BIR/00CN/LSC/2006/0001

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE MIDLAND LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

Property: **The Bantock Gardens Estate, Finchfield, Wolverhampton, West Midlands WV3 9LR**

Applicants: Mr Malcolm Hartill (leaseholder, 23 Abbots Way)
The Whitlock Trust (leaseholder, 12 Finchfield Road)

Respondent: The Bantock Gardens Residents' Association (landlord)

Date of hearing: 17 and 18 July 2006, in Wombourne

Appearances: Mr Harold Loasby FRICS (HLM, property management surveyors)
Mr Malcolm Hartill
Mr Reginald Whitlock
for the applicants

Mrs Helen Swaffield (Simon Swaffield, solicitor)
Mrs Phyllis Bulwer, Mrs Valerie Cooper and Mr B B Mason
(witnesses)

Members of the leasehold valuation tribunal:

Lady Wilson
Mr S Berg FRICS
Mr D Underhill

Date of the tribunal's decision: 16 August 2006

Background

1. This is an application under section 27A of the Landlord and Tenant Act 1985 ("the Act") to determine the applicants' liability to pay service charges. Each of the applicants holds a long lease of a property on the Bantock Gardens Estate, which is a development of 23 flats, five maisonettes and 15 houses built in the 1960s and all held on long leases in common form. The freehold is owned by the Bantock Gardens Residents' Association Limited, which is a company owned by all the tenants, each of whom hold a share. 35 tenants applied to be joined as respondents to the application, and were so joined at their request, but it was agreed at the hearing that it was unnecessary for them to remain as parties and accordingly the landlord is the only respondent named in this decision.

2. The application disputed the reasonableness of, and accordingly their liability to pay, service charges for the years ended 29 September 1999, 2000, 2001, 2002, 2003, 2004 and 2005. At a pre-trial review on 31 March 2006 the tribunal raised with Mr Harold Loasby FRICS, the applicants' representative, whether it was proportionate and necessary in the circumstances to challenge service charges due over such a long period, and Mr Loasby agreed to limit the ambit of the dispute to the service charge years ended 29 September 2002, 2003, 2004 and 2005 and the confine the issues in these years to the charges made for grounds maintenance, repairs and alterations, replacement of windows, external decorations, audit and accountancy fees and legal expenses. The landlord's solicitors had asked that at the pre-trial review Mr Loasby, who had between January and June 2004 been the landlord's managing agent and had been the subject of court proceedings brought by the landlord for the recovery of documents when his contract was terminated, should be directed to cease to act for the applicants on the ground that he might be in a position of conflict of interest. The tribunal declined to direct that he cease to act, Mr Loasby having agreed that if any evidence from him might be relevant to any of the issues in the proceedings, he would give evidence and submit to cross-examination.

3. The directions made after the pre-trial review required the applicants, on or before 28 April, to serve and lodge a statement setting out their case in relation to the identified issues. The only document served by the applicants in purported compliance with these directions was a statement from Mr Loasby, dated 27 April 2006, making no specific allegations as to the unreasonableness of the costs or standard of any works or services, but simply demanding copies of various documents, notwithstanding that the directions had provided that the parties must be given facilities to take copies of any relevant documents which had not been attached to their statements. Accordingly the tribunal made further directions dated 5 May 2006 requiring the applicants to serve and lodge a fully particularised statement of their case on or before 12 May 2006.

4. Notwithstanding these directions, the applicants failed to provide a fully particularised statement other than a Scott Schedule setting out the sums charged in the accounts for the disputed items in each of the years in question, (and also in the year to 29 September 2001 which had been excluded with the applicants' consent), making the vaguest of allegations, such as "excessive charge for work done" in relation to most of them.

5. Accordingly, by a letter dated 7 June 2006, the respondents applied to the tribunal for the application to be struck out under regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 as an abuse of the process of the tribunal. As it appeared likely that a, presumably contested, hearing of such an application, followed, if successful, by a fresh and more particularised application, would cause substantial further costs to be incurred by all the leaseholders, and since in any event the Regulations require at least 21 days' notice to be given of the hearing of such an application, and because it appeared that the landlord had already produced, in support of the application to strike out, a considerable quantity of information relevant to the substantive hearing, it was decided not to hear the application to strike out at a preliminary stage. In the event, Mrs Swaffield sensibly agreed at the hearing not to pursue the application to strike out, but to have the case heard on

the merits.

Inspection and hearing

6. The tribunal inspected the Estate in the morning of 17 July in the presence of Mr Loasby and Mr Hartill, and of Mrs Phyllis Bulwer and Mrs Valerie Cooper two of the directors of the landlord, and other leaseholders. We internally inspected 23 Abbots Way, the house of which Mr Hartill is the leaseholder, and, in the presence of Mr Whitlock, Flat 12, Finchfield Road, the flat of which he is the trustee. We also inspected a block of garages adjacent to the Estate. At the hearing, which started at 1.30pm on that day and continued on the following day, Mr Loasby represented the applicants, who gave evidence, and Mrs Helen Swaffield, of Simon Swaffield, solicitors, represented the landlord and called Mrs Bulwer, Mrs Cooper and Mr B B Mason, a former leaseholder, to give evidence. Mr Loasby did not give evidence.

7. At the start of the hearing Mr Loasby asked for the application to be adjourned to another date for disclosure of documents to be made by the landlord. When it was pointed out to him by the tribunal that the applicants had, by the first pre-trial directions, been given an opportunity to take copies of whatever relevant documents they wished to see, he agreed that they had not taken advantage of that opportunity and had never asked to inspect or to take copies of any documents because he had "misunderstood" the directions. He then asked to discontinue the application on the basis that the applicants would make a fresh application. We refused the application to discontinue and reapply which would undoubtedly have resulted in a wholly inappropriate waste of costs, which would have inevitably to be borne by the leaseholders, and because the applicants had been given a perfectly adequate opportunity to obtain copies of any documents which they considered that they required and had not taken advantage of it.

8. It became clear as the hearing progressed that the landlord's directors were not and had

never been aware of the consultation requirements in relation to qualifying works set out in section 20 of the Act and, since 31 October 2003, in the Service Charges (Consultation Requirements) (England) Regulations 2003, although, we were satisfied, a reasonable degree of informal consultation had taken place in relation to various qualifying works. It is necessary for all landlords, including tenant companies, to comply with the statutory consultation requirements or to obtain leave not to do so, and the landlord acknowledged that it should have complied in the past and would take care to familiarise itself with the requirements and to comply with them in the future. In the circumstances Mr Hartill and Mr Whitlock on behalf of the Whitlock Trust accepted the landlord's representative's assurances that in future the consultation requirements would be complied with, or dispensation from not doing so sought from the tribunal, and they agreed to take no point on non-compliance with section 20 procedures in any proceedings against them for non-payment of service charges due prior to the date of the tribunal proceedings. On that basis, and having given the landlord permission to make an application at the hearing under section 20ZA of the Commonhold and Leasehold Reform Act 2002 for dispensation from the consultation requirements in respect of works already carried out, we have made no order on the application but expect the consultation procedures to be complied with, or dispensation sought, in future.

The issues

9. The applicants' challenge to audit and accountancy fees was not pursued in their written case, and their challenge to legal fees and the cost of external decorations was withdrawn at the hearing. The dispute was pursued in respect of grounds maintenance for the years (to September in each case) 2003, 2004 and 2005; repairs and alterations for the years 2002, 2004 and 2005; and replacement windows for the years 2001, 2003 and 2004.

i. Grounds maintenance, 2003, 2004 and 2005

10. The charges made for these three years were, respectively, £2615, £5116 and £6829. In the Scott Schedule the only allegation in relation to these charges was "excessive charge for work done", and the amounts considered reasonable were given as £2000, £2850 and £3250 respectively. Mr Loasby said that the applicants' case was that the amounts in the accounts were "rather excessive". They had not obtained alternative quotations, and they had no evidence to support the amounts which they considered to be reasonable.

11. Mr Hartill, who has in the past served as a director of the landlord, said that he could not see why the amounts should have increased. Cross-examined, he agreed that some of the paved areas had been re-paved, and he accepted that the walkways had been levelled and that the grass was cut regularly. He complained that the roots of a cherry tree were intruding into his rear garden, but agreed that the tree itself was on land which the landlord did not own. He agreed that he had not queried the cost of re-paving at any Annual General Meeting of the landlord, although he had attended all or most of the meetings.

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13. Asked how many leaseholders other than the applicants shared his anxieties, Mr Hartill mentioned two, one of whom was, he said, Mr Dodsworth. However, Mr Dodsworth had written to the tribunal in connection with the present proceedings (page 190 of Bundle 1) to protest at the application which, he said, had been made "not with the wellbeing of the company in mind, rather as part of a self-serving agenda by [Mr Hartill] and two other shareholders, and a long-running nuisance campaign" and said that "I do not believe that Mr Hartill is acting in anybody's interests except those of himself, Mr Conway [who has since

moved] and Mr Whitlock, and that his application to the tribunal is nothing more than one of his childish attempts to thwart the normal flow of business by forcing the directors to spend hours trawling through the records for no useful purpose" and "I take my hat off to the board, and pledge my wholesale support to them". Thus it can hardly be said that Mr Dodsworth supports the applicants in the position they have adopted.

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15. Mrs Bulwer, who is a retired schoolteacher and director of the landlord company, gave evidence of the works which had been carried out. She explained to the tribunal that being a director was a time-consuming and tiring job for which none of the directors were paid. She said that Stewart Smith cut the grass once a fortnight and also attended to the trees where necessary. The man who did the work was, she said, very good and reliable, and she explained that the many elderly residents on the Estate liked to have workmen that they knew and trusted. She described the extensive re-paving works which had been carried out. She said that no complaints had been received about the cost or standard of the grounds maintenance and she was satisfied that the work could not have been done for less. She said that some invoices were missing because they had been retained by Mr Loasby, but the accountant who prepared the accounts had seen all the records and she said that he and the directors were satisfied that the amounts in the accounts had been spent and were reasonably incurred.

16. Mrs Cooper, who is also a retired school teacher and a director of the landlord company, said that the directors decided what areas needed to be re-paved and were satisfied with the charges which had been made for what was, she said, a lot of work. She said that invoices were always provided for work done, and that no workman was paid in cash.

17. Mr Mason said that he had been a director of the landlord company, but had now sold his property and moved from the Estate. He had been a director when the garage doors were painted, and he confirmed that the work had been paid for by the owners of the garages with the exception of one or two who failed or declined to pay and that Mr Shaw, another leaseholder, had paid for their doors to be painted. He said that he had showed Mr Hartill the cashbook which confirmed that nothing had been paid out of the service charges but, to his annoyance, Mr Hartill had, without any evidence, refused to believe him.

18. We are quite satisfied that these costs were reasonably incurred and that the applicants are liable to pay their share of the costs. The applicants did not so much as make a *prima facie* case that they were not, but, rather than decide the case on that basis, we are able and prefer to determine on the evidence, as we do, that all the costs were reasonable, as was the standard. No evidence was produced of any excessive charging or poor workmanship, and the figures included in the Scott Schedule as reasonable were based on no more than unsupported guesswork on which no reliance can possibly be placed.

ii. Repairs and alterations, 2002, 2004 and 2005

19. The charges made for these three years were, respectively, £1795, £3964 and £3966. Again, in the Scott Schedule, the only allegation in relation to these charges was "excessive charge for work done", and the amounts considered reasonable were given as £500, £1500 and £1500 respectively. Asked for the basis of the amounts alleged to be reasonable, Mr Hartill said: "I just think the costs shown are excessive" and said he had arrived at the amounts proposed in the schedule on the basis of his own common sense and his own knowledge. He said that his own property had been painted last year but the paint was already peeling in places. He did not know what the work had cost but, whatever it was, he considered it to be unreasonable. He said that his challenge was "broad brush" and was

largely based on Mr Loasby's advice

20. Mr Whitlock, who does not live on the Estate, gave evidence of problems which he had had with the windows of the flat of which he is trustee, but he agreed that Mr Smith, who had painted some of the windows, was a really good old-fashioned tradesman.

21. Mrs Bulwer gave evidence of the works which had been carried out and said that the directors always asked the residents whether they were satisfied with the works before the contractors were paid, and people were usually very pleased. J D Roofing had carried out all roofing works and had always done so satisfactorily and returned to put right any problems. Similarly, P Hornby, the electrical contractor was, she said, reliable and excellent.

22. We are satisfied that these costs were reasonably incurred and the works of a reasonable standard and that the applicants are liable to pay their share of the costs. Once again, in our view a *prima facie* case has not been made by the applicants, but, be that as it may, we are quite satisfied on the evidence that the standard of all the works has been, if not perfect, adequate, given the constraints of a 1960s block which now requires a good deal of upkeep, and leaseholders who are not all well off financially.

iii. Replacement windows, 2001, 2003 and 2004

23. The amounts charged for these years were £4303, £1610 and £2200 respectively and the applicants' case as set out in the Scott Schedule was, for each year "no record of address of properties". No figures for given for what would have been reasonable, but it was suggested that the records showed that the amounts spent differed from those given in the accounts.

24. Mr Hartill said that it was generally recognised that the situation in relation to windows

was "a mess". Some residents preferred to replace their own windows with uPVC double glazed windows, and the directors seemed to have no policy in relation to the replacement of windows. He agreed that there should be a proper plan to replace the windows over a period of years.

25. Mrs Bulwer produced a report from a building surveyor dated 22 November 2004 on the condition of the Estate, including the windows,, which suggested a more detailed report for the prioritisation of the replacement of windows. Mrs Cooper denied a suggestion that the directors were given priority over others, and said that at present that the carpenter decided, flat by flat, whether a window could be economically repaired or need to be replaced. She said that the money to pay for replacement of windows came out of general funds and there was no sinking fund in place for the purpose. She said that the directors had decided on JD Padmore as the contractor and they hoped that they were providing good value.

26. It was accepted by Mrs Swaffield that these works are ongoing and form part of a contract in respect of which there should have been consultation with the leaseholders under section 20 of the Act. In relation to works already carried out and costs incurred, the applicants have agreed (see paragraph 8 above) to take no point on the landlord's failure to follow the required procedures, but, in relation to all works of window replacement yet to be carried out for which firm instructions have not yet been given to the present contractor and to which the landlord is not contractually committed, we would expect that there should be statutory consultation or, if that is impractical, an application must be made under section 20ZA of the 2002 Act for dispensation from all or any of the requirements. Of the works carried out, there is no evidence that they have not been carried out to a reasonable standard and at a reasonable cost. It was explained to the tribunal and to the applicants, and we are satisfied, that there were no discrepancies in charging for the work, that proper records were kept, and that there was no question of directors being favoured in any way. We are satisfied that the applicants are liable to pay their share of these costs.

Conclusion

27. It follows that this application fails. In our view it was based on inadequate or no evidence and was a fishing expedition which put the landlord to unnecessary expense. It has, however, uncovered a failure, not deliberate but borne of ignorance, to comply with the statutory consultation processes in relation to major works, although that does not seem to us to have been the motive for the application and, had that been the only issue, the proceedings would have been less protracted and the burden on the landlord to provide evidence much less.

28. An application was made by the landlord for an order under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 that the applicants should pay a contribution towards the landlord's costs on the ground that the applicants have acted vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. Mr Loasby opposed the application. However, we are satisfied that the applicants have behaved unreasonably in relation to the proceedings in that they pursued vague allegations on flimsy or no evidence in circumstances in which they knew that their fellow leaseholders were going to have to shoulder the landlord's costs. We have borne in mind that they did, perhaps unwittingly, establish that the landlord had throughout failed to comply with the statutory consultation procedures and we have also had regard to the fact that, in the end, not all the challenges were pursued (although they should not have been made in the first place). We have decided in all the circumstances that the applicants should pay the landlord £400 towards its costs incurred in connection with the proceedings which will clearly considerably exceed that sum.

CHAIRMAN.....

DATE.....16 August 2007

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18. We are quite satisfied that these costs were reasonably incurred and that the applicants are liable to pay their share of the costs. The applicants did not so much as make a *prima facie* case that they were not, but, rather than decide the case on that basis, we are able and prefer to determine on the evidence, as we do, that all the costs were reasonable, as was the standard. No evidence was produced of any excessive charging or poor workmanship, and the figures included in the Scott Schedule as reasonable were based on no more than unsupported guesswork on which no reliance can possibly be placed.

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22. We are satisfied that these costs were reasonably incurred and the works of a reasonable standard and that the applicants are liable to pay their share of the costs. Once again, in our view a *prima facie* case has not been made by the applicants, but, be that as it may, we are quite satisfied on the evidence that the standard of all the works has been, if not perfect, adequate, given the constraints of a 1960s block which now requires a good deal of upkeep, and leaseholders who are not all well off financially.

iii. Replacement windows, 2001, 2003 and 2004

23. The amounts charged for these years were £4303, £1610 and £2200 respectively and the applicants' case as set out in the Scott Schedule was, for each year "no record of address of properties". No figures for given for what would have been reasonable, but it was suggested that the records showed that the amounts spent differed from those given in the accounts.

24. Mr Hartill said that it was generally recognised that the situation in relation to windows

was "a mess". Some residents preferred to replace their own windows with uPVC double glazed windows, and the directors seemed to have no policy in relation to the replacement of windows. He agreed that there should be a proper plan to replace the windows over a period of years.

25. Mrs Bulwer produced a report from a building surveyor dated 22 November 2004 on the condition of the Estate, including the windows,, which suggested a more detailed report for the prioritisation of the replacement of windows. Mrs Cooper denied a suggestion that the directors were given priority over others, and said that at present that the carpenter decided, flat by flat, whether a window could be economically repaired or need to be replaced. She said that the money to pay for replacement of windows came out of general funds and there was no sinking fund in place for the purpose. She said that the directors had decided on JD Padmore as the contractor and they hoped that they were providing good value.

26. It was accepted by Mrs Swaffield that these works are ongoing and form part of a contract in respect of which there should have been consultation with the leaseholders under section 20 of the Act. In relation to works already carried out and costs incurred, the applicants have agreed (see paragraph 8 above) to take no point on the landlord's failure to follow the required procedures, but, in relation to all works of window replacement yet to be carried out for which firm instructions have not yet been given to the present contractor and to which the landlord is not contractually committed, we would expect that there should be statutory consultation or, if that is impractical, an application must be made under section 20ZA of the 2002 Act for dispensation from all or any of the requirements. Of the works carried out, there is no evidence that they have not been carried out to a reasonable standard and at a reasonable cost. It was explained to the tribunal and to the applicants, and we are satisfied, that there were no discrepancies in charging for the work, that proper records were kept, and that there was no question of directors being favoured in any way. We are satisfied that the applicants are liable to pay their share of these costs.

Conclusion

27. It follows that this application fails. In our view it was based on inadequate or no evidence and was a fishing expedition which put the landlord to unnecessary expense. It has, however, uncovered a failure, not deliberate but borne of ignorance, to comply with the statutory consultation processes in relation to major works, although that does not seem to us to have been the motive for the application and, had that been the only issue, the proceedings would have been less protracted and the burden on the landlord to provide evidence much less.

28. An application was made by the landlord for an order under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 that the applicants should pay a contribution towards the landlord's costs on the ground that the applicants have acted vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. Mr Loasby opposed the application. However, we are satisfied that the applicants have behaved unreasonably in relation to the proceedings in that they pursued vague allegations on flimsy or no evidence in circumstances in which they knew that their fellow leaseholders were going to have to shoulder the landlord's costs. We have borne in mind that they did, perhaps unwittingly, establish that the landlord had throughout failed to comply with the statutory consultation procedures and we have also had regard to the fact that, in the end, not all the challenges were pursued (although they should not have been made in the first place). We have decided in all the circumstances that the applicants should pay the landlord £400 towards its costs incurred in connection with the proceedings which will clearly considerably exceed that sum.

CHAIRMAN.....

DATE.....16 August 2006