had had the bundle for a few days and did not object to the tribunal considering it or ask for more time. Miss

Davies is the previous site manager and in her statement she details the efforts made with Taylor Woodrow (developer), NHBC and the insurer. She gave oral evidence and answered questions put to her by Mr Daniels and the tribunal.

26. It would appear that the Developer did not respond to requests for comment. NHBC's position is that their guarantees extend only to the curtilage of domestic dwellings and not estate costs. The insurer has declined cover on the basis that land-slip is excluded under the policy if it occurs as a result of defective design.

27. Mr Daniel's case was that the Applicant had not tried hard enough with the developer (and suggested some sort of *possible* collusion between the Applicant and developer, based on the fact there was a sinking fund which included provision for the estate – we reject any suggestion of collusion which has not been proved to the requisite standard of proof), the NHBC position was ambiguous and that he was uncomfortable with the fact that the Applicant and the insurer were part of a larger arrangement of companies.

28. Whilst we can see the frustrations that Mr Daniels and concerned leaseholders have, it is not necessarily the duty of the Applicant to pursue the developer, possibly at great cost and risk of costs if litigation ensued. We find that the NHBC scheme reference to boundaries was to the curtilage of domestic dwellings and not of estate dwellings. We have not heard expert technical evidence as to what has been the precise cause of the issues with the wall/fence, but the fact remains that the insurer has declined cover. We are not satisfied that it is appropriate to take any view about whether what falls in and outside of the insurance arrangements subsisting here.

29. We were referred by the Applicant to the case of *Peverel OM Limited v Peverel Freeholds Limited, Jonathan Mackenzie and Others* [2010] UKUT 137 (LC). This is a decision of the Upper Tribunal and its determinations are binding upon this "lower" tribunal. In this case it was determined that the Manager did not have a duty to pursue any action against a developer in respect of a defective roof. Given that no duty arose there was not informal obligation upon the Manager to seek to persuade the house builder to pay for repairs. We are satisfied that this tribunal is faced with a similar position and bound by this approach.

30. Under s.19(a) of the Act, service charges are only payable "to the extent they are reasonably incurred…" In *Forcelux v Sweetman* [2001] 1 EGLR 173 it was held that this limb of s.19 involved consideration of two matters, namely, was the manager's decision to undertake the works appropriate and reasonable and, were the charges reasonable in light of market evidence?

31. As we note at the start of these reasons, we have not been invited to test the reasonableness of the level of charges in this determination, merely whether the Applicant, as a matter of principle, is taking a reasonable step. We were told that the application has been made due to the significant opposition faced from leaseholders in any proposal which would involve recovery of costs incurred in respect of the wall/fence via the service charge.

32. Provided works are within the terms of the lease (and that argument may be for another day) we are satisfied that it is reasonable, in principle, for the Applicant to be proposing to levy a service charge for the recovery of costs incurred here. Given the level of opposition that the Applicant has faced (in circumstances when all agree something has to be done) we are also of the view that the Applicant has been entirely proper in inviting the tribunal to express this preliminary view via s.27A(3).

s.20C of the Act

33. If the costs of legal proceedings are recoverable under the terms of the lease as a service charge (and we are satisfied that they are here) then s.20C invests in the tribunal a jurisdiction to block that contractual right of recovery. The tribunal may make such order on the application as it considers just and equitable in the circumstances.

34. Having found for the Applicant in respect of all aspects of the application and having determined that it was correct to make this application, we do not consider it would be just and equitable to make an order under s.20C.

Future hearings

35. The tribunal as presently constituted has learned a great deal about the circumstances pertaining at Golden Mile View and are alive to the fact that there may be further applications required. So far as administrative arrangements may permit, we intend to hear any future applications concerning the final resolution of this dispute, if so required.

Dated 28 May 2018

Lawyer Chairman