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DIRECTIONS BY LEASEHOLD VALUATION TRIBUNAL for the LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985, SECTION 27A

Case Reference: LON/00AG/LIS/2007/0053

Applicant: Mr A Tambyrajah

Respondents: (1) Mr L Steinhouse (2) Mr A Grosskopf (3) Ideal Management

Premises: Top Flat, 17 Dartmouth Road, London, NW5

Date of Application: 2 August 2007

Date of Determination: 30 January 2008

Appearances for Applicant: N/A

Appearances for Respondent: N/A

Leasehold Valuation Tribunal: Mr I Mohabir LLB (Hons)
Mr L Jarero BSc FRICS

IN THE LEASEHOLD VALUATION TRIBUNAL

LON/00AG/LIS/2007/0053

IN THE MATTER OF SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

AND IN THE MATTER OF TOP FLAT, 17 DARTMOUTH ROAD, LONDON, NW5 1SU

BETWEEN:

MR ANTHONY TAMBYRAJAH

Applicant

-and-

(1) MR L STEINHOUSE
(2) MR A GROSSKOPF
(3) IDEAL MANAGEMENT

Respondents

THE TRIBUNAL'S DECISION

Introduction

1. This application is made by the Applicant pursuant to s.27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of his liability to pay and/or the reasonableness of various service charges arising in the years 1999 and thereafter from 2001 until 2006. For the reasons set out below, it is not necessary to particularise all of the service charges challenged by the Applicant.

2. On 17 September 2007 formal mediation took place between the parties and, as a result, a mediation agreement dated 17 September 2007 ("the mediation agreement") was entered into by the parties in relation to the majority of the disputed service charge costs. These can be set out as follows:

Service Charge Item	Cost Claimed	Cost Agreed as Payable (all Years)
Insurance	£307.97	£307.97
Management	£577.72	£577.72
Repairs to garden wall	£504.94	Not agreed
Repairs to flat roof and carpet replacement	£384.41	£250.00
Repairs to basement flat	£539.50	£395.00
Arrears	£626.00	£250.00

The Issue

3. The only issue that falls to be determined by the Tribunal is the total cost of repairing the garden wall claimed in the sum of £504.94. It appears that this cost arose in the years ending 31 December 1999 and 2006 service charge years in the sum of £142.19 and £360.75 respectively. For the avoidance of doubt, the First Respondent, Mr Steinhouse, confirmed to the Tribunal on 30 November 2007 that this was the only outstanding issue to be determined.

4. Paragraph 9 of the mediation agreement expressly provided that the issue in relation to the garden wall costs claimed was limited to the Applicant's liability to pay those costs. The quantum of the costs is not challenged by the Applicant. In the same paragraph of the agreement, it was further expressly provided that the Applicant would seek independent legal advice on this point and would notify Mr Ost of the outcome in writing within 21 days from the date of issue of the mediation decision. Mr Ost agreed to be bound by the legal advice obtained by the Applicant.

5. It appears that the Applicant sought and obtained legal advice from the College of Law in a letter dated 8 November 2007. In essence, the advice was that the Applicant has no liability under the terms of his lease because he was no longer able to access the garden in which the wall was situated. The wall was included in the leases of the basement and ground floor flats. The College of Law advised that the position was analogous to the facts in ***Longmint Ltd v Rye*** (LRX/88/2005) where the Lands Tribunal held that the landlord could not recover a service charge contribution from the tenants for an entryphone system from

which they derived no direct benefit. By a letter to the Tribunal dated 23 November 2007, Mr Ost disagreed with the advice given by the College of Law and contended that the Applicant was contractually liable under the terms of his lease to pay a service charge contribution for the cost of repairing the garden wall.

The Facts

6. It is a matter of common ground that in 1993 the Applicant and Christine Karuna Tambyrajah were granted a lease by Timothy Allan of the Second Floor Flat in the subject property for a term of 125 years commencing from 29 September 1992 ("the lease"). The Applicant had previously occupied the premises under a residential tenancy agreement, which included the use of the common parts and the front and rear gardens.

7. It is the Applicant's case that he purchased the premises on the understanding that the previous rights enjoyed in relation to the common parts and the gardens generally would continue.

8. In or about 2001/02, the Respondents, as the new freeholder carried out works to the ground floor flat that resulted in the corridor that provided access to the rear garden being blocked. Thereafter, only the basement and ground floor flats had access to the rear garden. Subsequently, the ground floor flat was sold as a garden flat. The rear garden is presently partitioned into two halves with sole use enjoyed by the occupants of the basement and ground floor flats.

Decision

9. Both parties, by letter, have requested that determination of the remaining issues be made entirely on the basis of the written representations of the parties and without the necessity for an oral hearing.

10. Pursuant to the Tribunal's request, the Applicant clarified the challenge being made in relation to the cost of £142.19 arising in the year ending 31 December 1999. He stated that he was challenging the costs solely on the basis that they were not recoverable by the Respondent because they now fell outside the

limitation period of 6 years allowed under the Limitation Act 1980. The Respondent has not made any submissions on this point.

11. In raising the limitation point, the Applicant, although it was not expressly stated appeared to be relying on s.9 of the Limitation Act 1980. Section 9 provides:

> *" An action to recover any sum...by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued."*

However, the Tribunal considered that s.9 had no application in this instance because the sum of £142.19 was not recoverable under *an enactment.* It is recoverable under the terms of the lease. In the Tribunal's judgement, the lease amounted to a specialty, which includes contracts under seal, within the meaning of s.8 of the Limitation Act. Any action by the Respondent to recover the amount in issue would, therefore, be an action on a specialty and the relevant limitation period allowed under s.8 is 12 years.

12. Given that the sum of £142.19 falls within the limitation period of 12 years and that this sum is not challenged on any other basis by the Applicant, the Tribunal found it to be reasonable and recoverable by the Respondent.

13. As to the remaining sum of £360.75 arising in the 2006 service charge year, the Applicant's pleaded case is not that this sum is unreasonable but rather that its recoverability was conditional upon his continued use of the rear garden. The Tribunal did not agree with this argument. Whilst the Applicant's alleged former use of the rear garden may raise other issues outside the Tribunal's jurisdiction, the contractual position was both express and clear.

14.By clause 4(2) of the lease, the Applicant covenanted to pay a service charge contribution, by way of further and additional rent, as provided for in the Seventh Schedule. Paragraph 1(1) of the Seventh Schedule provides, *inter alia,* that the service charge costs shall include the total costs incurred by the lessor in carrying

out its obligations under clause 5(4) and (5). By clause 5(4)(a), the lessor expressly covenanted to:

> *"(4)……maintain and keep in good and substantial repair and condition:-*
> *(a)……all boundary walls and fences."*

15 There is nothing on the face of the lease that makes the service charge contribution of £360.75 condition upon having the use of the rear garden. In other words, the contractual position is clear and unambiguous. The Tribunal found that ***Longmint*** had no application in this matter and could be distinguished in the following way. In that case the Lands Tribunal construed an ambiguous service charge clause in the lease to mean that a service charge contribution regarding an entryphone system was not recoverable at all under the relevant clause. It did not decide the case on the basis that it was not recoverable because the tenant derived no direct benefit. No such ambiguity arises here for the reasons set out above and no such term or condition can be implied. The position is analogous to the tenant of a ground floor flat having to pay a service charge contribution for roof repairs when he derives no direct benefit. As stated earlier, the removal of the Applicant's alleged right to the use of the rear garden is an entirely separate matter. If it is contended by him that it was a term of his lease, then his remedy lies elsewhere. Unless and until another Tribunal makes such a finding, he is bound by the express terms of his lease.

Dated the 15 day of February 2008

CHAIRMAN..... I. Mohabir .....

Mr I Mohabir LLB (Hons)