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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

SOUTHERN LEASEHOLD VALUATION TRIBUNAL

Case Reference: CHI/29UM/LSC/2011/0120

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER:
(1) SECTION 27A OF THE LANDLORD & TENANT ACT 1985
(2) SCHEDULE 11 OF THE COMMONHOLD & LEASEHOLD REFORM ACT 2002
(3) SECTION 168(4) OF THE COMMONHOLD & LEASEHHOLD REFORM ACT 2002
(4) SECTION 20ZA OF THE LANDLORD & TENANT ACT 1985

Applicant:	(1) Influential Consultants Ltd (2) Featurekey Properties Ltd (3) Mr J F & Mrs D P Thompson
Respondent:	Mrs C Willens
Property:	Flat B, 301 High Street, Sheerness, Kent, ME12 1UT
Date of Hearing:	1 February 2012

Appearances
Applicant
Mr and Mrs Thompson — Influential Consultants Ltd

Respondents
Mrs C Willens — Leaseholder

Leasehold Valuation Tribunal
Mr I Mohabir LLB (Hons)
Mr D R Whitney
Miss C D Barton BSc MRICS

Introduction

1. Four applications are variously made by the First Applicant in this matter. These are:

   (a) under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") in respect of service charges claimed for the years ending 4 February 2011 and 2012.

   (b) under Schedule 11 of the Commonhold and Leasehold Reform Act 2002 (as amended) ("CLRA") in respect of administration charges.

   (c) under section 168(4) of CLRA for alleged breaches by the Respondent of one or more terms or conditions of her lease.

   (d) under section 20ZA of the Act to dispense with statutory consultation.

2. By letters dated 3 November 2011, the Second and Third Applicants applied for and were given permission to be joined as Applicants in this matter. Both are tenants of other flats in the building. It is not understood why the applications to join were made because neither Applicant is privy to the lease between the First Applicant and the Respondent nor does it appear that the lease gives them *locus standi* in these proceedings.

3. The Respondent is the present lessee of Flat B, 301 High Street, Sheerness, Kent, ME12 1UT ("the property") pursuant to a lease dated 23 February 1990 made between (1) Daniel O'Grady and (2) Michael Anthony Freeley and Valerie Freeley for a term of 99 years from 1 December 1989 ("the lease"). The First Applicant is the present landlord, having acquired the freehold interest.

4. In relation to the service charge application made under section 27A of the Act, the Respondent accepts that her contractual service charge liability is 39.38% of the actual or estimated expenditure incurred by the landlord. It is, therefore, not necessary to set out how her contractual liability arises under the terms of the lease. Where other lease terms become relevant to the other applications, they are referred to below as to their terms and effect.

The Issues

Section 20ZA

5. At the hearing, Mr Thompson withdrew the application made under section 20ZA of the Act.

Schedule 11

6. The Tribunal was told that the application made under Schedule 11 of CLRA was for compound interest in respect of the principal sum payable by the Respondent pursuant to an earlier Tribunal decision dated 22 September 2010 and travelling costs of £695.92 incurred by Mr and Mrs Thompson to attend a County court hearing to enforce the earlier Tribunal decision. However, it appears that those proceedings were compromised on a full and final basis including interest, disbursements and costs. The terms of the compromise are set out in a letter from the First Applicant's solicitors, JB Leitch, to the Respondent's legal representatives dated 10 May 2011.

7. The Tribunal indicated to the Mr Thompson that the compromise reached was in full and final settlement of all claims, including the interest and disbursement claimed under the Schedule 11 application. There appeared to be no basis upon which these claims could be pursued. Mr Thompson, therefore, withdrew this application.

Section 168(4)

8. Mr Thompson also withdrew the allegations made against the Respondent for breach of covenant or condition for non-payment of service charges, failing to repair and maintain the property and also in relation to any allegations of nuisance on her part. Save for these concessions, Mr Thompson confirmed that the First Applicant was still pursuing the application limited to the alleged breach in relation to the removal of the "purlins" as part of the roof structure.

9. The only other application that fell to be determined by the Tribunal was that made by the Applicants under section 27A of the Act.

The Law

10. The substantive law in relation to the determination regarding the service charges can be set out as follows:

Section 27A of the Act provides, *inter alia*, that:

> *"(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to-*
>
> *(a) the person by whom it is payable,*
> *(b) the person to whom it is payable,*
> *(c) the amount which is payable,*
> *(d) the date at or by which it is payable, and*
> *(e) the manner in which it is payable.*
>
> *(2) Subsection (1) applies whether or not any payment has been made."*

Subsection (3) of this section contains the same provisions as subsection (1) in relation to any future liability to pay service charges. Where the reasonableness of service charge costs falls to be considered, the statutory test is set out in section 19 of the Act.

11. Under section 168(4) of CLRA, the Tribunal's jurisdiction is limited to simply making a finding that a breach of covenant or condition in the lease has occurred.

Hearing and Decision

12. The hearing in this matter took place on 1 February 2012 following an inspection of the property earlier that morning. The Applicants were represented by Mr and Mrs Thompson. The Respondent appeared in person.

Section 27A – Service Charges

Y/E: 4 February 2011

12. The sums in issue for this year were identified at the pre-trial review as being the actual expenditure incurred by the First Respondent for insurance and maintenance works.

Directors and Officers Insurance

13. The contribution claimed for buildings insurance was £381.58 for a total premium of £987.50. This included a premium of £98.50 (including IPT) for Directors and Officers liability.

14. The Respondent submitted that the element of the insurance premium attributable was not recoverable as relevant service charge expenditure under the terms of the lease.

15. Mr Thompson submitted that Directors and Officers premium was recoverable either under clauses 1(2)(a) or (d) of the lease because it was incurred pursuant to the landlord's maintaining and/or management obligations. He said that he could not properly carry out the management of the building without this insurance.

16. To decide this point, it was necessary for the Tribunal to construe the relevant lease terms.

17. Clauses 1(2)(a) and (d) provide as follows:

"(2) There shall also be paid by way of further or additional rent...the amount which the landlord may from time to time expend...
(a) in performing the landlord's obligations as to repair maintenance and insurance hereinafter contained...

(b)...

(c)...

(d) in providing such facilities and amenities or in carrying out such works or otherwise incurring expenditure as the landlord shall in the landlord's absolute discretion deem necessary for the general benefit of the building...whether or not the landlord has covenanted to incur such expenditure or provide such services facilities and amenities or carry out such works."

18. When construing these clauses, the Tribunal applied the primary rule of construction, that is, the words should be given their plain and ordinary meaning to give effect to the intention of the parties at the time the lease was entered into.

19. It was clear to the Tribunal that the Directors and Officers insurance was not recoverable under clause 1(2)(a) of the lease because it could not be said that this expenditure was a direct cost to repair and maintain the building. Equally, it was not an insurance cost that was recoverable. The covenant to insure given by the landlord is limited to the cost of insuring the building and nothing else.

20. The directors and officers insurance represented an indirect cost of the Applicant company to manage the property including the repairing and maintenance as part of the overall management function. It provided an indemnity to the directors and officers of the Applicant company when managing the property, for example, by arranging the building insurance or for works of repair and/or maintenance to be carried out.

21. In the Tribunal's judgement the management function carried out by the Applicant was a "service" for the benefit of the building within the

meaning of clause 1(2)(d). In providing this service, the clause affords the landlord a discretion to incur this expenditure.

22. The Tribunal, therefore, concluded that the premium for the directors and officers insurance was recoverable under clause 1(2)(d) of the lease. It should be noted that the Tribunal in the earlier decision had determined that the insurance premium, save for those amounts disallowed, was reasonable. On that occasion, the premium had included an element for directors and officers insurance. Although the point did not appear to be expressly considered by the Tribunal, it is implicit that this premium was also allowed as part of the overall premium as being recoverable by the Applicant.

Maintenance Works

23. The Respondent withdrew her challenge in relation to the expenditure of £441.06 and agreed this amount.

Section 168(4) – Breach of Covenant

24. Clause 1(1)(e) of the lease demised the loft area immediately above the property but excluded the roof structure. By clause 3(8), the lessee covenanted not to cut, maim or injure any of the structural parts or walls of the flat or make any structural alterations or additions to it.

25. It was the First Applicant's case that the Respondent had breached clause 3(8) by removing "purlins" that form part of the elements of the roof structure. Mr Thompson invited the Tribunal to draw this inference from a letter sent by the First Applicant to the Respondent dated 30 March 2008 when no allegation of the removal of purlins was mentioned following an inspection of the property by a Surveyor. He argued, therefore, that the alleged removal of the purlins by the Respondent must have taken place thereafter.

26. Both in correspondence and in these proceedings, the Respondent has consistently denied having removed the purlins or carry out any structural alterations as the First Respondent alleged.

27. The Tribunal found that the Respondent had not breached clause 3(8) of the lease for two reasons. Firstly, even if the First Applicant's assertion were correct, the Respondent would not be strictly in breach of this clause. It is only concerned with structural alterations to the demised property. The roof structure, of which the purlins form part, is not demised under clause 1(1)(e).

28. Secondly, there was no evidence that the Respondent had removed the purlins as alleged. The First Applicant bears the burden of proving the alleged breach and its case amounted to no more than a mere assertion in those terms. Given the potentially serious consequences that flow from a finding of breach, the Tribunal was not prepared to make such a finding based on the omission on the part of the First Applicant to complain about the removal of the purlins in the letter dated 30 March 2008. It follows, therefore, that the First Applicant had not discharged the evidential burden of proving the alleged breach and does not succeed on this point.

Costs & Fees

29. No application was made by the Respondent, either at the pre-trial review or at the hearing, under section 20C of the Act for an order that the landlord be prevented from recovering all or any part of the costs it had incurred in these proceedings through the service charge account. It is open to the Respondent to make a separate application under section 20C. Otherwise, in the event that the landlord later seeks to recover its costs and the amount is challenged by the Respondent, they can form the subject matter of a further section 27A application brought by her.

30. Equally, the First Applicant made no application for an order that the fees it had paid to the Tribunal to have these applications issued and heard to be reimbursed by the Respondent.

Dated the 2 day of March 2012

Signed

Mr I Mohabir LLB (Hons)

Chairman