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RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Property	:	**45 Southwell Close, Chafford Hundred, Grays, Essex RM16 6AZ**
Applicant	:	**The Quadrangle (Chafford Hundred) Management Company Limited**
Respondent	:	**Clare Margaret Gayler**
Case number	:	**CAM/00KG/LSC/2006/0037**
Date of Application	:	**28th July 2006**
Type of Application	:	**Determination of reasonableness and payability of service charges (Sections 19 and 27A Landlord & Tenant Act 1985 ("the 1985 Act")**
The Tribunal	:	**Bruce Edgington (Lawyer Chair) Richard Marshall FRICS FAAV Jane Clark**
Hearing	:	**29th September 2006 at Lakeside Moathouse Hotel, North Stifford, Grays, Essex RM16 6AZ**

DECISION

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1. The service charges claimed by the Applicants in the sum of £883.81 are reasonable and payable by the Respondent. However, in view of the breach of covenant on the part of the Applicant, the Respondent is permitted to retain £500 for 6 calendar months from 29th September 2006 or until the Applicants comply with the terms of the Lease by cultivating, planting or otherwise keeping the garden area in good condition.

2. In the event that the terms of the lease have not been complied with or agreement reached within the 6 month period, the full amount of the service charges becomes payable and either party has permission to apply to this Tribunal for the proceedings to be transferred back to the

County Court for it to consider an application against the Applicant for a mandatory injunction to enforce the terms of the Lease.

Reasons

Introduction

3. The property is on a large estate of relatively new housing north of Grays in Essex. There is a wide variety of housing on the estate some of which is freehold and some, such as this property, is leasehold.

4. On the 8th May 2006 the claimant issued court proceedings in the Barnett County Court for the recovery of "Arrears of Service Charges due under the Lease in the sum of £803.81" plus court fee of £80. There is a statement attached to the claim form showing service charges incurred up to 12th April 2006 of £803.81 plus the court fee.

5. The Respondent filed a defence to the claim. She points out that she bought the property on the 19th July 2002 and since then she has been seeking to have an area outside her property either turfed properly or laid with patio slabs because the original turf was laid on rubble and died.

6. As far as the court proceedings are concerned, she says that she reached an agreement in March 2005 with Claire Newbrook, the assistant property manager with Crabtree, the managing agents appointed by the Applicant to manage the site. The alleged agreement was that the Respondent would withhold payment of her service charges without any penalty in terms of late payment charges or interest until the work was done.

7. At the end of her defence she says "I am more than happy to pay what I owe but was merely withholding payment in a desperate attempt to put an end to this matter so that I might be able to finally safely use the garden in the 5th summer of my owning the property".

8. Because of provisions within the Civil Procedure Rules, the case was transferred to the court local to the Respondent i.e. Romford County Court, on 13th June 2006. With her allocation questionnaire, the Respondent then sent to the court copies of correspondence she has had with the builder and then with the management company together with copies of minutes of meetings.

9. On the 6th July 2006, District Judge Mullis transferred the case to this Tribunal. Despite being ordered to do so, the Applicant decided not to make any written representations in answer to the allegations made by the Respondent. However, it did send copies of 2 documents which were described as service charge budgets for the years commencing 1st January 2005 and 1st January 2006.

The Law

10. Section 19 of the 1985 Act gives this Tribunal the jurisdiction to decide whether service charges incurred or to be incurred are reasonable or not. Section 27A gives jurisdiction to decide whether service charges are actually payable and, if so, by whom.

11. The Tribunal has been shown a copy of the Lease which is for 125 years from1st January 2002 at a ground rent which increases over the term. Unfortunately, the copy did not include a copy of the Lease plans. This property is one of 100 similar properties in this development. The developer is Bellway Homes Ltd. and there is an intention on completion of the last sale on the estate to grant a 125 year lease to the Applicant of land edged yellow on Plan 2. The Tribunal presumes that this is a lease of the common parts.

12. The Lease provides for the Applicant to maintain the common parts and to recover 100th of the service charges from the Respondent. Having looked at the documents called 'budgets' produced by the Applicants, it seems clear that the amounts being claimed are properly described as service charges and come within the terms of the Lease.

13. Furthermore, there is no challenge to the reasonableness of the service charges apart from the issue raised in the defence to the court claim. The Tribunal itself could not see that any of the charges were, on the face of it, unreasonable and so decided that they were reasonable in the absence of any evidence to suggest otherwise.

14. For example, there was no evidence to suggest that the charges for repairs maintenance or gardening include the cost of re-turfing or laying the patio slabs in the area in question.

15. The Applicant covenants with the Respondent in Clause 4 of the Lease that subject to the Applicant paying the service charge "without any deduction" (Paragraph 6 of the 7th Schedule), it will perform the obligations imposed by the 8th Schedule.

16. The 8th Schedule contains a covenant that the Applicant will do everything in the 5th Schedule which includes "keeping the garden areas within the Common Parts well cultivated and planted" (Paragraph 14). Although there was no plan with the copy Lease provided, it does seem clear from the definition of Common Parts in clause 1.15 that it would include the garden area in question.

The Inspection

17. The members of the Tribunal inspected the property and the part of the communal gardens referred to in the defence in the presence of the said Claire Newbrook and also Terry White from the Applicants. The Respondent was in her property and was able to observe the inspection.

18. The Tribunal found that these flats were in blocks which formed a large quadrangle around a landscaped garden including a fountain. The buildings along each edge of the quadrangle had overhanging balconies which were preventing rainwater reaching the grass areas beneath them. Looking at each of the edges of the quadrangle in turn it was clear that despite plentiful recent rainfall, there were large brown areas where the grass was dead.

19. The area complained of by the Respondent was part of this. Whether the original turf was laid on rubble or not is irrelevant because this is not the basic problem. If the developer did re-lay the turf, this seems to the Tribunal to have been rather a futile exercise.

20. It seemed clear to the members of the Tribunal that this problem is the result of a mistake by the developer, architect or landscaper who designed the estate. It should have been foreseen that the large overhangs would cause this problem.

The Hearing

21. The hearing was attended by the Respondent, Ms. Newbrook and Mr. White. The Tribunal was told that the Applicant company had obtained estimates to lay patio slabs on all the affected areas in the sum of £8,000, or lay them to gravel in the sum of £3-5,000. However the decision had been made not to go ahead with this work because it was too expensive.

22. Ms. Newbrook had also obtained an estimate from a company called Dalemarsh Ltd. to lay patio slabs in front of the lounge doors to the property in the sum of £340 plus VAT. Ms. Newbrook conceded that this would not cover all the affected area and she had estimated the cost of covering this total area in the sum of £500.

23. The Tribunal Chair explained to both parties that there is a clear problem in this case because of the legal position. The service charges are reasonable and payable. The Applicant was clearly in breach of the terms of the Lease because the garden area was not being 'well cultivated and planted'. However, this Tribunal has no power to make the sort of mandatory injunction which would be needed to force compliance. All it can do is order the service charges to be paid but defer payment of a proportion to enable the Applicant to comply with the terms of the Lease.

24. There is the additional problem that strict compliance with the terms of the Lease by relaying the turf would be futile and would not prevent the problem recurring almost immediately. What was needed was for the Applicant to accept that it needed to either replant the turf on good topsoil and then make provision for it to be regularly watered or to agree that these areas need to be laid with patio slabs or gravelled.

Both remedies would be expensive but slabs would be the most permanent solution.

Conclusions

25. The Respondent has accepted that the amount claimed by the Applicant would be properly payable if the communal garden area had been properly turfed or laid with patio slabs. She has not produced any evidence of the cost of re-turfing or laying the patio slabs because she was told that she could not undertake this herself as this was against the terms of the Lease.

26. It is clear from the correspondence that the Applicants deny that there was any agreement that the Respondent could withhold paying service charges until this work was done. The whole issue was clearly discussed at the annual general meeting of the Applicants on the 25th January 2006. The minutes show that the possibility of laying patio slabs was discounted due to excessive cost and it was agreed that Ms. Newbrook would speak to the gardening department about the possibility of them putting down more topsoil and seeding.

27. Nothing appears to have been done which means that in accordance with the terms of the Lease, both parties are in breach. The Respondent is in breach for not paying her share of the service charges and the Applicant is in breach for failing to maintain the garden area.

28. The Tribunal was impressed by the conduct of both parties who tried all they could to assist the Tribunal and avoid rancour. They accepted that it was the basic design of the garden area which was at fault rather than any shortcomings on either side.

29. The difficulty faced by the Applicant is that it is in breach of the terms of the Lease and could, at any time, be faced with court proceedings for an injunction which, in the Tribunal's view, is almost bound to succeed. This would have serious consequences for the Applicants who would face a large legal bill and the possibility of imprisonment of officers of the company if the injunction was not complied with.

30. The only solution for the Applicant is to call an immediate extraordinary general meeting of the company, with all tenants invited, when it can be explained that this problem will not go away and that if all else fails, the sum of £8,000 will have to be spent on laying patio slabs. This sum will have to be collected as part of the service charge from all flat owners i.e. about £80 for each. The fact that it may appear to be benefiting a small minority of flats is irrelevant. This is part of the communal gardens.

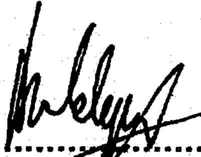
31. The Applicants may also want to consider an attempt to recover this cost from the developer as there has clearly been negligence in failing to realise that these grass areas were never going to grow under the

overhangs. Before taking court action they would clearly need to consider points for and against with their lawyers.

32. For all these reasons the Tribunal has decided that the only pragmatic way out of this very difficult situation for both parties is to order payment of the service charges subject to a retention being the estimated cost of laying patio slabs round the property.

33. The Tribunal had come to the view before hearing evidence that the likely cost would be in the region of £480 i.e. 12 square metres at £40 per metre. However it noted Ms. Newbrook's opinion that this would be about £500 based on the estimate she had obtained and decided to accept that figure.

34. With the Order made as set out above and goodwill and common sense on all sides, there will hopefully be no further need for court or Tribunal intervention.



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Bruce Edgington
Chair
29.09.06