RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL
Case No. CHI/43UB/LIS/2007/0027

IN THE MATTER OF An Application under section 27A Landlord and Tenant Act 1985

Premises: **13 Parkside Court Weybridge Surrey KT13 8AG**

Inspection: 10th December 2007

Applicant: Parkside Court (Weybridge) Limited
Respondent: Mr David Head

Appearances: Mr C. Fox (Director) for Applicant
Mr D. Head in person (Respondent)

Tribunal Members: Mr HD Lederman
Mr DL Edge FRICS

DECISION OF THE TRIBUNAL

1. The Tribunal decides that service charges amounting to £410.00 claimed by the Applicant for the period from January 2003 to April 2003, and from January 2005 to July 2006 are payable by the Respondent to the Applicant under the terms of an Underlease of 13 Parkside Court, Weybridge dated 1st April 1970 ("the Underlease") section 27A of the Landlord and Tenant Act 1985 (as amended).

BACKGROUND

2. On 17th August 2006 the Applicant landlord commenced proceedings in the Northampton County Court (Case No 6Q255370) claiming £410.00 arrears of service charges being £210.00 (£55.00 per week) from January 2003 to April 2003 and £190.00 from January to July 2006 at £10.00 per month. There was also a claim to £50.00 Court costs.

3. By a Defence dated 17th September 2006 in that case the Respondent said he had "withheld a very small part of maintenance charge as I am in dispute with (the Applicant) over my inability to access my garage with my motor car at all hours due to parked vehicles obstructing my ability to back in and out of my garage" (paragraph 3). He also contended "these charges are not payable because they relate to the maintenance and upkeep of a garage that I am unable to use for its original purpose at ALL hours" (paragraph 4). The Respondent notes the Applicant landlord had alleged the access road to the garages had been adopted by the local authority but he disagreed on this point and held the Applicant "responsible to

rectify the situation". The Respondent also made a Counterclaim at the same time as the Defence. The gist of the Counterclaim was the same as the Defence. Paragraph 2 of the Counterclaim alleged the Applicant had "failed to deal with the problem of badly parked cars making it impossible to get in and out of [his] garage". The Respondent counterclaimed what he said was a nominal value of £990.00 for the purposes of that case for "loss of use" and a sum of £60.00 per month until he was able to access his garage without obstruction

4. We have also seen written comments by Mr Fox on behalf of the Applicant confirming that the Applicant says the Respondent's garage fronts on to land which is or abuts a public highway. The Applicant refers to evidence of what is said to be adoption of that roadway by the local authority which would appear to indicate that statutory responsibility for that roadway has passed to the local authority.

5. This case was transferred to this Tribunal by order of District Judge Sethi sitting at Kingston County Court on 18th October 2006.

6. An oral pre-trial review was held on 24th September 2007. The order made at that pre-trial review suggested that the Applicant claimed arrears falling due between July 2006 and September 2007. We have not seen any evidence of that claim. That order also recorded that the Respondent made an oral application pursuant to section 20C of the landlord and Tenant Act 1987 in relation to the costs incurred by the Applicant in that the Applicant is not entitled to recover any costs by way of service charge. One of the directions made was that the parties were to notify the Tribunal whether they required an oral hearing. Neither party indicated it required an oral hearing

7. The Tribunal inspected on 10th December 2007. After that inspection the Tribunal directed the Applicant and the Respondent had until 4 pm on 14th January 2008 to make further written representations to the Tribunal upon the copy of the filed plan of Flat 13 Parkside Court Weybridge and of the filed plan and copy of the Land Registry plan relating to Parkside Court provided to the parties at inspection on 10th December 2007. At the inspection it was recommended the Respondent seek independent legal advice. The Applicant appeared to have sought legal advice in the past. The timetable was extended to enable the Respondent to seek such advice after the winter public holidays. We do not know if he has sought or obtained such advice.

8. Under cover of letter dated 10th January 2008 the Applicant provided what was described as an official copy of the Site Plan showing the fully maintained highway outlined in red and an agreement between Walton and Weybridge District Council and JD Tracey Limited of 4th October 1967. The Respondent provided a further letter dated 10th January 2008. In that letter, among other things he asked that the decision of the Tribunal be postponed to enable him to contact other owners of flats in Parkside Court. Unfortunately this decision has been delayed but this has had the effect of providing the Respondent with a further opportunity to produce additional

information if he so wished. The Tribunal does not consider it necessary or expedient to direct or require the Applicant to provide names and addresses of other flat owners as the Respondent requests in that letter.

Jurisdiction of the Tribunal

9. The question we have to decide under section 27A of the Landlord and Tenant Act 1985 (as amended) is 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.

10. The Tribunal bears in mind section 19 of the 1985 Act entitled Limitation of Service charges - reasonableness. This provides

(1) 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.

(2) 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

Set off and equitable defence

11. It has been held the Tribunal has jurisdiction to consider questions of breach of covenant raised by a tenant as a defence to service charge claim where such a breach can be asserted as an equitable set off: see *Continental Property Ventures Inc v White* [2006] 1 E.G.L.R. 85, a decision of the Lands Tribunal and *Filross Securities Ltd v Midgeley* [1998] 3 EGLR 43. It may also be possible for this Tribunal to determine any issue of law which is found necessary for or incidental to such a determination: see *Canary Riverside Pte Ltd v Schilling* LRX/65/2005 (paragraphs 43-44), unreported 16 December 2005 another Lands Tribunal decision. Equitable set off has been defined as that class of set offs in which a

Court of Equity would have regarded the cross-claim as entitling the defendant (here the Respondent) to be protected in one way or another against the claim of (here) the Respondent tenant. It has been said "Reliance may be placed in a court of law upon any equitable defence or equitable ground for relief: so also any matter of equity on which an injunction against the prosecution of a claim might formerly have been obtained may be relied on as a defence. This may involve that there will have to be an ascertainment or assessment of the monetary value of the cross-claim which, as a matter of equity, can be relied on by way of defence": see *Filross.*

12. In *Schilling* at paragraph 43 the Lands Tribunal held:

> "... that if a party to proceedings before an Leasehold Valuation Tribunal ("LVT") takes proceedings for the determination of such an issue before what the LVT accepts is a more appropriate court, the LVT will, as it did in the course of the Service Charges application, adjourn its proceedings pending such determination. It has power so to do under its inherent jurisdiction to regulate its own procedure. That this would be a reasonable and proper course if an issue were raised, to take..... examples, as to voidability for mistake, forgery or misrepresentation, I do not doubt. Such matters are better determined under Court procedures and by judges, rather than by specialist tribunals, encouraged to adopt comparatively informal procedures."

13. This Tribunal is not bound as a matter of law to follow the decision of the Lands Tribunal in *Schilling* on an issue of law, as distinct from an issue of valuation or practice: see the Court of Appeal in *Sportelli* [2007] EWCA Civ 1042 at paragraph 99. However, in the Tribunal's view it should in general follow decisions of the Lands Tribunal on matters of law and practice, unless satisfied that the Lands Tribunal is wrong. It is only right as a matter of judicial comity to respect decisions of a higher Tribunal. Moreover it is only sensible, since if this Tribunal refuses to follow decisions of the Lands Tribunal, there will inevitably be successful appeals to the Lands Tribunal, with consequential costs to the parties.

14. This is what the Court of Appeal has held previously. In *Shephard v Turner* [2006] EWCA Civ 8, Lord Justice Carnwath said at para 57 that:

> "In reviewing... decisions [of the Lands Tribunal], it is important to keep in mind that [Lands] Tribunal decisions are not normally to be regarded as setting any precedent in relation to what must be essentially a question of fact and degree. However, one of the functions of a specialist tribunal such as the Lands Tribunal (made explicit by s 4(1)(b) of the Lands Tribunal Act 1949) is to promote consistent practice in the application of the law to its

specialist field. Unexplained inconsistency of approach may in certain circumstances amount to an error of law."

15. We turn to consider whether the Respondent's Counterclaim about the alleged failure to provide access to the garage will amount to an equitable set off, or whether a decision on the merit of this defence is necessary for or incidental to a determination of whether service charge is payable. This requires a consideration of the Underlease of Flat 13 and the garage.

The Underlease and the Garage

16. The Underlease defines the property demised in Schedule B as 'the Flat on Ground floor of Block A in a the building coloured blue on the plan annexed to the Lease ("the plan") together with the Garage numbered "one" ("the garage")'. The copy of the plan accompanying the Underlease provided to us was uncoloured. Neither party was able to provide us with a coloured copy of the plan. The plan did however depict garage number "one" as part of the semi circle of garages numbered 1 to 12 at the northern boundary of the area outlined as the Estate on the plan.

17. When the Tribunal inspected the exterior of the Respondent's garage on 14th December 2007 in the presence of the parties mentioned above, the Tribunal noted the numbering of the garage was not number "one" but number 13. At the inspection all parties were agreed that the garage identified to us as number 13 was the Respondent's garage. The coloured copy of the plan accompanying the Land Registry plan relating to Parkside Court Title number SY33569 provided to the parties also shows the Garage demised by the Underlease as numbered 13.

The roadway in front of the Garage

18. The status of the roadway in front of the Garage must be considered in order to decide whether the Tribunal should assume jurisdiction to consider the merits of the Respondent's counterclaim that the Applicant is in breach of covenant or infringement of rights granted by the Underlease in failing to secure access to the garage. The Tribunal does not at this stage seek to reach a decision or final determination about the status of the roadway, nor the Respondent's complaint about access.

19. Schedule C to the Underlease grants to the Respondent as tenant "the right in common with the [landlord] and [the tenant] and occupiers of other flats and others having a like right to use for the purposes only of access to and egress from the Premises all such parts of the Estate as afford access thereto." An important question raised by the Respondent's Counterclaim and the Applicant's response is whether the roadway forms part of "the Estate" within Schedule C and other parts of the Underlease. "the Estate" is defined in paragraph 4(a) of the recitals to the Underlease as "the land shown and edged red on the plan". On the monochrome copy of the plan provided to the Tribunal the Estate does not extend to include or

encompass the roadway in front of (and to the north of) the Garage. If that is a correct interpretation of the Underlease (as to which the Tribunal makes no finding), the Applicant may owe no duties to the Applicant in respect of access to the Garage *under the terms of the Underlease*. The Tribunal emphasises the final words because it is possible that rights of access may arise in other circumstances.

20. However the coloured plan annexed to the copy of the land registry entry for Parkside Court (title number SY333569) appears to show the land registered as part of the Estate (the land vested in the Applicant) as including the roadway in front of and to the north of the Garage, and in particular that part of the roadway which the Respondent contends is blocked or obstructed by vehicles from or visiting neighbouring properties.

21. One real possibility which arises is whether the plan accompanying the Underlease was prepared in error, or the Underlease should be construed so as to include the roadway within the land vested in the landlord. This is not an issue to which the parties have directed their representations or their minds.

22. The service charge provisions of the Underlease are to be found in clauses 2 and 3 of the Underlease and Schedules E and F. In particular paragraph 14 of Schedule E required the Respondent to indemnify the Applicant for one twenty fourth of all costs charges and expense incurred as Estate owner incurred in carrying out its obligations under paragraph 15 of schedule F. There is nothing in those Schedules which appears to be of direct relevance to the Respondent's complaint of breach of covenant. There is no provision for on account payments of service charge in paragraph 15 of Schedule E to the Underlease. The calculation and reasonableness of the sums claimed as arrears is not otherwise challenged by the Respondent as we understand the material before the Tribunal.

23. On the copy of the Lease before us there are very real questions whether the Respondent's complaint about access to the roadway in front of and to the north of the Garage has merit, and whether that roadway forms part of the land vested in the Applicant. There may be difficult questions of rectification and interpretation of the Underlease and other issues about his right of access. These issues are more properly determined by a Court which has the appropriate procedures to reach a determination on these issues and reach a final determination on the merit of the Respondent's assertion of a set off.

24. We emphasise that we have not made any final determination of the merit of the Respondent's complaint and claim to set off which we consider should be properly determined by a Court. We decline to accept jurisdiction to address this issue. For the avoidance of doubt we do not consider this issue is necessary or incidental to determining the Respondent's liability to pay the service charge.

25. Questions of Court fees payable should be considered by the Court and are not within our jurisdiction.

Costs of these proceedings

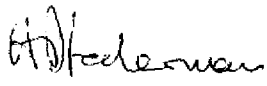
26. The Tribunal turns to consider whether an order should be made that all or any of the costs incurred, or to be incurred, by the Applicant landlord in connection with this application, should be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent under section 20C of the Landlord and Tenant Act 1985

27. Having considered the terms of the Underlease, our provisional view there is no provision which would enable the Applicant to charge the costs of these proceedings to the Respondent or other tenant by way of service charge. No order is therefore made under section 20C of the 1985 Act.

28. If the parties wish to make further written representations about costs or any other issue they should do so within 14 days of the date of this decision

Addendum

29. The Tribunal cannot leaves this decision without noting that the issue of obstruction of access to the garages appears to affect many of the other garages on the Applicant's Estate and clearly this issue requires resolution. No evidence has been seen of steps being taken to resolve this issue by the Applicant and both parties are urged to resolve this issue by negotiation, or mediation before it escalates into a much larger dispute in which further costs will arise.



Howard Lederman
Chairman

11th March 2008