

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McLean's (Jamie Lee) Applications [2014] NIQB 33

IN THE MATTER OF APPLICATIONS BY JAMIE LEE McLEAN FOR JUDICIAL
REVIEW

STEPHENS J

Introduction

[1] The applicant, Jamie Lee McLean, by way of judicial review challenges a decision of the Northern Ireland Housing Executive ("the NIHE") refusing to reimburse her in respect of the amount of money she paid to repair damage caused to a gas meter together with the amount of money that she paid in relation to the estimated value of the gas consumed whilst the meter was not functioning. The circumstances were that she had been compelled to pay for that damage and for that gas by Airtricity Gas Supply (NI) Ltd ("Airtricity"). The applicant is a tenant of the Northern Ireland Housing Executive and the gas meter which was damaged was at premises which she leased.

[2] The applicant also seeks leave to bring judicial review proceedings in relation to a decision of Airtricity to compel the applicant to pay for the damage and for the gas.

[3] Ms McMahon appeared on behalf of the applicant and Ms Doherty appeared on behalf of the respondent, the NIHE.

Factual Background

[4] On 12 October 2009 the applicant went into possession of a house ("the house") on foot of a tenancy agreement with the NIHE. There is a gas supply to the house. The gas pipes along the public road and across a small front garden up to and including the meter and the meter box on the wall of the house all belong to

Phoenix Natural Gas Limited (“Phoenix”). The pipework on the far side of the meter is part of the fixtures and fittings of the house and belong to the NIHE. The meter box is located on an external wall and accordingly it is accessible to anyone who walks from the public road across the small front garden.

[5] The gas is supplied by Airtricity using the pipes and the meter that belong to Phoenix together with the pipes inside the house which belong to the NIHE. The applicant enters into contracts with Airtricity to supply the gas. The method by which those contracts are formed is that the applicant has a gas card which she takes to a local shop. Upon payment the card is credited and then she inserts the card into the meter at her house. The credit is then transferred from the card to the meter permitting gas to be supplied. The card is removed and the process can be repeated whenever the applicant wishes to make further purchases of gas.

[6] Records establish that on 7 February 2011 £7.00 was added to the applicant’s gas card. On 8 February 2011 the battery inside the meter was disconnected and accordingly gas could flow through the meter without any payment being made. The battery was reconnected on 22 February 2011. The applicant states that she was away from the house on holiday between 20 February 2011 and 27 February 2011. That her mother had added £5.00 to the gas card on 23 February 2011 and that on her return from holiday on 27 February 2011 she attempted to top up her gas by inserting her gas card into the meter. When she inserted the card the meter read “Error”. She reported the fault. Phoenix then investigated the cause of the fault concluding that someone had tampered with the meter. They found that the module seal was missing and the module seal surround was damaged. They also found that the base seal was missing and the associated surround was damaged. They then charged Airtricity £369.37 plus VAT at 20% for the repair of the meter. Airtricity then passed on that cost to the applicant together with £9.42 plus 5% VAT for the estimated use of gas whilst the meter was not functioning. The method of collecting payment was to fit a meter that not only collected charges for the gas to be supplied but also collected in addition initially £15 per month and then £10 per month in respect of those costs.

[7] The applicant asserts that she did not tamper with the meter and that the costs should not have been deducted by Airtricity and/or that the NIHE should have reimbursed her the amounts deducted on the basis that a third party had damaged the meter. The first decision which the applicant seeks to challenge is the decision of Airtricity to compel her to pay for the cost of repair of the meter and the value of the gas. The second decision which the applicant seeks to challenge is the refusal by NIHE to reimburse her for the amounts deducted by Airtricity. I will deal with the decisions in that order. Accordingly I will first determine the application for leave to apply for judicial review in relation to the decision of Airtricity.

Application for leave to apply for judicial review in relation to the decision of Airtricity

[8] As I have indicated Phoenix owns the meter and the pipes on the public side of the meter. Airtricity supplies the gas. It is asserted by Airtricity that their standard contractual terms provide that the customer is responsible for the costs incurred in circumstances where there has been tampering with a meter irrespective as to whether the customer or any servant or agent did in fact tamper with the meter. The only standard terms to which they refer does not contain such a contractual provision (6/301). The terms and conditions state that:

“You”, (that is the person or persons who enter into the agreement with us for supply), shall at all times use gas in a proper, sensible and safe way ... Further that you shall not in any way tamper with, misuse or damage the meter ... if you do so you shall be responsible for the costs incurred by us ... repairing or replacing it ...”

The standard contractual term only gives rise to liability on the part of the customer if it was the customer who tampered with the meter. It does not permit the cost to be recovered if a third party, not under the control or the direction of the applicant, tampered with the meter.

[9] There are other issues that arise in relation to any claim based on the standard contractual terms. First, Airtricity would have to establish that the terms were actually incorporated into the contract between them and the applicant. Secondly, if the terms were incorporated, the court could consider the fairness of the terms under the Unfair Terms in Consumer Contracts Regulations 1999.

[10] If Airtricity is unable to establish a contractual term permitting it to charge the applicant irrespective as to whether she or any servant or agent did in fact tamper with the meter, then a claim could be made by either Phoenix (or by Airtricity if the cause of action had been assigned to it), on the basis that the applicant, her servants or agents had damaged the meter belonging to Phoenix and/or used the gas supplied by Airtricity without paying for it. There would be two claims. One is for the cost of repair or replacement of the meter and the other is for the value of the gas.

[11] In relation to the meter the applicant would only be liable for the cost of repair or replacement if it was established by Airtricity, on the balance of probabilities, that she or her servants or agents had caused the damage. She would not be liable for the cost of repair or replacement of the meter if a third party had caused the damage to the meter. Airtricity could form a view and charge the applicant for the damage to the meter, deducting the money from her but the applicant would be at liberty to commence proceedings in the civil courts for money had and received on the basis

that Airtricity has to establish a justification for the deduction. If the applicant commenced proceedings in the civil courts the onus would be on Airtricity to prove its case to the civil standard of proof. In so doing they could adduce evidence as to what actually had been done to the meter, the amount of gas which would ordinarily be used at that time of year, and the amount that was metered. In addition they could rely on an inference to be drawn from the primary fact that the only person to benefit was the applicant. The applicant could give evidence as to whether she was or was not at her house during the relevant period, where the meter is positioned and how accessible it is to members of the public and whether she did or whether she has any grounds for believing that anybody else did, damage the meter. The issue in the civil proceedings would be one of credibility.

[12] The applicant would only be liable for the value of the gas if it was established by Airtricity on the balance of probabilities that gas had been supplied to the house and that she or her servants or agents had used it without paying for it. Airtricity could charge the applicant for the value of the gas, deducting the money from her but the applicant would be at liberty to commence proceedings in the civil courts for money had and received on the basis that Airtricity has to establish a justification for the deduction. If the applicant commenced proceedings in the civil courts again the onus would be on Airtricity to prove its case to the civil standard of proof. Again similar issues would arise and in essence the proceedings would be determined by a conclusion in relation to credibility.

[13] The applicant's complaint is that the procedure adopted by Airtricity was procedurally unfair. However the analysis which I have set out demonstrates that the issues as between the applicant and Airtricity are all contractual and that the remedy is by way of civil proceedings. Airtricity is a commercial organisation selling gas to its customers. If it wrongly charges its customer, the applicant, then has a right of redress in the civil courts. The mechanisms provided by the state for the resolution of disputes between private parties and for determination of civil rights and obligations can obviously address the issues. The position as between the applicant and Airtricity, if incorrect, is subject to correction by a procedure which has proper procedural safeguards. I do not consider that the application involving Airtricity is amenable to judicial review proceedings. I refuse leave to apply for judicial review in relation to Airtricity.

Application for judicial review in relation to the decision of NIHE not to reimburse the applicant

[14] On 27 April 2012 the applicant completed a Housing Executive Public Liability Claim Form (235) seeking payment from the NIHE of the amounts that she had paid to Airtricity on the basis that the damage to the meter was not caused by her but rather was caused by an unknown third party. In determining that application the NIHE applied its policy HRAN/ES/01/12 entitled "Repairs to gas meters/meter boxes". The NIHE decided to apply that policy despite its genesis which was aimed at damaged meters in vacant properties and the liabilities as

between the NIHE and Phoenix. NIHE also applied that policy despite its date. It was signed on 5 March 2012 and the events about which the applicant complained occurred in February 2011.

[15] The application against the NIHE was part heard. I had requested further submissions from counsel in relation to the legal relationship created by the tenancy agreement and the respective rights of the landlord and tenant in respect of fixtures and fittings. In the meantime the NIHE indicated that it was

“prepared to agree to the quashing of its decision refusing to reimburse £453.13 to the applicant (that being the cost of repair/replacement of her gas meter) ... on the ground that it failed to follow its policy (HRAN/ES/01/12). In addition, NIHE is prepared to pay to the applicant:

- (i) £453.13 plus interest at the usual rate; and
- (ii) The reasonable costs of the judicial review proceedings, such costs to be subject to taxation in default of agreement.

[16] The applicant accepted those terms and I make those orders in respect of the NIHE.