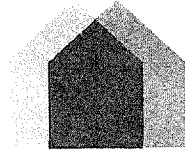


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Residential
Property
TRIBUNAL SERVICE

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

Reference number: LON/00BE/LSC/2009/0506

Property: 21 Brydale House,
New Rotherhithe Road
London
SE16 2PT

Applicant: The London Borough of Southwark

Respondent: Ms M Adeshina

Appearances: For the Applicant:
Ms E Sorbjan, Litigation Officer

For the Respondent:
Mr L Ogilvy LLB (Hons) BVC, Advocate

Tribunal Members: Mr A J Andrew
Mrs A Flynn, MA, MRICS
Miss J Dalal

Inspection date: 25 January 2010

Hearing Dates: 25 January and 8 March 2010

Date of Decision: 1 April 2010

DECISION

1. The service charge of £14,132.91 is payable in full by Ms Adeshina to the London Borough of Southwark.
2. We order Ms Adeshina to reimburse the London Borough of Southwark's hearing fee of £125 paid in connection with these proceedings.

BACKGROUND

3. Southwark issued proceedings in the Lambeth County Court to recover a service charge of £14,132.91 together with interest at the County Court rate. On 21 July 2009 District Judge Wakem on his own initiative and without a hearing transferred the matter to this tribunal. Consequently we had to determine, pursuant to Section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"), whether the service charge was payable by Ms Adeshina to Southwark. At the hearing Southwark applied for an Order pursuant to Regulation 9 of the Leasehold Valuation Tribunal's (Fees) (England) Regulations 2003 ("2003 Fee Regulations") for an order that Ms Adeshina reimburse the hearing fee of £125 paid by them in these proceedings. At the hearing Ms Sorbjan said that Southwark would not seek to recover any of their costs incurred in these proceedings through the service charge and consequently we do not have to consider if it would be appropriate to make an order pursuant to Section 20C of the 1985 Act.
4. Brydale House is a 15 storey block of flats that forms part of Southwark's Hawkstone Estate, which was built in about 1960. Ms Adeshina was the tenant of Flat 21 and in 2002 or possibly early 2003 she applied to buy her flat under the Right to Buy provisions of the Housing Act 1985 ("the Housing Act"). By a Notice dated 27 February 2003 and served pursuant to Section 125 of the Housing Act Southwark accepted Ms Adeshina's

application ("the 125 Notice"). The flat was valued at £95,000 but Ms Adeshina was entitled to a discount of £38,000 and thus paid £57,000 for her flat.

5. The 125 Notice incorporates two service charge estimates: the first relates to itemised repair costs whilst the second, which is not material to this decision, relates to day to day maintenance and insurance costs.
6. The 125 Notice includes the following note:-

"Under paragraph 16B of Schedule 6 of the Housing Act 1985, your liability to contribute to repair costs during the initial period 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 the work itemised in Appendix 1, plus an inflation allowance, nor will you be liable to pay more than the estimated annual amount shown, plus an inflation allowance, in respect of works not itemised".

7. The relevant section of appendix 1 to the 125 Notice reads as follows:-

"REPAIRS / RENEWALS REQUIRED TO:

<u>ITEM</u>	<u>ESTIMATED COSTS (£)</u>	<u>APPORTIONED COSTS</u>
<i>External Decorations</i>		
<i>Internal Communal Repairs</i>		
<i>Window Renewal</i>		
<i>Roof Repairs</i>		
<i>Concrete Repairs</i>		
<i>Door Entry System</i>		
TOTAL	£3,000,000.00	£11,000.00

TOTAL PROVISIONAL ESTIATED COST	£3,000,000.00
APPORTIONED PROVISIONAL ESTIATED COST	£11,000.00"

8. The appendix concludes with the following further note:

"NOTE: It should be noted that the above figures are calculated on current prices, and the landlord has and will exercise the right to adjust those prices incorporating an allowance for inflation"

9. A copy of the counterpart of Ms Adeshina's lease was included in the hearing bundle and it is dated 2 August 2004. The service charge provisions of the lease are contained in the Third Schedule. It is only necessary to consider them in general terms.

10. The lessee has to pay *"a fair proportion"* of various costs and expenses that are listed in the schedule. These include the cost of repairing the structure and exterior of both the flat and Brydale House and the installation of certain specified improvements including double glazed windows and an entry phone system. The schedule provides that in calculating *"a fair proportion"* Southwark *"may adopt any reasonable method of ascertaining the said proportion and may adopt different methods in relation to different items of costs and expenses"*.

11. The service charge year runs from 1 April. At the beginning of each year Southwark should estimate the service charge for the forthcoming year and the lessee is required to pay that estimate by four equal on account payments on 1 April, 1 July, 1 October and 1 January of each year.

12. At the end of each service charge year Southwark must ascertain the service charge payable for the year on the basis of its actual incurred expenditure. If the service charge exceeds the on account payments the lessee is required to pay a balancing charge within one month of it being demanded. If however the on account payments exceed the service charge the surplus must be set against the following year's on account payments.

13. By the early part of this century the Hawkstone Estate was clearly in need of considerable repair and modernisation. Southwark have a planned programme of work for the estate and they commissioned a feasibility report for the refurbishment of Brydale House that was published on 28 February 2006. On the basis of that report they prepared a detailed specification of works and on 21 April 2006 the leaseholders, including Ms Adeshina, were given intention notices pursuant to the consultation regime introduced by Section 20 of the 1985 Act. The notice contained a general outline of the proposed work and although it included the work listed in the 125 Notice it also listed additional work such as the renewal of the lightning conductor, replacement of balcony panels and the upgrading of communal lighting.
14. The detailed specification was then put out to tender and six returns were received. They were analysed in a tender report dated 27 July 2006 that recommended acceptance of the tender submitted by Apollo London Limited in the sum of £2,388,262.
15. On 11 August 2006 Southwark gave a proposal notice, under the statutory consultation procedure, to each of the lessees. The notice was unfortunately dated 23 January 2006 but that was clearly a mistake and Ms Adeshina did not dispute that the notice was actually given on 11 August 2006. It is not necessary to go into the notice in any great detail because Ms Adeshina did not assert that Southwark failed to comply with the statutory consultation procedure. Although not a model of clarity it is clear from the notice that Ms Adeshina's contribution to the total cost, including professional and administration fees, would exceed £24,000. The notice however explains that her contribution is limited to the estimate contained in the Section 125 Notice "*plus an allowance for inflation*" and it concludes with an estimated service charge of £14,132.91, which is of course the amount claimed by Southwark in the County Court proceedings. Southwark demanded this sum by an invoice dated 25 September 2007. Ms Adeshina did not pay the invoice and on 7 February 2008 Southwark wrote to her demanding payment of the

estimated service charge by four equal quarterly payments of £3,533.23, on 1 April 2008, 1 July 2008, 1 October 2008 and 1 January 2009.

16. As confirmed by our inspection of Mrs Adeshina's flat and the exterior and common parts of Brydale House the works have been completed and at the hearing we were provided with a draft final account. Ms Adeshina's contribution to the cost of the works listed in the 125 Notice, including professional and administration fees, is £18,524.08 whilst the cost of the additional work (which Southwark acknowledged was in any event irrecoverable) is put at £4,877.18. However Ms Adeshina's contribution is capped by the estimate contained in the Section 125 Notice plus the inflation allowance.

ISSUES

17. Following the transfer from Lambeth County Court the Tribunal held a Pre-trial Review on 9 September 2009 at which Ms M Adeshina was represented by Mr Ogilvy, an Advocate at Law. The directions record that Ms Adeshina relied upon the following in support of her case:-

- 1) *That the lease referred to in the Proceedings is dated 1st March 2003 and not 2nd August 2004 as claimed by the Applicant.*
- 2) *That as she was not party to the agreement between the Applicant and its contractors, she has no common law liability for the costs involved.*
- 3) *That the lease does not include itemised sums for service charge and in particular does not include the £14,132.91 sought by the Applicant.*
- 4) *That the sum demanded did not form part of the bargain between the parties when the lease was signed.*

- 5) *That there was no certainty in respect of the sum sought at the time of the lease agreement.*
 - 6) *There is no certainty in the lease agreement as to what repair works if any the Respondent will become liable for in such repairs.*
 - 7) *In addition, the Respondent states that the costs of the works in any event were unreasonable by reference to the amounts others paid on the development/estate. The Respondent does not state that the actual standard of the works undertaken was of an unreasonable standard, merely that the method of apportionment was unreasonable.*
18. Amongst other things the directions required Ms Adeshina to provide a detailed response to the application with the inspection eventually being listed for 10.30am on 25 January 2010 to be followed by a hearing commencing at 1.30pm on that day with a time estimate of 1 day.
19. During our inspection on 25 January 2010 Ms Adeshina handed us a letter from Mr Ogilvy requesting a postponement of the hearing due to commence at 1.30pm on that day. Neither Ms Adeshina nor Mr Ogilvy attended the hearing. With considerable reluctance and for reasons that are not relevant to this decision we agreed to the written postponement request and the hearing was therefore postponed to 8 March 2010. In breach of the tribunal's directions and notwithstanding the postponement of the hearing Ms Adeshina did not provide a detailed response to Southwark's application so that when the hearing commenced the grounds of her challenge to the service charge were unknown. At the start of the hearing Mr Ogilvy confirmed that his client relied on the grounds set out in the directions and recited above. In addition, as the hearing progressed, the following grounds were added:-
- 8) That no service charge was recoverable because the items in the Section 125 Notice were not individually costed as required by Section 125A(3)(a) of the Housing Act.

- 9) That no service charge was recoverable because the Section 125 Notice did not give "*an estimate of the average annual amount (at current prices) which the landlord considers is likely to be payable by the tenant*" as required by Section 125(A)(3)(b) of the Housing Act.
- 10) That in breach of Section 21B of the 1985 Act the service charge demand was not accompanied by a summary of rights and obligations.
- 11) That the estimated cost cannot be reasonable because Southwark did not inspect Ms Adeshina's flat.
- 12) That the service charge is not payable because it was demanded as one sum and not by four equal payments in conformity with the terms of Ms Adeshina's lease.

REASONS FOR OUR DECISION

The lease

20. Under this head we deal with the first six grounds of challenge referred to in the directions.
21. As to the date of the lease Mr Ogilvy did not pursue the issue at the hearing. As observed the copy counterpart lease in the hearing bundle was dated 2nd August 2004 and no evidence was adduced to the effect that either it was incorrectly dated or that it did not reflect the terms agreed between the parties.
22. We had considerable difficulty in understanding the other issues raised by Mr Ogilvy under this head. Ms Adeshina's obligation to pay the service charges arose from the terms of her lease and not from the contract between Southwark and the contractors. The liability to pay for repairs and improvements is a natural incidence of home ownership and

it is self evident that when buying a home, whether it be a freehold house or a leasehold flat, the future cost of repairs and improvements can only be estimated in the most general way. Ms Adeshina had the benefit of legal advice when she purchased her flat and must have appreciated her obligation, clearly set out in the lease, to contribute, by the payment of a service charge, to all the costs incurred by Southwark in the repair and maintenance of Brydale House and more generally the Hawkstone Estate.

23. The heads of expenditure to which Ms Adeshina is required to contribute, through the service charge, are clearly set out in the lease and the suggestion that there is no certainty as to the nature of the repair works is without foundation. There is even less merit in the argument advanced by Mr Ogilvy in a case such as this where the work is completed within the five year initial period and the cost of the work is capped in accordance with the 125 Notice given to Mrs Adeshina prior to her purchase of the flat: in short she knew what she would have to pay during the initial period and she cannot now complain when it is demanded from her.

Contributions made by other lessees and unreasonable apportionment

24. One of Ms Adeshina's main complaints was that significantly lower contributions had been demanded from some other lessees who had purchased their flats under the Right to Buy legislation, although she was unable to produce any documentary evidence to substantiate the complaint. In any event we agreed with Ms Sorbjan that the service charges demanded from other lessees were irrelevant when considering either the reasonableness of the estimated cost of the works or the payability of the service charge demanded from Ms Adeshina. As she pointed out if other lessees had received lower demands the probable explanation was that at the time of their purchases they had received 125 Notices with lower estimates, based on the information available at the time when the notices were issued: to an extent any such discrepancy would be self correcting in that the valuation at which the

flats were offered to the purchasers reflected their potential liability for service charges during the initial period.

25. As far as the apportionment of both the estimated and actual cost of the works were concerned the evidence put before us, supported by the Proposal Notice, was that Southwark used a “*bed weighting*” calculation with each flat being allocated four units plus an additional unit for each bedroom. Ms Adeshina’s flat having two bedrooms it was allocated six units and her on account payment was calculated by dividing the total estimated cost by the total number of units in the building and multiplying the resultant figure by six. This apportionment method is in common usage and we were told that it had been agreed with the Home Owners Council. We concluded that it resulted in Ms Adeshina paying a “*fair proportion*” of the estimated and actual costs in accordance with the terms of her lease.

Section 125 of the Housing Act

26. Section 125(A) of the Housing Act is headed: “*Estimates and information about service charges*” and sub-section 3 reads as follows:-

“(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 of 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. Mr Ogilvy's first point was that the 125 Notice was defective because it did not provide an estimate of Ms Adeshina's contribution for "*each item*" of expenditure. As will be seen from paragraph 7 above only the total cost and contribution are given whilst no figures are recorded for the individual items listed in the first column of the table.
28. Ms Sorbjan said that it was always envisaged that the works listed in appendix 1 to the 125 Notice would be completed at the same time as a package and under one contract as part of a major works programme. Consequently we agreed that the listed works could collectively be regarded as a single item of work with an estimated cost of £3million and an apportioned service charge contribution of £11,000.
29. In the alternative we were satisfied that the 125 Notice gave effect to the clear intention of the legislation which was both to limit the lessee's service charge liability during the initial five year period and also to ensure that the lessee was fully aware of the extent of that liability before signing the lease. On reading the 125 Notice Ms Adeshina would have known that her maximum liability for the itemised work during the initial period was £11,000 plus an inflation uplift and it was not suggested that the inflation uplift was incorrectly calculated.
30. Mr Ogilvy's second point was that the Section 125 Notice was deficient in that it did not contain "*an estimate of the average annual amount (at current prices) which the landlord considers is likely to be payable by the tenant*" as required by Section 125(A)(3)(b). With respect to Mr Ogilvy, he misconstrued the quoted provision: it relates not to the itemised work listed in appendix 1 of the 125 Notice but to the day to day maintenance and insurance costs which are listed in appendix 2 and where the average annual cost for each head of expenditure is clearly set out.
31. Consequently we concluded that the Section 125 Notice complied with the relevant provisions of Section 125(A) of the Housing Act and that Ms Adeshina's challenge under this ground must fail.

Section 21b of the 1985 Act

32. We were told by Ms Sorbjan that summaries of the tenant's rights and obligations were attached to the original service charge demands but had not been included in the hearing bundle because the point had not been taken in the defence filed in the County Court. In any event the point is misconceived. The invoice was issued on 25 September 2007 but section 21(B) of the 1985 Act did not come into effect until 1 October 2007 and consequently when the demand was issued Southwark were not obliged to supply a summary of the tenant's rights and obligations.

Failure to inspect Ms Adeshina's flat

33. It was apparent from the feasibility report that only a limited number of flats were inspected and that Ms Adeshina's flat was not one of them. We regarded this as being wholly irrelevant. The works, in respect of which the service charge was demanded, related to the structure, exterior and common parts of Brydale House and there was no need to inspect the interior of individual flats. The work did include kitchen and bathroom replacement work in respect of some of the tenanted flats and that no doubt explains why some of the flats were inspected internally. However that work had no relevance to the leasehold flats and the cost of the work was stripped out before the lessees' service charge contributions were calculated.

Service charge not demanded in accordance with the lease terms

34. As observed the on account payment of £14,132.91 was initially demanded in full by an invoice dated 27 September 2007 whereas the lease clearly provides for quarterly on account payments. Nevertheless we reject this objection for each of the following two reasons. Firstly because any defect was cured by the passage of time in that the total sum would fall due for payment during the service charge year commencing 1 April 2008 with the last payment becoming due on 1 January 2009. Secondly because Ms Adeshina's obligation to pay in accordance with the lease terms and by four equal quarterly payments

was explained in Southwark's letter of 7 February 2008 that constituted a further demand.

Conclusion

35. Having considered the documents in the hearing bundle we are satisfied that the statutory consultation procedure was complied with. The uncapped service charge was based on an estimated cost that had been tested in the market place by a process of competitive tendering. Equally we are satisfied that the capping provisions of Section 125 of the Housing Act were properly applied. Consequently it follows that the service charge demanded by Southwark was reasonable within the context of Section 19(2) of the 1985 Act, which provides that:-

"Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise".

Having rejected all the grounds of challenge relied on by Ms Adeshina we therefore concluded that the service charge as demanded by Southwark is payable in full.

Repayment of fees

36. Finally we turn to the reimbursement of the hearing fee of £125 incurred by Southwark in these proceedings. Regulation 9(1) of the 2003 Fee Regulations provides that:-

"A tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings".

37. The regulation clearly confers a discretion. Southwark had been wholly successful in defending this application. Many of the points relied on by Ms Adeshina were wholly without merit. She had failed to comply with the tribunal's directions so that until the hearing Southwark did not know

with certainty the case that it had to answer. The postponement application in respect of the listed hearing on 25 January 2010 came late in the day and caused considerable inconvenience to Southwark and the tribunal. Taking each of these factors into consideration we considered it appropriate to Order Ms Adeshina to refund the hearing fee paid by Southwark.

Chairman: (A J Andrew)