

# LEASEHOLD VALUATION TRIBUNAL

In the matter of Sections 35 & 36 of the Landlord & Tenant Act 1987

Tribunal: M J Greenleaves Chairman  
S Hodges FRICS  
A Osborn

Re: 5 Redlynch House, Redlynch Park, Bruton, Somerset BA10 0NH

| RE Section 35 application |                                 |            |                 |
|---------------------------|---------------------------------|------------|-----------------|
| <b>Applicant:</b>         | Madeleine Heal                  | No 5       | Redlynch House  |
| <b>Respondents</b>        | Redlynch Park Management Co Ltd |            | Freeholder      |
|                           | Redlynch Management Co Ltd      |            |                 |
|                           | Clock House Management Co Ltd   |            |                 |
|                           | Mr F S Hurndall-Waldron         | No 7       | Redlynch House  |
|                           | Lt Col I M G Strong             | Stalbridge |                 |
|                           | Lt Col W M W Jackson            | No 4       | The Clock House |
|                           | Dr & Mrs A Davies-Jones         | No 8       |                 |
| RE Section 36 application |                                 |            |                 |
| <b>Applicant</b>          | Redlynch Park Management Co Ltd |            | Freeholder      |
| <b>Respondents</b>        | Madeleine Heal                  |            | Redlynch House  |
|                           | Mr F S Hurndall-Waldron         |            |                 |
|                           | Mr & Mrs R A Sharp              |            |                 |
|                           | Mr & Mrs Bottrill               |            |                 |
|                           | Lt Col I M G Strong             |            |                 |
|                           | Mr & Mrs R M S Farrant          |            |                 |
|                           | Mr & Mrs P J Whalley            |            |                 |
|                           | Mr & Mrs G King                 |            | The Clock House |
|                           | Mr T Bell                       |            |                 |
|                           | Lt Col & Mrs W M W Jackson      |            |                 |
|                           | Mr & Mrs J Bastin               |            |                 |
|                           | Mr D Barron                     |            |                 |
|                           | Dr & Mrs A Davies-Jones         |            |                 |

## Preliminary

1. On 1<sup>st</sup> February 2005 the Applicant Madeleine Heal made an application (the First Application) to the Tribunal for variation of her leases under Section 35 of the Landlord and Tenant Act 1987 and for an Order under Section 20C of the Landlord & Tenant Act 1985.
2. Consequent on that application, on 30<sup>th</sup> March 2005 Redlynch Park Management Co Ltd made an application under Section 36 of the Act seeking similar variation of the

leases of the other flats of Redlynch House and the Clock House in the event of the First Application being granted wholly or in part.

3. On 23<sup>rd</sup> May the Applicant made an application under Section 27A of the Landlord and Tenant Act 1985 as to the reasonableness of service charges levied in respect of her flat. That application is to be heard at a later date.

### **Inspection**

4. On 23<sup>rd</sup> June 2005 the Tribunal inspected the property in the presence of Mr Webb, on behalf of the Applicant, and Miss Zoe Rowlinson of Counsel and Mr Hurndall-Waldron and Mr Sharp of the Respondents and their Counsel Mr Anthony Speaight QC.
5. Redlynch House and Clock House, both of three storeys, are set close to each other in substantial laid out grounds in a rural setting. Redlynch House was originally converted into 8 units, 6 of which shared a common entrance hallway and staircase, one other unit having its own entrance and another unit comprising a ground floor dwelling to the rear. Redlynch House was built about 100 years ago and was converted into those units in the 1980s. The wood staircase leads to the subject flat which is spacious and laid out on two floors. It originally comprised two units but the Applicant had converted them into one unit.
6. The windows of the subject flat are uniform in style and character, being leaded lights in wooden frames, painted black; the other windows in the block are the same.

### **Hearing**

7. On the same day a hearing was held. The Applicant was represented by Miss Rowlinson. While other Respondents were present, none took part in the hearing except for Redlynch Park Management Co Ltd and Redlynch Management Co Ltd both of which were represented by Mr Speaight.
8. The hearing considered the application under Section 35 under which the Applicant sought variation of her leases on the ground that they failed to make satisfactory provision with respect to (a) the repair and maintenance of the flat and (b) as to computation of the service charge payable under the leases.
9. Prior to the hearing the Tribunal had received bundles of documents including witness statements and no further evidence was adduced. The Tribunal received submissions from both Counsel in support of the skeleton arguments and authorities which had also been submitted and filed with the Tribunal.
10. Miss Rowlinson submitted the case for the Applicant and particularly referred to the following as to computation of service charge

- a) Historically the service charge had been apportioned according to the number of units, for instance, 1/8<sup>th</sup> for Redlynch House common parts
  - b) The Applicant had purchased her two flats at different times and had, with the Landlord's written licence, merged them irrevocably into one dwelling known as 5 Redlynch House.
  - c) Accordingly, she says, there are now 7 units but the Management Company fails to apportion the charge on the basis of that number, but continues to do so on the basis of the historical number of units
  - d) The Leases are varied by the Licence dated 3<sup>rd</sup> September 2003 which authorised the works resulting in the two flats becoming one
  - e) The works had been completed and a Certificate of Final Inspection of Work granted by South Somerset District Council on 10<sup>th</sup> May 2004.
  - f) By letter dated 17<sup>th</sup> May 2005 the South Somerset District Council had confirmed, in relation to Council Tax assessment, that "Stourhead Suite, Redlynch House.. was closed on 16<sup>th</sup> January 2004 as it was merged with 5 Redlynch House".
  - g) The result of the merger is a reduction in the overall use of services
  - h) The Applicant is not seeking an equal apportionment but proposes a calculation based on floor areas
  - i) As a result of the merger Clause 18 of the leases had been rendered unsatisfactory
  - j) The minutes of Board meeting of the Freeholder dated 3<sup>rd</sup> October 2003 at paragraph 7 noted that "a separate deed of covenant will be required from everyone with 2 flats to accept the responsibility for 2 maintenance fees and insurance premiums appropriately"
  - k) The case is purely a matter of construction, the law excluding "from the admissible background the previous negotiations of the parties and the declarations of subjective intent". In determining the issue one has to take into account the matrix of fact principle.
  - l) The minutes of meeting dated 13<sup>th</sup> July 2002 ignored the fact of the merger of the two units into one.
  - m) The Deed of Licence was not necessary as the work legally constituted improvements which were permissible under Section 19(2) of the Landlord and Tenant Act 1927, citing authority for that proposition.
  - n) The insurance premium is calculated on floor areas and such a method is commonly used by Leasehold Valuation Tribunals
11. In respect of repairs and maintenance, Miss Rowlinson referred to the following:
- a) The two questions to be decided are whether the windows are common parts and also whether the leases should be varied

- b) She referred to the definition of common parts contained in Part 1 of the Second Schedule to the leases which did not refer to the windows forming part of common parts
  - c) She also cited the authority of *Holiday Fellowship Ltd v Hereford* [CA 1 WLR p.211] that external walls did not include windows
  - d) That there was no risk to the appearance of the property if each flat was responsible for its own windows because of the Listed status of the property.
12. Mr Speaight referred to the following in respect of apportionment of service charge:
- a) The importance of the principle of freedom of contract subject to some exceptions
  - b) Section 35 requires the total service charge payable by all units to be no more and no less than 100%
  - c) If the Applicant says that the 2003 licence effected a variation of the leases in respect of service charges, why is she making the application?
  - d) The purpose of the licence was to give approval to the alterations and there is nothing in it concerning apportionment of service charge
  - e) The Council Tax point is not relevant; conversely the flats still have separate titles
  - f) The Applicant says nothing about any appropriate changes concerning ground rents, votes or loan notes
  - g) An Order should not be made as all the other tenants want to retain the present apportionment; that at board meeting on 15<sup>th</sup> January 2005 all present, other than the Applicant, had voted to retain the present apportionment
  - h) Although they had two units each, Mr & Mrs Bastin and Mr & Mrs King were in favour of the present apportionment
  - i) The minutes of meeting for 13<sup>th</sup> July 2002 (attended by the Applicant) show that all present agreed that the Applicant's combined unit should always be treated as two
  - j) The minutes of meeting of 5<sup>th</sup> October 2002, at which the Applicant was present, note a decision to prepare a further deed of covenant between the Applicant and the management company to provide for the establishment of 2 shares, 2 votes and 2 maintenance payments, although the deed had not in fact been prepared.
13. In respect of the windows. Mr Speaight referred to the following:
- a) Whether the issue was in fact a boundary dispute and therefore whether the Tribunal had jurisdiction
  - b) The leases are not well drafted
  - c) The frames are common parts because (a) the general scheme of the lease is that external parts belong to the landlord and internal parts to the tenant (b) glass is more likely to get broken by a tenant (c) if they were not to be common parts, they would also have been excepted from that definition (d) it is more convenient

and cheaper to do all window frames at the same time (e) the plans attached to the leases do not include them

d) The Holiday Fellowship case notes that “ windows in the outer walls of a building may, in certain contexts and for certain purposes, be regarded as part of the walls”

e) He referred to the views expressed by different solicitors in correspondence

### **Consideration**

14. The Tribunal took into account the submissions made by both Counsel, the skeleton arguments and authorities produced, the witness statements and other documents produced and its inspection of the property.

15. The Tribunal decided that it did have jurisdiction to deal with all issues raised by the application under Section 35 and, if necessary, under Section 36 of the 1987 Act

16. The fundamental question for the Tribunal was to decide whether the leases fail to make satisfactory provision for repairs and service charge computation

17. The Tribunal noted that, for instance, the Section does not, instead of “satisfactory”, use words such as “fair” or “ideal”. It also noted the definition in The Oxford Dictionary of English: “fulfilling expectations or needs; acceptable though not outstanding or perfect”.

### **Computation of service charge**

18. The Applicant says that she being required to pay a total of two-eighths is not satisfactory because she no longer has two flats: that it results in total service charge payments not totalling exactly 100%; that the approved work resulted in one flat merged from the two; that the fact of there now being one flat is accepted by the Council and it is used irrevocably as one.

19. She refers to the Licence for the alterations as being a merger licence. She proposes not that the apportionment should now be one seventh per unit but that it be divided on the floor areas used for apportionment of insurance premium. It is within the knowledge and experience of the Tribunal that floor area is by no means the only way in which charges are apportioned.

20. The Respondents, without exception, say that the present apportionment is satisfactory to them.

21. The Tribunal has carefully considered all the evidence and the arguments submitted. While it accepts that where there were two units there is now one only, irrevocable or not, the Licence for the alterations did not merge the leases even if it physically resulted in a merged flat. There was no intention, express or implied, that it should alter the service charge apportionment and there is significant evidence from minutes of meetings that no change was intended in the amount payable under Clause 18 of each of the two leases. The Applicant agreed those apportionments when she bought

the flats and that while she might now prefer a different apportionment, the original apportionment fulfils, on any objective view, the dictionary definition.

22. The Applicant bases her case on the proposition that because there is now physically one flat where there were two, it means that the service charge must be re-apportioned to be satisfactory. The Tribunal does not find a basis for that proposition.
23. The Tribunal finds that the two leases remain in existence, subject only as expressly varied by the licence for alterations; there is no express or, indeed, implied variation of the service charge provisions; the apportionment provisions under the two leases continue and remain satisfactory within the terms of Section 35 and do not fail to comply with Sub-section (2)(f).

#### **Repairs.**

24. The Tribunal accepts, as do the parties, that the leases are not best drafted. The common parts are defined to include in paragraph (2) of Part 1 of the Second Schedule to the leases the main structural parts...(but without prejudice to the generality of the foregoing) the foundations external walls parapets roofs chimney stacks chimneys cover flashings flues and vent pipes and the gutters and drains.....(but not the glass of the windows of the flats nor the interior faces of such of the external walls as bound the flats)....." The Third Schedule reserves from the flat "the main structural parts of Redlynch House including the roof foundations and external parts thereof (but not the glass of the windows of the flat nor the interior faces of such of the external walls as bound the said flat) and generally any part of the Redlynch House common parts".
25. Plainly the glass of the windows forms part of the flat. The definition of the flat is not on all fours with that of the common parts, but specifically depends on the definition of common parts as well as excluding main structural parts and external parts.
26. Even though Listed status may, in practice, ensure uniformity of the external appearance, it appears to the Tribunal that it is difficult to say that the window frames are included in the flat: the draftsman has only specifically referred to the glass. Conversely, they could be construed to be external parts notwithstanding that by their nature, part of them faces into the flat. The authorities to which the Tribunal has been referred do not exclude the Tribunal from coming to the conclusion that the frames form part of the external walls.
27. The Tribunal recognises that if windows and frames are purchased and installed as one unit, there may be issues about apportionment of the cost of those units between the glass and the remainder. That, however, may be a necessary consequence of the proper construction of the leases.

28. The Tribunal considers that the only available construction, bearing in mind also the physical nature of Redlynch House, is that it was intended that the window frames form part of the external walls. The Tribunal finds that they are common parts.

**Decision**

29. Accordingly the Tribunal finds as follows:

- a) Computation of service charge. There has been no change in law to the two leases of the Applicant, so that apportionment of service charge on the basis of each lease as set out in Clause 18 remains correct and does not result in total services of anything but 100%.
  - b) Repairs. The proper construction of the leases includes the window frames as common parts and that the leases require no variation. Had a formal variation been necessary, the Tribunal decision would have been to the same effect.
  - c) Accordingly that on neither count do the leases fail to make satisfactory provision
  - d) It follows that no Order falls to be made under Section 36
30. The Tribunal decides that it is not just and equitable to make an Order under Section 20C.

Dated 4<sup>th</sup> July 2005.

Signed  
M J GREENLEAVES  
(Chairman)

A member of the Southern  
Leasehold Valuation Tribunal appointed by  
the Lord Chancellor