UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case Number: LRX/82/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – right to buy – 5 year limitation on service charges – "straddling" these charges – Housing Act 1985, ss 125 and 125A, Sch 6 para 16B – appeal dismissed

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

BETWEEN:

LONDON BOROUGH OF SOUTHWARK **Appellant**

and

MS BEE A SMITH **Respondent**

Re: 35 Iliffe Street,
London SE17 3LJ

Before: Her Honour Judge Walden-Smith

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on
17 May 2012

Angela Jack instructed by the Communities, Law and Governance, Department of Southwark Council, on behalf of the Appellant
The Respondent in person

No cases are referred to in this decision

DECISION

Introduction

1. This is an appeal by way of review from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel dated 7 March 2011. The Appellant applied for permission to appeal on 31 March 2011. Permission to appeal was refused by the LVT on 8 June 2011.

2. An application was made to the Upper Tribunal (Lands Chamber) on 27 June 2011 for permission to appeal. Permission to appeal was granted by the President on 31 August 2011 with the following observations:

> "It is appropriate that the Upper Tribunal should consider on appeal whether the LVT's conclusion that the costs on which the service charge was based should be limited to those in the section 125 estimates was correct in law and in principle. The appeal is confined to this issue and will be dealt with by way of review."

3. The Appellant contends that the LVT erred in the decision promulgated on 7 March 2011 by deciding that the Respondent was not liable to pay all of the sums claimed as service charges, in particular with respect to the charges for works listed in a notice served pursuant to the provisions of section 125A of the Housing Act 1985. The Respondent seeks to uphold the decision of the LVT.

Submissions

4. In addition to oral submissions received on 17 May 2012, a statement of facts and issues was received from both the Appellant and the Respondent (not agreed), and skeleton arguments were received from counsel acting on behalf of the Appellant and from the Respondent, who has been acting in person throughout.

5. Subsequent to the oral hearing, the Appellant provided further submissions on 21 May 2012 which were responded to by the Respondent on 28 May 2012. These further submissions had not been requested from the Appellant and their provision has delayed this decision. The Respondent's reaction to the additional submissions is that they should not be taken into account but, if taken into account, the additional submissions do not have any relevance to the matters subject to appeal.

The Background

6. The Appellant is a local authority. The Appellant is the freehold owner of premises known as 35 Iliffe Street, London SE17 3LL ("the premises"). The Respondent is the long leaseholder of the premises which comprise a one-bedroomed flat within a large block of flats owned by the Appellant.

7. The original long leaseholder was Stephen McDowell. He had purchased the premises from the Appellant on 4 June 2001 pursuant to the provisions of the "Right to Buy" legislation contained within the Housing Act 1985.

8. Mr McDowell had been the statutory tenant of the Appellant and the notice served pursuant to the provisions of section 125 of the Housing Act 1985 ("the section 125 notice") set out that the market value of the property was £115,000 but, with a discount of £38,000, the purchase price was £77,000. The offer to purchase was made by the Appellant to Mr McDowell on 6 December 2000 and was accepted on 29 January 2001.

9. Paragraph 5 of the section 125 notice provided that the estimated service charge in respect of works of repair was set out in Appendix 1 to the section 125 notice which provided that the total estimated total service charge was £1580.21, being £380.21 for capital repairs and £1200.00 for redecoration.

10. Within the section 125 notice was the explanation that under paragraph 16B of Schedule 6 to the Housing Act 1985, the liability to contribute to repair costs during the initial period (normally the first five years of the lease) is limited. Further explanation was provided that under paragraph 16C of Schedule 6 to the Housing Act 1985 the liability of the leaseholder to pay improvement contributions during the initial period of the lease is limited. The provisions of paragraph 16B of Schedule 6 to the Housing Act 1985 are set out below.

11. The section 125 notice set out that the reference period for the estimates began on 1 June 2001 and ended on 31 March 2007. Further explanation was provided within the section 125 notice that the reference period adopted for the purpose of the estimates will not be the same as the initial period unless the lease is granted on the date expected when the estimates were made. The lease of the premises was in fact granted to Mr McDowell on 4 June 2001 ("the Lease").

12. The Respondent bought the long lease of the premises from Mr McDowell on 30 July 2004 and notice of transfer and charge was given to the Appellant on the same date.

13. The Respondent made it clear, both before the LVT and in her skeleton argument to this Tribunal, that she had been concerned about ascertaining the extent of protection that she was to enjoy by reason of the section 125 notice served upon Mr McDowell if she were to purchase the premises and the next date for major works to be undertaken.

These were not new points taken before this Tribunal and could not have taken the Appellant by surprise. I am satisfied that she did seek assurances from the Respondent and received those assurances. In particular, the page added to the appeal bundle by the Respondent evidences that she was sent a copy of the service charge notice from 2000 on 5 (or 8) July 2004 prior to the purchase of the long lease.

14. A statutory notice of intention to carry out external refurbishment works to the Pullens Estate, of which the premises formed part, was served upon the Respondent by letter dated 31 May 2005. A notice of proposal for those works was served on 2 August 2006 pursuant to the provisions of section 20 of the Landlord and Tenant Act 1985 (as amended by the Commonhold and Leasehold Reform Act 2002). That notice provided that the cost of the works was to be £643,263.49. The statement of Jenny Dawn dated 7 December 2010, made on behalf of the Appellant and provided to the LVT, explained that each property is given a basic weighting of four units and an additional unit for each bedroom. As the premises comprise a one-bedroomed flat it attracted a weighting of five units. The entire block was 480 units on the same weighting so that the proportion of the cost of works attributable to the premises was 5/480 x £643,263.49 which equated to £6,700.66. In addition to that figure was added a professional fee of 4.4% and an administration fee of 10%, giving a total estimated service charge of £7,665.56.

15. Subsequent to that section 20 notice served on 2 August 2006, a further notice was served on 30 August 2006 setting out the protection of section 125 notice in the following terms:

> "During the five year period, starting from the date of completion of sale, leaseholder's service charges for repair costs will be limited to those items included in the Appendix B of the section 125 notice and only up to the amount specified, plus an allowance for inflation."

The estimated service charge of £7,665.56 was reduced to £1664.29 on the basis of the limitations imposed by section 125 and the notice further provided that "the service charges have been calculated directly from the specification and are an estimate only" and further "we will recalculate your service charges in accordance with the actual costs incurred once the contract has completed…"

16. A further notice was served on 15 September 2006, recalculating the price of the major works and reducing the figure to take into account the limitations imposed by section 125. The figure estimated was then £1,568.23.

17. No further section 20 notice was served and on 26 February 2007 a package of external refurbishment works was commenced. Those works did not complete until 12 March 2008 and the defects period ended on 12 March 2009.

18. On 14 July 2009 the Appellant served on the Respondent a final account setting out that the actual cost of the work to the block was £445,750.99 and the proportion attributable to the premises was £4,643.24. Adding the professional fee and the administration fee and taking away the section 125 reduction the final account service

charge was £4758.87. The reason for the substantial difference between the estimate and the final account is that the works had been carried out, in the main, outside the reference period. The Appellant had adopted a system of apportionment known as "straddling" so that the Respondent was charged fully for the 49.29 weeks of the 54 week contract which fell outside the reference period and the items of work included in the section 125 notice had their limits pro-rated for the 4.71 weeks of the contract, subject to the statutory allowance for inflation.

19. The notice on 14 July 2009 was the first occasion upon which the Respondent had been informed that the costs to her were considerably greater than they had been represented to her. The LVT described it as "an unexpected bill for three times the amount estimated."

The LVT

20. By an application made on 28 August 2010 and received on 1 September 2010, the Respondent (then the Applicant) applied to the LVT for a determination under section 27A of the Landlord and Tenant Act 1985 as to the liability to pay the service charge claimed by the Appellant (the Respondent to the application to the LVT) with respect to major works charged in a final account pursuant to the terms of the long lease.

21. The central issue for determination before the LVT was whether the method of determination used by the Appellant for the apportionment of cost was valid in view of the terms of the section 125 notice.

22. It was clear from the submissions made before me, both orally and in writing, that the Respondent was also contending that she had acted to her detriment on the basis of representations made to her by the Appellant prior to purchasing the long lease. The Respondent was contending that the Appellant was bound by the representations that the Respondent would not be charged more than that set out in the section 125 notice as the cost of the external works to be undertaken to the premises. The Respondent was adamant that she would not have purchased the long lease had she not been informed that her liability for service charges was so limited.

23. This secondary point was a matter that was raised before the LVT and a consideration of the Decision as a whole reveals that it was an important part of the LVT's consideration. It is clearly an important matter for this Respondent, albeit that the Appellant only sought permission to appeal on the principled point with respect to the interpretation to be given to the provisions contained in section 125 of the Housing Act 1985. The permission to appeal as to "whether the LVT's conclusion that the costs on which the service charge was based should be limited to those in the section 125 estimates" includes consideration of this secondary point.

24. The LVT concluded that one of the objectives of a section 125 notice was

> "effectively to provide a guarantee that certain planned capital work would be carried out at a limited cost, and for a period of five years no unplanned work would be chargeable at all. It would seem unreasonable that having given such a guarantee a lessor can circumvent the guarantee by delaying the planned work and then charge the full amount for it. There might often be cases where the planned work was delayed through no fault of the lessor, but the lessee had no control at all over that matter, and any loss should properly lie with the lessor, particularly as the lessor is statutorily entitled to add an amount for inflation to the limited cost. This appears to be the true effect of paragraphs 16B and 16C of schedule 6 to the Housing Act 1985. In this case, the Respondent [Appellant] must have known prior to 31st May 2005 from it survey what works were required. The tendering and consultation process was too protracted, in the Tribunal's view. Also, some months of delay were solely the result of the Respondent's [Appellant's] own procedures, rather than external factors outside its control [para 18]. The Tribunal therefore decided that while the formula used by the Respondent in straddling cases was not unreasonable, the decision to apply the straddling formula had to be reasonable. In this case the Respondent had not demonstrated that it applied the formula reasonably. The Tribunal decided that the reasonable cost of doing the works subject to this application should be limited to an amount not greater than the amount specified in the section 125 Notice with an amount added for the appropriate statutory inflation figure [para 19]."

25. The Appellant criticises the decision of the LVT on a number of grounds. First, that the LVT were wrong to consider the issue before it from first principles. It was a matter of statutory interpretation. Second, that the LVT's finding that a section 125 notice provides a guarantee that works will be carried out within a specified period is unsupported by the statute. Third, that the LVT's decision that no unplanned work is chargeable within a five year period is also unsupported by the statute. Fourth, that the LVT's decision that works referred to in the section 125 notice but carried out outside the initial period or the reference period must be reasonable is an error. Fifth, that there is no guarantee (either express or implicit) within the section125 notice that certain works will be carried out within a specified period.

The Relevant Provisions of the Housing Act 1985

26. Section 125 of the Housing Act 1985 provides, insofar as it is relevant to this issue, the following:

> "(1) Where a secure tenant has claimed to exercise the right to buy and that right has been established (whether by the landlord's admission or otherwise), the landlord shall
>
> (a) …
>
> (b) …
>
> Serve on the tenant a notice complying with this section

(2) …

(3) …

(4) Where the notice states provisions which would enable the landlord to recover from the tenant –

(a) service charges, or

(a) improvement contributions

the notice shall also contain the estimates and other information required by section 125A (service charges) or 125B (improvement contributions)

(4A) …

(5) …"

Section 125A of the Housing Act 1985 provides, insofar as it is relevant to this issue, the following

"(1) A landlord's notice under section 125 shall state as regards service charges

(2) A landlord's notice under section 125 given in respect of a flat shall, as regards service charges in respect of repairs (including works for the making good of structural defects), contain –

(a) the estimates required by subsection (3), together with a statement of the reference period adopted for the purpose of the estimates, and

(b) a statement of the effect of –

paragraph 16B of Schedule 6 (which restricts by reference to the estimates the amounts payable by the tenant), and section 450A and the regulations made under that section (right to a loan in respect of certain service charges).

(3) The following estimates are required for works in respect of which the landlord considers that costs may be incurred in the reference period –

(a) for works itemised in the notice, estimates of the amount (at current prices) of the likely cost of, and the tenant's likely contribution in respect of, each item, and the aggregate amounts of those estimated costs and contributions, and

(b) for works not so itemised, an estimate of the average annual amount (at current prices) which the landlord considers is likely to be payable by the tenant.

27. Section 125C(1) of the Housing Act 1985 defines the reference period as being the period beginning on such date not more than six months after the notice is given as the landlord may reasonably specify as being a date by which the conveyance will have been made or the lease granted and ending five years after that date or where the notice states

that the conveyance or lease will provide for a service charge or improvement contribution to be calculated by reference to a specified annual period with the end of the fifth such period beginning after that date.

28. Paragraph 16B of Schedule 6 to the Housing Act 1985 provides that where a lease of flat requires the tenant to pay service charges in respect of repairs, including works for the making good of structural defects, the liability of the tenant 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 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 services 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 the 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.

Limitation of the Service Charge

29. Sections 125 and 125A of the Housing Act 1985 provide that the local authority landlord is to serve on the tenant who claims to exercise the right to buy an estimate for works in respect of which the landlord considers that costs may be incurred in the reference period.

30. Paragraph 16B of Schedule 6 to the Housing Act 1985 makes it clear that the tenant is only liable to pay the amount shown as his estimated contribution in respect of works itemised in the estimates contained in the section 125 notice (together with an allowance

for inflation) in respect of costs incurred in the initial period. The initial period begins with the grant of the lease and ends five years after the grant. Paragraph 16B of Schedule 6 to the Housing Act 1985 further makes it clear that there is a limitation on the amount to be paid with respect to works not so itemised falling with the reference period.

31. This is a matter of statutory interpretation from the wording of the section.

32. The landlord is obliged to set out, by virtue of the provisions of section 125 and 125A of the Housing Act 1985, once the right to buy has been established, the costs that it considers may be incurred in the reference period. The purpose is to enable a prospective purchaser, exercising its right to buy, to know what its liability might be for repairs (including the making good of structural defects) for the period of the reference period. Beyond the reference period, the tenant does not have any statutory protection with respect to works that may be carried out.

33. The landlord does not guarantee, pursuant to the provisions of sections 125 and 125A of the Housing Act 1985 that the works, for which an estimate has been provided, will in fact be undertaken within that reference period. If the works are not in fact carried out within the reference period then the section 125 notice does not limit the amount of service charge that can be levied upon a tenant.

34. Further, contrary to the findings of the LVT, the landlord is not prohibited from charging for any previously unplanned work. Paragraph 16B(3) of Schedule 6 to the Housing Act 1985, set out above, expressly provides for the limitations for charging for such works.

35. The LVT accepted in its decision that the method of apportioning costs for works which "straddled" the reference period was a proper method of apportioning costs: namely charging in full for those works carried out after the reference period and charging a pro-rata sum for those works carried out during the reference period. In this particular case, 49.29 weeks of the works were carried out in a period outside the reference period and the first 4.71 weeks of the works was carried out within the reference period. There was no challenge to the Appellant's attribution of when the costs were incurred or the Appellant's calculations.

36. In conclusion on these points, the section 125 notice does not guarantee that works will be carried out within a particular period or that the costs estimated will in fact be incurred during that period.

37. If works are carried out within the initial period and costs incurred then if those works are itemised in the estimates contained in the section 125 notice then they are restricted to the amount shown as the estimated contribution, together with an inflation allowance (paragraph 16B(2) of Schedule 6 to the Housing Act 1985) and with respect to works not so itemised in the section 125 notice the tenant is not required to pay in respect of works at a rate exceeding the average amounts (paragraph 16B(3)(a) and (b)

of Schedule 6 to the Housing Act 1985) depending upon whether the works fall within the initial period falling with the reference period or the initial period not falling within that reference period.

38. "Straddling" the costs over the period that falls within and outside the reference period is, in my judgment, an acceptable method of dealing with costs for works which fall both within and outside the reference period. Such a method of calculating the service charge does not fall foul of the statutory provisions contained in sections 125 and 125A of the Housing Act 1985 and Paragraph 16B of Schedule 6 to the Housing Act 1985.

39. Having dealt with those points of principle, that is not the end of the matter in this case.

40. In the Decision, the LVT were clearly grappling with the fact that they were satisfied that the Respondent had made enquiries about the proposed work and that, prior to the purchase of the lease, she had been assured by an employee of the Appellant that she would be protected by section 125 and would take the benefit of the "Appendix B" reduction, and that the Respondent had acted upon that assurance.

41. Estoppel by representation arises where a person has, by either words or conduct, made to another a representation of fact, either with knowledge of its falsehood or with the intention it should be acted upon, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other has acted upon such representation and thereby altered his position. In such circumstances an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be. Estoppel prevents a person from denying what he has once said.

42. In this matter, the LVT found that the Respondent had carried out reasonable enquiries about the proposed work but had not been informed of the actual cost until well after the work had been completed. The Respondent had told the LVT that she believes she had spoken to Mr Emakpose about this but, having heard his evidence on this point, the LVT were not satisfied that she had received any assurances from him. In the section 20 notice served upon the Respondent in August 2006 the estimated contribution was £1,568.23 to include the "Appendix B" reduction and the Respondent had submitted in the LVT hearing that she had spoken to Carla Blair at that time and had been specifically assured by her that the Appendix B notice would still apply and she would be covered. The LVT accepted the Appellant's submission that the Respondent had not referred to conversations she claimed to have had with the staff of the Appellant prior to making oral submissions at the LVT hearing and that her memory might not be entirely accurate on the details; but crucially, the LVT accepted the general thrust of her submission that "she had made fairly strenuous efforts to discover what her costs were likely to be, in light of the section 125 Notice and the possible expiry of the reference period, and had still been presented with an unexpected bill for three times the amount estimated by the Respondent in September". The LVT found that the Respondent had

made reasonable efforts to discover her likely costs relating to the major works contract and that the Appellant had failed to warn the Respondent of the major cost escalation of its original estimate.

43. I am satisfied, on the basis of the facts found by the LVT, that the Appellant is estopped from denying that the cost of the works was limited to that set out in the section 125 notice in this particular case. That finding is limited to particular circumstances of this case.

44. Consequently, while I find that "straddling" is an acceptable method for the apportionment of costs and that the section 125 notice does not provide a guarantee that works will be carried out within a particular period or that the costs estimated will in fact be incurred during that period; in the particular circumstances of this case, I find that the Appellant was not entitled to charge the full amount set out in the final account dated 14 July 2009. The Appellant is limited, by reason of estoppel, to the amount specified in the section 125 notice together with the inflationary uplift.

45. The Appellant therefore succeeds on the points of principle with respect to the interpretation to be given to section 125 notices but, in the particular circumstances of this case, I find that the final conclusion of the LVT should be upheld. The appeal is therefore dismissed.

Dated 21 August 2012

Her Honour Judge Karen Walden-Smith