THE SOUTHERN AREA RENT ASSESSMENT COMMITTEE AND LEASEHOLD VALUATION TRIBUNAL

PART IV LANDLORD AND TENANT ACT 1987
and
SECTION 27A LANDLORD AND TENANT ACT 1985

Case Number: CHI/24UF/LSC/2005/0017

B E T W E E N:

CROWN MEWS (GOSPORT) MANAGEMENT CO LTD

Applicant

- and -

MR S F and MRS M U WARNER

Respondents

PREMISES: **CROWN MEWS, CLARENCE ROAD and NORTH STREET, GOSPORT**

HEARING: **14th JULY 2005**

TRIBUNAL: **Mr D Agnew, LLB, LLM (Chairman)**
Mr P Turner-Powell, FRICS
Mrs C Newman, JP

REASONS FOR ORDER

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1. Background

1.1 On 23rd February 2005 the Applicant submitted two applications for determination by the Tribunal. The first was an application under Section 35(2)(f) of Part IV of the Landlord and Tenant Act 1987 to vary the lease of 22 Crown Mews, Clarence Road, Gosport ("the Property") by substituting the words "the properties numbered 1-45 on the Plan " for "the properties numbered 1-25 on the Plan" in Clause 4 of the lease. Clause 4 dealt with the proportion of the overall service charge which was payable by each unit in the Crown Mews development. Thus, by basing the charge on a proportion of the cost incurred for properties numbered 1-45 rather than 1-25 the Landlord is seeking a higher payment from the tenant. The reason for seeking this variation is set out below.

1.2 The second application was for the Tribunal to determine the reasonableness of the service charges levied in respect of the Property since 1996 on the assumption that the application to

vary the lease was successful. This application is made under Section 27(A) of the Landlord and Tenant act 1985.

2. The Property

2.1 The Property is a flat in the Crown Mews complex. This comprises a mixture of 45 flats built new approximately 15 years ago, and a redeveloped public house known formerly as The Crown Inn and another redeveloped property known as "The Ballroom".

2.2 The whole development has been carried out to a high standard and the new build and redeveloped parts blend in well. Crown Mews is situated very conveniently for the shops, the Town Hall and the terminal of the ferry across the harbour to Portsmouth. The whole complex is well maintained as was evident to the Tribunal when it inspected the property prior to the hearing on 14th July 2005.

3. Reason for requesting a variation of the lease

3.1 Clause 4 of the lease of the Property states:-

"the lessee hereby covenants with each of the other parties to this Underlease for the benefit of and with the owners and lessees from time to time of the other parts of the Development that the lessee will pay and contribute 4/176ths of the costs expenses outgoings and matters mentioned in Part One of the Third Schedule hereto so far as they relate to the properties numbered 1-25 shown on the Plan .....".

3.2 It was the developer's intention (as evidenced in correspondence referred to below) that the service charges for the new flats (numbered 1-45) should be shared proportionally according to the number of rooms of each flat. Some flats have 3, some 4 and some 5 rooms. Flat 22 has 4 rooms. The respondents' share of the service charge account should therefore have been 4/176ths of the total expenditure in respect of the new build flats numbered 1-45. Consequently, there was an error in Clause 4 of the leases of some of the flats where the contribution was expressed to be a proportion of the expenditure for properties numbered 1-25.

3.3 This error was highlighted in a letter from the developers dated 7th July 1995. As a result all lessees whose leases contained this error have entered into a deed of rectification to remedy this problem apart from the Respondents.

3.4 Unless the Respondents' lease is rectified the Landlord will never be able to recover 100% of the service charge expenditure.

4. Title

4.1 Gosport Borough Council owns the freehold of the land on which 1-45 Crown Mews is built. On 31st August 1989 the Council granted a lease of this land to Lovell Urban Renewal Ltd for 150 years at a peppercorn rent. This is the head lease.

4.2 Lovell Urban Renewal Ltd granted a lease of 22 Crown Mews to the Respondents for 150 years less 10 days from 9th August 1989. This lease is registered at HM Land Registry with Absolute Title under title number: HP440596.

4.3 Crown Mews (Gosport) Management company took a transfer of the head lease from Lovell Urban Renewal Ltd on 4th May 1995. Their title is registered at HM Land Registry with Title Absolute under title number: HP392393.

4.4 Consequently, the Respondents are tenants of Crown Mews (Gosport) Management Company and hold their property under the terms of their lease.

5. The Lease

5.1 The lease demised to the lessees the interior shell of the property at 22 Crown Mews together with all doors and windows, floors, joists, etc, internal non load bearing walls, one half of party walls and ceilings but not the exterior of the flat, save for doors and windows nor the structure.

5.2 By clause 4 of the lease the lessee covenants to contribute to the costs, expenses and outgoings mentioned in Part 1 of the third schedule of the lease. This refers amongst other things to expenses of the Management Company in insuring the buildings and common parts, managing agents' fees, fees of professionals such as accountants or solicitors in certain circumstances, and the expenses incurred by the Management Company in connection with the maintenance and running of the Development. The Development is defined as all the land contained within title number HP392393 together with the buildings erected thereon. This includes all the flats numbered 1-45. Mr and Mrs Warner are, therefore, obliged to contribute towards the maintenance of buildings in the whole development (as limited by the wording of the clause which is subject to the application for variation) and not just their own flat or their own block. This applies to all the owners of flats 1-45 in the development.

6. The Law

6.1 Section 35 of Part IV of the Landlord and Tenant Act 1987 as amended by Section 163 of the Commonhold and Leasehold Reform Act 2002 gives the Leasehold Valuation Tribunal power to vary leases in certain circumstances.

6.2 By Section 35(3)(f) of the 1987 Act, one of those circumstances is where the lease fails to make satisfactory provision with respect to the computation of a service charge payable under a lease. By Section 35(4) of that Act it is provided that, "a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if:-

(a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and

(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure."

6.3 By Section 38(6) of the 1987 Act it is provided that, "The [Leasehold Valuation Tribunal] shall not make an order under this section effecting any variation of a lease if it appears to the [Leasehold Valuation Tribunal]:-

(a) that the variation would be likely substantially to prejudice

(i) any respondent to the application .....

or

(c) that for any other reason it would not be reasonable in the circumstances for the variation to be effected."

6.4 By Section 38(9) of the 1987 Act it is provided that :-

"The [Leasehold Valuation Tribunal] may by order direct that a memorandum of the variation of a lease effected by an order under this section shall be endorsed on such documents as are specified in the order."

6.5 With regard to the application under Section 27(a) of the Landlord and Tenant Act 1985 the law is as follows:-

6.6 Under Section 27A of the Landlord and Tenant Act 1985 the Leasehold Valuation Tribunal may determine whether a service charge is payable and, if it is, determine:

(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

(e) the manner in which it is payable.

6.7 By Section 19 of the 1985 Act service charges are only claimable to the extent that they are reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

7. The Evidence

7.1 Both the Applicants and Respondents submitted representations to the Tribunal.

7.2 The Landlord's case was to the effect that there had been an error in the drafting of some of the leases of apartments 1-45 which had been spotted by the developers, Lovell Urban Renewal Ltd as early as August 1995 and it produced correspondence from the developers explaining the problem and offering various solutions. This correspondence also demonstrated that attempts had been made by the Landlord via its managing agents to persuade the Respondents of the necessity of rectifying the problem and inviting them voluntarily to enter into a deed of rectification.

7.3 The Respondents' response to this correspondence was somewhat contradictory and confused. Having initially acknowledged in his letter of 3rd February 2003 to a Mr Nouch that he held a lease of 22 Crown Mews, in a letter of 16th June 2003 to Mr Guinness, Chairman of the Management Company, he stated that he "neither leased nor rented it". He maintained that he had no responsibility for the upkeep of other properties. In a letter to a Mr Grouse dated 3rd December 2004 Mr Warner stated that he was an assignee of Lovell's lease and that he paid a peppercorn rent to Gosport Borough Council, both of which statements are incorrect. In a letter of 31st January 2005 to Messrs Allens (a firm of solicitors) Mr Warner

stated that "the Deed of Rectification to which you refer is a contradiction of the legal titles registered in my name at the Land Registry Office and recorded on my Land Registry Certificate ..... I have no reason to sign a Deed of Rectification which contradicts my legal titles, nor am I obliged to do so". Again, in a letter dated 10th April 2005 to a Mr Torrington Mr Warner stated: "No one is at liberty to alter [my] titles be they directors, a council of management or management agents. They neither own the land or the buildings. I own No 22. I do not lease it from a landlord. I do not bear any financial responsibility for any other owners' demised properties nor to their shared communal facilities....."

7.4 Mr Warner's Statement of Case in response to that of the Applicant continued in a similar vein. He stated: "Upon purchase of No 22 Crown Mews we signed two contracts. One with the builder Lovell for the purchase of flat No 22 for which we received the deeds to No 22 and we signed the contract between Lovell and Gosport Borough Council for the lease of the land thus becoming an assignee out of that contract. GBC being the superior lessor and Lovell the underleaseholder lessor. The result of our signing the two contracts gave us "Title Absolute" to No 22 and "Title Absolute" to a leasehold of land. We are registered thus on our Land Registry Certificate which is the legal document that records our legal titles. No one is at liberty to alter those legal titles."

7.5 As for the reasonableness of the service charge Mr Warner's case was that he had withheld payment because he had written to the managing agent many times for detailed accounts but these details were never provided. No case was made by him against any of the detailed accounts provided by the Applicant with its Statement of Case.

8. Inspection

8.1 The Tribunal inspected the Property on 14th July 2005 prior to the hearing and found it to be as described in paragraphs 2.1 and 2.2 above.

9. The Hearing

9.1 The hearing was attended by the Applicant's Company Secretary, Mr Brian Rawlinson, Mr Peter Guinness, Chairman of the Applicant Company, and Mr Paul Redington, a Director of the Applicant Company.

9.2 Mr and Mrs Warner were unable to attend the hearing. They are 80 and 78 years of age respectively and in poor health. At the inspection Mr Warner stated that he was happy that he had included everything that he wished to say to the Tribunal in his correspondence with the Tribunal Office.

9.3 The Tribunal went through the accounts for each year since 1996 to 2004 to consider each and every item of expenditure as to whether it was reasonable.

10. The Determination

10.1 The Tribunal had no hesitation in finding that the Applicants had made out a case for varying the lease of the Property under Section 35(2)(f) of Part IV of the Landlord and Tenant Act 1987 as amended. Without the variation sought, the Landlord would not be able to recover 100% of its service charge expenditure.

10.2 The Tribunal also determined that there was not prejudice to the Respondents such as to prevent the making of the Order. Whilst the result of the variation is that the Respondents will pay more in service charges than under their lease as executed, there is nevertheless an advantage to them on a sale of their property as any prospective purchaser will see that this problem and the under-recovery of service charge for the development will have been resolved. There was also a detriment to the Respondents in that once the leases were varied they immediately became liable for the difference between the service charges worked out on the new basis compared with the former basis. The Tribunal decided, however, that the Respondents had been made aware of the problem and invited to execute a deed of rectification as long ago as 1995. There was no substantial prejudice because had they agreed to the variation then, the same amount would have been paid over the years as is payable now. Furthermore, they will be paying no more (save for interest and costs) than all the other affected leaseholders who did agree to enter into deeds of variation.

10.3 Having determined that the lease should be varied the Tribunal went on to consider whether the expenditure set out in the service charge accounts for the years 1996 to 2004 inclusive was reasonable and, if so, what was the Respondents' liability therefor.

10.4 The Tribunal had some sympathy with Mr and Mrs Warner in that they are elderly and not in good health and these are not matters that are easy to comprehend, particularly matters of title. To set out the legal position as clearly as possible for the Respondents the situation is that they own a long lease of the interior shell, the doors and windows of 22 Crown Mews. They are the leaseholders (tenants) of Crown Court (Gosport) Management Co Ltd. This was originally simply the Management Company given responsibility in the lease for the maintenance and repair of the structure and exterior of the buildings, the grounds and common parts of the development. As is quite common, once the development was complete and the last unit sold off, the headlease which had been held by the developers (Lovell Urban Renewal Ltd) was transferred to the Management Company who became registered as owner of the headlease which it holds from Gosport Borough Council. Whilst the Respondents are registered with Absolute Title, they are still subject to the terms of their lease and are

therefore bound to contribute to the cost of maintenance and repair not just of their own flat or block but of the expenses incurred in respect of flats 1-25 of the development. By the Order made by the Tribunal this has been changed to cover the expenditure for flats 1-45. The Respondents are quite right in that neither the Landlord nor the Management Company had the right to vary that contribution unilaterally. The court had power to do so between 1994 when the problem came to light until the coming into effect of the relevant part of the Commonhold and Leasehold Reform Act 2002 whereafter that power was transferred to the Leasehold Valuation Tribunal.

10.5 It was clearly a mistake that the original contribution to service charge was expressed to be based on expenditure relating to flats 1-25. This would relate to the flats in four blocks plus one flat on the ground floor of the Tower block. Such an arbitrary cut off point for contribution to expenditure does not make sense and it would be extremely difficult to determine what expenditure had been incurred only by the one flat in the Tower block. It clearly makes more sense and, according to the correspondence from the developers' managing agents, it was the intention of the developers when setting up the leases that all the new build flats would be covered by a similar service charge clause and that the expenditure in maintaining and repairing the new build units would be shared between those units in proportion to the number of rooms each flat had.

10.6 The Tribunal determined that each and every item of expenditure since 1996 was reasonable. The directors of the Management Company are also residents and it is in their interests to keep the costs down and the Tribunal found that the Managing Agent and the Management company had procedures in place to go to brokers to place the annual insurance and to seek estimates for items of more substantial expenditure. They have adopted a very reasonable and commonsense approach to expenditure for Crown Mews.

10.7 Accordingly, the Tribunal determined that the service charges claimed by the Management Company against the Respondents were reasonable and reasonably incurred. The details of the amounts found to be owed by the Respondents are set out in the Order accompanying these Reasons.

10.8 The Respondents are liable under clause 11(xi) of the lease to pay interest on unpaid service charges. The figure for this interest is £836.65 as at 14th July 2005

10.9 The Applicant applied for an Order that the Respondents pay the fees they had been required to pay to the Tribunal in order to bring this case and have a hearing. The Applicant's costs in this respect were £350 application fee and £150 hearing fee. By Schedule 12 of the Commonhold and Leasehold Reform Act 2002, paragraph 9, the Tribunal has power to order a party to reimburse fees incurred by another party up to £500. The Tribunal decided that the

Respondents had, by their refusal to agree to a variation, caused the Management Company to incur those fees. All other affected tenants had agreed to a deed of variation. It was therefore reasonable for the Respondents to reimburse the Management Company the fees incurred and the Tribunal so orders.

10.10 The Applicant also asked for the Respondents to be ordered to pay their other costs associated with bringing the applications before the Tribunal. Here, the Tribunal's powers are limited. By paragraphs 10(2) and (3) of Schedule 12 the Tribunal may only make such an order where the Respondent has acted "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings". Again, the amount is limited to £500. The Tribunal decided that although the Respondents were perhaps misguided in requiring the Applicant to bring the proceedings this did not quite constitute conduct justifying an order being made against them under this section. This does not prevent costs from being included in the next service charge account levied against all the tenants but the Tribunal has made no determination at this juncture as to the reasonableness of the costs claimed.

Dated this 1st **day of** ~~July~~ August **2005**

Signed: .....

D Agnew
Chairman

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TRIBUNAL: **Mr D Agnew, LLB, LLM (Chairman)**
Mr P Turner-Powell, FRICS
Mrs C Newman, JP

ORDER

IT IS ORDERED as follows:-

1. The lease of 22 Crown Mews, Clarence Road, Gosport, Hampshire, dated 30th January 1992 and made between Lovell Urban Renewal Limited (1), Crown Mews (Gosport) Management Company Limited (2) and Mr and Mrs S F Warner (3) be varied so that in clause 4 of the said lease the words "the properties numbered 1-45 on the Plan" shall be substituted for the words "the properties numbered 1 to 25 on the Plan".

2. The Tribunal hereby directs that a memorandum of the variation set out in paragraph 1 above shall be endorsed on the lease of 22 Crown Mews.

3. The Tribunal determines that the following service charges levied in respect of 22 Crown Mews are reasonable:-

for the service charge year:	1996	£505.18
	1997	£690.67
	1998	£540.54
	1999	£554.28
	2000	£554.28
	2001	£554.28
	2002	£640.54
	2003	£755.75
	2004	£750.00

4. The Tribunal finds that the Respondents have paid the following amounts in respect of service charges for the years specified:-

1996	£419.18
1997	£290.00
1998	£550.00
1999	£354.00
2000	£360.00
2001	£200.00
2002	£ nil
2003	£ nil
2004	£ nil

5. The Tribunal therefore determines that the Respondents owe the Applicant the sum of £3,372.34 in respect of unpaid service charges since the service charge year 1996.

6. The Tribunal determines that in addition to the sum of £3,372.34 set out in paragraph 4 hereof the Respondents owe the Applicant the sum of £836.65 by way of interest under Clause 11(xi) of the aforesaid lease for unpaid service charges.

7. In addition to the sums ordered to be paid by the Respondents under paragraphs 5 and 6 above, the Respondents shall reimburse the Applicant the Tribunal's fees for making the application and the hearing fee totalling £500. For the avoidance of doubt the total sum required to be paid by the Respondents to the Applicant is £4,708.99.

Dated this 1st day of August 2005

Signed: .....

D Agnew
Chairman