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LON/00AG//LDC/2006/0002

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
ON APPLICATIONS UNDER SECTION 27A
OF THE LANDLORD AND TENANT ACT 1985

Property Barnfield and Woodfield, Parkhill Road, London NW3

Applicant: The London Borough of Camden

Respondent: The Leaseholders of Barnfield and woodfield

Application received: 20 January 2006

Hearing date: 8, 9 and 10 May 2006

Appearances: Mrs E Howells (Camden Home Ownership) for the Applicant
Ms E Sherwood (Project manager)
Mr H Yates (Mechanical and Electrical Services Manager
Planned Maintenance Group)
Mr Gerald Eades Dip Arch (Dearle & Henderson)

Miss H Thomas, Mr J Mustafa and Miss M O'Gunleye (College
Of Law)
Mrs Smith (Leaseholder 23 Woodfield)
Mr M D Miller (Stevens Scanlan LLP, Chartered Surveyors)

Members of the Leasehold Valuation Tribunal:

Lady M Wilson
Mr P S Roberts Dip Arch RIBA
Mrs S Baum

Background

1. This is an application by the landlord, the London Borough of Camden, under section 27A of the Landlord and Tenant Act 1985 ("the Act") for a determination that, if costs are incurred for proposed major works to flats held by leaseholders of Barnfield and Woodfield, a service charge will be payable in respect of them by the leaseholders. The application was originally made against one such leaseholder, then other leaseholders were joined as parties at their request. But it appears to this tribunal that all are equally affected and all should be respondents to the proceedings. None of them are thereby prejudiced. Mrs Howells, for the landlord, confirmed that the landlord does not propose to place any of the costs of the proceedings on the service charges of any leaseholder.

2. Barnfield and Woodfield are two blocks of flats built in 1948 (winning the RIBA London Architecture Medal as best building of that year) and listed Grade II. Together they contain 92 flats, 27 of them held by leaseholders, in the rest of this decision mainly called "the tenants", on Right to Buy leases. The leases are in standard form and, by clause 4, require the landlord to maintain repair and renew the structure of the buildings, including the window frames. By clause 3.2 the tenants are required to pay a service charge calculated in accordance with the fourth schedule. By clause 3.10, the tenants are required to maintain and renew the landlord's fittings in their flats, and by clause 3.11 they must do such works as may be required by any public authority under any Act of Parliament.

3. Central heating was installed in all the flats in the 1980s, at a time when all the flats were occupied by secure weekly tenants, with individual boilers in each flat. As flats were acquired on Right to Buy leases, responsibility for the maintenance of the central heating installation passed to the leaseholder of the flat. As originally installed, the Potterton boilers had flue terminals in the upper part of the glazed screens, described below, which would have complied

with the regulations in force at the time. Over the years, some boilers have been replaced by the tenants and the flues extended to the face of the balcony, which aligns with the main rear wall; again compliant with the regulations at the time.

4. The landlord is carrying out a major refurbishment to both blocks which includes works to the roof and fabric of the buildings which are not the subject of this application. As built, each flat has a glazed metal screen leading to a small balcony, with a glazed door and sidelight to the kitchen, and glazing with an opening casement and fanlight to the bathroom. The proposal which is the subject of the application is to replace the screens with new screens which will be similar in appearance to the old but will be galvanised and polyester powder-coated, with double glazed windows and doors. It is common ground that, if the windows and doors are to be replaced, the current regulations require that they be double glazed.

5. Because many of the central heating boiler flues pass through glazing in the metal screens, the replacement of the screens involves removal of the flues, with the consequence that the flues must now comply with current regulations. All the central heating boilers in the tenanted flats, but not those in the flats held by leaseholders, have, as part of a separate contract, been replaced by the landlord with wall-hung boilers in the wc compartments. Planning and listed building consents have been obtained for the works, the application for which included detailed drawings of the proposed positions of the flue terminals in the external walls adjacent to the balconies.

6. The leaseholders have been asked to re-locate their own boilers and were offered *ex gratia* payments of £1000 towards the cost of so doing if they moved their boilers before 20 March 2006. The majority have accepted the offer but some have not. The time limit was imposed in an attempt to ensure that the re-location of the boilers would have been completed before the start of the contract to replace the screens. The leaseholders were also invited to contact BTU, the heating contractor who carried out the boiler replacements in one of the blocks, because it



was hoped that they would thereby obtain a discounted price for a bulk order, but this did not materialise.

7. Many of the central heating boilers in the leaseholders' flats are old, and although these old boilers comply with the regulations which were in force when they were installed and are therefore lawful, and are functional, if they are moved they will have to comply with the current regulations. In order to comply, the older boilers may well therefore have to be renewed, together with new flue arrangements, at additional cost to the leaseholders concerned.

8. The total cost of all the major works in the present contract, which includes the replacement of the screens as well as other works, is estimated to be £276,587.06 for Barnfield and £267,525.56 for Woodfield. The amount which each leaseholder will be expected to pay towards all these works is estimated to be around £23,000 of which about £4500, excluding the cost of supervision by Dearle & Henderson, is for the replacement of the screens.

9. An outline of the background to the present contract follows.

a. On 30 January 2001 English Heritage, having discussed the proposed works with the landlord, wrote (bundle, page 275) to Ms Sherwood, the landlord's project officer, to say that the existing metal windows showed signs of rust and warping and that they recommended that they should be overhauled where possible and replaced with metal windows where overhaul was not practicable.

b. On 17 June 2002 Steel Window Service advised Dearle & Henderson, the landlord's consultant (bundle, page 279), that the metal windows and doors were in their opinion "past any kind of economic or meaningful repair" and were having a detrimental effect on the structure of the building, and they advised replacement of all of them which would, in their opinion,

provide a longer lasting system which would protect the buildings from deterioration by water penetration.

c. On 30 October 2003 the landlord applied for listed building consent for the replacement of the metal windows and doors, but was advised to and did withdraw the application and re-submit one which was more detailed.

d. The contract was prepared by Dearle & Henderson and sent out to tender in or about January 2004 and tenders were returned in February. On 23 June 2004 planning permission was granted for the replacement of the metal screens, windows and doors. Notice of intention to carry out the works was given to the leaseholders in accordance with section 20 of the Act on 18 October 2004, and the works were re-tendered in February 2005. Four tenders were returned, and Dearle & Henderson's tender report (bundle, page 358) is dated May 2005. Notices of estimates dated 26 August 2005 (sample for 23 Woodfield at bundle, page 287) show the total projected cost for the leaseholders of that flat at £26,064.94. This does not, of course, include any costs of moving and replacing boilers.

e. The contractors started to replace the screens in March 2006 and the work is due to be completed in August 2006.

10. By section 19(1) of the Act, relevant costs shall be taken into account in determining the amount of a service charge *only to the extent that they are reasonably incurred*. The question for determination is whether the proposed costs will be reasonably incurred.

11. The issues, as they were developed at the hearing, may be summarised as follows:

i. whether the screens, with their doors and windows, should be repaired rather than

replaced;

ii. whether the existing flues can be extended to comply with existing gas safety regulations, or whether, as the landlord proposes, all the flues should terminate through the walls to give a uniform appearance;

iii. how the costs of moving the boilers in the flats held by leaseholders, if the work is determined to be necessary, should be charged to the leaseholders; can it be classed as “making good” after the works to the windows and thus charged by the landlord to the leaseholders as a service charge? Or, alternatively, are these works the responsibility of the individual leaseholders, as the landlord suggests, or of the landlord, as suggested by the tenants?;

iv. whether the landlord requires dispensation from any part of the consultation requirements in relation to the relocation of flues to the boilers. (The tenants do not oppose the grant of such dispensation if it is needed.)

12. The tribunal inspected the blocks in the morning of 8 May 2006, in the presence of Mrs E Howells, the landlord’s representative, Mr G Eades of Dearle, & Henderson, and Ms E Sherwood, the project officer, and of Ms Helen Thomas and Mr Jehad Mustafa of The College of Law PBP, two of the tenants’ three representatives. We internally inspected Flats 15, 17, 20 and 23 Woodfield. In Flat 15, the screen had already been replaced as a pilot, and the boiler had been replaced and made good. Flats 17, 20 and 23 had their original screens.

13. At the hearing, which started at 1.30pm on 8 May and continued on 9 and 10 May, the landlord was represented by Mrs Howells, who called Mr Eades, Ms Sherwood and Mr H Yates, the landlord’s Mechanical and Electrical Services Manager in the Planned Maintenance Group, to give evidence of fact. The tenants were represented by Ms Thomas, Mr Mustafa and Ms M O’Gunleye, also of The College of Law PBP. They called Mr M D Miller BSc MRICS, of Stevens Scanlan LLP, chartered surveyors, to give expert evidence and Mrs Mary Smith to give

evidence of fact.

Issue 1: should the screens be repaired rather than replaced?

14. The landlord's case was that, although the screens were in most cases capable of repair, replacement was the better option for a number of reasons and the landlord's decision to replace them was a reasonable and sensible decision.

15. Mr Eades, who is an architect by profession, said that he was the team leader at Dearle & Henderson which was responsible for the project. The contract administrator was an employee of Dearle & Henderson who was answerable to him. He said that he and other member of the company had inspected seven flats for the purpose of establishing whether it was more appropriate to repair or to replace the screens, and he produced photographs of what they had observed. He acknowledged that the condition of the screens was such that repairs could be considered but said that the full extent of any repairs could not be known unless the glazed units were removed and the frames stripped down. He produced a costs appraisal (bundle, page 83) prepared by his company which showed that the costs of replacement and repair were roughly equal over a 30 year cycle. The appraisal assumed that the costs of repair and decoration would be £2000 for each flat (based on a quotation at page 86 of the bundle), that the windows would, if repaired, last for 30 to 35 years, and that new windows would last for the same period. Mr Eades said that the appraisal had not taken into account the benefits of replacement with double glazed screens, which would be warmer, more secure, and less disruptive to instal. He also drew attention to the aesthetic disadvantage of replacing some screens and not others. He agreed that the appraisal took no account of the costs of moving and, if necessary, replacing boilers.

16. Ms Sherwood gave evidence of the history of the project and of the thinking behind the

landlord's offer of *ex gratia* payments to the leaseholders.

17. Mrs Howells produced correspondence, surveyor's reports and emails (bundle, pages 87 - 121) relating to past disrepair claims and other complaints against the landlord relating to the metal windows.

18. The tenants relied mainly on the evidence of an independent expert, Mr M D Miller BSc MRICS, of Stevens Scanlan LLP, chartered surveyors. He has 20 years' experience as a building surveyor and has dealt with a wide variety of properties throughout the country, and is directing a similar scheme to that under consideration in this case for the London Borough of Southwark. He had inspected a number of flats and had reviewed the photographs taken and reports prepared by Dearle & Henderson. In his view Dearle & Henderson should have inspected many more than seven flats - between 30% and 40% - before reaching a conclusion as to whether repair or replacement was the better option. His conclusion was that the metal framed windows and doors were in a condition commensurate with their age. He found that some frames had corroded, but such corrosion was limited and the corrosion was not so severe as to cause structural failure of a frame member. He concluded that repair was possible. He agreed that the decision to replace the windows was not unreasonable in itself, but considered that it was rendered unreasonable by the associated costs of adapting the boiler and flue arrangements, which were functioning effectively, at a time of great financial pressure on the leaseholders.

19. Mr Miller said that if thermal efficiency was a relevant consideration he would have expected the timber sash windows to the living rooms in the flats also to have been renewed with double glazed windows, because, without that, thermal efficiency in the flats would not be significantly improved. He accepted that life cycle costings were a standard way of assessing options, but considered that the figures prepared by Dearle & Henderson were skewed, mainly because the cost of the associated works to the boilers was omitted. He agreed, however, that it was

reasonable to assume that new windows would last at least 50 years.

20. Mrs Smith gave evidence of the serious financial problems which the costs of the works would cause to many leaseholders, and of the considerable cost of making good the decorations, including tiling, affected by the moving of the boiler and flue in her modernised flat.

The tribunal's conclusion

22. We are satisfied that the decision to replace rather than repair the screens, windows and doors was reasonable and that the tenants will be liable to pay their share of the reasonable costs of so doing as a service charge. The single-glazed screens have been in place for nearly 60 years. Some of them are severely corroded and twisted and at the end of their actual life, and the others are at the end of their projected life. Maintenance and decoration of the original windows and doors will be expensive, and we accept Mrs Howell's submission that the projected £2000 per flat for repair and redecoration, used as a basis of the costs comparison, may well prove to be on the low side, that the projected life of repaired windows used in the appraisal may be too long and that of the new windows too short. We accept that increased thermal efficiency will be produced by replacement, even without replacement of the timber framed windows, and that that is a relevant consideration. We also accept that it would be aesthetically unpleasing, and, indeed, would be likely to have an effect on the values of the flats, if some screens were replaced and others repaired. We also accept that the new screens will be more secure and (although this is a lesser consideration) that replacement will be less disruptive than repair. While we accept, as Mr Eades and Mr Miller agreed, that the screens could in most instances be repaired, we have no doubt that replacement is the better option in all the circumstances, notwithstanding that it makes necessary the moving, and in many cases therefore the renewal, of the boilers.

cases, replacement of the boilers. However, the indications are that, because these blocks are listed buildings the appearance of which is a very important consideration, Listed Building Consent would be unlikely to be granted for extended flues, which would look unsightly, particularly because many of the flues have already been installed and uniformity is desirable. All in all we conclude that extended flues are not feasible and that, on the basis of the advice given to the landlord, its proposal is not unreasonable.

Issue 3: how should the costs of moving the boilers in the flats held by leaseholders be charged to the leaseholders

29. The landlord's primary position is that the cost of moving the boilers falls within the tenants' obligations at clauses 3.10.1 (bundle, page 28) and 3.11 (page 29) of the lease, but subject to the *ex gratia* payments of £1000 which it has offered, and which, we were told, it is still prepared to offer to those few tenants who have not so far moved their boilers if they are prepared to do the work themselves.

30. Its secondary position is that the works can be classed as "making good" in connection with works which are its responsibility under the leases and, as such, the cost is recoverable as a service charge which it would propose to divide only between those leaseholders who had not so far moved their boilers. Mrs Howells submitted that the landlord is entitled to divide the costs thus by paragraph 4.3 of the fifth schedule which enables it to divide service charges by "such ... method as the Landlord shall specify acting fairly and reasonably in the circumstances ...".

31. The tenants' primary case, which we have rejected, is that the windows could be repaired, or, alternatively, that the existing flues could be extended, so the re-siting of the boilers is unnecessary and the costs irrecoverable.

23. We do not accept that the costs arising from the need, consequent upon the works to the screens, to replace the flues and, in many cases, the central heating boilers, discussed below, makes incurring the cost of the new screens unreasonable. In our view it is reasonable to do the works despite the additional cost arising out of the works to the flues and boilers.

24. The likely cost of the replaced screens was raised in evidence, and Mr Miller said that he had contacted Crittall Windows Limited who had informed him they would be able to supply and fix modern equivalents of the existing windows for £3682.89 including fees and VAT, and that he therefore considered the cost proposed by the landlord to be excessive. The figure which he had been quoted did not, however, include the contractor's mark-up which would be likely to be in the order of 10%, bringing it very close to the figure quoted to the landlord. We accept that it is reasonable to employ a main contractor to take responsibility for overall control of a contract of this magnitude, and we do not regard the likely costs of the works as unreasonable in amount.

Issue 2: can the existing flues can be extended to comply with existing gas safety regulations, or should all the flues should terminate through the walls to give a uniform appearance

25. Mr Yates gave evidence for the landlord. He has very extensive experience of gas safety issues and of the relevant regulations. In his evidence, which was largely undisputed by Mr Miller, he described the effect of the relevant regulations, and in particular of the Gas Safety (Installation and Use) Regulations 1998. He explained that if any works were carried out which had an impact on the flues, the flues would have to comply with current regulations even though, if left alone, they would not be required to do so. He also said that the original 1980s boilers had reached the end of their useful lives or would soon do so, that they would therefore shortly require replacement, and that they were not efficient by today's standards. He agreed that there was no evidence that any of them were, at present, not compliant with the relevant regulations or that

they did not work satisfactorily. He said that he did not think that extending the flues over the balconies, which would be a cheaper option than through the brickwork of the rear external walls as the landlord had done in the tenanted flats, would be feasible.

26. Mrs Howells drew attention to the terms of the Listed Building Consent, which encompassed more than the configuration of the windows, and to an email from a member of the landlord's Conservation and Urban Design Department (bundle, page 118) which said that preserving the external appearance of the building was the key issue, and that "attempts must be made to have these positioned in the same place for each flat in a regular or symmetrical way in the outer brickwork plain only and not projecting from within the balcony areas".

27. For the tenants, Mr Miller said that, as far as he knew, all boilers in the leaseholder's flats complied with current regulations, although he agreed with Mr Yates that if the boilers were moved they would be unlikely to comply with the regulations which would then become relevant. He said that extended flues were commonplace and acceptable when condensing boilers were fitted, but he agreed that different considerations might apply to a listed building. Mr Mustafa submitted that the effect of the listing on the need to re-site the flues was unresolved, that English Heritage had given no firm opinion on the subject, and that proper consideration of the option of extending the flues had not been given by the landlord.

The tribunal's conclusion

28. We accept from the evidence put before us that extended flues would almost certainly comply with the relevant regulations, subject to the performance of individual boilers and their manufacturers' recommendations, and that they would be a cheaper option than that which the landlord proposes because such a course would not involve wholesale removal and, in many

The tribunal's conclusion

32. We have accepted that the works to the screens were necessary and that those costs will be reasonably incurred. Having made the reasonable decision to replace the windows, and having taken the advice of English Heritage and of the landlord's own Conservation Officer, we are satisfied that its decision to relocate the boiler flues rather than explore further the option of extending the flues was also reasonable. On balance we have concluded that the cost of relocating the boilers and, if necessary, of replacing them, and the associated flue arrangements, are the tenants' responsibility under their leases, subject to the *ex gratia* payment offered by the landlord which we hope will be extended to all the leaseholders. In our view, on balance, such work goes beyond "making good" which would be the landlord's responsibility (see *Bradley v Chorley Borough Council*, Court of Appeal, 275 EG 801-802). It is also a fairer way of allocating cost, because the leaseholders pay for what they get. We emphasise that "making good" consequent upon the works to the windows is the landlord's responsibility, and therefore subject to a service charge.

Issue 5: dispensation with the consultation requirements

33. The tenants do not oppose the dispensation from any consultation requirements with which the landlord may have failed to comply in relation to the re-siting of boilers and flues, because they acknowledge that they were kept fully informed by the landlord of what it proposed to do. No application was formally issued under section 20ZA of the Act although such a course was considered at the pre-trial review. For good order, and to avoid any unnecessary difficulties later, we determine that any consultation requirements which have not been met in relation to the works should be dispensed with.

Section 20C

34. As indicated above, the landlord does not intend to place any costs it has incurred in connection with these proceedings on any service charge, and so no order under section 20C is required.

Conclusion

35. Accordingly we grant the landlord's application and determine that the leaseholders must bear their own costs in relation to re-siting their boilers and flues, subject to an *ex gratia* payment of £1000 from the landlord.

CHAIRMAN.....

DATE..... July 2006