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RESIDENTIAL PROPERTY TRIBUNAL

Reference:LVT/0043/12/20

In the Matter of 17 & 21 Bryntirion, Bedwas, Caerphilly, CF83 8AE

And in the matter of an application under section 27A of the Landlord and Tenant Act 1995

Applicant:	**(1) Mrs. Christine Watson (No. 21)** **(2) Mrs. Paula Thomas (No. 17)**
Representation:	**In person**
Respondent:	**Caerphilly County Borough Council**
Representation:	**Samir Amin of counsel**
Type of Application:	**Section 27A of the Landlord and Tenant Act 1995**
Tribunal:	**Mr. C. R. Green (Chairman)** **Mr. K. Watkins (Surveyor Member)** **Mrs. C. Thomas (Lay Member)**
Date of determination:	**6 January 2022**

DECISION

(1) The sum of £23,106.13 the subject of the demand dated 22 January 2020 in respect of flat 21 is not payable by reason of section 20B(1) of the Landlord and Tenant Act 1985.

(2) The sum of £24,301.85 the subject of the demand dated 22 January 2020 in respect of flat 17 is not payable by reason of section 20B(1) of the Landlord and Tenant Act 1985.

(3) In so far as the costs incurred by the Respondent in connection with these proceedings are recoverable by way of the service charge payable in respect of the tenancies of flats 21 and 17, one-fifth thereof shall not be regarded as relevant costs to be taken into account in determining the amount of any such service charge.

REASONS FOR DECISION

Background

1. This is an application by the Applicants, Christine Watson and Paula Thomas ("the Applicants") under section 27A of the Landlord and Tenant Act 1985 in respect of service charge demands that have been made by the Respondent ("the Council") as their landlord. Mrs. Watson and Mrs. Thomas, together with their respective husbands, are tenants of flats 21 and 17, Bryntirion, Bedwas, Caerphilly, a development of two-storey blocks of flats owned by the Council which consist of tenancies let on long leases acquired under the right to buy and short term lets.

2. For the block in question flats 21 and 17 are let on long leases with provision for payment of a service charge. The two leases, dated 10 April 2000 (Mr. and Mrs. Thomas) and 17 February 2003 (Mr. and Mrs. Watson) are for terms of 125 years from the date of the leases and in all relevant respects are in identical terms. Clause 6(ii) contains a covenant by the Lessee to:

> *"Contribute and pay one equal quarter part of the costs expense and outgoings incurred by the Lessor in respect of the matters set out in Clause 7 (iii) (iv) and (v) hereof as certified by the Head of Corporate Finance for the time being of the Lessor (whose certificate shall be final and binding) such payments to be made on demand."*

Clause 7 (iii) is a covenant by the Lessor to maintain, repair, decorate, and renew, and in its discretion to carry out improvements to, the main structure and exterior of the block of flats, the gas and water pipes, drains and electric cables, and the main entrance, passages, landings, and staircases. The service charge in issue concerns works falling within such provisions.

3. From 2017 substantial works were carried out at several blocks by way of rectifying long standing issues arising out of what are known as Cornish designed properties. The service charge demands made in respect of the costs of such work were dated 22 January 2020, for a sum of £24,301.85 (Mr. and Mrs. Thomas) and £23,106.13 (Mr. and Mrs. Watson). It is these demands which the Applicants have challenged on various grounds.

The Hearing

4. The hearing took place on 16 June 2021 by way of CVP. Many issues had been raised and were explored by the parties in evidence and submissions – whether the Council had complied with the requirements of the consultation process under section 20 of the 1985 Act, whether the scheme of works chosen by the Council was appropriate and preferable to an alternative scheme, whether the work could have been funded differently, the quality of the work carried out and

damage that had resulted, and whether suitable restoration works had been completed.

5. Paragraph (2) of the Tribunal's directions order of 5 February 2021 had identified issues to be determined, including whether the "costs" were payable under section 20B of the 1985 Act. During the hearing, Mr. Amin, counsel for the Council, quite properly addressed this issue and referred the Tribunal to the decision of *Brent London Borough Council v. Shulem B Association Ltd* [2011] EWHC 1663 (Ch). A copy of that case was not available, and no skeleton argument had been provided. Notices had been served on Mr. and Mrs. Watson and Mr. and Mrs. Thomas dated 15 November 2018, purportedly pursuant to s 20B(2) for the purpose of stopping time running in respect of any later service charge demand. Mr. Amin submitted that although the notices might be considered invalid, on a proper consideration of *Brent* that was not the case.

6. The Tribunal was not able to consider the point properly during the hearing, and as part of the directions given at its conclusion the Council was directed to provide written submissions on several matters, including the validity of its section 20B (2) notice dated 15 November 2018, with the Applicants having the right to respond in writing.

7. On consideration of Mr. Amin's written submissions, and after having had the opportunity of reading the *Brent* case in full, the Tribunal took the preliminary view that the notices of 15 November 2018 were invalid, which could have very significant consequences concerning the payability of the service charges in issue. Since the consequences of the notices being invalid had not been explored at the hearing the Tribunal provided the parties with an opportunity of addressing that issue. After receipt of further written submissions, the panel reconvened on 6 January 2022 to determine the matters arising under s. 20B, which provides as follows:

> *"20B Limitation of service charges: time limit on making demands.*
>
> *(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.*
>
> *(2) Subsection (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."

Each subsection will be addressed in turn.

Section 20B(1)

8. The date of demand is 22 January 2020. 18 months before that date is 20 July 2018. As to when costs were incurred, the Council relies on the following passages from the decision of the Court of Appeal in *OM Property Management Ltd v. Burr* [2013] EWCA Civ 479:

> *"15. In my view, therefore, costs are not "incurred" within the meaning of section 18, 19 and 20B on the mere provision of services or supplies to the landlord or management company. Like the Upper Tribunal, I do not find it necessary to decide whether costs are incurred on the presentation of an invoice (or other demand for payment) or on payment. This interpretation accords with the natural and ordinary meaning of the words and is strongly supported by section 19(2)*
>
> *16. I am not persuaded that the policy reasons advanced by Mr Burr compel or support a different meaning. I agree that section 20B was enacted in order to protect tenants from stale claims. But this merely prompts the question: what is the extent of that protection? On the conclusion that I have reached, the tenant enjoys the protection that, subject to section 20B(2), he is not liable to pay so much of a service charge as reflects costs incurred more than 18 months after an invoice is presented or payment is made by the landlord/management company."*

9. In the present case, the works giving rise to the 2020 service charge demands were part of larger works to 9 blocks of flats subject to a single contract. The Tribunal has not seen the contract but the Council states that it provided for periodic interim payments as the work progressed, which would be the usual method in respect of such a contract.

10. The Council's case is set out as follows:

> *"…the Respondent submits that the relevant costs under section 20B(1) in regards to the qualifying works to the Applicants' flats were incurred on the crystallising of the legal liability of the Respondent to make payment for the same. In this instance, this was comprised of the presentation of the relevant Certificate of*

Interim Payment and subsequent invoices to the Respondent from the contractor, given during and just after the repair works to the Applicants' block of flats. The Applicants' liability under the Leases would not be contingent on the ultimate cost of the entire project, being the cost to the Respondent of the "walls out" PCR repair to all 9 blocks of flats, but only the costs incurred for the Applicants' block. For instance if there was a significant cost overrun on a block that was not the Applicants' block, then this would have no effect on the service charge demanded from the Applicant. It is our submission that costs for the repair on the Applicant's block we[re] clearly incurred, at the latest, 1 to 2 months after the Applicants' block repair works were completed – as the legal obligation crystallised via the invoices rendered by the contractor and the Respondents payment of the same."

11. The Applicants' evidence is that work to their block was completed on 30 January 2018. This has not been disputed and no alternative date has been advanced by the Council. Adopting the above reasoning, the costs in respect of the Applicants' block, which are the relevant costs so far as their service charge is concerned, were incurred – invoiced and paid – within 2 months of that date, which is more than 18 months before the demands of 22 January 2020.

12. Accordingly, unless subsection (2) applies, the sums demanded are not payable.

Section 20B(2)

13. The notice dated 15 November 2018 was served under cover of a letter of the same date in the following terms:

> "Dear Mr and Mrs Thomas
>
> **Re: Major works at Bedwas flats**
>
> I have been advised that the external works on your block are now complete.
>
> You will recall that a Section 20 notice was issued in relation to these works on 19th February 2017. The notice provided a breakdown of the work scheduled for your block and details of your individual contributions towards the costs.
>
> As the works have now been completed we are in the process of finalising your contribution towards the work.
>
> If there are any outstanding issues, or alternatively if you are unsatisfied with the works that have been undertaken, please contact this office immediately so we can investigate and undertake remedial works if required.
>
> I have also enclosed with this letter a Section 20B Notification which confirms that the Council has incurred costs in respect of

the work and that you will be required to contribute to the cost of the work. The costs noted on the attached are an estimate which may reduce when the final figures are received and invoices raised.
If you have any queries please do not hesitate to contact me.
Yours sincerely
Laura Jones
Leasehold Services Officer"

14. The notice itself was as follows:

"NOTIFICATION THAT RELEVANT COST HAVE BEEN INCURRED
SECTION 20(B) LANDLORD AND TENANAT ACT 1985

TO: Mr & Mrs Thomas
RE: 17 Bryntirion, Bedwas CF83 8AW

1. On behalf of the landlord of the above property, you are hereby notified that the following relevant costs have been incurred and that you will subsequently be required under the terms of your lease to contribute to them by payment of a service charge.
   The Council has undertaken a major works contract of your block of flats. The estimated cost of the work is £24,801.87.
2. This notification is given in accordance with section 20B of the landlord and Tenant Act 1985."

The notice is signed on behalf the Council and dated 15 November 2018.

15. A letter and notice were also sent to Mr. and Mrs. Watson, in identical terms save for reference to them and flat 21.

16. Clearly, the notice was served within the period of 18 months beginning with the date when the relevant costs in question were incurred, that is, 18 months from, say, the end of March 2018. In order to determine whether it was a notice which complied with the other requirements of subsection (2) one must consider the *Brent* case.

17. That case addressed a number of issues, but it is only s. 20B(2) which is relevant here. Paragraph [18] of the judgment of Morgan J. quotes in full a letter of 23 February 2006. In summary, the letter set out in respect of the flat in question estimated costs of the works, not the totality of the costs but the estimated portion that would be payable by the tenant. Paragraphs [54]ff. deal with whether the February letter was a valid notice under s. 20B(2). At [56] the Judge

accepted that the notice must state the amount of costs which have been incurred. As he states at [57],

> *"In my judgment, subsection 2, taken literally, appears to require the lessor to state the costs it has actually incurred."*

18. At [59] it is said that although the lessor must notify the tenant that he will subsequently be required under the terms of his lease to contribute to the costs by the payment of a service charge, this does not oblige the lessor to state the resulting amount of the service charge –

> *"there will be a valid notification for the purposes of the subsection if the lessor notifies the lessee that it has incurred costs of £x on certain service charge matters without telling the lessee what sum the lessee will ultimately be expected to pay."*

19. The requirements of a valid notice are summarized at [65] in the following terms:

> *"Accordingly, my conclusion as to interpretation of section 20B(2) is that the written notification must state a figure for the costs which have been incurred by the lessor. A notice which so states will be valid for the purpose of subsection (2) even if the costs which the lessor later puts forward in a service charge demand are in a lesser amount. Secondly, the notice for the purposes of subsection (2) must tell the lessee that the lessee will subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge. It is not necessary for the notice to tell the lessee what proportion of the cost will be passed on to the lessee nor what the resulting service charge demand will be."*

20. So far as the February 2006 letter is concerned, the Judge found at [66]:

> *"It remains to apply this interpretation of section 20B(2) to the letter of 23rd February 2006. I have already analysed the contents of that letter in some detail. The letter does not state the actual costs which were incurred by the lessor in relation to the major works. It does state that major works have been carried out and that the lessor has incurred actual costs. The letter states that the lessor does not know what those actual costs were. The letter repeats the figures which were initially provided in March 2004 as a prediction of future cost.* ***There is a separate point which can be made about the statement of costs in the letter. The letter does not attempt to say what were the total costs which will be taken***

> ***into account in determining the amount of the service charge but rather goes to the end of the process by identifying (on the basis of estimated costs) the sum which will be claimed by way of service charge from the lessee. I think it is likely, in another case, if a lessor served a notice stating that it had incurred costs on major works and that the lessee's liability to pay would be a specified sum that would be taken as sufficient compliance with section 20B(2).*** *However, in the present case, the letter does not state the actual costs which have been incurred nor does it state what figure will be payable by the lessee as its proportion of actual costs but rather it states what the lessor says is the lessee's proportion of estimated costs."* (emphasis added)

21. Turning to the present case, the covering letter of 15 November states the works have been completed and the Council is in the process of finalising the tenant's contribution towards the work. The penultimate paragraph refers to the 20B notice and that the costs are an estimate which might reduce when the final figures are received, and invoices raised. The notice itself notifies the tenant that "the following relevant costs have been incurred", which is a reference to the words in italics:

> *"The Council has undertaken a major works contract at your block of flats. The estimated cost of the work is £24,801.87."*

22. As is apparent when comparing this sum to the later demands, the figure given is not the cost of the works to the block but the tenant's expected contribution by way of service charge, although the notice does not actually say that and refers expressly to "the estimated cost of the work". Perhaps when read in conjunction with the covering letter the words in italics can be interpreted as a reference to the tenant's service charge contribution; and according to the passage at [66] highlighted above, limiting the notice to the tenant's liability for the costs incurred will not invalidate the notice. Nevertheless, in the Tribunal's view the position remains that the notice does not purport to state what actual costs have been incurred, all it provides is an estimate. On that footing it is invalid.

23. Against this, the Council contends that the judgement of Morgan J. expressly allows for the landlord to provide an estimated figure within the section 20B(2) notice, provided that the ultimate service charge demand does not exceed the earlier estimate contained within the section 20B(2) notice:

> *"63. …It was submitted that difficulties could arise if there were a lengthy gap between the time when services were provided and the service charge bill was presented to the lessee,…I consider that Parliament plainly recognised that*

> *there would be cases where an 18-month period between incurring costs and making a service charge demand could be too short…Further, some leases require the account to be audited or certified before a service charge demand can be prepared. If a lessor finds that it will not be able to make a service charge demand within the 18-month period required for section 20B(1), the lessor has the right to stop time running by giving a notice for the purposes of subsection (2). It might be said that if the lessor's difficulty is that it cannot specify the actual costs for the purpose of making a service charge demand, it will have a similar difficulty in notifying the lessee of the amount of the costs which have been incurred. There may be some force in that point in some cases but in my judgment the difficulty is met by an interpretation of subsection (2) along the lines I have already put forward. If a lessor is not able to specify with complete accuracy the amount of actual costs, then the lessor can specify a figure which it thinks will cover the claim which it will later wish to make. (underlined emphasis added)*
>
> 65. *…A notice which so states will be valid for the purpose of subsection (2) even if the costs which the lessor later puts forward in a service charge demand are in a lesser amount…"*

Here, both demands of 22 January 2020 were for lesser sums than the estimated contribution stated in the notices of 15 February 2018.

24. In the Tribunal's view, this does not overcome the above difficulties. It is correct that the actual amounts demanded were less than the figure in the notices, but this does not address the issue that no figure is given purporting to be the actual costs, only a figure expressed to be an estimate, whether of the costs incurred or the tenant's contribution by way of service charge. A figure for costs incurred based on an estimate may suffice but a figure expressed to be an estimate does not.

25. In his written submissions, Mr. Amin asked the Tribunal to consider *Brent* in the light of the observations made in *No.1 West India Quay (Residential) Limited v East Tower Apartments Limited* [2020] UKUT 163 (LC) at paragraphs [32] to [41], and the appeal of that case to the Court of Appeal: [2021] EWCA Civ 1119. The Tribunal has read both but does not consider that the decisions of either the Upper Tribunal or the Court of Appeal, which are concerned with s. 20B(1), affect the views expressed concerning s. 20B(2) by Morgan J in *Brent*, a decision which is binding on the Tribunal. The Council was invited to comment on whether the

Court of Appeal decision in *No. 1 West India* made any difference and received no reply.

26. By reason of the above, the Tribunal must conclude that the sums the subject of the two service charge demands of 2 January 2020 are not payable. On that basis it is unnecessary to go on and consider the other issues that were raised concerning such service charges.

Section 20C

27. Under s. 20C of the 1985 Act, the Tribunal is empowered to order that all or any of the costs incurred by the landlord in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant. Without determining whether the Council's costs are recoverable by way of service charge under the leases of flats 21 and 17, having regard to the Council's failure in respect of the s. 20B issue, the Tribunal considers it just and equitable to order that a proportion of the Council's costs shall not be recoverable by way of service charge in respect of those tenancies. The proportion of costs attributable to the s. 20B issue is assessed at one-fifth of the Council's costs of the proceedings.

Dated this 1st day of February 2022

C. R. Green
Chair, Residential Property Tribunal