

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL



Section 27A Landlord and Tenant Act 1985

Application for a determination of liability to pay service charges

DECISION AND REASONS

Case Number: CH1/18UB/LIS/2009/0001

Property: Lawn House, 10 West Terrace, Budleigh Salterton,
Devon EX9 6LU

Applicant : Sandy Bryant Limited

Respondent : Mr G. English Mrs. P. Shepherd-Smith and Mrs M.
Fines-Allin

Date of Application: 19th December 2008

Date of Inspection 24th April 2009

Tribunal Members: Miss Cindy A. Rai LLB (Chairman)

Mr Timothy N. Shobrook BSc.FRICS (Valuer Member)

Date of Decision: 14th May 2009

SUMMARY OF DECISION

The Tribunal decided that the Respondents being the tenants of the Flats B C and D at the Property are not obliged to contribute towards the cost of maintaining the rear garden walls of the garden situate at the rear of the Property above the courtyard garages and parking area.

BACKGROUND

1. The Applicant made the application to the Tribunal on the 19th December 2008 to ask it to determine whether the Respondents are liable to contribute within the service charge and pursuant to their obligations in their respective leases of Flats B C and D at the Property to the cost of repairing the rear garden walls, which cost was incurred in 2004.
2. Directions were issued by the Leasehold Valuation Tribunal on the 5th January 2009 in which the parties were invited to supply further information particularly relating to the amount claimed by the Landlord and also to supply written statements of their respective cases on which each could comment. The Tribunal indicated that it proposed to determine the matter without an oral hearing but following an inspection (if required) and on the basis that either party may request an oral hearing. Neither party subsequently requested an oral hearing so the application has been determined without a hearing.

INSPECTION

3. The Tribunal inspected the Property on the 24th April 2009 unaccompanied by either party. It wished to examine the exterior boundaries and grounds of the Property and relate these to the lease plan supplied with the Application. The Property is a substantial detached property which was apparently converted into four flats in or about 1977. Following a conversation with both one of the directors of the Applicant and one of the Respondents Mrs Fines-Allin it was told that the conversion had been carried out by the parents of the person who currently owned the company which was the Landlord. The house had apparently incorporated a row of fisherman's cottages but it had been renovated and added to over many years before the conversion into flats took place. It is located in an elevated position and opposite the church. Apparently there is a view of the sea from some of the upper floor rooms. A driveway situated on the left side of the property leads to the enclosed rear courtyard in which garages and parking spaces serving the flats are located. Each flat has its own garage. Beyond the rear wall of the courtyard, and at an elevated level, is an enclosed walled garden. Access is gained by a ramp although it appears that at one time there would also have been steps leading to the garden. The majority of the garden is a lawn but there are some shrubs and fruit trees. The walls on the three sides beyond the courtyard are substantial brick walls of approximately 8 foot in height. The render had decayed in places where ivy and other similar plants have grown into the mortar or attached themselves to the bricks. There was evidence of previous repair work, none of which appeared very recent. The fruit trees in the

garden were mainly mature but the Tribunal members noted that one tree was quite young and appeared to have been planted more recently than the other trees. The grass was quite short and appeared to have been recently cut. The garden generally gave the appearance of being regularly maintained.

EVIDENCE

4. The Applicant is a company and is the Landlord and also the owner of Flat A. It is not known if this flat has a lease or not. The Landlord has applied to the Tribunal to determine if service charges are payable by the Tenants in respect of the year 2004 at which time the Landlord carried out repairs to the "rear garden wall" It is the case that the rear garden wall to which the application refers is the rear wall of the elevated garden and not the wall retaining the courtyard.

5. With the application the Applicant supplied a copy of the lease of Flat B. It confirmed that the lease of Flat D is identical and that the lease of Flat C is also similar except in relation to clause 3 of the second schedule and a copy of that clause of that lease (Flat C) was also supplied.

6. The lease of Flat B contains the following definitions:-

The property known as Lawn House 10 West Terrace Budleigh Salterton in the County of Devon together with the building and garages erected thereon (hereinafter referred to as the "the Estate") and the said building (hereinafter referred to as "the Building") has been divided into four flats known respectively as flats A B C and D and shown on the plan annexed hereto and coloured respectively yellow blue green and red on which are also shown the garages appurtenant thereto lettered and coloured respectively as aforesaid

7. Flat B is described as being on the ground floor of the Building and shown coloured blue on the plan and including the internal walls and the garage shown lettered "B" and coloured blue on the Plan. The demise includes the easements rights and privileges mentioned in the Second Schedule but excepts and reserves (inter alia) from the demise main structural parts of the building of which the flat forms a part and the roof foundations and the external parts thereof. There is no mention of the courtyard or the rear elevated garden in the demise.

8. The Second Schedule to the lease includes rights for the Lessee (with specified others) to pass and repass on foot only over the footpaths on the Estate and steps leading up to the Estate from West Terrace and with or with or without motor cars or other vehicles to pass and repass over the main entrance drive and courtyard on the Estate.. Paragraphs 3 and 4 of the same schedule are relevant to this application and is therefore set out in full below:-

"3 At the discretion of the Lessors a licence (which may be terminated without notice) for the Lessees and all persons authorised by him (in common with all other persons entitled to the like license) to have access to the said gardens shown hatched brown on the said plan (but not for the purpose of playing games or for any other purpose likely to cause or constitute a nuisance to other lessees) and to have access thereto over the said footpaths)

4 Full right and liberty for the Lessees and all persons authorised by him (in common with all other persons entitled to the like right) to use the garden shown cross hatched brown on the said plan for such purposes are specified in clause 3 above of this Schedule and to have access thereto on foot only by means of the ramp leading thereto shown coloured brown on the said plan but only at such times and under such other conditions as may be determined by the Lessors from time to time."

9. The Fourth Schedule in the Lease of Flat B is headed "Lessors Expenses and Outgoings and other Heads of expenditure in respect of which the Lessee is to pay a proportionate part by way of Service Charge" It refers for the most part to costs of maintaining the "said building" and to costs of insurance but Clause 4 refers to "All charges assessments and other outgoings (if any) payable by the Lessors in respect of all parts of the said building and estate (other than income tax). Clause 7 refers to "The amount which the Lessors shall be lawfully called upon to pay as a contribution towards the expense of making repairing maintaining rebuilding and cleansing all ways roads pavements sewers drains pipes watercourses party walls party structures party fence walls or other conveniences which may belong to or be used for the said building and estate in common with other premises near or adjoining thereto."
10. It is noted by the Tribunal that notwithstanding the definition of the Estate and the Building at the beginning of the Lease these terms are not necessarily referred to with capitals later in the lease, as would normally be expected where definitions are included within a legal document. However notwithstanding that it is normal modern practice to expect the use of such definitions to be precise and consistent if the terms are to be interpreted as defined, it is acknowledged that leases prepared at the time when the leases of the Flats within the Property were granted were not necessarily as consistently drafted as modern leases.
11. When the Applicant was invited to supply a statement of case and further information in support of the application for consideration by the Tribunal he confirmed in his letter dated 20th February 2009 that, in his opinion "the information submitted with his application was sufficient for a ruling to be given on the meaning of the Lease regarding the Leaseholders shared responsibility to contribute to the cost of repairs to the rear garden walls". In that letter he stated "The Leaseholders do contribute to the cost of maintenance and planting of the garden therein" He also stated that "4 solicitors letters were mentioned in the application form but copies were not enclosed and enclosed copies of "the Landlord's, as I expect the Leaseholders will copy their 2 solicitors letters to you." With his letter he enclosed a copy of a solicitors' letter dated 11th June 2007 from Shepherd, Harris & Co (and addressed to him).
12. The Tribunal received letters on behalf of each of the three Respondents. Mrs Fines-Atlin (Flat C) refers the Tribunal to the sections of the lease referring to repair covenants. She states that there is a specific clause stating that the rear garden was retained for Mr W. Bryant to develop, subject to planning permission and that access and use was restricted and could be withdrawn at any time. She enclosed a copy of a letter from Everys Solicitors dated 10th May 2006 and addressed to her.

13. Mrs Shepherd Smith (Flat B) sent the Tribunal a copy of one page of a letter from Group Captain Folley (who appears to have been a former leaseholder) dated 11th January 2004 and a copy of a letter from Stokes Solicitors dated 25th February 2003 and addressed to Group Captain Folley
14. Mr English (Flat D) sent the Tribunal a bundle of correspondence including two letters from Rawlison Butler solicitors dated 26th March 2004 and 20th April 2004 (both addressed to him), a complete copy of group Captain Folley's letter dated 11th January 2004 and a copy of a letter dated 5th February 2004 which his father (who was at that time the owner of Flat D) had sent to the Landlord, in which he stated that whilst he accepted that the walls needed repairing at that time he could not accept that he had any liability to share the costs of such structural repairs and on that basis felt it inappropriate to suggest a contractor who might carry out such works.

THE LAW

15. Section 27A of the Landlord and Tenant Act 1985 (the Act) gives a Leasehold Valuation Tribunal jurisdiction to determine 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

The only issue for determination in the Application is whether or not the Applicant can recover the cost incurred by the Landlord (the amount of which has not been specified to the Tribunal in the Application) for the repair of the rear garden walls in 2004.

THE DECISION

- 16 The Applicant and each of the three Respondents have supplied the Tribunal with copies of letters from the various solicitors who has supplied advice as to whether or not the Applicant as lessor is entitled to recharge the Respondents as tenants for the repair works carried out the rear garden wall in or about 2004.
- 17 Both parties appear to accept that the leases were not particularly well drafted. It is clear, however, that the lessees were not granted rights to use the rear garden for the duration of their leases. It appears that the lessor anticipated that he might be able to develop or use the rear walled garden separately from the main house. Lessees were simply given a licence, in common with the lessor and others so entitled, to use the rear garden and for defined purposes only (and not for ball games) This right is set out in the second schedule to the leases and referred to and set out in full in paragraph 8 above. The service charge contributions set out for the most part in the fourth schedule do not refer to garden walls. This is not really surprising given that it is clear from the deliberate way in which only a licence was

given to the lessees at the time the leases were granted that there was no intention for this to be a permanent right.

- 18 The Applicant was however advised by Shepherd Harris & Co solicitors in a letter dated 11th June 2007 that clause "5c" of the lease obliged him to repair the boundary garden walls and that the lessees had an obligation to contribute towards the service charge under clause 3 of the lease. It was also stated that the part 7 (of the fourth schedule "outlines the landlord's obligation "to pay as a contribution towards the expense of making repairing maintaining and rebuilding and cleaning all ways, roads, pavement, sewers, drain pipes watercourses, party walls party structures party fence walls and all other conveniences which may belong to or be used for the said building and estate in common with other premises near or adjoining thereto" "It is this clause which appears to cover the ability to recover funds and the obligation to maintain, repair and rebuild garden walls"
- 19 The Tribunal does not accept that this advice was correct. Clause 5 (1) (c) of the lease contains a conditional covenant by the lessor (subject to receiving payment from the lessee) to maintain and repair (inter alia) "the boundary walls and fences of an in the curtilage of the said building". It is noted that the reference to the building is not to the defined term. This is presumably what has led the solicitors who provided the advice to assume it meant the building in a "loose sense" and that the lessor could properly interpret it to include the garden walls. However the Tribunal decided that this could not be correct given the clear separation of the garden both on the plan and in general rights granted to the lessees in the second schedule of the lease. Further more their reliance upon clause 7 of the fourth schedule is wrong. That schedule does list "the Lessors Expenses and Outgoings and other Heads of Expenditure in respect of which the Lessee is to pay a proportionate part by way of Service Charge". Clause 7 clearly refers to expenses in respect of shared (party) walls (or fences) and other conveniences used by the building and estate in common with other premises near or adjoining. It was clearly intended to cover costs of maintaining party walls drains and services where costs were shared with another owner. On the basis of the lack of capitalisation of the terms "building" and "estate", neither term was apparently meant to relate specifically to the defined terms. The lessors solicitors seem to acknowledge that in their subsequent statement "Therefore although the matter is not black and white, it is clearly the intention of the lease that boundary garden walls are included in the service charge obligation and the leaseholders are required to reimburse you for any costs that you incur to comply with your covenant". The Tribunal considers that this advice was wrong. It takes no account whatever of the fact that the lessor could at any time simply terminate the rights of the lessees to use the rear garden.
- 20 The Applicant had obtained advice from TLT solicitors on the 2nd September 2003. They also advised him that the costs of repairs to the boundary walls could be recovered from the lessees. Their interpretation also relied upon clause 5 (1) (c) of the lease and in addition clause 1 of the fourth schedule which refers to "the expense of maintaining repairing redecorating and renewing amending cleansing repointing painting graining varnishing whitening or colouring the said building and all parts thereof and all the appurtenances apparatus and other things thereof belong and more particularly described in clause 5(1)". Somewhat strangely their letter states

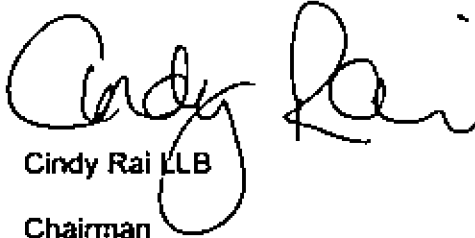
that the lessees would be liable to pay for the repair of the walls even if they do not make use of the area where the wall is situated. They do not seem to have taken into account the limited nature of the rights of the lessees to use the area and the fact that the rights could be terminated. It would seem to the Tribunal that it would be inequitable to allow the Landlord to recover costs incurred in maintaining the boundary walls of a garden to which the lessee could be refused access at any time by the lessor.

- 21 The lessee of Flat C obtained advice from Everys solicitors. In a letter dated 10th May 2006 That letter correctly interprets clause 7 of the Fourth Schedule as relating to the joint expenses incurred for the benefit of the property and other properties but states that because in clause 5(1) the reference is to the boundary walls and fences in the curtilage of the building (and not the estate) there is no liability for the tenant to contribute. It also states that the liability of the lessee to contribute is linked to the matters set out in the fourth schedule and not what the lessor has covenanted to do. The Tribunal found it difficult to follow the logic of this statement given that paragraph 1 of the Fourth Schedule specifically refers to the expenses incurred in maintenance and repair etcetera of matters referred to in clause 5 (1) .
- 22 The lessee of Flat D referred the Tribunal to a letter from Group Captain Folley who appears to have been a former tenant and owner. She also enclosed a copy of a letter from his solicitors Stokes dated 25th February 2003. In that letter Stokes advised that the lessees are liable to contribute towards the maintenance of the gardens but not the upkeep of any boundary walls. The firm suggest that the only practical means of resolution is an application to a Leasehold Valuation Tribunal but also suggests a practical method of resolving the dispute, which from the content of the letter seems to be limited to a contribution of £70. (A copy of the letter from Group Captain Folley was also sent to the Tribunal by the lessee of Flat B and is considered below together with the other information supplied by that Respondent)
- 23 Mr English the lessee of Flat D forwarded the Tribunal letters from Rawlison Butler solicitors, a letter from his father (former owner of Flat D) and the letter from Group Captain Folley. He states that he accepts that the leases were all poorly drafted but asks that the Tribunal considers several points:-
 - a. The walled garden does not form part of the demise of the flats.
 - b. It was excluded on account of the lessors' wish to build on it so the lessees were given temporary rights over it only.
 - c. The leases do not refer to the rear garden wall as being part of the Building or Estate as defined in the lease (thus the expense of maintenance cannot be recoverable either under clause 3(3) or the Fourth Schedule.
- 24 The Tribunal does not believe that Mr English correctly understood the meaning of a "demise" as a legal term referring to the extent of the property within each lease. Clearly it was never intended that the garden or indeed the grounds would be included in any lease but certainly permanent rights were granted in the leases to the lessees to use certain areas such as the driveway and the rear courtyard but not the garden. The Tribunal accepts that the lessees were not granted rights over the

garden but only given a licence to use it, and for defined purposes only, and that the licence could be terminated at any time. Similarly the Tribunal agree with the interpretation that the garden boundary walls are not included within the definition of either the Building or the Estate and that it is difficult therefore to imply that they are included even if it might be accepted that sometimes the two terms were intended to be used other than in the "defined" sense in the leases. Clause 3(3) of the lease simply refers to the obligation of the lessees to pay by way of service charge for those items of expenditure set out in the Fourth Schedule.

- 25 Rawlison Butler solicitors wrote two letters to Mr English dated 26th March 2004 and 20th April 2004 respectively. The first letter concludes that although the drafting in the lease is somewhat ambiguous the lessees are not obliged to contribute towards the cost of repairing the walled garden. The second letter seems less clear on account of it trying to define curtilage. It is apparently written in response to a letter from the Lessors solicitor which has not been disclosed to the Tribunal; nevertheless the same conclusion is reached and it is restated that the lessees are not obliged to contribute towards the costs of repair to the garden wall.
- 26 Group Captain Folley's letter dated 11th January 2004 was written to the Applicant apparently in response to a letter from him presumably sent by it to each of the lessees at that time. It sets out the history of the building and the deliberate segregation of the walled garden from the grounds of Lawn House when the later was converted to enable the developer at the time to separately develop and sell the garden. It refers to the grant of rights by licence to the lessees to use the garden until such rights were terminated. It refers to a discussion with the occupiers of the flats and the lessor's representative at the Property taking place at which it was decided to replace some of the apple trees in the garden. It acknowledges that the costs of the replacement trees were included in the "half yearly accounts" but suggests that this does not and did not then imply an acceptance by the lessees that they would accept the financial responsibility for maintenance of the upper garden beyond that of the garden ground. It contains a very firm rebuttal by that lessee (at the time) of any form of liability for the upper garden "other than the established system of sharing the cost of cutting the grass and tidying up the garden ground so long as I benefit from the "licence" granted by the freeholders".
- 27 Mr English's letter dated 5th February and addressed to the Applicant states simply that whilst the lease is poorly drafted and ambiguous the costs of repairing the rear garden walls are not an item for which he or the lessee of Flat B (whose lease he believes to be similar to his) should be liable.
- 28 The Tribunal has considered this Application together with of all the information supplied by both the Applicant and the Respondents. It determines that the leases contain no provision which would enable the Applicant to recover the cost of repairing the rear garden walls from the Respondents as part of the service charge which it is entitled to recover. It notes and accepts that notwithstanding that the garden is not included within the definition of the Estate or the Building; the leases could have been drafted more clearly. However the most critical fact is that all the rights of the Respondents to use the rear garden are limited. All that is granted is "At the discretion of the Lessors a license (which may be terminated without notice)". It is

however noted that notwithstanding that there is no formal requirement so to do, the lessees appear to have jointly agreed to share the costs of maintaining the garden and even replacing at least one of the trees, but this cannot and is not accepted as implying an acceptance by the Respondents that they are obliged under the terms of their respective leases to contribute towards these costs.

A handwritten signature in black ink, appearing to read "Cindy Rai". The signature is fluid and cursive, with the first name "Cindy" and the last name "Rai" clearly distinguishable.

Cindy Rai LLB

Chairman

13th May 2009