RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/45UK/LIS/2004/0043

Re: Flat A, 84 Harestone Hill, Caterham, Surrey CR3 6DH ("the Premises")

BETWEEN

Mrs Nancy Marie Mallier

("the Applicant/Landlord")

and

Mr John Arthur Stowell

("the Respondent/Tenant")

Members of the Tribunal: Mr J.B. Tarling, Solicitor, MCMI (Chairman)
Mrs H. Bowers MRICS
Mr H. Preston JP, FRICS

Hearing: 29th June 2005

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

1. Background to the case
The matter had been transferred to the Tribunal from the County Court following the issue of proceedings by the Applicant/Landlord against the Respondent/Tenant to recover the sum of £746.67 in respect of Service Charges alleged to be payable by the Tenant to the Landlord. The Tenant had filed a Defence in the County Court proceedings denying liability to pay the amount claimed to the Landlord, but saying that he had paid the said amount to the Leaseholders Association ("BILA")

2. Preliminary Hearing
As there was some doubt as to a number of jurisdictional issues a Preliminary Hearing took place on 2nd March 2005. At that Preliminary Hearing the parties agreed that the Tribunal had jurisdiction to deal with the matter and agreed that the issues to be decided by the Tribunal should be limited to:
(a) Whether the Respondent/Tenant is liable to pay to the Applicant/Landlord the sum of £746.67 referred to above.
(b) Whether there is any right of set-off between the parties in respect of any monies that are alleged to be owed by the Applicant/Landlord to the Respondent/Tenant. The Respondent/Tenant accepts liability to pay the said sum of £746.67 and has already paid this amount to Belle Ile Lessees Association ("BlLA") but maintains that the Applicant/Landlord and her Husband Mr P.L. Mallier (who are jointly

the Tenants of Flat C 84 Harestone Hill) owe money to the Service Charge fund administrated by BILA which if it had been paid would have off-set the amount being claimed.

(c) Whether the Deed of Covenant dated 24th May 1961 is binding on the Applicant/Landlord and the current Lessees of all the Flats in the Building.

Directions were given for the disclosure of documents by both sides and a Hearing was set for 29th June 2005.

3. Inspection

The Tribunal inspected the property in the presence of Mr P.L. Mallier (the Husband of the Landlord), representing the Landlord, and Mr G.R. Stowell (the son of the Tenant) representing the Tenant. A number of the other tenants of Flats in the Building also attended the Inspection. Neither the Landlord herself, or the Tenant himself, attended the inspection. The Tribunal were shown around the exterior of the Building and also the areas of two flat roofs, which had been repaired. The Cellar was also inspected which housed the old central heating/hot water oil fired Boiler. Outside the gardens and block of six garages were also inspected. It was quite clear from inspection that apart from the repairs to the flat roofs, few repairs had been undertaken for some years and the property was now in serious disrepair. The whole of the exterior needed repair and decoration. Some of the windows and doors were in need or repair or replacement. The garages were almost derelict and the gardens overgrown in places.

4. Hearing

A Hearing took place at Redhill which was attended by Mr P.L. Mallier, representing the Landlord and Mr. G.R. Stowell on behalf of the Tenant. Neither the Landlord nor the Tenant attended the Hearing. Mrs Janet Suter, the Tenant of Flat D, and Miss Andrea Nicholls of Flat F, also attended the Hearing. Both parties had submitted written Statements and representations and Witness Statements from Mrs Suter and Miss Nicholls were before the Tribunal.

5. Agreed matters

The issues which the Tribunal was being asked to decide, were very limited and the Tenant had agreed the amount of the roof repairs and the reasonableness of them in all respects. His main objection was to paying the amount being claimed against him to his Landlord, as he had already paid it to the Leaseholders Association BILA. The three issues which the Tribunal was specifically being asked to decide flowed from the Tenant's objection to paying the amount in question to the Landlord.

6. The Lease and Deed of Covenant

Disclosure of copies of the Lease and Deed of Covenant had taken place and there seemed to be a fair amount of agreement between the parties as to the effect of the two Deeds, although the liability of the Tenant to the Landlord and vice versa was at issue in some respects.

(a) The Lease

The Lease was dated 21st April 1961. It contained no express covenant by the Landlord to maintain the Building. The only (relevant) covenants by the Landlord were to insure, to manage the property, and to require other Tenants to observe similar covenants and to enforce such covenants. There were 23 covenants by the Tenant. In particular covenant 2 (7) required the Tenant "Jointly with the Lessors and owners of the remainder of the flats..." to repair the Building etc. Covenant 2 (10) provided that if the Tenant shall default in the covenant to repair, the Landlord may do so and any money spent by the Landlord shall be "repaid by the Tenant to the Landlord immediately on demand.." Covenant 2 (12) was a similar covenant saying that if there was any default *by anyone* in doing or executing any repair... the landlord could execute the repairs at the joint expense of the Tenant and the other tenants and one sixth of the expense of such repair shall be repaid to the Landlord by the Tenant on demand.

(b) The Deed of Covenant

The Deed of Covenant was a Deed dated 24th May 1961 (about a month after the date of the Lease) entered into by all six original Tenants and executed by them all. Although the Deed referred to the Landlord as being a party to the Deed, the original Landlord had not executed it, nor had the Landlord entered into any specific obligations in the Deed. The Deed was expressed to have been entered into as a condition of the grant of the Lease. It's purpose was to create a scheme for the efficient running and management of the block of Flats and in particular to deal with the joint responsibilities of the Tenants under their respective Leases which were to be enforceable by the owners and occupiers for the time being of the flats. The Second Schedule of the Deed sets out provisions for regular meetings of the tenants to take place, with decisions being made by a majority, the requirement of a quorum of four, the appointment of a chairman and other matters that are usual in such arrangements. Paragraph 9 of the Second Schedule provided that the cost of repair and maintenance shall be shared between all six flats equally. The items to be repaired included the exterior of the Building including the roofs, main walls and all other structural parts etc. and the gardens. Sub-clause (iii) included the cost of the oil fired boiler and the necessary fuel therefore.

7. There had been a general agreement on the background facts to the case as evidenced by the bundles of documents produced by both sides. At some stage the oil fired boiler had broken down and needed to be repaired. The Tenants at that time had refused to contribute to the repairs to the boiler. This upset the Landlord who, jointly with her Husband, owned the largest Flat in the Building. Subsequently each of the five other Tenants had installed their own central heating to their own flats and the oil fired Boiler had not been repaired.

8. A large flat roof at the rear of the Building had needed repairing. Correspondence took place between the parties and other Tenants regarding those repairs. The Leaseholders Association, BILA failed to carry out the repairs despite requests from the Landlord, and after service

by the Local Authority of a Repairs Notice, the Landlord carried out the work. Five of the other Tenants paid their share of those roof repair works, but the Respondent/Tenant failed to pay his share. Hence the Landlord had commenced proceedings in the County Court for the recovery of the amount and the matter had been transferred to the Tribunal to deal with.

9. Issue (a) - **Whether the Respondent/Tenant is liable to pay to the Applicant/Landlord the sum of £746.67 referred to above.**

The Tenant did not deny the amount, or the reasonableness of the amount or the reasonableness of the way in which it had been incurred by the Landlord. He was objecting to having to pay it to the Landlord as he had already paid it to BILA.

10. At the Hearing Mr P.L. Mallier addressed the Tribunal on behalf of the Landlord and said the payment that the Tenant had made to BILA was irrelevant. The Landlord had put the repairs in hand when BILA had refused to carry them out. He referred the Tribunal to Clause 2 (12) of the Lease *(see above)* which allowed the Landlord to carry out the works and recover the costs from the Tenants. The other five Tenants had paid, but this Tenant refused to pay. When the Landlord issued County Court proceedings to recover the money, the Tenant paid the money to BILA.

11. Mr G.R. Stowell addressed the Tribunal on behalf of the Tenant. He said his Father had no objection to paying the amount. He does not wish to pay it to the Landlord. He maintained that Clause 2 (7) of the Lease required such payments to be paid "jointly with the Lessors or owners of the Flats..." He said his Father had paid the amount twice. Once he paid it to the Reserve Fund with his regular half-yearly payments and the second time he had paid the amount to BILA.

12. Issue (b) **Whether there is any right of set-off between the parties in respect of any monies that are alleged to be owed by the Applicant/Landlord to the Respondent/Tenant.** The Respondent/Tenant accepts liability to pay the said sum of £746.67 and has already paid this amount to Belle Ile Lessees Association ("BILA") but maintains that the Applicant/Landlord and her Husband Mr P.L. Mallier (who are jointly the Tenants of Flat C Harestone Hill) owe money to the Service Charge fund administrated by BILA which if it had been paid would off-set the amount being claimed.

13. Mr Stowell addressed the Tribunal and suggested it may be better to consider adjourning this item as it was relevant to another application which some of the Tenants (acting as BILA) had made under Section 27A against Mr & Mrs Mallier as Tenants of Flat C. He referred to the papers that had been filed in the Bundles of documents in support of the tenants claim for a set-off against the Landlord Mrs Mallier.

14. Mr Mallier also addressed the Tribunal and said he did not agree that there should be a set-off. The identity of the Landlord (Mrs Mallier) was legally different from the identity of the Tenant of Flat C which was Mr & Mrs Mallier. He took the view that if there was to be a set-off the claims by the parties had to exist between the same parties and in the same right. In this case the claim was between a Landlord and a Tenant. The fact that another Tenant comprised one of the persons who was also the Landlord was not relevant and set-off did not apply.

15. Issue (c) **Whether the Deed of Covenant dated 24th May 1961 is binding on the Applicant/Landlord and the current Lessees of all the Flats in the Building**.

Mr Mallier on behalf of the Landlord said he was dubious as to whether the Deed of Covenant was binding on the Landlord. He agreed it established a scheme to deal with repairs and service charges relating to the Building. He referred the Tribunal to Counsel's Opinion produced by the Tenant in which under Paragraph 6 (iv) Counsel himself doubted if it was binding on the Landlord.

16. Mr G.R. Stowell said he believed the Deed of Covenant was binding on the Landlord. He was unable to give any legal or other reason for his contention. He agreed that Counsel's Opinion said the deed was inadequate, but it gave guidance to the Tenants.

17. Consideration
Following the conclusion of the Hearing the Tribunal retired to consider the matter. It was being asked to give replies to very specific questions raised by the parties. It reviewed its powers under Section 27A of the Landlord & Tenant Act 1985. In particular this gave the Tribunal express power to make decisions generally about Service Charges payable by one party to another. After consideration it concluded that due (a) to the very wide powers contained in that Section and (b) the request by both parties that the Tribunal make such Decisions, it would do as requested.

18. Issue (a) **Whether the Respondent/Tenant is liable to pay to the Applicant/Landlord the sum of £746.67 referred to above.**

The Tribunal decided the Respondent/Tenant is liable to pay to the Applicant/Landlord the sum of £746.67 for his contribution to the roof repairs undertaken by the Landlord. The reasons were that the covenants by the Tenant contained in the Lease and in particular Clauses 2 (10 and 2 (12) were clear and unequivocal. These covenants were direct covenants by the Tenant with the Landlord and had not been varied by the subsequent Deed of Covenant. Exercising its powers under section 27A of the 1985 Act the Tribunal requires this amount to be paid by the Tenant to the Landlord forthwith, which follows the wording of the Lease. An Order to that effect follows this Decision.

19. Issue (b) **Whether there is any right of set-off between the parties in respect of any monies that are alleged to be owed by the Applicant/Landlord to the Respondent/Tenant.**

The Tribunal decided not to adjourn this issue as requested by the Tenant. The matter had come before the Tribunal for a Decision and in the interests of expediency and justice, the Tribunal decided to make a Decision. It decided there could be no set-off in this case. The reason for this was that the legal identities of the two parties and the fact that the amounts were owed by parties with different identities was critical to the set-off applying. To be valid a set-off can only be maintained where the claims to be set off against each other exist between the same parties and in the same right. Here one was owed by a Tenant to a Landlord and the other was (allegedly) owed by one Tenant to another Tenant. Mr Mallier had included in the Landlord's Bundle reference to a Decision of the Croydon County Court a few years ago, in which a similar attempt had been made to invoke a set-off in a similar situation and on that occasion the County Court Judge had decided that a set-off did not apply. The Tribunal saw no reason to depart from that Decision. An Order to this effect follows this Decision.

20. Issue (c) **Whether the Deed of Covenant dated 24th May 1961 is binding on the Applicant/Landlord and the current Lessees of all the Flats in the Building**.

The Tribunal decided that the Deed of Covenant is binding as between the Tenants, but decided it is not binding on the Landlord. The reasons for this are that (a) the original Landlord did not execute it and as a general principle of law no-one can be bound to take a burden of covenants unless they actually execute a Deed to that effect. (b) The Tribunal agree with the views expressed by Counsel's Opinion, which was produced by the Tenant, which cast some doubt on the legal liability of the Landlord under that Deed. (c) Construing the Lease and the Deed of Covenant together, the Tribunal came to the conclusion that the "scheme" set up by those two Deeds (both of which were promulgated by the Landlord) deliberately omitted any liability on the shoulders of the Landlord. The "scheme" deliberately required the Tenants to bear the burden of the repairs, but if they did not do them the Landlord could (but was not obliged to) repair. These may seem rather unusual in the days of modern Leases, but in the experience of the Tribunal such arrangements were not uncommon in the 1960s, before modern Leases were invented. An Order to this effect follows this Decision.

Dated this 7th day of July 2005
J.B.Tarling
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John B. Tarling, Solicitor, MCMI
(Chairman)

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Re: Flat A, 84 Harestone Hill, Caterham, Surrey CR3 6DH ("the Premises")

BETWEEN

Mrs Nancy Marie Mallier

("the Applicant/Landlord")

and

Mr John Arthur Stowell

("the Respondent/Tenant")

ORDER OF THE LEASEHOLD VALUATION TRIBUNAL

The Tribunal HEREBY ORDERS

(a) In respect of issue (a) **Whether the Respondent/Tenant is liable to pay to the Applicant/Landlord the sum of £746.67 referred to above.**
Decision: The Respondent/Tenant is liable to pay to the Applicant/Landlord the sum of £746.67 in respect of his share of roof repairs and that such amount shall be payable by the Respondent/tenant to the Applicant/Landlord forthwith.

(b) In respect of issue (b) **Whether there is any right of set-off between the parties in respect of any monies that are alleged to be owed by the Applicant/Landlord to the Respondent/Tenant.**
Decision: There is no right of set-off between the parties in respect of any monies that are alleged to be owed by the Applicant/Landlord to the Respondent/Tenant

(c) In respect of issue (c) **Whether the Deed of Covenant dated 24th May 1961 is binding on the Applicant/Landlord and the current Lessees of all the Flats in the Building.**
Decision: The Deed of Covenant is binding as between the Tenants, but is not binding on the Landlord.

Dated this 7th day of July 2005
J.B.Tarling
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John B. Tarling, Solicitor, MCMI
(Chairman)

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