Y Tribiwnlys Eiddo Preswyl

Residential Property Tribunal Service (Wales)

Leasehold Valuation Tribunal (Wales)

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DECISION OF LEASEHOLD VALUATION TRIBUNAL (WALES)
LANDLORD AND TENANT ACT 1985 s.27A ("The Act")

Premises:	Room 5, 375 Newport Road, Cardiff ("the property")
LVT ref:	LVT/0042/11/16
Hearing:	25 October 2017
Order:	**6** December 2017
Applicant:	Mr Franklin Jones (in person)
Respondent:	Huggard (represented by Mr Khan)
Tribunal:	Mr R S Taylor – Lawyer Chairman Mr Kerry Watkins - FRICS

DETERMINATION

Introduction

1. This application dated 15 November 2016 concerns the recoverability of service charges under the terms of three successive tenancy agreements. For the tribunal's purposes in this determination there are no material differences between the three tenancies (save where indicated) and we shall refer simply to the tenancy agreement.

2. We have already made a preliminary determination in this matter, dated 10 April 2017. In that decision we described the service charge provisions within the tenancy agreement. We determined that the relevant clauses within the tenancy agreement did fall to be considered "service charge" provisions for the purposes of s.18 of the Act. The respondent did not seek permission to appeal that decision. That decision should be read in conjunction with, and prior to, this determination.

The problem of the missing "schedule 1"

3. It became apparent during and immediately after the preliminary hearing that the tenancy agreement did not have a "schedule 1" appended to it. Schedule 1 is noted at clause 1(3)(i) in the tenancy agreement as follows, "Huggard shall provide the services set out in the attached Schedule 1 for which the Tenant shall pay a service charge."

4. Directions following the determination in April have provided for the respondent to explain how it asserts it is contractually entitled to recover for service charges when this key part of the service charge mechanism is missing.

Should the "tenant's handbook" be implied into the tenancy agreement?

5. The respondent's case, in a nutshell, is that we can "read into" the tenancy agreement some provisions to be found in a tenant's handbook which was issued at around the same time that the tenancy agreement was entered into.

6. One page of the handbook is entitled "Estimated charges eligible for Personal Contribution based on 2015/2016." It then notes costs for the cleaning of communal area, gardening and garden maintenance, TV licence and heat, light and water. The charge is noted as being £11 weekly. Note 2 on that page states "Above service charge are for the services provided for the communal areas in your house where your tenancy relates to."

7. The respondent filed some undated written submissions further to the tribunal's directions dated 3 August 2017, which requested a skeleton argument on what was the contractual basis for recovery for service charges. The submission is noted as having been prepared by Huttons Solicitors. Mr Khan, who appeared on behalf of the respondent, is not a solicitor from Huttons. The submissions state, without reference to any legal authority which may justify such a position "the tenancy agreement and the handbook form the contractual terms."

8. Unsatisfied with this level of assistance, the tribunal, when setting the matter down for a hearing, gave fair warning in the recital to its directions dated 22 September 2017, that it expected to be addressed on the law in this area and it was suggested that the case of *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 should be referred to.

9. At the hearing Mr Khan addressed the tribunal by reference to the written submissions and to *Wood*. He invited us to take a "contextual" rather than a more narrow and literal "textual" approach to the interpretation of what the contract meant. He drew particular attention to paragraphs [10] and [13] of the judgment in *Wood.* This states:

> "[13] Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in

contracts of the same type. The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

10. The parties were also asked by the tribunal to comment upon whether the handbook could be implied adopting the analysis in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1978) 52 ALJR 20, PC at 26 where Lord Simon stated:-

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

11. We have in mind that the implication of a notional term, and the implication of a page in a handbook are different exercises. We further have in mind the warning noted in "Commercial and Residential Service Charges" (Bloomsbury, Rosenthal et al) at 2.94 where it states "In *Belize*, Lord Hoffman noted that the above criteria are not a series of independent tests but a collection of different ways of expressing the central idea that an implied term must spell out what the contract actually means."

12. Mr Khan's essential submissions were:-

    a. The factual matrix here justifies applying *Wood,* a contextual rather than purely textual interpretation to this contract. The factual matrix includes the fact that the respondent is a housing charity, the services have been provided throughout and paid for until about 2014, the handbook was issued about the same time as the tenancy and the front page of the tenancy makes reference to the handbook as a source of information about the tenancy.

    b. Clause 1(1)(ii) of the tenancy provided for a starting weekly charge of either £10.50 or later £11 (it went up 50p per week in a later tenancy), which correlates with the figure in the handbook.

    c. The factors in the *BP Refinery* case favoured the implication of the handbook into the contract.

13. The applicant did not make a significant oral contribution to the hearing. However, the counter arguments appear to be:-

    a. The factual matrix would favour a literal, textual, analysis of the wording of the tenancy agreement, which would not involve incorporation or implication of any external document into the agreement.

    b. The fact that there is a similar charge in the handbook to the starting figure in the tenancy agreement does not justify incorporating the handbook into the contract.

    c. The tenancy makes express reference to both the handbook and Schedule 1 – so they must be different documents and the former cannot simply be treated as if it were the latter.

    d. The factors in *BP Refinery* do not favour implication.

14. It is most unfortunate that it was only after the hearing had finished the tribunal become aware of the Upper Tribunal decision of *Cardiff Community Housing Association Limited v Kahar* [2016] UKUT 279 (LC). Neither party, but particularly the legally represented respondent, brought this to our attention. In *Kahar* the precise scope of the services to be paid for were not set out in the relevant tenancy, but payments for those services had been made by Mrs Kahar over a number of years. Overturning the LVT decision, the Upper Tribunal found that at any time Mrs Kahar could have ascertained what services were being provided and paid for and that accordingly the service charges were recoverable on account of the long standing course of conduct between the parties. *Kahar* has striking resemblance with this case.

15. Upon becoming aware of this case the tribunal considered it only fair that each party should be given an opportunity to comment upon the same. Predictably the respondent invites us to find that the service charges in this case are recoverable based on an analogous approach to *Kahar.* The applicant objects to the tribunal's reliance upon it, stating, in effect, that the tribunal has been biased and unfair in "introducing new evidence" after the hearing has finished. He invites us not to rely upon the case and states that if we do so he will have grounds of complaint to the Upper Tribunal.

16. We are anxious to emphasise that it would be wrong of us to determine a case without reference to what appears to be a pertinent and binding authority upon us. It would further be very unfair to determine the application without giving each side an opportunity to comment upon a case which nobody drew to the tribunal's attention at the hearing.

The only fair thing we were able to do is to invite each party to comment upon this case in writing – and we have done so sequentially, thereby giving the applicant the "last word" and opportunity to comment upon what the respondent has said.

Our determination

17. We have determined that we should take a contextual approach to the interpretation of the tenancy and we bear in mind the long period of time during which the applicant did pay service charges without complaint. The applicant is arguably in a stronger position than Mrs Kahar as he even had a tenant's handbook which made plain what services were being provided and what he was due to pay for. At any time he either knew or was able to easily find out what the services were. Upon this basis we prefer the submissions of the respondent and consider that the case of *Kahar* requires us to interpret this tenancy so that the relevant services contained within the tenant's handbook are incorporated on the basis of the parties' conduct over a considerable period of time.

Other issues

18. There were other arguments canvassed at the hearing, involving the lack of service of valid service charge demands, s.20B of the Act and the reasonableness of the level of the service charges.

19. As to reasonableness, we merely note that the respondent had set out the costs of the service charges in the bundle and it appears that it was charging only about 50% of what it might otherwise have been entitled to do. Upon this basis the applicant conceded in his oral evidence that he had no submissions to make about the question of whether the costs were reasonably incurred for the purposes of s.19 of the Act, preferring to nail his submissions to the primary question of contractual recoverability. Upon this basis the tribunal accepts that the costs, charged at 50% of market value, are indeed reasonably incurred.

20. The respondent accepts that it has not served valid charge demands and that it must do so in order to be able to recover outstanding service charges.

21. It submits that it is not prevented, by virtue of s.20B(1) of the Act, from recovery for accounting periods ending March 2014 and March 2016, upon the basis that the respondent has had written notification of the charges in the letters dated 5 December 2014, 19 December 2014, 8 January 2015, 12 January 2015 and 1 January 2017.

22. Upon this basis it is submitted by the respondent that they fall within s.20B(2) of the Act which provides that s.20B(1) "... shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

23. The respondent has provided a helpful table which shows when the letters noted above were sent and to which period of accounting they relate, when the costs were incurred. It would appear that it is conceded that there were no letters which would "cover off" the accounting period ending March 2015. This means that the figure of £572 during this period is barred by s.20B(1). However, for costs incurred in the accounting periods ending March 2014 and March 2016, the letters noted above do bring the respondent within s.20B(2). The period ending March 2017 is still live and we do not comment upon that. It seems to us that the sum of £572 to the end of March 2014 and £531 to the end of March 2016 are the historical charges which can fall within s.20B(2).

24. The exact issue of payability can only be determined if and when correct service charge notices have been served.

Dated this 6th day of December 2017

Issued on 22nd December 2017

Lawyer Chairman