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HM COURTS AND TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Application relating to payability and reasonableness of a service charge under the Landlord and Tenant Act 1985

Case number	**BIR/00CW/LSC/2012/0030**
Property	**49a Second Avenue, Wolverhampton WV10 9PE**
Applicant	**Mr Barry Stewart**
Respondent	**Wolverhampton City Council**
Respondent's representative	**Wolverhampton Homes Ltd**
Tribunal	**Mr C J Goodall, LLB, MBA Chairman** **Mr S Berg FRICS**
Date decision issued	23 NOV 2012

Background and key facts

1. Mr Barry Stewart ("Mr Stewart") bought a flat known as 49A Second Avenue, Wolverhampton, WV10 9PE ("the Flat") on 3 October 2005. The flat was purchased from Wolverhampton City Council ("the Respondent") under the Right to Buy provisions contained in the Housing Act 1985 ("the Housing Act"). The interest purchased was a leasehold interest for 125 years pursuant to a lease dated 3 October 2005 ("the Lease").

2. The Respondent has appointed Wolverhampton Homes Ltd ("WHL") as managing agent for the Respondent's housing stock. WHL have assumed conduct of this case on behalf of the Respondent.

3. It is apparent from the Lease and the documentation considered by the Tribunal that the Flat is one of six flats in a larger building ("the Building").

4. This case concerns an invoice for £239.00 which has been demanded by WHL from Mr Stewart for the cost of installing a digital aerial to serve the Building. WHL's case is that the digital switchover announced in 2005, to take full effect in 2011, meant that a new aerial system would be required in order for properties under its management to be able to receive television signal, and that it would therefore install new aerial systems throughout its housing stock.

5. On 8 May 2008, WHL wrote to Mr Stewart and told him that the cost of installation of an aerial system for the Building was quoted as £1,588.92. Between six properties, that would cost £264.82 each. They said that the work was going to take place, and that the cost would be shared between the flats in the Building. Mr Stewart was told that he had the option of "buying in" to this service. He was told that in order to "buy in", he should take no action (and the cost would by implication be charged as part of Mr Stewart's service charge), but that if he did not want to "buy in" he would have to confirm this in writing to the Head of Home Sales & Leases at WHL. He was given two other options. The first was to pay £239.00 to have the aerial brought to his front door or other convenient location only at this stage, so that it could be connected at a later date. The second was to totally opt out of the programme.

6. Mr Stewart says that he never wanted the digital aerial and did not want to pay for it. He says he telephoned WHL to say he did not want the service, but he has not identified the date and time of his call. WHL say they cannot trace a record of the call without the date and time, although they do not challenge that Mr Stewart made a call. Mr Stewart says that in his call he informed WHL that he would not need the service as he already subscribed to a cable tv service and he had done for 15 years, and he was quite happy with that service. He says his call was accepted and he was not asked to put anything in writing.

7. According to WHL's evidence, work to undertake the aerial installation at the Building was carried out in January 2010. The contractor apparently made some attempts to contact Mr Stewart to obtain access to the Flat to complete the installation. Bearing in mind Mr Stewart's attitude to the work, perhaps it is not surprising that they failed. It appears that subsequently to Jan 2010, WHL have invoiced Mr Stewart for the sum of £239.00. The Tribunal has not been supplied with a copy of the invoice and does not know its date. There seems to be no doubt however that an invoice for this work was rendered and the parties are in dispute about it.

8. WHL were not willing to accept that Mr Stewart had opted out of the obligation to pay the cost of the aerial installation, and Mr Stewart was not willing to pay the invoice, so Mr Stewart has applied to this Tribunal for a consideration of whether the invoice rendered, which WHL claims is due as a service charge under the Lease, is payable.

9. In submitting his application, Mr Stewart also sent to the Tribunal a copy of the notice given to him when he purchased the flat under section 125 of the Housing Act, which draws attention to the costs of future service charges, and which has importance for determining the issue of payability.

10. Both parties agreed that the application could proceed without an oral hearing. The Tribunal did not consider that an inspection was necessary, as the issue turned on the terms of the Lease and the section 125 notice, the statutory provisions, and the documents submitted. This is the decision of the Tribunal following consideration of the statements and evidence of both parties.

The Law

11. Under Section 27A(1) of the Landlord & Tenant Act 1985 (1985 Act), the Tribunal has jurisdiction to decide whether a service charge is payable and if it is, the Tribunal may also decide:-

    (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

12. In considering the amount payable under a service charge, Section 19 of the 1985 Act provides that:

"Relevant costs shall be taken into account in determining the amount of the service charge payable for a period –

(a) Only to the extent that they are reasonably incurred, and

(b) Where they are incurred on the provision of services and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly."

13. In relation to the test of establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman* [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

"39. ...The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.

40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence..."

14. In *Veena v Cheong* [2003] 1 EGLR 175, the Lands Tribunal (Mr P H Clarke FRICS) said:

"103. ...The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable."

15. Having set out the key provisions in the 1985 Act that the Tribunal has to apply in connection with the payability and reasonableness of the service charge, in this case it is also necessary to set out key provisions of the Housing Act, upon which an issue of payability of the disputed invoice turns.

16. Section 125 of the Housing Act provides that when a secure tenant has claimed the right to buy, the landlord has to serve a notice stating the price and other details upon which the landlord accepts the tenant is entitled to acquire the property. That notice must also contain estimates of service charges and improvement contributions to which the tenant may be required to contribute under sections 125A and 125B.

17. Section 139 of the Housing Act provides that a grant of a lease under the Right to Buy provisions shall conform with the requirements of Part III of the Sixth Schedule of the Housing Act.

18. Para 16B of Part III of the Sixth Schedule provides:

(1) Where a lease of a flat requires the tenant to pay service charges in respect of repairs (including works for the making good of structural defects), his liability in respect of costs incurred in the initial period of the lease is restricted as follows.

(2) He is not required to pay in respect of works itemised in the estimates contained in the landlord's notice under section 125 any more than the amount shown as his estimated contribution in respect of that item, together with an inflation allowance.

(3) He is not required to pay in respect of works not so itemised at a rate exceeding—

(a) as regards parts of the initial period falling within the reference period for the purposes of the estimates contained in the landlord's notice under section 125, the estimated annual average amount shown in the estimates;

(b) as regards parts of the initial period not falling within that reference period, the average rate produced by averaging over the reference period all works for which estimates are contained in the notice;

together, in each case, with an inflation allowance.

(4) The initial period of the lease for the purposes of this paragraph begins with the grant of the lease and ends five years after the grant, except that—

(a) if the lease includes provision for service charges to be payable in respect of costs incurred in a period before the grant of the lease, the initial period begins with the beginning of that period;

(b) if the lease provides for service charges to be calculated by reference to a specified annual period, the initial period continues until the end of the fifth such period beginning after the grant of the lease.

19. Para 16C of Part III of the Sixth Schedule provides:

(1) Where a lease of a flat requires the tenant to pay improvement contributions, his liability in respect of costs incurred in the initial period of the lease is restricted as follows.

(2) He is not required to make any payment in respect of works for which no estimate was given in the landlord's notice under section 125.

(3) He is not required to pay in respect of works for which an estimate was given in that notice any more than the amount shown as his estimated contribution in respect of that item, together with an inflation allowance.

(4) The initial period of the lease for the purposes of this paragraph begins with the grant of the lease and ends five years after the grant, except that—

(a) if the lease includes provision for improvement contributions to be payable in respect of costs incurred in a period before the grant of the lease, the initial period begins with the beginning of that period;

(b) if the lease provides for improvement contributions to be calculated by reference to a specified annual period, the initial period continues until the end of the fifth such period beginning after the grant of the lease

The Lease terms and the section 125 notice

20. The Lease contains (at Schedule III para 2.00) a covenant by the tenant "to pay the Service Charge on demand (and in advance if ... the Council so requires), provided that during the Initial Period of this Lease, the Tenant will not be required to pay in respect of Repair Service Charges and Improvement Charges a sum exceeding the estimated charges for the same set out in the Landlords Offer Notice...".

21. Definitions of the key phrases in this covenant are:

    a. Service Charge means a reasonable part of all the costs ... incurred... in providing the Services

    b. Services means those works of repair maintenance and improvement which the Council shall from time to time carry out

    c. Repair Service Charges means the sums payable ... in respect of the cost of repairs detailed in the Landlords Offer Notice

    d. Improvement Charges means the charges for improvements detailed in the Landlords Offer Notice

    e. Initial Period has the meaning ascribed by paragraphs 16B – C of Schedule six of the Housing Act [see paragraphs 18 and 19 above]

    f. Landlord's Offer Notice means the Landlord's Notice relating to a flat as defined in section 125 of the Act

22. The section 125 notice provided to Mr Stewart sets out, in paragraph 4, details of existing service charges under headings of Grass cutting, maintenance: communal lighting, building insurance and management quoting an annual cost of £185.90.

23. The notice then identifies, in paragraph 5, specified works in respect of anticipated repair totaling £39,900 for which Mr Stewart would be liable for £6,650, and it identifies that a further charge in respect of works not itemised would result in an estimated annual charge of £1,000.

24. In respect of improvements, paragraph 6 the section 125 notice identifies four improvements, being roof replacement, window replacement, introduction or upgrading of entry-phone, and external landscaping. The total cost of these is shown as £78,000 with the tenants share being £13,000. There is no reference to aerial installation in paragraph 6.

The issues

25. The Tribunal considers that these are the key issues. Firstly, does the Lease prevent the Respondent or WHL from seeking recovery of the disputed charge for the aerial installation because it is a purported recovery of an Improvement Charge in the Initial Period; secondly, was the action taken by WHL in installing the aerials reasonable; thirdly, was it appropriate for WHL to oblige the tenants to opt-out by way of written opt-out only; fourthly, did the disputed telephone call act as an effective opt-out despite it not being in writing.

The Housing Act, the Lease, and the section 125 notice

26. The purpose of section 125 – s125C of the Housing Act is to require that the tenant is notified of possible charges within the first five years of the lease, and that the terms of the lease restrict the service charges and improvement contributions that can be levied upon a purchasing tenant under the right to buy provisions within that initial period. If these restrictions apply, the charge cannot be "payable" within the terms of section 27A of the 1985 Act.

27. WHL's case is that the charge for installing the aerial system is not caught by the statutory restrictions because the charge is covered by the reference in paragraph 5 of the section 125 notice to unitemised annual charges of £1,000.

28. There is an important difference between charges for repair and charges for improvements. Paragraph 5 of the s125 notice and paragraph 16B of the Sixth Schedule of the Housing Act deal with items of repair. The notice can give details of specific items, but it can also (under para 16B(3)) give a figure for unitemised items which may also become necessary. Items which are improvements are referred to in paragraph 6 of the section 125 notice, and para 16C of the Housing Act. Para 16C contains no reference to unitemised charges.

29. So far as the Tribunal interprets it, if a landlord wishes to charge for improvements within the period of five years from the date of the lease, those improvements must be specifically identified in the section 125 notice. Para

16C(2) and Schedule III para 2.00 of the Lease otherwise prevent the landlord from charging for them.

30. The crucial question therefore becomes whether the installation of a new aerial system is a repair or an improvement. This question is answered in section 187 of the Housing Act which provides:

> "improvement" means, in relation to a dwelling-house, any alteration in, or addition to the dwelling-house and includes...(b) the erection of a wireless or television aerial...
>
> and "improvement contribution" means an amount payable by a tenant of a flat in respect of improvements to the flat, the building in which it is situated or any other building or land..."

31. If follows that, as the disputed invoice related to an improvement, it cannot be charged to Mr Stewart within the five year period from commencement of the lease unless it was specifically mentioned in the section 125 notice, which it wasn't. As the Lease was granted on 3 October 2005, and the work which was the subject of the invoice was carried out in January 2010, it is caught by these provisions, and is not payable by Mr Stewart. This is, in the opinion of the Tribunal, the meaning and effect of the terms of the Lease, and it cannot be over-ridden by consultation, or bringing the issue to the attention of Mr Stewart. It would always be possible for Mr Stewart to expressly agree to pay despite the terms of the Lease, but there is no evidence he did; on the contrary his position has always been that he did not want the aerial.

Installation reasonable / written opt-out only etc

32. As the Tribunal has found that the disputed invoice is not payable, further consideration of the second, third, and fourth issues identified in paragraph 25 is not necessary.

33. The Tribunal would however comment that it would have considered it reasonable for WHL to improve the Building by installing a digital aerial system. The Tribunal would though have found making a decision on whether use of a compulsory written opt-out system was an appropriate and reasonable action by WHL much more difficult. When spending someone else's money, it seems to the Tribunal there is a responsibility to be sure that the item purchased on that persons behalf is desired. However, the Tribunal reached no settled conclusion on this difficult point, and did not need to do so.

Decision

34. The Tribunal determines that the disputed invoice charged by WHL to Mr Stewart at some point between Jan 2010 and May 2012 for £239.00 to cover the cost of

installation of a digital aerial to an external connection point close to the Flat is not recoverable.

Fees

35. Mr Stewart paid a fee of £50 to have this issue determined by the Tribunal. Under paragraph 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, a Leasehold Valuation Tribunal may require any party to proceedings to reimburse any other party the whole or part of any fees paid in respect of the proceedings. The Tribunal considers that it should exercise this discretion in favour of Mr Stewart and orders that the Respondent should reimburse the sum of £50 to Mr Stewart.

Signed

C. Goodall

C Goodall
Chair