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Ref: LON/00AM/LSC/2010/0015

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER ss 27 AND 20C OF THE LANDLORD AND TENANT ACT 1985

Applicant: Mr M Hall

Represented by: In person

Respondent: London Borough of Hackney

Represented by: Miss A Gourlay of Counsel instructed by Ms C Tsiga, Solicitor, London Borough of Hackney

Premises: 6 Vinson House, Cranston Estate, London N1 6TS

Hearing date: 29 April 2010

Members of the Leasehold Valuation Tribunal: Mrs F R Burton LLB LLM MA
Mr W J Reed FRICS
Mrs L Walter MA

Date of Tribunal's decision: 10 June 2010

LON/OOAM/LSC/2010/0015

6 VINSON HOUSE, CRANSTON ESTATE, LONDON N1 6TS

BACKGROUND

1. This was an application dated 6 January 2010 for determination of liability to pay and the reasonableness of service charges pursuant to s 27A of the Landlord and Tenant Act 1985. There was also an application for a s 20C Order under the Act. The subject property is 2 bed flat on the second floor of a local authority block containing 16 flats. The year in issue is 2009-2010.

2. Attached to the Application was a copy of a letter dated 5 November 2009 to the Applicant from the Hackney Homes Major Works Team Leader in which she - (a) referred to a Section 20 Notice dated 27 January 2009, in which the Applicant had been advised that the estimated cost to the block was £514,947.80 and that his contribution would be £28,143.97, and (b) referred to the terms of the Lease under which the Applicant was required to make a payment of 75% of this sum. She enclosed a schedule of the full estimated cost of the works, and an interim invoice for £21,107.98 with a calculation showing how this sum had been calculated, based on a factor of 4/85 - 4 being the unit factor applicable to a two-bedroomed flat and 85 being the total number of units within the block.

3. The Applicant claims that the works involved, particularly to the windows, are works of improvement and that the Lease does not require him to pay for such. He also challenged quantum of the amount claimed on the grounds that it was not reasonable for a Lessee to be required to pay such a disproportionate amount as had been billed especially as other Lessees had installed identical windows in 2005 for a much lesser sum, showing that the Landlord had not obtained competitive rates. On 9 February 2010 the LVT issued Directions (subsequently varied) following an oral Pre-Trial Review, setting the case down for hearing on 29 and 30 April 2010. A copy of the Lease, dated 5 March 1990, for a term of 125 years was provided.

THE HEARING

4. At the hearing the Applicant attended personally and presented his case in person. The Respondent Landlord was represented by Miss A Gourlay of Counsel, instructed by Ms C Tsiga, Solicitor to Hackney Council. Mr Gareth Lewis, the Major Works Team Leader of the Landlord, Hackney Homes, and Mr Terry Green, also of Hackney Homes, attended to give evidence.

THE CASE FOR THE APPLICANT

5. The Applicant, Mr Mike Hall, submitted that half the residents of his block were Tenants of the Landlord and half Lessees like himself, and as Lessee his liability to pay for works under his Lease did not cover those works which were improvements, despite the fact that Miss Gourlay claimed in her written submissions that the Ninth Schedule repairing obligation of the Landlord meant that these repairs, whether improvements or partial improvements, were covered as the survey she produced showed that these windows were in need of repair. He submitted that the new windows were not a "like for like" replacement: they were double glazed whereas those replaced were single glazed. Miss Gourlay's submissions contended that case law showed that whether the windows were a repair or an improvement, or a repair with an element of improvement was a matter of fact and degree and that there had been no evidence that single glazed units were any cheaper than those installed.

6. The Applicant accepted that Miss Gourlay was relying on the clause in the Lease which required the Landlord to "renew" as well as to "repair", took note of her reliance at page 10 in her skeleton argument on the case of *Minja* to support this argument and was happy for the LVT to interpret and decide the meaning of his Lease, but also wanted to point out that the Landlord had done negligible work since 1990, the works had been neglected since at least 2002 until they were effected in 2009, and he regarded this as significant neglect that had probably increased the cost. He accepted Miss Gourlay's argument in her skeleton that delay in doing the work was not a reason for not paying for the works when they were eventually done and that the cost, for example, of scaffolding during intervening years if the work had been tackled earlier might have exceeded the final cost when the work was eventually all done in 2009. Nevertheless he pointed out that the windows could be installed

from inside the flats so that scaffolding might not have been required at all, although he accepted that he had not monitored the condition of the windows over time as he had only acquired the flat some 5 years previously. He could not understand why quotations he had obtained were cheaper than the Landlord's, when the latter should be able to exercise some bulk purchasing power.

7. The Applicant was also concerned by the absence of a reserve fund. He argued that if there was a lifespan approach to repairs and renewals there should be a reserve fund to enable Lessees to save towards such a big bill (£28,000 in his case, which he was expected to pay all at once). It seemed that the Landlord Council had not provided for such a fund although the Lease permitted one. However it seemed that the Applicant had not taken any professional advice at purchase, other than the usual cursory conveyancing questioning by his solicitor about expected repairs and service charge liability, although he accepted that the life expectancy of the flat roof of the building and metal windows should have been suspect to a valuer. He accepted that he had been told that works would be needed and that there had been consultation on a qualifying long term agreement, but this had been in 2003 before he had acquired his flat. There had then been appropriate notices about the works when the contractor had been appointed.

THE CASE FOR THE RESPONDENT LANDLORD

8. Miss Gourlay had presented a helpful skeleton argument for which the Tribunal was grateful. She said that while the total amount sought was £28,143.97 only 75%, £21,107.98, was now sought by way of interim payment. She pointed to the Clauses of the Lease which required the Lessee to pay these charges, including Clause 8 which required the Landlord "to manage the Estate and the Block in a proper and reasonable manner" and the Ninth Schedule which required the Landlord, at the Lessee's expense, to keep them "in good and substantial repair and condition (and wherever necessary rebuild and reinstate and renew and replace all work and damaged parts) ..." She pointed to the s 20 Notice dated 27 January 2009, setting out the nature of the works and the reason for them, and submitted that the flat roof work and the replacement windows had taken place between March and October of that year. Both had guarantees. On 5 November 2009 the Lessee had been informed by letter of his

contribution in the amount stated although this had since crystallised at the lower figure of £23,153.96.

9. Miss Gourlay relied on *Forcelux v Sweetman* [2001] 2 EGLR 174 for the proposition that reasonableness of a charge was not related to whether the work could have been done more cheaply. She relied on the tendering process to show that the most cost effective selection of contractor had been carried out and on the fact that the only contrary evidence was the Applicant's own quotation for replacement windows of £3,250 including VAT which did not however show that it was a direct comparison. She pointed out that over 4 years had passed since the neighbour had installed new windows for £4,000, and the fact that the Applicant had elected *not* to replace his own windows at that time. She submitted that the Applicant appeared not to be challenging the quality of the works. She also did not accept that the window works were "improvements". She added that the Decent Homes Initiative required the Landlord to meet a higher standard than basic repair but did not require a higher standard than that imposed by the Lease which requires the property to be kept in "good and substantial repair and condition". The block was constructed in 1960 so that inevitably more modern replacements would import a higher standard of technical specification. She pointed to the survey (conducted by Frost Associates) which evidenced the need for replacement of parts of the building which had reached the end of their natural lives, including work required to balconies, windows, walkways, roofing and rainwater goods.

10. Mr Green's witness statement had supported the proposition that concrete 40-60 years old, single glazed steel windows over 30 years old and roof finish over 30 years old were beyond repair and reasonable maintenance and needed replacement. These had been addressed in the 2009 works. Miss Gourlay relied on *Wates v Rowland* [1952] 2 QB 12, per Lord Evershed for the distinction between repairs and improvements whereby the former inevitably sometimes involved an element of the latter, and on the case of *Minja Properties v Cussins Property Group* [1988] 2 EGLR 52 where replacing single glazed corroded metal windows with double glazed units since the change in design was needed to rectify the damage. With regard to the allegation of historic neglect she relied on *Continental Properties Inc v White* [2007]

L&TR 4, per HHJ Rich QC to rebut the suggestion that delay should be taken into account when deciding whether a cost had been reasonably incurred.

11. With regard to the reserve fund Miss Gourlay submitted that this is not relevant to recoverability, and neither was the charge that the cost was disproportionate to the value of the Lessee's flat.

12. Miss Gourlay then called Mr Green to give evidence about the methodology of selecting Lovells as contractors. He said that Lovells are managers of construction companies and supervise the work (via a project manager and site manager) of whichever building contractor is used. However each company operates to a maximum price agreed in 2003 so that the Lessee is protected from excessive cost. 21 companies had been invited to tender, 5 actually did so: in answer to the Tribunal's question as to whether this actually produced a competitive market if each builder worked to agreed maximum fees he said that it was competitive and not a cartel agreement . He explained that the total cost included 13% for "preliminaries" payable to Lovells as its cost of administrating the contract on site, and an additional 9.71% of that increased cost as representing Lovells' overheads and profit - making a total additional cost/fee payable to Lovells of 22.71%. Hackney Homes Project Management had then added 6% to that increased cost for their oversight of Lovells as the landlord, and Hackney Homes Leasehold Services had added a further 10% - making a total compounded addition for overheads, profit and fees of 25.71%. With regard to the Hackney Homes administration fee, he said that Hackney Homes had a large administrative department which had to be paid for.

13. In cross examination the Applicant was concerned to establish that the bulk purchasing power of the Landlord local authority was apparently not effective in view of the very high costs apparently charged, despite allegedly competitive tendering. However the Tribunal's questions were directed to the high percentage fees on top of the building costs, although Miss Gourlay submitted that this was inevitable where a large organisation is required to manage such a large works contract. She said that this was in line with most managing agents' fees for a 1 year project covering a set of major works, and pointed out that it was a one off fee. She added that the final cost was subject to finalisation of the preliminaries which might have been over estimated,

and that this would account for the projected reduction in the global figure. She submitted that each and every section of the nearly 40% uplift fee was necessary, including the 6% professional fees. Mr Stephen Costello, seconded from Sense Cost Consultancy Limited, to work on the project did not get any additional fee over and above this figure. He had provided a witness statement setting out in detail how the costs were incurred, in accordance with EU Procurement Guidance.

14. Mr Gareth Lewis, who had also provided a witness statement, next gave evidence in connection with the s 20 process and confirmed that so far there was no evidence that any other Lessee was unhappy with the charges or had failed to pay them.

15. Finally the Applicant confirmed that he was not challenging the quantum of the individual items but had been seeking assurances of competitive tendering, reasonable processes and reasonable prices. However he had in fact challenged one item of sub-standard work, the mastic round the windows in places, where it appeared that the application of the sealant had been defective, although the sealant itself was not apparently at fault. Mr Green was able to explain that this had in fact been inspected by the window installers, the mastic suppliers (Arbo-Seal), by Lovells and by the Landlord's own clerk of works and all had been satisfied (and he had dealt with this matter in his witness statement).

FINAL SUBMISSIONS

16. Miss Gourlay drew the Tribunal's attention to the flow of correspondence from November 2009 which had attempted to give the Applicant the fullest information about the project in answer to all his queries. He had been given a detailed breakdown and all his queries had been answered. He had been told of the works to be expected on purchase, and if he felt that he had not been given sufficient detail at that stage he should refer to his own conveyancer on that matter. She submitted that a reserve or sinking fund would only have spread the cost rather than addressed the overall total of the bill. In any case she submitted that it would not be relevant to compare average annual service charge costs with a major works bill. She added that she opposed a s 20 C order, which was sought by the Applicant as he said

he had been seeking a breakdown for an extended period before making the application to the LVT. However she had provided written submissions on the issue of the s 20C order and in summary contended that the Lease permitted the recovery of legal costs. She accepted that the likelihood of a s 20C Order being reasonable depended on whether the Applicant won his case. Nevertheless she submitted that it was reasonable for the Landlord to employ lawyers to deal with the LVT application and that the s 20C Order should therefore be resisted.

17. The Applicant submitted that he had only been given the vaguest information at the time of his purchase. The major works were said to be expected "at some stage". He added that he had applied for a s 20C order after a year's correspondence with the Landlord during which none of his queries had been properly addressed, so that he considered it reasonable to go to the LVT.

DECISION

18. The costs of the actual building works were approximately £300,000. The costs of the 40% uplift bring this up to approximately £500,000. The Tribunal determines the building costs to be reasonably incurred and liability to pay them established. Nevertheless the nearly 40% for preliminaries, profit and fees (which escalates quickly owing to the compound element of the percentages onto percentages) requires some further consideration. The Lovells' fees including preliminaries amount to nearly 22% but are agreed without reduction because in the case of a very large contract these are clearly necessary, especially in relation to the increased costs of Health and Safety requirements.

19. Other fees are also required to be "reasonable". An additional 10 - 12.5% should be adequate if based, for example, on the guidance from ARMA, in the case of an ordinary managing agent. The 6% charged by Hackney Homes Project Management as the landlord to oversee Lovells, and the further 10% charged by Hackney Homes Leasehold Services, appears in the light of this comparison to be excessive.

20. There also appeared from the evidence to have been some duplication of

roles, with Hackney Homes Project Management having its surveyors and Clerk of Works working alongside those already included in the contract by Lovells. The 10% administration fee charged by Hackney Homes Leasehold Services also appears to be an exceedingly top heavy addition, and the total has been increased by both Hackney Homes Project Management and Hackney Homes Leasehold Services charging "fees on fees".

21. The Tribunal therefore determines that the 6% charged by Hackney Homes Project Management should be allowed in full, that the 10% charged by Hackney Homes Leasehold Services should be reduced to 5%, and that each percentage should be applied to the total cost of the works - estimated at £514,947.80 and now finalised at £406,395.04. This arrangement will avoid charging fees on fees.

THE SECTION 20C APPLICATION

22. Miss Gourlay opposed the grant of a s 20C Order on the grounds that the Lease permitted the recovery of the costs of the LVT proceedings. The Applicant on the other hand submitted that such an order should be made as he should not have had to come to the LVT in order to receive the explanations which had then been provided. The Tribunal is of the view that while the Respondent Council had not resolved all the Applicant's queries during their correspondence they had not totally neglected to respond to his requests and the proceedings have resulted in the Council's conduct of the works being largely approved apart from the excessive percentages of fees and some potential for duplication of work. Otherwise the Council has established satisfactory performance. The Applicant has secured some reduction in the overall costs which he has to pay but this is not, in the Tribunal's view, sufficient for a s 20C Order to be granted where there is a provision in the Lease for the recovery of the costs of responding to the Applicant's application to the LVT. A s 20C Order will not therefore be made.

Chairman.....

Date..... 11. 6. 2010