UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – validity of major works consultation notice – whether additional works carried during the contract included - section 20 of the Landlord and Tenant Act 1985

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE SOUTHERN RENT ASSESSMENT PANEL

BETWEEN **THE LONDON BOROUGH OF SOUTHWARK** **Appellant**

and

SAMUEL DAVID OYEYINKA **Respondent**

Re: 65B Glengarry Road,
London
SE22 8QA

His Honour Judge Nigel Gerald
Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 17 September 2013

Simon Butler of counsel represented the appellant
The Respondent appeared in person assisted by a friend

The following cases are referred to in this decision:
None

DECISION

Introduction

1. The appellant is the landlord of 65 Glengarry Road, East Dulwich, London SE22 8QA ("the premises"). The premises comprise a two-storey terrace house. The respondent is the tenant of flat 65B which is slightly larger than flat 65A and so is liable to pay 7/12th of the costs of repairs and maintenance to the building carried out by the appellant pursuant to the service charge provisions of the lease.

2. There is no dispute that the works which the appellant seeks to recover the costs of fall within the service charge provisions of the lease, so it is not necessary for the terms of the lease to be set out.

3. The appellant appeals against the decision of the Leasehold Valuation Tribunal dated 4 October 2011 disallowing a substantial portion of the appellant's costs of repairing the windows of the building. The two questions raised in this appeal are whether firstly the appellant complied with the consultation provisions of the Landlord and Tenant Act 1985 ("the 1985 Act") as amended by the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). Secondly whether or not the amounts claimed should have been increased by 10% as allowed by the LVT.

The statutory provisions

4. By section 20 of the 1995 Act a landlord intending to carry out "qualifying works" must comply with the provisions of section 20 of the 1985 Act failing which the landlord shall be restricted to recovering £250 per dwelling for any works carried out without satisfying those requirements. The detailed requirements are set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations").

5. Schedule 3 of the 2003 Regulations provide as follows:

1. Notice of intention

(i) The landlord shall give notice in writing of his intention to carry out the qualifying works:

(a) To each tenant; and

(b) Where a recognised Tenants Association represents some rule of the tenants to the Association.

2. The notice shall:

(a) Describe, in general terms, the works proposed to be carried out or specified the place and hours at which a description of the proposed works may be inspected;

(b) State the landlord's reasons for considering it necessary to carry out proposed works;

(c) Contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works;

(d) Invite the making in writing of observations in relation to the proposed works or the landlord's estimated expenditure;

(e) Specify:

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the stay of the relevant period and;

(iii) the date on which the relevant period ends."

6. This is referred to as the stage 1 consultation. Paragraph 3 goes on to say where, within the relevant period, observations are made in relation to the proposed works of the landlord's estimated expenditure by any tenant or the recognised Tenants Association, the landlord shall have regard to those observations.

7. Schedule 4 deals with stage 2 of the consultation process and provides as follows:

3. Notice of intention

(i) The landlord shall give notice in writing of his intention to carry out qualifying works:

(a) To each tenant; and

(b) Where a recognised Tenants Association represents some or all of the tenants to the Association.

(ii) The notice shall:

(a) Describe, in general terms, the works proposed to be carried out or specify the place and hours in which a description of the proposed works may be infected;

(b) That the landlord's reasons for considering it necessary to carry out the proposed works;

(c) State the reasons why the landlord is not inviting recipients of the notice to nominate persons from whom he should try to obtain an estimate for carrying out the works. Public notice of the works is to be given;

(d) Invite the making, in writing, of observations in relation to the proposed works;

(e) Specify:

(i) The address to which such observations may be made;

(ii) That they must be delivered within the relevant period; and

(iii) The date on which the relevant period ends.

Background

8. On 20 September 2007 the appellant sent the respondent a Notice of Intention to carry out works. This was a stage 1 notice. It sets out the planned works which amongst other things included "window repairs/renewals". It then went on to explain why the council was proposing the works.

9. On 10 October 2008 the appellant wrote a second letter, a stage 2 notice, notifying the respondent that it intended to carry out works which had been broadly outlined in the stage 1 notice which again expressly included "window repairs/renewals". It identified the various contractors who had tendered for the works, explained that the respondent's costs would be recoverable under the service charge and estimated that the proportion of the costs being the estimated service charge applicable to the whole building, that in 65 Glengarry Road was £12,908.17 of which the respondents' share was £7,529.77 which when professional fees and administration fees are added totals £8,038.48. The letter went on to explain that detailed estimates were available for inspection at a stated address of the council.

10. The documentation which I have been shown showing the breakdown of the £12,908.17 figure includes, amongst other figures which are not relevant for the purposes of this appeal, the total cost of repairs to the windows which is described as "window repair/renewal" of £3,025.00 plus scaffolding of £2,188.08, general preliminaries of £1,290.34, provisional sums of £414.41, contingencies of £216.69 which brings the sub total to £7,134.52 which is comprised within the total costs associated with no.65 Glengarry Road of £12,908.17.

11. If the underlying contractual documentation is looked at – which was available to all tenants including the respondent to inspect – it would have been seen that so far as the "window renewal/repair" were concerned there were two alternatives. First "allow the provisional quantity of six windows to be renewed to the rear of each property allowing £3,025.00." The other alternative was for seven specific items of works involving the replacement of windows/doors re-glazing and repairing windows to both 65A and 65B for a total cost of £8,107.50.

12. The figure which was included in the estimate was the lower figure of £3,025.00 because it was then intended by the appellant to confine the works to mere works of repair. However it was left open in case it turned out to be necessary to replace the windows in which case the costs set out in the alternative would be charged.

13. The works were carried out between April and September 2005. On 7 October 2009 the appellant invoiced the respondent for the estimated service charge of £8,038.48 which was in accordance with the estimate that I have already referred to. However a year later on 18 October 2010 the appellant wrote to the respondent seeking an additional £6.054.18 bringing the total service charge cost of these works to £14,092.66.

14. The reason for the additional funds requested was because the appellant had found that the windows were so rotten that they needed to be replaced and therefore the second alternative work which had been set out in the contract documents and estimates which I have referred to, had to be implemented rather than the lower costs of the first alternative which had been included in the estimate provided to the appellant and had at that point in time been hoped to be carried out by the appellant.

15. The additional sum claimed was £8,107.50 as referred to in the original tender which I have already referred to, plus site preliminaries of £4,114.73 and scaffolding costs of £3,953.11. The preliminaries figure had therefore increased from £1,290.34, which is as usual an automatic sum being a percentage or whatever of the contract price. The scaffolding had increased in price from £2,188.08, the reason no doubt being that replacement of windows and also some additional replacement of windows required more scaffolding than mere repair to fewer windows. The other sums of provisions and contingencies of £414.41 and £216.69 respectively were not of course included in the final bill as they would have been overtaken or subsumed in the other additional sums.

16. It was in those circumstances that the respondent applied on 14 February 2011 to the LVT to amongst other things challenge the additional increase in costs which had been claimed. So far as relevant the respondent's statement of case before the LVT advanced two challenges. First that the appellant had failed to comply with the consultation requirement of section 20 of the Act. Secondly and in the alternative that the increase of nearly 75% from the original £8,000 odd to £14,000 odd was unreasonable and excessive. The appellant resisted both challenges.

17. Before the LVT the respondent represented himself. However I am told by him which is confirmed by the appellant that he did not give evidence before the LVT, had not served a witness statement and called no other witnesses or evident as to the reasonableness or otherwise of the amounts which were ultimately charged.

The decision of the LVT

18. The LVT records the evidence produced by the appellant which was to the effect that the appellant had initially intended to carry out the more limited works of repair but it was not until the contractors went on site that the necessity for the additional window repairs was discovered. The rear windows to the ground floor tenanted flat, that is 65A were found to be "completely rotten". Various other observations were made in relation to the state of repair and works carried out to the windows, none of which were challenged and all of which it would appear the LVT accepted.

19. The LVT also noted that the respondent had accepted that there had been valid consultation in respect of the works both at stage 1 and at stage 2 and that stage 1 and stage 2 notices were valid. The argument of the respondent as I understand it before the LVT was that the reference to "window repairs/renewals" in both the stage 1 and stage 2 letters was insufficient to comply with the requirements of schedules 3 and schedule 4 of the 2003 Regulations. The respondent told me that he understood that what was envisaged was a few repairs of a relatively minimal nature to the windows to flat 65. But in actual fact what was carried out was major works of replacement.

20. The material parts of the LVT's decision are as follows:

> "40. The Tribunal accepts that there are many instances where additional works are found on site and that it is sensible and cost effective for these to be remedied as part of the major works contract provided that those works fall within the remit of the original consultation. The Tribunal is aware that there is a long line of authority in relation to additional works under a major works contract. The Tribunal accepts that it is impracticable to stop a major works contract once commenced to consult about small variations to the contract. In each case the commonsense approach must be taken. However in this instance the works in question in the original specification amongst entirely formed of window repair and replacement. The original estimate to the applicant was £8,038.48 which was increased to £14,092.66 by virtue of the additional works. The window works were increased by in the region of 75% of which the Tribunal considered is substantial given the fact that the building comprises only two units.
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> 41. In considering whether there had been proper consultation in compliance with section 20, the Tribunal considers that each project must be reviewed on a case by case basis and with a commonsense approach. It did not accept the respondent's submissions that where it is only additional costs to a category which are incurred rather than works in a new category there is no necessity for any fresh consultation. If this were correct one might have an instance of a block with some one hundred units in which the original estimate contains works to replace only one window and additional works to the remainder of the windows at a huge additional cost involved to the contract later which would require no fresh consultation. This cannot be what the legislation intended which was to provide each leaseholder with an estimate of the costs which he is likely to face to enable him to make sufficient provision. Where as in this case, the costs of the category of works has increased by approximately 75% and the cost of a contract to an individual has increased by almost 50%, the Tribunal considers that a reasonable landlord would have accepted that it should the works at that point and consult

with the leaseholder. Accordingly the Tribunal considers that there had been breach of section 20 in relation to the additional works.

42. The Tribunal does accept however that had the additional works only made a slight variation to costs that they would have not required additional consultation. In this case the Tribunal considers that a variation of approximately 10% should be allowed to the original estimated costs of the window repairs and renewals to allow for the natural fluctuations which occur to major works contracts of this nature when works have commenced. The Tribunal does not consider that there is any hard and fast rule or methodology to this percentage which allowed but considers that this will be something which should be considered on a case by case basis and with a commonsense approach.

43. As a result the Tribunal finds the reasonable costs to be the original contract cost together with the tolerance of 10% and £250 limit in respect of additional works. In turn the scaffolding costs and preliminaries require proportioning to reflect the costs allowed. The Tribunal sets out below its findings and calculations on the amount now payable. The Tribunal then sets out its calculation of what it allows.

Adjustment or rechargeable costs

Original provision of sum allowed for window renewals, £3,025.00.

Allow tolerance of say 10%, £302.50

Further allowance up to S20 limit for additional works, £250

Cost of glazing repairs to 65B, £240

Total £3,817.50

Pro rata allowing for site preliminaries for these measured works, £1,937.46

Pro rata allowance for scaffolding costs for these measured works £1,861.38

Balance of rechargeable works including proportion of site, preliminaries and scaffolding, £5,297.02

Total rechargeable works £12,913.36

Amount payable by Lessee 65B Glengarry Road, £12,913.36 x 7/12 = £7,532.79

Professional fees at 8.18%, £616.18

Administration fees at 4%, £301.31

Total amount payable £8,450.28

Discussion

21. In my judgment the question in this case is whether or not the stage 1 and stage 2 notices, particularly the stage 2 notice comply with paragraphs 1 and 2(a) of schedule 3 and schedule 4 of the 2003 Regulations. They require as already recited that the respective notices should "describe, in

general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected."

22. The notices both described the works as being "window repairs/renewals". The LVT itself at paragraph 40 described the original specification as being "almost entirely formed of window repair and replacement". As a matter of fact the works carried out, that is the more expensive alternative, did comprise repair and replacement to the windows to the ground and first floor flats. Furthermore had the respondent inspected the documents referred to in the stage 2 notice he would have seen that there were alternative ways of dealing with the windows. There was the lower cost alternative and the more expensive alternative.

23. In those circumstances in my judgment the statutory provisions have been complied with as a matter of law and also as a matter of fact. Even if which I do not think is the case the stage 2 notice did not comply on its face with the provisions of the Act there was sufficient information lodged at the council's office for the tenant to inspect had he chosen to do so. Had he done so that would have revealed the alternatives which were available to the council. It is not unusual in building cases for a provisional sum to be inserted, that is the £3,025, and then when matters on the ground are inspected with greater care, for it to be seen that more extensive works are required. And that indeed is what happened in this case. The costs of those additional works are fixed as I have already recited.

24. In my judgment there is also as the appellant's submitted an inconsistency in the reasoning of the LVT's decision. On the one hand the LVT says in paragraph 41 that the works which were actually carried out were not within the ambit of the qualifying works described in the consultation notices. On the other hand, in paragraph 42 the LVT says that it allows the costs of those works but on the footing of the estimated costs of the cheaper version of the works plus an uplift of 10%. Those two findings are inconsistent. If it is right that works have been carried out without compliance with the consultation requirements as a matter of law those costs are not recoverable save to a cap of £250. Therefore had the LVT been being consistent and applying the law as they interpreted it, the result would have been that the appellant would not have been able to recover for any works in relation to the windows because the works which were comprised within the lower estimate of £3,025.00 were not carried out but for the works which were carried out costing £8,107.50 there had no been any proper consultation from which it would follow that the total recoverable in respect of each flat for the works which actually carried out would have been confined to £250.

25. I therefore allow the appeal. In short the works which were in actual fact carried out were comprised within the stage 1 and stage 2 consultation notices. Secondly the amount of those works being fixed price plus the consequential increase in preliminaries and also the inevitable increase in scaffolding should also be recoverable, there being no evidence that either of those additional sums were unreasonable before the LVT.

26. I should also say that in my judgment paragraphs 40 and 41 of the decision appear to misunderstand the nature of the evidence before it. The contract envisaged alternative solutions to the defective windows, the cheaper and the more expensive version. The decision refers to additional works being added to the contract, but that of course is not correct, because these were alternative

works which were greater than that which was the other alternative. Both were envisaged by the contract and were recoverable and recovered within the framework of the contract. It is inaccurate to describe the works as being "additional" in the sense that there is something new not previously envisaged by the contract and therefore added to it. If they were completely new works which had not been in anybody's mind at the time, it may possibly follow that a new consultation should have been carried out, but that is not the case here.

27. In oral submissions Mr Oyekinka said that it was his view that it was unreasonable or unnecessary for the work to be carried out because the windows were not rotten and secondly, and in any event, the cost of the works were unreasonable. However the respondent accepted that before the LVT he did not challenge the relevant witness as to the reasonableness or necessity for carrying out the works. Secondly there was no evidence of any nature whatsoever before the LVT as to the reasonableness of carrying out the so-called additional works by Mr Oyekinka.

28. What needs to be borne in mind here is that as far as the statutory framework is concerned even after the consultation provisions have been complied with and the works carried out, it remains open to a tenant to challenge the reasonableness of the works and it is not uncommon for tenants to challenge the actual cost of execution of the works. In this case the tenant, the respondent did not avail himself of that opportunity. What appears to be happening here is that the Tribunal was trying in the circumstances it was faced with to be reasonable from both the landlord and the tenant's perspective. On the one hand allowing the landlord to recover for works in the LVT's (incorrect) view had not been subject to statutory consultation requirements and on the other hand, allowing the tenant to have a reduction in those costs because they seemed higher than originally envisaged (even though they were not). However these decisions must be based on the law and the evidence.

29. For the reasons already set out I allow the appeal. In short the respondent must now pay the appellant the outstanding balance of £6,054.18.

Dated: 9 June 2014

His Honour Judge Nigel Gerald