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REF LON 00AC/LSC/2010/0700

IN THE LEASEHOLD VALUATION TRIBUNAL

IN THE-MATTER OF THE LANDLORD AND TENANT ACT 1985 SECTION 27A and S20C

Address	**9 Raeburn Close London NW11 6UG**
Applicant	**(1) Ian David Iwi** **(2) Diana Rosemary Iwi**
Represented by	**Ian David Iwi**
Respondent	**Hampstead Garden Suburb Trust**
Represented by	**N Packard MRICS surveyor**
The Tribunal	**Mr P Leighton LLB**
Date of Decision	**25th March 2011**

Introduction

1 By an application dated 7 October 2010 the Applicants applied to the tribunal for a determination as to whether service charges imposed by the Respondent in respect of the property at 9 Raeburn Close London in NW11 ("the property") for the years 2009 and 2010 were payable.

2 A pre trial review was held on 30 November 2010 at which Mr Iwi equally and Mr Packard attended and directions were given for the conduct of the proceedings on the basis that if both parties were

content for the matter to proceed by way of a paper determination it would be determined in the week commencing 21 March 2011 and that if the matter was to proceed by way of an oral hearing, the hearing was scheduled for 22 March 2011. In the event the parties agreed that the matter should proceed by way of a determination on the papers submitted and did not request an oral hearing.

The Property

3 The property is a semi detached house situated in a small close off Wildwood Road. The close contains 16 properties.

4 The Applicants' lease was granted on 17 March 1925 for a term of 999 years and was assigned to the Applicants in 1973.

5 Prior to the formation of the London Borough of Barnet the property was situated within the Borough of Finchley and the houses in the close were on either side of the boundary between the former boroughs of Finchley and Hendon.

6 At the date when the leases were granted the road in the close was privately owned and was required to be maintained by the frontagers of Raeburn Close. Eventually the part of the road in the Borough of Finchley was adopted by the local authority but the part in Hendon was not. The subject property is within the area of the former Borough of Finchley.

The Lease

7 The lease was originally granted to Beatrice Pass on 17 March 1925 for an annual ground rent of £12. The relevant clause upon which the respondent relies in order to justify the imposition of the service charge is set out at clause 3 of the lease which provides as follows: –

8 *"The lessee will at all times during the said term contribute......... To the lesssor a proper proportionate share with the owners and occupiers of the other and lands adjoining the said road as aforesaid*

according to the extent of their respective frontages to such road of the expense of repairing cleaning and maintaining to the satisfaction of the surveyor of the Lessor the same road as aforesaid and the sewers thereunder and the footways and surface drains via to and all other proper expenses connected with (other than the expense of maintaining the uninstalled margins if any hereinafter referred to while the same may be kept uninstalled as hereinafter provided) until the same respectively shall be taken over by the local authorities."

9 *"For the purposes of this lease a house shall be deemed to adjoin a road if it adjoins any uninstalled margins set out by the less sore by the side of the road" It is also provided that for the purposes of the lease the frontage of the demised premises shall be deemed to* be 64 feet." The frontage of the applicant's property is in fact 38 feet. The Applicants contend that whilst they may be liable to contribute to the upkeep of the road while it is still privately owned by the trust, that their liability ceases upon the road being adopted by the local authority

The Issues

10 On 30 November 2009 the Respondent trust issued an invoice for £14.08 for road maintenance which after deduction of £3 cash received amounted to £11.08. On 26 August 2010 the Respondent issued an invoice for £27.91 which comprised the previous sum of £14 08 plus a further sum of £5.07 for the galley and £8.76 for sweeping costs.

11 The Applicants object to the payment of the sums on the following grounds: –

(a) That the demands are not made in good faith

(b) that on the proper interpretation of clause 3 of the lease there is no power to impose liability for payment on the lessee.

(c) That if it is established that on a literal reading of the clause liability is imposed, the court will not give effect to it on the ground that it is

commercially unsuitable as not being in accordance with the intention of the parties

(d) That the trust is estopped from relying upon clause 3 of the ground that it is an estoppel by convention as recognised by Lord Denning in **Amalgamated Investment and Property Company Limited –v-this Texas, commerce (1981) 3 All ER 577**

12 The Applicants further contend that the Respondent should be required to refund to them the fees paid to the Tribunal for the issue of the application on the grounds that they were forced to take proceedings as a result of the attitude adopted by the Respondent

13 The Applicants maintain that the claim by the Respondent is not made in good faith and that the Tribunal should not entertain a claim by the respondent for these service charges on the grounds that they are a tactic "designed to put unlawful and improper pressure on the applicants to pay the disputed charges whether they are in fact due or not." In support of his contention Mr Iwi states that when he intimated to the respondent they intended to commence proceedings the Respondent proposed mediation but later agreed that since this was a legal matter mediation was not appropriate, so that the suggestion for mediation was merely a delaying tactic.

14 In relation to the construction of clause 3 they maintain that once that part of the road which frontages their property is removed from the private ownership of the respondent and vests in the local authority that they have no continuing obligation to contribute towards the maintenance and upkeep of that part of the road which has not been retained by the local authority but remains vested in the respondent

15 They maintain that if the lease had intended that each of the properties should have made an equal contribution to the upkeep of the road it would have specified that by providing that they should contribute to any part of the road which is unadopted.

16 Secondly they maintain that if it was intended that they should make an equal contribution or indeed a proportion contribution towards the upkeep of the road in part then the lease should have so specified and that in the circumstances the intention of the parties as expressed in the lease was that once the local authority adopted the road the liability of leaseholders in the former Borough of Finchley should cease. They further maintained that this was the clear intention of the parties at the time when the lease was executed and that to impose a liability on those properties which no longer front that part of the road which remains vested in the Respondent renders the lease commercially unrealistic and therefore not valid.

17 Thirdly they maintain that the parties have proceeded on the assumption that there would be no liability imposed upon their property in respect of that part of the road retained by the respondent and that this is borne out by the fact that no demands were made for payment towards the maintenance and upkeep and cleaning of the road until 2009.

18 They maintain that at one point in 1980 question was raised first to an enquiry by the landlord's agents asking whether the lessee's preferred the landlord to carry out works of a longer lasting standard at great expense or to carry out lessor and cheaper works. Mr Iwi states that he wrote to the landlords pointing out that they were proposing to do work which was the responsibility of the local authority. In the event the Applicants were not required to pay for resurfacing works which were carried out at that time.

19 There was a further claim in 1983 for payment of £12.97 as a contribution for galley clearance which Mr Iwi disputes having received, since he states that had he done so he would have disputed liability in the same way as he did in relation to the resurfacing. Again he maintains that no sum was paid nor was it pursued by the landlord.

20 The Respondent disputes the construction placed by the Applicants on clause 3 of the lease and maintains that in so far as the applicants were liable to contribute to the whole of the cost of the road before it was adopted in part by the local authority, that they remain so liable in respect of that part which has been retained by the landlord. This would apply even though no part of their property fronts onto the road and that the home of the frontage of their property is on part of the road adopted by the local authority.

21 The Respondent further maintains that the figure of 64 feet as the deemed with of the applicants frontage is inserted merely for the purpose of calculation of the proportion of liability to be born by the Applicants in respect of the costs incurred.

22 With regard to the question of estoppel Mr Packard contends that demands had been sent on occasions during the period which is consistent with its view that the Applicants and other lessees who front onto that part of the road adopted by the local authority have always been required to make a contribution to the upkeep of any part of the road retained by the landlord. The fact that the Respondent did not pay the demands and the Respondent did not sue them is not material.

23 They accept that for a period of over 10 years up to 2009 there were certain failings in the management of the Respondent trust which resulted in no demands for contributions being made during that period. Mr Packard contends however that that was not consistent with a course of conduct amounting to an estoppel by convention.

The Tribunal's Decision

24 The tribunal is of the opinion that the construction of clause 3 of the lease involves a liability on the leaseholders to contribute to the maintenance and upkeep and cleaning of the road until it ceases to belong to the Respondent and is taken over by the local authority . The obligation under this clause is to make a contribution towards the

cost of the whole of the road and if a part of the road is removed from the ownership of the respondent the liability of each of the leaseholders is reduced accordingly.

25 The Tribunal considers that to limit the contributions to those leaseholders whose property fronts that part of the road previously within the former Borough of Hendon but which remains vested in the Respondent would be artificial and unfair. The intention of the lease was that all parties should contribute a proportionate share.

26 The situation is analogous to the position where a leaseholder living on the ground floor of a block of flats is nonetheless required to contribute to the costs of maintaining lift or of repairing the roof, and a tenant on the top floor is required to contribute towards the cost of the foundations of the building.

27 It is clear that the time of the grant of the leases each leaseholder was required to pay a proportion contribution towards the maintenance of the road and that it was purely fortuitous that part of the road was in one borough and the other part in another. The intention was not that a leaseholder should only contribute to that part of the road immediately outside his own property but that he would share in the cost of the road as a whole and that liability would continue as long as any part of the road remain vested in the landlord.

28 Accordingly the Tribunal sees no commercial unsuitability or unreasonableness in the construction for which the landlord contends and finds against the Applicants on the second ground as well as the first.

29 In relation to the issue of estoppel the tribunal did not hear any evidence from the parties and is not satisfied on the facts that the Respondent has treated the Applicant as having no liability to contribute towards the road and the legal authority relied upon the by the Applicants is in connection with an entirely different type of case.

30 In the view of the Tribunal the mere fact that the landlord does not impose a levy for a number of years and meets the cost himself does not preclude him from relying upon a clause in the lease requiring payment with regard to any liabilities which may arise in the future although he may have some difficulty in recovering any past contributions. No attempt is made to recover earlier payments than those in 2009 and 2010 so no question of limitation applies.

31 On the facts of this case it appears that a demand may have been made in the 1980s whether paid or not. Any claim by the landlord arising from such a demand would now be statute barred but it would not in the view of the Tribunal preclude him from making demands in 2009 and 2010.

32 The Tribunal can find no basis for holding that the landlord has acted in bad faith in this case. It would be entirely appropriate in a case such as this to attempt to resolve it by mediation particularly having regard to the very small amounts involved and the disproportionate costs likely to be incurred in dealing with the numerous technical issues surrounding this case. The size length and complexity of the bundles actually produced on this application supports that proposition.

33 The Tribunal is fortified in its view as to the construction of the clause in question because it produces a result which in the view of the tribunal is fair and reasonable in the circumstances under the formula prescribed by the lease the applicants are required to pay approximately 1/16 of the costs in connection with the road. Since there are 16 houses in the close the door all been required to pay of approximately equal contribution to a facility which benefits them all.

34 The Tribunal was not impressed with the contention that the leaseholders living within the area of the former Borough of Finchley are making an additional contribution to the road through the Council tax. In the view of the Tribunal such a contribution if any would be minimal.

35 The Tribunal also does not accept that the liability to meet a service charge of the order of approximately £12 per annum would amount to a serious bar to selling a property in this desirable part of London.

36 The Applicants in their submission concerning the alleged bad faith of the Respondent indicate that the Tribunal should not accept the Respondent's claim for service charge. It should be noted that any claim before the tribunal is that of the Applicants and not the Respondent. In the view of the tribunal that claim is misconceived and unnecessary and the cost of pursuing it disproportionate. . Accordingly the Tribunal is unwilling to grant reimbursement of the fees paid by the Applicants and dismisses the claim.

Chairman Peter Leighton

Date 25 March 2011