2008

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

Reference number:	LON/00BE/LSC/2005/0248
Property:	2 Glebe House, Slippers Place, London SE16 2EP
Applicant:	Mr I Jimenez (Tenant)
Respondent:	London Borough of Southwark (Landlord)
Appearances:	The Applicant appeared in person For the Respondent: Mr J Joseph of the Respondent's Leasehold Management Unit Mr D Lebby, MIIE, Electrical Project Officer
Tribunal:	Mr A J Andrew LLB Mr D Levene OBE MRICS Mrs A Moss
Application Dated:	26 August 2005
Directions:	5 October 2005
Hearing and Inspection:	9 January 2006
Decision:	26 February 2006

Decision

1. We determined that the sum of £1,826.34 was payable by the Applicant to the Respondent by way of service charge. That sum was the Applicant's share of the estimated cost of installing new electricity mains to Glebe House together with associated administration charges and supervision fees and was payable now.

2. We ordered the Respondent to pay to the Applicant the sum of £250 being the whole of his application fees.

Background

3. The Applicant applied under Section 27A of the Landlord and Tenant Act 1985 ("the Act") for an determination of the amount payable by way of service charge, in respect of the estimated cost of installing new electricity mains in Glebe House together with associated administration charges and supervision fees. The Directions authorised us to consider ordering the reimbursement by the Respondent of the Applicant's fees. No application was made under Section 20C of the Act for an order limiting the recovery of the Respondent's costs incurred in these proceedings, through the service charge.

Facts

4. On the basis of our inspection, the documents included in the hearing bundle to which our attention was drawn and the evidence tendered and submissions made by or on behalf of the parties, at the hearing, we found the following relevant facts: -

   a. Glebe House is a four-storey block of 20 two-storey maisonettes built in approximately 1965. It forms part of a very large estate, which includes a number of other similar buildings.

   b. The Property was purchased under the Right to Buy legislation and is held by the Applicant under a lease dated 14 May 1990 ("The Lease").

   c. The original electricity cables connecting the individual maisonettes to the mains supply ran through internal ducts, in the fabric of Glebe House. An internal report concluded that this wiring was at or near the end of its useful life and should be replaced. Modern wiring, of the type under consideration, is now considerably thicker than that originally installed and could not be drawn through the existing internal ducts. Consequently it was decided to run the new wiring round the exterior of Glebe House and the other blocks referred to above. It was proposed that the wiring to service the lower maisonettes would be run round the exterior of Glebe House at the height of the joists

supporting the first floor with "spurs" being taken into each maisonette, at that level, to connect with the fuse boxes situated in the under stairs cupboards. The external wiring was to be situated immediately above an external gas main and was to be largely supported by metal wiring plates.

d. Approval for the proposed re-wiring was given in 2002. A specification was prepared and put out to tender. Three tenders were received, the cheapest being from EK Mechanical Services Ltd in the sum of £417,381.60. Section 20 consultation notices were issued on 28 July 2003. The cost of re-wiring Glebe House was put at £23,389.86. To that sum was added the Respondent's management fee, assessed on a sliding scale, at £1,286.44 (5.5%) and a professional fee of £1,988.14 (approximately 8.5%). Thus the total estimated cost was £26,664.44 of which the Applicant's contribution was said to be £1,333.22 (1/20th).

e. However after the consultation notices had been issued it was discovered that EK Mechanical Services were not on the Respondent's list of approved contractors. An internal report of 6 August 2004 states that: *"Initially this was not seen to be a valid reason not to appoint them.....however before the Delegated Report was actually submitted and further to advice from Strategic Procurement, it was decided that, because the contractor was not on the approved list and there was no guarantee that suitable references would be received, the tender process should be declared void and the contract should not be let."*

f. The contract was re-tendered and this time four completed tenders were received from approved contractors, the lowest being from P A Finlay and Co Ltd in the sum of £504,218.00. A comprehensive statutory consultation notice was issued to the leaseholders on 3 August 2004. Details of all the tenders were supplied. The cost of re-wiring Glebe House, re-chargeable to the leaseholders, was put at £33,206.10. To this was added a management fee of 10% and a professional fee of 5%. The Applicant's share of the total cost was put at £1,909.35 (1/20th).

g. The Applicant did not respond to the statutory consultation notice and indeed he had not responded to an earlier notice issued on 17 November 2003 inviting him to nominate a contractor, from whom an estimate would be obtained.

h. The work was put in hand and has been substantially completed although the defects liability period had not expired at the date of the hearing and the Respondent accepted that some snagging works remained outstanding.

i. The Applicant was on 29 March 2005 invoiced for his estimated contribution towards the total cost (£1,909.35), which was demanded as an interim on account payment. The final account has not yet been prepared although at the hearing Mr Joseph said that the estimate would not be exceeded: consequently the Applicant's ultimate contribution to the cost would not exceed that already invoiced.

The Lease

5. The service charge provisions are contained in the third schedule. The service charge year runs from 1 April. Prior to the commencement of each year the lessor is to prepare an estimate of the service charge for the forthcoming year. The lessee is to pay that estimate by four equal instalments on 1 April, 1 July, 1 October and 1 January. At the end of each service charge year the lessor is to prepare an account of the costs actually incurred during the year and is required to inform the lessee of his/her contribution. If that contribution exceeds the interim on account payments then the balance is to be paid within the one month. If however the interim on account payments exceed the contribution then the surplus is to be carried forward and set against the following years interim on accounts payments.

6. The costs to be taken into account in calculating the service charge are set out in clause 7 of Part 1 of the Third Schedule. The Applicant did not suggest that the basic re-wiring costs were not recoverable under the terms of his lease and it is only necessary to recite sub-clause 7(7) which reads as follows: "*The employment of any managing agents appointed by the Council in respect of the building or the estate or any part thereof PROVIDED that if no managing agents are so employed then the Council may add the sum of 10% to any of the above items for administration.*"

Issues in Dispute

7. No final account having been issued we were effectively being requested to determine, under sub-section 27A(3), whether if costs were incurred a service charge would be payable and if so the amount that would be payable. As far as the re-wiring was concerned the Applicant said both that the work had not been carried out to a reasonable standard and that the cost had not been reasonably incurred. He suggested that the estimate obtained from E A Finlay & Co Ltd was suspect. In particular he criticised the aesthetics and suggested that the cables presented a security risk in that they could assist an intruder to gain access to the first floor windows.

8. The Applicant also took issue with the professional and management fees, which he considered to be unreasonable. In

particular he objected to their being charged as a percentage of the cost of the specified work.

9. The Applicant took no issue on the terms of the lease. He did not suggest that the costs could not be recovered through the service charge provisions of the lease. Equally he did not suggest that there had been any failure on the part of the Respondent to comply with the statutory consultation procedure.

Reasons for our Decisions

10. In answer to our questions the Applicant accepted that the work was necessary. He did not dispute Mr Lebby's evidence, based on forty years' experience, that the old wiring was at or near the end of its useful life and did not comply with current regulations. Although we agreed with the Applicant that the external wiring was somewhat unsightly the only practical alternative would have been to take it underground and increase the size of the old ducts embedded in the fabric of Glebe House. Such a solution would have substantially increased the cost. Given the age and appearance of Glebe House we considered that the solution adopted was reasonable and it was not without significance that the Applicant had not taken the opportunity to respond to the initial consultation notices.

11. Equally we were not convinced that the new wiring presented an increased security risk: it was sited above an existing external gas pipe which would have offered an intruder a far more effective purchase, to gain entry to an upper window. Although the Applicant had drawn our attention to a floorboard on the first floor landing that had been cut, to permit access to the new cabling, it was a reasonable measure and did not justify any reduction in the Applicant's contribution.

12. As far as the cost of the work was concerned the Applicant was unable to suggest a reasonable cost, saying that he would leave the matter entirely to us. We were concerned by the considerable increase in the estimated cost for Glebe House during a period of just over a year. We were not surprised that the Applicant had drawn the conclusion that the estimate submitted by PA Finlay & Co Ltd was suspect. There was however no evidence before us to support the Applicant's conclusion. We were conscious that reasonable cost does not equate to lowest cost. For any particular item of work there will always be a band of reasonable cost and provided that the estimated or actual cost falls within that band it will be reasonable. During the process described above seven contractors tendered for the work and the estimate submitted by P A Finlay & Co Ltd was the second lowest and was consistent with the generality of the estimates received. Although the Respondent could be criticised for initially obtaining an estimate from an unapproved contractor there was no evidence before us to suggest

that the estimated cost was inherently unreasonable. The estimate had been obtained as a result of price competition and we concluded that the estimated cost was reasonable.

13. As far as the professional fees were concerned it was usual for these to be calculated as a percentage of the cost of the specified works. 60% of the fees would be paid to Southwark Technical Services for providing contract administration and Clerk of Works services whilst 40% would be paid to Nigel Ross & Partners for quantity surveying and planning supervisor services. The fees appeared to us to be entirely reasonable and the Applicant had offered no evidence to suggest otherwise.

14. Turning to the Respondent's management fee it was again reasonable for such a fee to be calculated as a percentage of the cost of the works. We were however concerned that in the space of just over a year the fee had risen from 5.5% of the total estimated cost to 10%. Mr Joseph's explanation was that the scale upon which the original fee had been calculated had been abolished: we were more inclined to think that someone in the Respondent's office had read the lease and in particular sub-clause 7(7) of Part 1 of the Third Schedule recited above. Certainly at the hearing Mr Joseph relied on that sub-clause to justify the management fee.

15. The sub-clause does not however provide for a fixed fee of 10%. The use of the word *"may"* indicates a discretion to add a management fee of 10%. As a public body the Respondent had to exercise that discretion reasonably. Consequently we concluded that the discretion enabled us to consider the reasonableness of the proposed management fee and if unreasonable to substitute a reasonable one.

16. In July 2003 the Respondents had clearly considered that a management fee of 5.5% was reasonable. On the basis of the scale then used the management fee for work costing in excess of £500,000.00 would have been 5%. We had heard no evidence that would justify a doubling of the management fee during a period of just over a year. We were not convinced by Mr Joseph's assertion that the new statutory consultation procedures would have justified such an increase. In any event if they had initially obtained estimates from only approved contractors there would have been no need to repeat the consultation. Furthermore although 10% is a usual and reasonable management fee to apply for ongoing annual expenditure we considered that it was excessive when applied to a major works contract of this nature where the supervision and other professional services are contracted out and charged separately.

17. For each and all of these reasons we considered that the proposed management fee of 10% was unreasonable and that it should be substituted with a fee of 5%. In this case that would result in a

reduction in the Applicant's contribution to the estimated cost from £1,909.35 to £1,826.34. On the basis of the terms of the Applicant's lease considered above the total estimated cost was payable by four equal instalments on 1 April 2005, 1 July 2005, 1 October 2005 and 1 January 2006: the last of those dates having passed the total sum was now due and payable. We noted from the copy correspondence in the hearing bundle that the Respondent accepts payment over 12 months or longer.

18. As far as the fees were concerned although we had found substantially in favour of the Respondent we considered that it had, to a large extent, brought the application upon itself by initially accepting an estimate from an unapproved contractor and issuing consultation notices and invoices based upon that estimate. It was not unreasonable that the Applicant's suspicions were aroused by the issue, just over a year later, of a further consultation notice indicating a substantial price increase. In such circumstances we considered it just and equitable to order the Respondent to refund the Applicant with his fees incurred in making his application.

19. Although the Applicant had made no application under Section 20C we hoped that the Respondent would not seek to recover its costs incurred in these proceedings through the service charge. If an application had been made then, for the reasons set out in the previous paragraph, we would have been minded to make an order under Section 20C and it remains open to the Applicant to make an application under that section.

Chairman:.....(A J Andrew)

Dated: 26 February 2006