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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/23UB/LSC/2013/0099**
Property	:	**44 Oldbury Road, Cheltenham Gloucestershire GL51 OHJ**
Applicants	:	**Mrs Shirley Sylvester-Gray and seven other joined applicants**
Representative	:	**In Person**
Respondent	:	**Cheltenham Borough Council**
Representative	:	**Mr Nicholas Grundy, Counsel**
Type of Application	:	**Application under Section 27A of the Landlord and Tenant Act 1985 in respect of service charges**
Tribunal Members	:	**Judge D Archer (Chairman)** **Mr I Perry (Chartered Surveyor)** **Mr M Cook (Lay Member**
Date and Venue of Hearing	:	**18 December 2013 at the Bell Hotel, Tewkesbury**
Date of Decision	:	**29 January 2014**

DECISION

For the reasons set out below, the Tribunal makes a determination that a service charge of £159.98 is payable as a service charge by the applicant to the respondent in respect of the costs incurred by the respondent in relation to the respondent's costs of the upgrade of the key fob entry system to the property, incurred in the financial year 2012-2013. The applicant was correctly invoiced for the service charge on 4 September 2013.

REASONS

Background

1. Mrs Sylvester-Gray ("the applicant") resides in a purpose built block of six flats at 44 Oldbury Road, Cheltenham ("the property"). The application relates to changes to the key fob system used to access 307 blocks of flats within the respondent's property holding with electronic door entry systems. Residents are able to access the blocks with a key fob programmed to their specific block.

2. An electronic key fob system was first installed at the property in 2002. In March 2010 the respondent identified that technology ("the KMS system") could enable the respondent to manage the door entry systems and, to some extent, the key fobs remotely from an office and thereby improve the level of service available to residents of flats. The KMS system involved the installation of telecommunication equipment including a modem, aerial and interconnecting cabling. A programme to install the technology has been completed and it is now possible to programme key fobs at a central office location for all communal door entry systems. The respondent claims various benefits from the KMS system including eliminating the need for specialist contractors to visit sites in order to programme fobs, reduced waiting times for new fobs (from a week to as little as a day), significant cost savings to the respondent, reducing the cost of replacement fobs from £15 to £10 and improving the management of the door entry system as it is possible to check whether fobs are being used and delete fobs that are being misused or retained by former residents and therefore maintain the security of the system and the property. The applicants seek a determination as to whether the new system is an improvement and not just an upgrade which is of no benefit to tenants and leaseholders.

3. The respondent's statement of case dated 3 October 2013 confirms that the lease was granted to Mrs Sylvester-Gray on 8 March 2004 for a period of 125 years at an annual

rent of £10 per annum. The respondent's properties are managed by an arms length management company, Cheltenham Borough Homes Limited ("the agents"). In 2012, the agents replaced the communal entrance door key fob system at the property. The programme of work was in two stages with the property being included in the second stage. The value of the second stage of the contract was £49,482.46 excluding VAT and the cost attributable to the property was £959.60 excluding VAT. That cost was divided equally amongst the six flats and the applicant was invoiced for the period 2012-2013 in the sum of £159.98 on 18 September 2013. The matter is of importance to the respondent because significant sums of money were expended across the entirety of the respondent's holding of residential property. The respondent relies upon the improvement clause in the lease and section 187 of the Housing Act 1987.

4. The application was listed for hearing on 18 December 2013. The applicants and respondent were notified of the date, time and venue of the hearing by letter from the Tribunal.

The Law

5. Section 27 of the Landlord and Tenant Act 1985 provides that an application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to the person by whom it is payable, the person to whom it is payable, the amount which is payable, the date at or by it is payable and the manner in which it is payable. That is the basis of our jurisdiction in this case. The following statutory provisions are of assistance in our consideration of the relevant provisions of the lease.

6. Section 187 of the Housing Act 1985 ("the Act") defines "improvement" in relation to a dwelling-house as any alteration in, or addition to the dwelling house and includes any addition to, or alteration in, the landlord's fittings and fixtures and any addition or alteration connected with the provision of services to the dwelling house.

7. Paragraph 16A of Part III of Schedule 6 of the Act states that the lease may require the tenant to bear a reasonable part of the costs incurred by the landlord in discharging or insuring against the obligations imposed by the covenants implied by virtue of paragraph 14(2) of the same Part of the Act. Those covenants include at paragraph 14(2)(c) a requirement for the landlord to ensure, so far as practicable, that services which are to be provided by the landlord and to which the tenant is entitled (whether by himself or in common with others) are to be maintained at a reasonable level and to keep in repair any installation connected with the provision of those services.

8. Paragraph 16A of the same Part of the Act has effect subject to paragraph 16B which restricts liability to pay in respect of works in the first five years of a "right to buy" lease. Paragraph

16C contains a similar restriction on liability to pay improvement contributions in the first five years of a "right to buy" lease where the lease of a flat requires the tenant to pay improvement contributions.

9. Paragraph 13 of the same Part of the Act states that where the dwelling-house is a flat and the tenant enjoyed, during the secure tenancy, the use in common with others of any premises, facilities or services, the lease shall include rights to the like enjoyment, so far as the landlord is capable of granting them, unless otherwise agreed between the landlord and the tenant.

10. Section 19 of the Landlord and Tenant Act 1985 states that relevant costs (costs incurred by or on behalf of the landlord in connection with the matters for which the service charge is payable) shall be taken into account for a period only to the extent that they are reasonably incurred and where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard.

The Lease

11. The Tribunal had before it a copy of a lease dated 8 March 2004 between Cheltenham Borough Council ("the Council") and Shirley Elizabeth Sylvester-Gray ("the lease"). Paragraph (e) of Schedule C of the lease ("the improvement clause") requires the lessee in accordance with paragraph 16A of Part III of Schedule 6 of the Act to pay to the Council on demand a reasonable part of the costs incurred or to be incurred by the Council in carrying out improvements to the demised premises or entire property within the meaning of section 187 of the Act such reasonable part of the costs being calculated by reference to an annual period ending on the thirty-first day of March of each year and being proportionate to the number of properties the occupants of which will have the benefit of the said improvement.

12. Paragraph 7(c) of the lease requires the Council to ensure so far as practicable that services to be provided by the Council and to which the purchaser is entitled (whether by himself or in common with others) as specified in Schedule A are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services. Schedule A includes at (iii) a right in accordance with paragraph 13 of Schedule 6 of the Act (see paragraph 9 above) in common with the Council and all others now entitled or becoming entitled to use any premises, facilities or services provided by the Council for the use and benefit of the occupiers of the entire property.

Inspection

13. The Tribunal inspected the property on 18 December 2013. There are six flats in the block (numbers 42-48).

There are two flats on each floor; three floors in total. Access is gained to the block via two communal doors, one at the front of the building and one at the rear. The front communal door is controlled by the key fob system and the door leads to a communal hallway which in turn leads via stairs to the front door of each of the flats. The telecommunications equipment for the property appeared to be in good order. The key fob system was fully functional.

14. We saw a pink key fob that operated the automatic door. The external panel includes a "T" button for trade and we were told that the button opens the door at specific times of day. The key fob does not have to be touched to the external panel but must be held in close proximity to open the door. The same entry system operates the rear door. There is a new control box with a modem. There are two disabled tenants and the automatic doors have been provided by the respondent. There is an external aerial at the rear of the building. The modem communicates through the aerial rather than a telephone line. Entry to individual flats in the block is by key.

The Hearing

15. The hearing took place at The Bell Hotel, Tewkesbury on 18 December 2013. The applicants were informally represented by Mr Roy Griffin who is also a joined applicant. Three other applicants attended the hearing, Mrs Betty Stiley, Mrs Cynthia Jones and Mr Ron Dark. Mr Mike Tyrell attended the hearing to informally represent Mrs DE Sweetman who is a joined applicant. The remaining joined applicant, Mr Mark Woods did not attend but again was informally represented by Mr Griffin. The Respondent was represented by Mr Nicholas Grundy, Counsel. At the outset of the hearing, Mr Grundy submitted a new indexed and paginated respondent's bundle comprising 148 pages in total.

16. Mr Griffin expressed concern at the outset of the hearing that he had just received the statements and exhibits and could not respond to them in the time allowed. We asked Mr Griffin if he was asking for additional time to consider the evidence and he said "no". Mr Grundy submitted that the witness statements simply elucidate what is said in the statement of case. There were no directions for witness statements. The respondent had to call someone to support the statement of case. The witness statements only exhibit a few additional documents. Mrs Cynthia Jones was on the committee that considered the new fob arrangements.

17. Mr Griffin responded that Mrs Jones could not attend the meeting where this issue was brought up and did not receive the agenda or minutes. He submitted that the witness statements should be ignored. We noted that the directions do not specifically refer to witness statements. We decided that we would admit the witness

statements and hear oral evidence from the witnesses. That would provide a full opportunity for the factual issues to be explored.

The Evidence

18. The evidence submitted by the respondent on 18 December 2013 included the following;

1) The application form dated 19 August 2013 signed by the applicant.

2) Applications to join the other applicants.

3) Directions issued by the Tribunal on 9 September 2013.

4) Exhibits and examples appended to the application form.

5) The respondent's statement of case.

6) Witness statements from Elizabeth Avitabile and Victoria Day plus proof of service of those statements.

At the hearing, we heard oral evidence from Elizabeth Avitabile and Victoria Day.

The Submissions

19. Mr Grundy submitted that the issue for the Tribunal is whether the costs of installing the new key fob system are recoverable. The lease is a "right to buy" lease and the reference to Part III of Schedule 6 needs to be considered in that context. There was a requirement to notify charges in advance for the first 5 years of the lease but that ended in 2009. Improvements are defined in section 187 of the Act include the upgrade to the KMS system. The installation is plainly part of the landlord's fixtures and fittings and includes an aerial. Costs have been assigned to each lessee; 1/6 in the applicant's case. There is no evidence to challenge the reasonableness of the costs. Mr Grundy relied upon **Wales and West Housing Association Limited v Sharon Paine (2012) UKUT 372(LC)** to support his submission that the Tribunal should be slow to question a service charge item that has not been identified as being in dispute between the parties; the Tribunal should not regard itself as having a roving commission to mete out justice. If the Tribunal questions an item that has not been hitherto in dispute problems of evidence are likely to arise since the parties will not have prepared their cases or sought to produce material to deal with the new question.

20. Is the KMS system an improvement? Clearly it is because of the speed of distribution of new key fobs, the cost of new key fobs and the ability to monitor the use of key fobs have all been improved. The old system clearly had limitations and the speed of turn- around is an improvement. Tenants may not see an improvement unless they have a problem. Old key fobs can now be deactivated, there is no limit on capacity and there is now an ability to monitor the usage of the fobs. The respondent is entitled to recover under the lease and the costs are reasonable. A tender evaluation was carried out. There was no formal consultation requirement and lessees representatives were involved in the decision making process. The respondent has chosen not to recover management costs although it could do so.

21. Mr Grundy submitted that the Tribunal has jurisdiction under Schedule 11 of the Common and Leasehold Reform Act 2002 to determine whether the cost of improvements is reasonable. He did not rely upon Schedule A of the lease because it could not be shown that the old system was in disrepair or at the end of its working life. Lessees should be able to understand the terms of their lease. The lease allows the respondent to charge for any improvement that falls within section 187 of the Act. Section 19 of the Landlord and Tenant Act 1985 is the protection for leaseholders – the Tribunal has a jurisdiction to determine whether relevant costs shall be taken into account in determining the amount of a service charge and the test is whether they were reasonably incurred and whether the services or works are of a reasonable standard. Paragraph 16A of Schedule 6 of the Act does not refer to improvements but Paragraph 16C does. Paragraph 14(2) sets out the minimum standards but there can be contractual terms that are wider. Section 139 of the Act confirms that Schedule 6 sets out the minimum requirements of a lease.

22. Mr Grundy further submitted that this lease does have an improvement clause. That is quite often included in older blocks in right to buy cases. The words in the lease, *In accordance with Paragraph 16A* (see paragraph 10 above) refer to the statutory limitation on recovery of improvement costs. Improvements in the lease are not limited to 14(2) matters because that would render nugatory the general terms of the improvement clause in the lease. 14(2) is simply a classic repair and maintain clause. The lease permits any improvement to be charges to the lessees subject to section 187 of the Act and section 19 of the Landlord and Tenant Act 1985.

23. Mr Griffin submitted that there was very poor consultation and the leaseholders were not informed about costs. The costs are unreasonable bearing in mind the lack of breakdown and the previous request to the respondent for a breakdown. The new system is no different to what was in place before – we had a key fob and we got in. There may be a benefit to the respondent but not to the leaseholders or the residents.

24. The only improvement to fixtures and fittings is the aerial and that is a very small improvement compared to the cost that has been charged. The door frames and doors were improved in 2002 when the key fob system was first introduced. That was a genuine improvement and the charge of £1500 was reasonable because there were no security doors before that. Leaseholders have still not received a full breakdown of all of the costs and Mr Griffin was also locked out of his block.

25. Mr Tyrell on behalf of Mrs Sweetman submitted that the respondent was previously awarded three stars (the highest rating) for compliance with good practice. There was an agreement that there would always be consultation with tenants and leaseholders. Here, the decision to proceed was taken when the representative was not present. It was wrong to just go out and do the job. It was certainly possible to consult with the leaseholders concerned.

Conclusions

26. We found the witnesses to be credible and to have a genuine belief that the KMS system represents an improvement over the original key fob system. Victoria Day is the Technical and Investment Manager for the agents and has held that role since January 2010. She is responsible for managing the repairs and improvements to the respondent's housing stock and for capital investment in that stock. She states in her witness statement of 16 December 2013 that she was involved in the decision making process to upgrade the key fob entry system. There was a key fob system in existence at the property on 8 March 2004; installed in 2002. Prior to 2010 there were difficulties with the original key fob system. They included;

- If a resident lost or mislaid a fob or had a fob stolen then replacing the fob often took more than a week and could take up to a fortnight and required the attendance of a contractor at the relevant premises.
- Lost fobs represented a security risk because the entry system could not be easily reprogrammed to prevent that fob opening the doors and in any case such reprogramming could not be done remotely or immediately.
- Where a resident was evicted and did not surrender their fobs those fobs would continue to operate the communal entrance doors.
- The agent could not monitor the use of fobs remotely. Now the agent can remotely monitor fobs in real time; so can identify if the fobs for any particular flat are being used and if not can go and see whether the flat has been abandoned or the tenant is unwell.
- The fob reader in each block under the original system had a limit to the number of fobs which could be

registered to operate the door to which it was connected. The agent has to issue a number of master fobs and was reaching the stage where some readers were reaching their limit.

27. A business case was prepared for the KMS system which estimated the costs of the upgrade across 307 multi-occupancy blocks managed by the agent at around £388,355. At a meeting on 3 November 2010 the agent's Operations Committee approved the upgrade to the KMS system. One of the lessee representatives on the committee was Mrs Jones but she did not attend the meeting. There were three phases for the KMS upgrade and the second phase (including the property) was put out to tender on 16 May 2012. Three tenders were received and subject to a tender evaluation. Harrold Jones Services were awarded the contract and the upgrade was completed in the 2012-2013 financial year. The variation in cost between the blocks depended upon the number of entry doors and the amount of wiring necessary. On 10 December 2013 Harrold Jones Services provided a breakdown of the costs of the upgrade at the property; labour of £105.57, equipment of £700.58 and an aerial for £153.55. The applicant was previously invoiced for £159.98 on 4 September 2013.

28. In oral evidence, Ms Day accepted that there was a requirement that the agents should collect fobs from those leaving properties but the requirement was not always complied with. There was no way to remotely delete fobs from the system. If a key fob was lent to another resident than there would be no action unless the agents received a report that the fob was being misused. There is now no limit on the number of fobs for each property. The limit under the original key fob system was 99 fobs for each door entry system. It was not possible to issue more fobs without deleting old fobs. There was one occasion where it was necessary to delete all fobs for a block and to issue new fobs. It was impossible to issue Royal Mail with all of the master fobs that they asked for. The new system requires less contractor attendance and the additional fob charge has been reduced to £10. The previous charge was £7.50 up to 2010 but there was a review and the charge was increased to £15.

29. Ms Day stated that there were increasing problems with the original key fob system. There was a danger of vulnerable people being put at risk because of delays in replacing fobs. There was a danger of inappropriate use and anti-social behaviour. Now it is possible to look at the fob record of use and delete fobs from the system as necessary. There has been some successful work with police. Trying to manage two systems in different blocks would not be viable. The respondent has always covered the cost of administering the key fob system. The respondent always intended to recover the cost of the new KMS system through service charges. If the lease allows then costs of improvements are recovered.

30. There was no formal consultation process but leaseholders would have been notified prior to the works

being undertaken. The briefing note at page 145-146 of the respondent's bundle was sent out with the service charge demand for payment. That was the legal advice received by the agents. It was copied word for word. The conclusion in the briefing note is that the works are an improvement. The advice was provided by Rose Gemmell, a solicitor for the respondent. The briefing note was sent out after the works were completed but would have been the first that the leaseholders knew about the costs. Mr Griffin said that two letters were sent out, one two days before the installation of the KMS system and another one day before the new key fobs were delivered. That was the only communication.

31. We find that there was no formal requirement for consultation in this case. There was no effective consultation with leaseholders prior to the works being undertaken. Notification was very late (we accept Mr Griffin's evidence on this point) and the explanation for the introduction of the KMS system was not sent out until the leaseholders were invoiced for their proportion of the costs for their block. The advice from the respondent's legal team included on the second page of the briefing note is difficult to follow, even for a trained lawyer, and includes various paragraphs of the lease that are not relied upon by Mr Grundy. We find that these proceedings may well not have been necessary if effective consultation had been carried out well in advance of the works being undertaken.

32. Ms Day also confirmed that the system can inform the agents about whether fobs are being used at all but the logs are not checked regularly. The use of the trade button is down to residents of the block – if an issue is raised then the agents look to see what times people want a trade button. The trade button has always been there but can be removed if people want to remove it. There is no way of recording when the trade button is used. Mr Dark asked about a case where a resident had died and her daughter had purchased three key fobs. Mr Dark received the key fobs and is still using them. Ms Day did not know whether the agents had been informed or why the fobs were not deleted.

33. Elizabeth Avitabile states in her witness statement of 13 December 2013 that she has been employed by the agents as an administrator since March 2009. She is responsible for the day to day management of the KMS system. Under the old system, requests for replacement fobs were dealt with on a Tuesday as a contractor came from Birmingham to Cheltenham once a week for that purpose. The contractor went to the block where the fob was requested and manually reprogrammed the system. The fob was just programmed to the next space on the system and not to a specific property. That made it difficult to delete fobs which had been lost or stolen as it was difficult to identify which fob had been lost or stolen. The longest delay in issuing a new fob might be Tuesday to the following Friday i.e. 11 days. There are a number of specific examples of fob management set out at paragraph 10 of Ms Avitabile's witness statement (page 80 of the respondent's bundle).

34. The main benefit of the new system is that a replacement fob can be issued as quickly as the same day; in an emergency. The standard procedure is delivery in 1-3 working days. Mr Griffin said that one new key fob for him took 10 days. Ms Avitabile accepted that there might be longer delivery times on occasion. We find that it is clear from the evidence that replacing fobs is much quicker on average under the KMS system and fobs that are lost or being inappropriately used (for example, by an ex-partner) can be readily identified and deleted from the system. The system can monitor all fob usage which is sometimes helpful to the police which in turn is beneficial to the security and safety of residents.

35. We find that the requirements of section 187(a) of the Act are met. The KMS system (modem, aerial and wiring) is an addition to and an alteration to the landlord's fixtures and fittings and is an addition or alteration connected with the provision of services to the property. There is no benefit requirement under section 187 but we find as a fact that the KMS system has benefits for the leaseholders and the respondent, for all of the reasons set out above at paragraphs 19, 25, 27, 28, 32 and 33. There is no evidence that the costs incurred by the respondent are unreasonable. The original key fob system was 10 years old and the KMS system is a relatively low cost upgrade. The various problems with the original key fob system have been clearly established in evidence.

36. We have considered the lease. We find that enjoyment of the original key fob system was a right in accordance with paragraph 13 of Schedule 6 of the Act because the dwelling-house is a flat and the applicant enjoyed the key fob facility or service during her secured tenancy between 2002 and 2004. That right falls within paragraph (iii) of Schedule A of the lease and therefore there is a corresponding obligation on the respondent under paragraph 7(c) of the lease to ensure that services are maintained at a reasonable level and to keep or repair any installation connected with the provision of those services. We have not seen any evidence that the original key fob system was not operating at a reasonable level in terms of allowing access to the property. Mr Grundy does not seek to rely upon Schedule A. We do, however, note that the original key fob system would have required upgrade or replacement at some stage in any event.

37. The improvement clause in the lease would be straightforward were it not for the words *In accordance with paragraph 16A of Part III of Schedule 6 of the Act*. Paragraph 16A is not concerned with improvements – it relates to the implied covenants or a minimum standard for leases set out in paragraph 14(2) of Part III and restricts service charges in the first five years of a "right to buy" lease. One interpretation of the improvement clause is that it is restricted to the matters set out in paragraph 14(2). We reject that interpretation. We accept Mr Grundy's submission that such an interpretation would render the improvement clause largely useless and that would adversely impact upon the business efficiency of the lease. We also note that improvement

clauses are specifically referred to in paragraph 16C of Part III. We therefore find that the words were simply intended to highlight the fact that the respondent would respect the statutory limitation on service charges for repairs, services and improvements in the first five years of the lease.

38. The applicants do not argue otherwise – their application is simply for the Tribunal to determine whether the KMS system is an improvement. For the reasons set out above we find that the KMS system is an improvement within the terms of section 187 of the Act and that the improvement clause permits a service charge to be levied for such an improvement.

39. Mr Grundy accepted that the Tribunal can apply a reasonableness test to service charges. We have therefore considered section 19 of the Landlord and Tenant Act 1985 and we find for all of the reasons given at paragraphs 34 to 36 above that the cost of the KMS upgrade was reasonably incurred and that the works were carried out to a reasonable standard. We do not find it necessary to limit the amount payable by the applicant to the respondent. We find that the sum of £159.58 is payable by the applicant to the respondent as a service charge for the financial year 2012-2013.

Appeals

40. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

41. If the person wishing to appeal does not comply with the 28-day time limit the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit. The Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

42. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the ground of appeal, and state the result the party making the application is seeking.

Judge D Archer (Chairman)
Dated: 29 January 2014