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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTIONS 27A OF THE LANDLORD AND TENANT ACT 1985

Case Reference:	LON/00BE/LSC/2011/0712
Premises:	91 Symington House, Deverell Street, London SE1 4AB
Applicant:	The London Borough of Southwark
Respondent:	Mr Wayne Hackett
Representative:	The Citizens Advice Bureau
Appearance for Applicant:	Miss E Bennett – Litigation Officer
Appearance for Respondent:	Mr A Parker – Council Leaseholders Advice Project Co-ordinator
Date of hearing:	27 February 2012
Leasehold Valuation Tribunal:	Angus Andrew Mr N Maloney FRICS, FRIPM, MEWI Mr C Piarroux JP, CQSW
Date of decision:	16 March 2012

DECISION

1. The sum of £19,821.78 claimed by the Southwark is not payable by Mr Hackett.

THE APPLICATION AND HEARING

2. Southwark issued proceedings in the Lambeth County Court to recover £19,821.78 being the balance of Mr Hackett's claimed contribution to a major works project that included window and roof replacement and concrete repairs. On 3 October 2011 District Judge Zimmels ordered that the matter be transferred to the Leasehold Valuation Tribunal. The matter having been referred we had to consider the payability of the claimed service charge pursuant to the provisions of section 27A of the Landlord and Tenant Act 1985 ("the Act").

3. Directions were issued at an oral pre-trial review held on 3 November 2011. The directions required Southwark to send copies of various documents to Mr Hackett that were, in due course, to be included the hearing bundle. Regrettably Southwark did not comply with that direction and instead of sending copies of the specified documents to Mr Hackett they sent a statement that largely answered a case that had never been put by Mr Hackett. In consequence a number of relevant documents (including the intention notice, the contract for the work, the payment and completion certificates and the first demand for the outstanding balance) were not included in the hearing bundle. We granted a short adjournment to enable Southwark to send electronically to the tribunal such of the missing documents as could be found.

4. At the hearing we heard oral evidence from Miss J Dawn (Southwark's final Accounts Manager), Mr T Wellbeloved (Southwark's Estimates Manager) and Mr Hackett.

5. At the end of the hearing Miss Bennett said that Southwark would not seek to recover any of the costs of these proceedings through the service charge and consequently it was unnecessary for us to invite Mr Hackett to consider making an application under section 20C of the Act.

BACKGROUND

6. We found the following facts on the basis of the oral evidence given at the hearing and the documents contained in the hearing bundle and sent to us electronically.

7. Mr Hackett purchased the Premises under the Right to Buy Scheme. On 7 March 2001 Southwark gave Mr Hackett an offer notice under section 125 of the Housing Act 1985 in which they offered to sell the Premises to Mr Hackett at the discounted price of £54,500. Mr Hackett accepted the offer and completed the purchase of the Premises on 4 March 2002.

8. The offer notice, as required by section 125 of the Housing Act 1985, included details of capital repairs and improvements that Southwark intended to complete during an initial reference period that, the parties agreed, expired on 31 March 2007. The offer notice included an estimate of both the costs of the proposal work and Mr Hackett's contribution that would be paid through the service charge. The offer notice includes the following note that summarises Mr Hackett's liability to contribute towards the cost of the repairs identified in the notice:-

   "Under paragraph 16B of schedule 6 to the Housing Act 1985, your liability to contribute to repair costs during the initial period of the lease is limited. The initial period is normally the first five years of the lease. The general rule is that you will not be liable to pay more than the estimated contribution to the cost of any works itemised above plus an inflation allowance nor you will be liable to pay more than the estimated average annual amount shown above, plus an inflation allowance, in respect of work not itemised".

9. As observed the parties agreed that the initial period expired on 31 March 2007. It is unnecessary to recite the estimated figures included in the offer notice because, as will be seen, the extent of Mr Hackett's contribution is not in dispute.

10. In the fullness of time Southwark decided to proceed with the refurbishment of Symington House and much of the proposed works had been identified in the offer notice given to Mr Hackett. Southwark initially contracted out the administration of the contract and the consultation process to Leather Market JMB and that organisation gave notice of Southwark's intention to complete the proposed works to Mr Hackett and the other long leaseholders pursuant to the provisions of part 2 of schedule 4 to the Service Charge (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations"). Southwark were unable to produce a copy of the intention notice but Mr Hackett accepted that he had received it and did not dispute its validity. After the intention notices had been served Southwark terminated their relationship with Leather Market JMB and assumed direct responsibility for the administration of the contract and the consultation notices. On 29 November 2006 Southwark gave a Notice of Proposal to Mr Hackett and the other long leaseholders in Symington House. The Notice of Proposal is referred to in the 2003 Regulations as a *"paragraph (b) statement"* and it forms the second stage of the consultation process.

11. The Notice of Proposal given to Mr Hackett records that estimates had been obtained from five contractors and that Southwark proposed to let the contract to Frencon Ltd at a cost of £3,102,513.68. The notice includes a short statement of the protection afforded to Mr Hackett under the provisions of the Housing Act 1985 in these terms:-

"During the five year period, starting from the date of completion of sale, leaseholders service charges for repair costs will be limited to those items included in the Appendix B of s125 notice and only up to to the amount specified, plus an allowance for inflation".

12. There then follows an estimate of the service charge that Mr Hackett would normally have to pay, which is put at £21,105.48. The estimate however concludes in the following terms:-

"Major works to your building	*£21,105.48*
Estate costs	*£0.00*
	£21,105.48

Professional fee @ 4.25%	*£896.98*
	£22,002.47
Administration fee @ 4.00%	*£880.10*
	£22,882.56
Appendix B reductions	*£19,978.34*
Estimated Service Charge	***£2,904.22***"

13. The work commenced 20 August 2007 after the reference period had ended but on 25 September 2007 Mr Hackett received a service charge demand for £2,904.22 that was of course the sum estimated in the Notice of Proposal. Mr Hackett did not have the funds to discharge the demand by one payment. However he put in place a payment scheme and the demand was eventually discharged in full. During the intervening period Southwark sent various letters to Mr Hackett advising him of the amount then outstanding. On the basis of the document bundle the last such letter appears to have been sent on 3 March 2009 when Southwark demanded £1,515.27.

14. As the work progressed Southwark made a number of stage payments to the contractors based on the payment certificates received from those responsible for the administration of the contract. 20 such payments representing 97.5% of the cost of the work were made between 17 September 2007 and 20 October 2008, with practical completion being achieved on 10 October 2008. Miss Dawn's evidence was that all payments were paid within 10 days of their falling due.

15. The contract provided for a defects liability period of one year and final completion of the contract was certified on 10 October 2009 with the final payment of £76,843.65 (representing 2½% of the contract sum) being paid to the contractors on 24 November 2009.

16. Miss Dawn said that the professional and administrative fees were paid on a pro-rata basis as the stage payments were made to the contractors.

17. On 12 November 2010 Mr Hackett received a letter headed "Final Account" from Southwark. The letter put his service charge contribution to the major works

project at £22,729.75 and having recorded his payment to date of £2,904.22 it concluded with the observation that the sum of £19,825.53 was due from him. Although not included in the hearing bundle Miss Dawn said that a formal demand for that sum was enclosed with the final account and that was not disputed by Mr Hackett.

18. Prior to the receipt of the final account on 12 November 2010 Mr Hackett had not received any notification from Southwark to the effect that his contribution to the cost of the major works project might exceed the initial estimate of £2,904.22.

19. Mr Hackett objected to paying the balancing charge of £19,825.53 and Southwark informed him that the charge was payable in full because the reference period had expired.

ISSUES IN DISPUTE

20. Mr Hackett did not take issue with the quality of work and neither did he suggest that the cost incurred was inherently unreasonable. Instead he disputed liability on each of the following three grounds:

    a. He asserted that the balancing charge of £19,825.53 was not payable because it had not been demanded within 18 months of the costs being incurred as required by section 20B of the 1985 Act.

    b. He said that the consultation procedure conducted under section 20 of the 1985 Act was defective because the Notice of Proposal estimated his contributions at £2,904.22 rather than £22,729.75 and in consequence Southwark could recover no more than £250.

    c. He said that Southwark were estopped from demanding more than the estimated service charge contribution of £2,904.22 contained in the Notice of Proposal.

REASONS FOR OUR DECISIONS

Section 20B of the 1985 Act

21. Section 20(B) of the 1985 Act reads:-

"(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."

22. At the start of the hearing we handed both parties copies of the Lands Tribunal decisions in *Paul v the London Borough of Southwark LRX/133/2009* and *London Borough of Islington v Abdel-Malek LRX/90/2006* and they had the opportunity to consider those decisions during the adjournment referred to in paragraph 3 above.

23. Miss Bennett on behalf of Southwark argued that the period of 18 months ran from the completion of the defects liability period on 10 October 2009. As the balance was demanded within 18 months of that date section 20B was simply not engaged.

24. That argument is however inconsistent with the decision of the President in the *Paul* case and that of the Member in the *Islington* case. In *Paul* the President said:-

"In my judgment however, costs are only "incurred" by the landlord within the meaning of section 20B when payment is made".

25. In both cases the local authorities had completed a major works project with payment being made to the contractors by stage payments. Although both decisions related to the interpretation of section 20B (2) (to which we shall shortly refer) it is apparent that both the President and the Member considered that relevant costs are "incurred" when each stage payment is made. That can be inferred in particular from the final two sentences of paragraph 17 of the President's decision in *Paul* when he said:-

"The final two payments were made by the council in March 2006 and March 2007, but no demand or other notification was sent to the tenants between the letter of 17 February 2006 and the demand of 1 October 2008. If any part of these final payments related to works for the cost of which the tenants were potentially liable, none of this would be recoverable because the demand of 1 October 2008 was more than 18 months after the costs were incurred."

26. Although Ms Bennett did not specifically take a point under section 20B(2) we have nevertheless considered whether the Notice of Proposal or the demand of 25 September 2007 or the subsequent a reminder letters sent by Southwark could amount to a notification in writing for the purpose of subsection 20(B)(2) of the Act.

27. As far as the Notice of Proposal is concerned the point is conclusively dealt with by the Member in the *Islington* case when at paragraph 45 he said:-

"It is not sufficient to rely upon the estimates contained in the section 20 notice since these are estimated costs to be incurred rather than cost incurred".

28. In the *Paul* case Southwark had demanded an on account payment of £44,657.40 which was greater than the tenant's eventual liability of £39,049.43. The President concluded that letters sent to the tenant reminding him of his liability to pay the outstanding on an account payment of £44,657.48 constituted sufficient notification with the purpose of section 20B (2). However we do not consider that either the demand of 25 September 2007 or the reminder letters assist Southwark because the sums said to be outstanding in both the demand and the letters are

only a small fraction of the balancing charge ultimately demanded from Mr Hackett.

29. We are confirmed in that conclusion by the following comment of Etherton J in *Gilje v Charlegrove Securities [2004] 1 All ER 91* that is recited with approval in both of the decisions to which we have referred:-

"…. the policy behind section 20B of the Act is that the tenant should not be faced with a bill for expenditure, of which he or she was not sufficiently warned to set aside provision. It is not directed at preventing lessor from recovering any expenditure on matters, and to the extent, for which there was adequate prior notice."

30. We accept that an experienced landlord and tenant lawyer receiving the Notice of Proposal and having reconsidered the original offer notice might have appreciated that if the work was completed outside the reference period he would have to make a full contribution towards the cost of such work. However Mr Hackett was not an experience landlord and tenant lawyer. Having heard his evidence we accept that he took the estimate of his service charge liability contained in the Notice of Proposal at face value as, in our opinion, he was entitled to do. It was only when he received the final demand on 12 November 2012 that he appreciated that he might have to pay a considerably higher sum. In short Mr Hackett was eventually faced with a bill of which he was not sufficiently warned and of which no adequate prior notice had been given to him.

31. We are fortified in this conclusion by the evidence of Mr Wellbeloved when he explained, in answer to our questions, that following this case Southwark has changed its procedure and that in similar cases, where a Notice of Proposal is given towards the end of the reference period, the tenant is given a full estimate of his or her potential service charge liability.

32. It follows from the above that the first 20 stage payments where not *"incurred"* within 18 months of the demand for payment of the service charge and that consequently no service charge is payable in respect of those costs. That leaves

outstanding the 21st and final stage payment of £76,843.64 that was incurred within 18 months of the demand. However Mr Hackett's contribution towards that stage payment and any associated professional and administrative fees is more than covered by the on account payment that he has already paid and consequently the balancing charge of £19,821.78 is not payable by him.

33. Strictly speaking it is unnecessary for us to consider the consultation and estoppel points taken by Mr Hackett but for the sake of completeness we mention them briefly.

Defective consultation

34. Mr Hackett relied upon the service charge estimate of £2,904.22 contained in the Notice of Proposal. As observed the relevant regulations are those contained in part 2 of schedule 4 to the 2003 regulations and Southwark's notice corresponds to the paragraph (b) statement referred in those regulations.

35. The regulations do not require the landlord to include an estimate of the tenant's service charge liability in the paragraph (b) statement. The landlord's obligation is confined to specifying the amounts of at least two of the contractors' estimates: the intention being, presumably, that the tenant will then be able to calculate his potential liability. However as the regulations do not require the landlord to provide an estimate of the tenant's service charge liability we do not consider that the provision of an inaccurate or misleading estimate of that liability can invalidate either the paragraph (b) statement or the consultation procedure.

Estoppel

36. Mr Parker did not pursue this point with any great enthusiasm and that is perhaps understandable given the complexity of law relating to estoppel. Certainly the point was not fully argued out by either party. Mr Hackett faces a number of obstacles in raising the shield of estoppel. We doubt that the provision of an estimate, as opposed to a quotation, could give rise to an estoppel. Further it is far from clear that, in relying upon the estimate, Mr Hackett significantly altered

his position. However the point not having been fully argued we consider that this issue is best left for another day.

Chairman: A J Andrew