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THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE LONDON LEASEHOLD VALUATION TRIBUNAL ON MATTERS REFERRED TO IT UNDER PARAGRAPH 3 OF SCHEDULE 12 TO THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Property: **Flat 4 Burnage Court, Lawrie Park Avenue, London SE 26 6HS**

Applicant: Burnage Court Limited (landlord)

Respondent: Mr David Maxwell Tildsley (tenant)

Date of hearing: 6 April 2006

Appearances: Mr J Taylor (director)
Ms L Hadfield (director)
Mr D Scudamore (leaseholder)
Ms V Townsend (leaseholder) for the applicant

Ms C Nankivell and Ms A Kershaw (BPP College of Law)
Mr D M Tildsley (the respondent)

Members of the leasehold valuation tribunal:

Lady Wilson
Mr P S Roberts Dip Arch RIBA
Mrs L Walter MA

Date of the tribunal's decision: 7 April 2006

Background

1. This service charge dispute has been referred to the tribunal by the County Court under paragraph 3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

2. Burnage Court is a substantial detached house, built in the late nineteenth century and converted in the 1920s into flats. As now arranged it comprises eight flats, all held on long leases. In February 2005 seven of the eight leaseholders acquired the freehold of the building. Accordingly, the landlord is a company of which seven leaseholders are shareholders, and the functions of the management company as defined in the leases have devolved on the landlord. Mr Tildsley, the respondent, did not participate in the enfranchisement. He will be referred to as "the tenant" in this decision.

3. It is not disputed that Mr Tildsley has not paid all the service charges demanded of him, and on 31 August 2005 the landlord issued County Court proceedings to recover £3120.15 arrears of service charges. On 11 November 2005 the proceedings were stayed and the matter transferred to the tribunal.

4. On 6 April 2006 the tribunal inspected the building, and internally inspected the tenant's flat, in the presence of the tenant and of Ms Hadfield, Mr Scudamore and Ms Townsend, who are fellow leaseholders and shareholders in the landlord company. The hearing began at 1.30 pm and occupied the afternoon. At the hearing the landlord was represented by Mr J Taylor, a leaseholder and director of the landlord company. The tenant was present and was represented by Ms C Nankivell and Ms A Kershaw of BPP College of Law.

5. The tribunal had prepared a schedule of all the service charges included in the service charge accounts for the service charge years (which coincide with the calendar years) from 1998 to 2005 inclusive. The service charge accounts for 2006 have, obviously, not yet been prepared, but the estimated service charges

for the year, to include some of the many repairs which the building clearly requires, are £11,000. The tenant agreed:

i. that the amounts claimed in the service charge accounts were not unreasonable in that the costs had not been unreasonably incurred, and the services provided were of a not unreasonable standard, and

ii. that the estimated service charges for 2006 of £11,000 were not unreasonable as estimated service charges and that the tribunal could so determine.

6. The issues which the tenant raised were these:

i. the way in which the service charge payable by him were apportioned,

ii. whether he was liable to contribute to the landlord's costs of insuring the building,

iii. the method of determining loan repayments for garage land adjacent to the garden of the building and the arrangements for the payment of the garage rent;

iv. the method by which the purchase of the freehold was organised,

v. misdirection of maintenance expenditure,

vi. lack of maintenance which had caused damage, and

vii. a general lack of democratic process and proper management practices.

7. It is clear, and is acknowledged by the tenant's representatives, that the tribunal does not have jurisdiction in these proceedings to deal with issues (iii), (iv), (v) and (vi).

8. Issues (iii) and (v) relate to the purchase in 1996, by a company called Burnage Court Management Company Limited of which the tenant was then a director or secretary, and six of the then leaseholders, of a piece of land with a garage held under a title separate from the title to the building and its surrounding garden. Issues have arisen about how the loan obtained to buy

this piece of land was serviced, it being alleged that service charge funds were diverted to repay the loan, but it is quite clear that they do not involve service charges levied under the leases and do not come within the jurisdiction of the tribunal.

9. Similarly, issue (iv) is not within the jurisdiction of the tribunal, although we observe that the tenant acknowledged that he was invited to participate in the enfranchisement and chose not to do so.

10. Issue (vii), which relates to matters such as minute-taking at residents' meetings, does not go to the tenant's liability to pay service charges and is not relevant to the matters in dispute. In any event the tenant acknowledges that such matters are now generally well handled.

11. The issues within our jurisdiction are thus issues (i), (ii) and (vi).

Decision

General

12. By section 27A of the Landlord and Tenant Act 1985, an application may be made to the tribunal for a determination whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

13. By section 19(1) of the 1985 Act, relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

(a) only to the extent that they are reasonably incurred, and

(b) 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;

and the amount payable shall be limited accordingly.

Issue (i): apportionment

14. Under the tenant's lease, the tenant is required to pay a "proportionate part" of the service charges as defined. By clause 4(ii), "proportionate part" is defined as:

such proportion as the rateable value of the Flat from time to time bears to the total of the rateable values of all the Flats in the Building as certified by the Management Company's Surveyor In the event that rateable values shall not at any time be available as a basis of calculation then the proportionate part shall be such fair and reasonable proportion as the Management Company's Surveyor shall from time to time certify In both cases the said Surveyor's certificate shall be final and binding on the Management Company and the Lessee.

15. It is not disputed that the rateable value of the tenant's flat is £240 and that the proportion which this rateable value bears to the total of the rateable values of all the flats is 15.61%. Nor is it disputed that the total service charges recoverable from all the leaseholders calculated according to this formula is 100%. The tenant says that this method of apportionment is unfair because of an historic error in the calculation of the rateable value of his flat. He claims that before he bought his lease a room which had been within Flat 4 was incorporated within the adjacent Flat 5, but that this change was never reflected in the rateable values of the two flats. He says that he has in the past raised the matter with the rating authority, but with no success. It is clear that there have been attempts at compromise between the leaseholders on this issue over the years but that no lasting solution has been reached.

16. Mr Taylor said that there was no evidence that a room in Flat 5 had ever been part of Flat 4, and that the hollowness of the wall between the room which the tenant said had been incorporated in Flat 5, on which the tenant relied as a pointer to the reallocation of the rooms was due to the structure of the building, which was formerly in single occupation but which had been enlarged and reconfigured over the years. In answer to a question from the tribunal he said, and the tenant agreed, that if the apportionment of the service charge to the tenant's flat was made on the basis of floor area rather than rateable values, the proportion payable by the tenant would be within half a percentage point of the present proportion.

17 We are satisfied that the lease requires the apportionment of the service charges to be made according to rateable values. The rateable values are "available" as the lease requires, and in the absence of agreement by all leaseholders to a variation of the lease, it is according to rateable value that the apportionment must be made. We cannot vary the lease, and certainly not in the present proceedings. It is clear from the (voluminous) documents put before us that the tenant has for many years been aware, or should, in his capacity as an officer of the management company, have been aware, of the respective rateable values of all the flats, and did not effectively pursue any opportunity he may have had to persuade the rating authority to change the rateable value of his flat. Furthermore, we are not satisfied on the evidence that the room which the tenant says was incorporated within Flat 5 was ever part of Flat 4. It certainly was not part of Flat 4 at the commencement of the lease. Nor are we satisfied on the evidence that the rateable value of the tenant's flat is incorrect or unfair to him. What is more, we do not consider that apportionment according to rateable value produces a result which is unfair to the tenant, in that the apparently fairest alternative method, which would be according to floor area, would produce a result which, he agrees, would not be significantly different from the present apportionment.

Issue (ii): insurance

18. According to clause 5(A) of the lease the management company covenants to insure the flat and building, essentially as it thinks fit, but is agreed that:

> *in the event of the Lessee effecting a Mortgage on the Flat with a Building Society the insurance of the Flat may be effected by the Lessee with an Insurance Company nominated by and through the Agency of the Building Society if that be a requirement made by that same Building Society.*

19. The tenant bought his flat in 1979 with the aid of a mortgage. He says that his mortgagee, a building society, required insurance to be effected through it, and that though this is no longer the case he has continued to insure the flat himself because he has, at any rate until recently, had outstanding disrepair which might have been (though has not) the subject of insurance claims

20 Mr Taylor says that the landlord, and previously the management company, has had no choice but to insure the whole building, including Flat 4, because the insurance company has required it to do so, because otherwise the landlord or management company could not otherwise be sure that Flat 4 was insured since the tenant would not produce written confirmation that insurance was in place, and because of concerns that Flat 4 was under-insured by the tenant's policy.

21. We are satisfied that the lease requires the landlord to insure, and we are not satisfied that the tenant's mortgagee has at any relevant time required insurance to be effected by it. Accordingly the tenant is liable to contribute the appropriate proportion to the cost of insurance throughout the relevant period.

Issue (iii): past disrepair

22. The tenant says that he has withheld payment of service charges because of disrepair to the building which has caused damage to his flat. Mr Taylor agrees that the building is not in full repair, but says that repairs to deal with such damage affecting Flat 4 as has been reported to the landlord have been carried out, and that the refurbishment which the building requires has not been able to be carried out because of lack of funds, caused in part by the tenant's failure to pay. He says that he and a fellow leaseholder have recently lent the landlord company a substantial sum, over and above their service charge liabilities, to carry out essential repairs.

23. We are quite satisfied that it has not been established that any past disrepair by the landlord has increased the service charges which are the subject of this claim, and that the landlord has done its best to carry out the necessary maintenance work. Without the funds needed to refurbish the building the works cannot be done. Accordingly past neglect does not afford a defence to any of the service charges claimed.

24. We were informed by Mr Taylor, and, subject to the issues considered above, it was not disputed, that the arrears of service charges which the tenant is liable to pay amount to £3102.65 as at 31 December 2005. In the light of our findings, we determine that the tenant is liable to pay this sum to the landlord forthwith. In addition, the tenant is liable to pay his proportionate share of the estimated service charge of £11,000 for 2006 as and when it is demanded of him in accordance with the lease.

Reimbursement of fees

25. By regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, a tribunal may require any party to the proceedings in respect of which a fee is payable under the Regulations to reimburse to any other party for the whole or part of any fees paid by him in respect of the

proceedings. Such an order cannot be made against a person in receipt of certain benefits, but the tenant confirmed that he is not. We are satisfied that an order should be made that the tenant reimburse the landlord with the hearing fee of £150 which the landlord has paid in accordance with the Regulations, because his defence was wholly without merit. The tenant's representatives urged us to take into account the tenant's difficult financial position, but we do not consider that it should in the circumstances stand in the way of the reimbursement of the hearing fee. A hearing could have been avoided if the tenant had adopted a reasonable approach.

CHAIRMAN.....

DATE.....7 April 2006.....