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**LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL**

**DETERMINATION BY THE LEASEHOLD VALUATION TRIBUNAL AS TO
JURISDICTION**

S27A of the LANDLORD AND TENANT ACT 1985, AS AMENDED

REF: LON/00AG/LSC/2011/0858

Address: Flat 2, 97 Greencroft Gardens, London, NW6 3PG

Applicant: FFF Estates Ltd.

Respondent: William Miller

**Tribunal: Mrs JSL Goulden JP
Mr D I Jagger MRICS**

Background

1. The Tribunal is dealing with an application under S27A of the Landlord and Tenant Act 1985, as amended ("the Act") by way of a referral by an Order of Barnet County Court made by District Judge Gerlis dated 1 December 2011 (Claim no: 1UDA56155). The Tribunal's jurisdiction flows from the county court proceedings. The Tribunal is able to deal only with service charges issues which were transferred from the county court, and therefore issues relating to ground rent, county court interest, court fees and solicitors costs, all of which were included in the county court application, remain within the jurisdiction of the county court.

2. The Applicant is FFF Estates Ltd. The Respondent is William Miller.

3. A copy of the lease under which the Respondent's flat is held is in the case file. It is understood that the Respondent is the long lessee of a ground floor flat in a converted detached house c 1900, with 8 flats being off communal parts and a ninth flat being in a rear extension accessed via a separate entrance to the rear

4. An oral Pre Trial Review had been held on 17 January 2012 and the Tribunal's Directions were issued on the same date. At the Pre Trial Review, the question of jurisdiction had been raised on behalf of the Applicant company. The relevant paragraphs of the Tribunal's Directions are as follows:-

"4. The Respondent explained that his main complaint related to the water ingress issue referred to in his County Court defence. In his submission, the Applicant had failed to deal with the issue of water ingress into the premises over

a considerable period of time, causing him considerable distress and seriously affecting his quality of life.

5. Mr Haycock on behalf of the Applicant acknowledged that there had been a problem with water ingress and that this had caused significant damage to the Premises. He also stated that the source of the water ingress had now been identified and the premises repaired, and the Respondent for his part acknowledged that the premises had indeed been repaired.

6. The Respondent confirmed that at the present time he did not have any other specific challenge to the service charge, although he would shortly be instructing a solicitor to give him formal advice having previously obtained only informal advice."

5. The Applicant's representative had suggested at the Pre Trial Review that the Tribunal may not have jurisdiction to deal with the service charge issue and at paragraph 9 of the Tribunal's Directions, it is stated:

"9. On the jurisdiction question, having discussed the matter with the parties and deliberated, the Procedural Chairman came to the conclusion that it would be appropriate to set the case down for a preliminary hearing on the question of whether it was possible for the LVT to deal with the case effectively or whether it was better (and possible) to remit it back to the County Court. Whilst there were circumstances in which the LVT had jurisdiction to consider what was effectively a counterclaim as part of a service charge dispute there was a reasonable risk in this case that it would not have jurisdiction to deal with the water ingress issue. Whilst it did have jurisdiction in relation to the primary service charge issues as stand alone issues, in practice they were arguably not stand alone issued but were very much intertwined with the Respondent's defence. There was therefore a real risk that it would be difficult to determine the issues in isolation and that the LVT would not have jurisdiction in respect of the water ingress point, and then the parties would need to go through the whole process again in the County Court"

6. The matter was therefore set down for a preliminary hearing as to jurisdiction to be heard on 8 February 2012.

The Hearing

7. At the hearing on 8 February 2012, the Applicant company, FFF Estates Ltd., was represented by Mr J Bates of Counsel, instructed by Lee Pomeranc, Solicitors, and Mr A Haycock, Property Manager, of Defries & Associates Ltd., the Applicant's managing agents. The Respondent, Mr W Miller, appeared in person and was unrepresented.

8. Mr Bates, for the Applicant, contended that the Respondent's counter claim for damages was not by way of equitable set off, in which case the Tribunal would have no jurisdiction under S27A of the Act since it was not a defence to the service charge claim. He said that if the Tribunal was not with him on that point, then his "fall back" position was that if the Tribunal found that there was an equitable set off, the Tribunal should not exercise its discretion to deal with the issue since none of the remedies on offer were open to the Tribunal.

Mr Bates provided written submissions and case law in support of his argument that the Tribunal should remit the case back to the county court.

9. Mr Wheeler said that he was disappointed that the Tribunal was unable to hear the facts relating to the case, but understood that the hearing on 8 February 2012 was limited to consideration of jurisdiction only. He had no views as to whether the substantive hearing should be at the LVT or the county court.

The Tribunal's Determination

Is the counterclaim by way of equitable set off?

10. Mr Miller had filed and served a defence and counter claim within the county court proceedings. A copy had not been included within the hearing bundle, but was set out in Mr Bates' submissions as follows:

"(1) Loss of Amenity

(2) Breach of Contract: I believe the claimants are in breach of contract and liable for making an entirely avoidable situation a distressing & unending affair that had serious effects on my sense of wellbeing for over 2 years. I started to get a serious amount of water coming into my bedroom wall whenever it rained from the flat above (which is owned by the claimant's client) from Sept 08 on after it had rained & had informed D & A by email & telephone about it, but nothing was done to rectify it. This state of affairs continued until it got so bad, that whenever it rained a literal wall of water poured down my wall. I tried my best with pots & pans to try & contain the ingress when I was present until after 18 months (Feb 2007) of this when the ceiling finally collapsed in. The heavy shards of plaster flying through the roof could have killed me. But even after all of this (unclear word) still wouldn't act in a timely manner & while I waited for the situation to be finally resolved there was a gaping hole in my ceiling which caused me to become ill & depressed as my living standards fell yet further. I believe it was only the threat of me seeking mediation last October that finally got the situation rectified after 2 ½ years. Tragically, had pre-emptive or even interim action been taken vis a vis the water ingress, the entire run of evens could largely have been avoided".

11. Schedule 12 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") defines the Leasehold Valuation Tribunals: Procedure. Paragraph 3 of Schedule 12 deals with transfers from the court as follows:

"(1) Where in any proceedings before a court there falls for determination a question falling within the jurisdiction of a leasehold valuation tribunal, the court-

- (a) may by order transfer to a leasehold valuation tribunal so much of the proceedings as relate to the determination of that question, and**
- (b) may then dispose of all or any remaining proceedings, or adjourn the disposal of all or any remaining proceedings pending the determination of that question by the leasehold valuation tribunal, as it thinks fit"**

12. Although as stated in paragraph 1 above, the Tribunal's jurisdiction flows from the county court proceedings, under the 2002 Act this can only be on the basis

that the county court has transferred issues “**falling within the jurisdiction of a leasehold valuation tribunal**”.

13. It is correct that the Tribunal has jurisdiction, under S27A of the Act, to deal with payability of service charges and this can include jurisdiction to deal with any question as a raised defence. The Act confers power to the Tribunal to decide various wider issues relating to the payability of service charges and, in this case, whether the sums claimed by way of service charges are reduced or extinguished by a counter claim (the claim for ground rent would, as stated above, not fall within the Tribunal’s jurisdiction in any event)

14. The test of equitable set off is set out in the Court of Appeal decision in **Geldof Metaalconstructie NV v Simon Carves Ltd [2010] EWCA Civ 667** as “those in which a court of equity would have regarded the cross-claims as entitling the defendant to be protected in one way or another against the plaintiff’s claim. However, that did not mean that all cross-claims may be relied on as defences to claims..... two factors are critical: it would have been “manifestly unjust” for the claim to be enforced without regard to the cross-claim; and “there was a close relationship between the dealings and transactions which gave rise to the respective claims”

15. However, in this case, the Tribunal accepts Mr Bates’ contention that there is no inextricable link between the service charges and the counterclaim. It appears that Mr Miller did not pay his service charges solely because he required compensation for the disruption undoubtedly caused by significant water ingress into his flat for a considerable length of time. It does not appear that there is a dispute in respect of the underlying service charges, but a cross claim for damages. The Tribunal does not consider that there is a close relationship between the two elements of this case.

16. Accordingly the Tribunal determines that it has no jurisdiction in this matter and the case will be remitted to the county court.

17. However, and in order to assist the parties, the Tribunal has considered the alternative if the Tribunal had determined that there had been an equitable set off.

If there had been an equitable set off, would the Tribunal have exercised its jurisdiction?

18. As was explained at the hearing, the Tribunal’s remit is narrow. Although it appears from previous case law that there is no reason in principle why the Tribunal’s jurisdiction should not extend to determining a claim for loss of amenity or loss of health arising from a breach of a repairing covenant, the Tribunal should exercise caution in this regard.

19. A superior court would be able, for example, to order documentation to be produced and take evidence on oath. The Tribunal, being a more informal body, has no such powers. The Tribunal has no power to award damages. If this case had been permitted to continue before the Tribunal, all the Tribunal could do if Mr Miller were to be successful, would be to reduce or extinguish the service charges at present before the Tribunal.

20. Accordingly, this Tribunal, if it had found that there had been an equitable set off (which is not the case), the Tribunal would not have exercised its discretion, would not have accepted jurisdiction and would have remitted the case to the county court.

CHAIRMAN Mrs J S L Goulden

DATE 14 February 2012