

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN
APPLICATION UNDER SECTION 24 OF THE LANDLORD AND TENANT
ACT 1987

Reference number: LON/OOAF/LAM/2005/001

Property: 72 Anerley Park, London SE20 8NQ

Applicant: Mr A T Johnstone
(Lessee of the first floor flat)

Respondent: Mr B McGroarty

Appearances: For the Applicant:
Mr D Jackson
Ms L Philps-Tate
Both of the College of Law, Free Representation
Unit

The Respondent did not appear and was not
represented

Proposed Manager: Mr S Dothie MIRPM, of Northleach Property
Management Ltd

Tribunal Members: Mr A Andrew
Mr C Kane FRICS
Mr T W Sennett MA FCIEH

Application dated: 23 December 2004

Directions: 28 January 2005

Hearing date: 29 March 2005

Further documents
Received: 11 April 2005

Decision: 18 May 2005

BACKGROUND

1. This was an application dated 23 December 2004 under Section 24 of the Landlord and Tenant Act 1987 (the Act") for the appointment of a Manager and Receiver. An oral pre trial review was held on 16 January 2005 and Directions were issued on 28 January 2005.
2. We had written statements from the Applicant and the Proposed Manager both of which contained statements of truth. Ms A King of Horwood & James, the Respondent's solicitors, had also submitted a statement on his behalf which contained a statement of truth. Ms King's statement indicated that the Respondent would not attend the hearing and we were advised by the Applicant's representatives that Ms King had no instructions to attend on his behalf. Subsequently, at our request, the Applicant submitted copies of the leases of the other two flats in the Property and these were received on 11 April 2005. On the basis of these statements, the documents produced to us and the evidence and submissions tended and made at the hearing, we found the followings facts:
 - a. The Property is a four-storey semi-detached house that was converted by the Respondent into three flats. On 5 March 1984 the Respondent granted a lease of the first and attic floor flat to a Mr R M Grindley ("the Lease"). The Applicant purchased the interest created by the Lease in 1987 and he has owned the flat ever since. The Lease is for a term of 99 years from 29 September 1983 at a ground rent of £50 per year increasing to £100 per year after 33 years and to £150 per year after 66 years.
 - b. The Lease incorporates an unusual repairing scheme. Most leases place responsibility for the maintenance and repair of the common parts, exterior and main structures on the lessor who recovers the cost through the payment of a service charge. In the Lease however these repairing obligations are transferred to the lessee so that, in the case of the upper flat, the Applicant is responsible for maintaining not only the interior of the flat but also its exterior and main structures, including the roof. Similar leases were subsequently granted in the respect of the two lower flats. The Property is therefore divided into three segments with each lessee being responsible for one such segment. The intention is to divest the lessor of any responsibility for the maintenance and repair of the Property whilst enabling it to enjoy the ground rental income.
 - c. Clause 3(3) of the Lease requires the lessee to contribute one-third of any costs incurred by either of the other two lessees in carrying out these repairing obligations in so far as they relate to the structure and exterior Property, including the roof and foundations. Thus, similar leases having been granted in

respect of the other two flats, the Applicant as lessee is entitled to receive similar contribution from the other two lessees. However as there is neither privity of estate nor privity of contract between the lessees that obligation can only be enforced through the lessor and hence at clause 5(2) the lessor covenants to enforce, against the other two lessees, similar covenants which are contained in their leases. The clause also requires the lessee to indemnify the lessor against all costs incurred in such enforcement and the lessee is required to provide such security for costs as the lessor may reasonably require.

- d. By clause 4(1) of the Lease the lessor covenants to insure the Property and by clause 2(1)(b) the lessee covenants to reimburse one-third of the insurance premium on demand, by way of rent.
- e. The Respondent, having converted and sold the lower two flats, moved to live in Ireland in about 1990. Since that time he has failed either to insure the Property or to assist the Applicant in recovering contributions from the other two lessees in respect of works that he has carried out to the roof. The other two flats in the Property are now owned as investment properties: they are let on short term tenancies and the owners of those flats have shown little interest in either the maintenance or insurance of the Property which has fallen into a general state of disrepair.
- f. Since about June 2002 the Applicant has been attempting to sell his flat. He has however been unable to achieve a sale because prospective purchasers are deterred from proceeding when they learn that the Respondent has failed to insure the Property and has not assisted the Applicant in enforcing the lessees' obligations contained in the other two leases. It is in these circumstances that the Applicant has applied for the Appointment of a Manager.
- g. The Applicant gave notice of his application to the other two lessees by letters of 15 February 2005 but no response has been received from them.
- h. The Respondent has now instructed a firm of solicitors in England, Horwood and James, to represent him so that the Applicant now has a point of contact with him. The statement submitted by Ms King indicated the Respondent's intention to "take a more hands on approach" to the management of the Property and confirms that the Respondent has now insured the Property and will proceed to recover the Applicant's contributions and also the substantial arrears of ground rent. The statement opposes the appointment of a Manager on the grounds that the manager's fees would be substantial and

unnecessary. We had a copy of a policy schedule indicating that the Property had been insured by the Respondent with the Norwich Union, since 7 October 2004 in the sum of £245,000. However the Respondent had provided neither a full copy of the policy nor a copy of the premium receipt note.

- i. The Applicant's representatives produced to us a copy of a draft order dated 24 March 2005 signed by the Applicant and by Ms King on behalf of the Respondent. The draft order proposed that Mr Dothie of Northleach Property Management Limited should be appointed to manage the Property from 1st April 2005. The draft order was predicated on the assumption that the Manager would be responsible for the maintenance and repair of the Property and that his costs would be recovered through "maintenance contributions" to be paid by the lessees. The draft order also provided that the proposed Manager would collect the ground rent and that it would assist the Applicant in recovering monies due from the other lessees in respect of repairs already carried out to the roof. Finally it proposed that either "the Respondent or Managing Agents" should continue to insure the Property.

Decision

3. The Respondent had failed to carry out his obligations contained in the Lease for a period of some 14 years. As a result the Applicant has been unable to sell his flat. Given the Respondent's past failures we had no confidence that he would continue the buildings insurance policy or fulfil his other obligations under the Lease. No one should find themselves in the situation of being unable to sell their home because of their lessor's default. We could envisage few more cogent reasons for appointing a Manager and it was evident, from Ms King's signature to the draft order, that not only had the Respondent withdrawn his objections to the appointment of a Manager but that he consented to the appointment of Mr Dothie. However we had reservations about the terms of the draft order in that they were not consistent with the terms of the Lease in so far as they envisaged that responsibility for the maintenance and repair of the Property would rest with the Manager rather with the lessees as provided in the Lease.
4. We fully appreciated that the terms of section 24 of the Act are extremely wide in that they permitted us to appoint a manager to carry out in relation to the Property "*such functions in connection with the management of the Premises or such functions of a receiver..as the Tribunal thinks fit*". Certainly we considered that section 24 of the Act permitted us to give business efficacy to the appointment of a Manager and Receiver so that it would enable us to deal with any lacuna in the Lease that would frustrate such an appointment. However, in the absence of persuasive legal argument to the contrary, we did not consider that section 24 permitted us to effectively rewrite the Lease to

substitute a wholly different repairing scheme from that contained in it. Such an Order would amount to a variation in the terms of the Lease. Part IV of the Act specifically permits the parties to a lease to apply for its variation. We did not consider that section 24 could be used as a means of achieving a variation of a lease, by a different route. If section 24 had been intended to confer a wide power of variation on tribunals then we would have expected that power to be explicitly set out in the section. Consequently we concluded that although it would be appropriate to appoint a Manager and Receiver under the provisions of section 24 such appointment should have regard to the terms of the Lease and the repairing scheme contained within it.

5. Having considered Mr Dothie's statement, his very comprehensive terms and conditions and having heard his evidence relating to his past experience of management we considered that it would be appropriate to appoint him as a Manager and Receiver under the provisions of Section 24 of the Act. He indicated that he would be prepared to accept the appointment for a period of two years on the basis that his remuneration would be derived from reasonable commission earned on placing the buildings insurance cover and from any security and/or costs received by him from the individual lessees pursuant to the terms of the Lease.
6. Accordingly under section 24 of the Act we appointed Mr Dothie to be the Receiver and Manager of the Property for a period two years with effect from 1 June 2005. The terms of the appointment are set in the Order annexed.
7. The Applicant applied to us for the reimbursement of his fees incurred in making his application and the directions authorised us to make such an order. The Respondent had, by his neglect over a long period of time, brought this application upon himself. In such circumstances we considered it appropriate to exercise our discretion and we ordered that the Respondent reimburse the Applicant the fees incurred by him in making his application to the tribunal.

Chairman:..........(A J Andrew)

Dated: 18th May 2005

**IN THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT
ASSESSMENT PANEL**

**IN THE MATTER OF PART II OF THE LANDLORD AND TENANT ACT
1987**

RE: 72 ANERLEY PARK, LONDON SE20 8NQ

BETWEEN: ALEXANDER THOMAS JOHNSTONE
Applicant

And

BERT MCGROARTY
Respondent

ORDER

1. That Mr Dothie, MIRPM, of Northleach Property Management Limited ("the Manager") be appointed Receiver and Manager of 72 Anerley Park, London SE20 8NQ ("The Property") in place of Respondent and his successors in title, to exercise in that capacity all the responsibilities of the freeholder contained in a lease dated 5 March 1984 and made between the Respondent and Rodger Martin Grindley ("the Lease) and in similar leases of the other two residential flats in the Property with the exceptions set out in and otherwise on the terms of this Order.
2. That the Manager be so appointed on 1 June 2005 for a period of two years ("the Management Period").
3. That the Respondent shall within 28 days from the date of this Order provide the Manager with a complete schedule of all arrears of ground rent due from each of the three lessees.
4. That the Manager shall, in so far as they are relevant to the terms of this Order, comply with all applicable statutory provisions, including the Landlord and Tenant Acts 1985 and 1987 as though the Manager were freeholder of the Property and shall act in accordance with duties of a Manager as set out in the Service Charge Residential Management Code published by the Royal Institute of Chartered Surveyors and approved by the Secretary of State pursuant to Section 87 of the Leasehold Reform, Housing and Urban Development Act 1983.
5. That during the Management Period the Manager shall insure the Property in accordance with the terms of the Lease and in its full reinstatement value with a reputable insurance company and shall in

lieu of management fees be entitled to receive any reasonable commission earned on placing such insurance in accordance with the insurance companies usual terms of business.

6. That the Receiver may in the name of the Respondent grant any consent to the Applicant and the other lessees relating to the completion of works for which they are responsible under the terms of their leases upon receiving from such lessees, in advance, his reasonable costs to be calculated in accordance with his terms and conditions, produced to the Tribunal.
7. That the Manager shall in the name of the Respondent and at the request of any lessee enforce against the other lessees the lessee's covenants contained in the Lease and in the leases of the other two flats. The lessee requesting such enforcement shall indemnify the Manager against all costs and expenses of such enforcement and shall provide such security for such costs and expenses as the Manager may reasonably require.
8. That the Manager shall be entitled to bring and prosecute such proceedings as are reasonably required to recover any arrears of ground rent and any other monies payable by the lessees of any of the three flats within the Property whether such sums fell due for payment before or after his appointment. Any such claims shall be brought by the Manager in his own name.
9. That the Manager may apply any ground rent recovered from the lessees of the three flats in the first instance in discharging the insurance premiums on the buildings insurance policy referred to above but he shall forthwith account to the Respondent with the ground rent upon receipt from the lessees of their contributions to the premiums.
10. That the Manager shall be entitled to recover any costs and expenses incurred in the recovery of any sum due from the lessees on a full indemnity basis with the intent if proceedings are issued for recovery of such sums costs shall be award on that basis.
11. That the Manager is not to be treated as a person claiming under or in trust for the Respondent for the purpose of the Respondent's covenant for quiet enjoyment.
12. That the Manager shall have permission to apply to the Tribunal for such further directions as he may require in order to give effect to this Order and the Applicant, the Respondent and lessees of the other two flats in the Property may apply to the Tribunal to vary this Order.
13. That the Manager shall prepare a report on the progress of his management as soon as reasonably practicable after 1 January 2006 or earlier or so if desired.

14. That the Manager shall send a copy of this Order to each of the other two lessees both to their respective flats in the Property and, and if different, to their last known addresses.

Chairman:.....(A J Andrew)

Date: 18th May 2005