

**LON/LVL/39/06**

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL  
ON AN APPLICATION UNDER PART IV OF LANDLORD AND TENANT  
ACT 1987 (as amended) SECTION 38 (1)**

**PROPERTY: FLATS 32 & 32A FAIRTHORN ROAD LONDON SE7  
7RL**

**APPLICANT: SINCLAIR GARDENS INVESTMENTS (KENSINGTON)  
LIMITED**

**RESPONDENT: MS L FERNIE AND MS R MAWOOD**

**TRIBUNAL**

Mrs T I Rabin                      Chairman

Date of Tribunal's decision:    18<sup>th</sup> December 2006.

**FLATS 32 & 32a FAIRTHORN ROAD LONDON SE7 7RL**

**FACTS**

1. The Tribunal was dealing with an application made on 15<sup>th</sup> August 2006 by Sinclair Gardens Investments (Kensington) Limited ("the Applicant") for an order under Section 35 of the Landlord and Tenant Act 1987 ("the Act") varying the leases of Flats 32 & 32a Fairthorn Gardens London SE7 7RL ("the Flats"). The Applicant is the freeholder of the building known as 32 Fairthorn Road aforesaid ("the Building") Flat and the Respondents, Miss Laura Fernie (Flat 32) and Miss Rachel Mawhood (Flat 32a) are the long leaseholders of the Flats. The Lease of the Flat 32 was dated 18<sup>th</sup> June 1975 and the Lease of Flat 32A was dated 23<sup>rd</sup> January 1975 and copies of both Leases are in the file.
2. The Building is a house converted into the two Flats. Each of the Respondents holds their Flat as assignees of leases originally granted in 1975 by the then freeholder for a term of 99 years from 23<sup>rd</sup> January 1975 ("the Leases") for the premiums therein stated each reserving a ground rent of £25 per annum each until 23<sup>rd</sup> January 2008 and thereafter rising. The Leases were expressed to be granted on the basis that each Lease was intended to contain terms similar to those contained in the other Lease to the intent that the covenants would reflect one another for each of the Flats.
3. Each of the Leases contained express obligations on the part of the lessee to pay the rent, rates and costs of forfeiture notices (see Clauses 4(1), (2) and (3)), but neither of the Leases contained a covenant by the lessee to pay service charges nor was there any reservation of additional rent for the payment of service charges. The Leases did include an obligation on the part of the landlord in Clause 5(1) as follows:

"subject to the Lessee paying his proper proportion of the costs thereof (which proportion shall be determined by the Lessor's surveyor whose decision shall be final and binding on the Lessee) from time to time and at all times during the term hereby created to substantially repair uphold support cleanse maintain and keep the whole of the exterior of the building and the main walls party walls (other than those maintainable by the Lessee pursuant to the terms hereof ) roof an other structural parts. "
4. Although the Leases were both expressed to be on the same terms, the Lease of Flat 32a includes the following:

**THE FIRST SCHEDULE**

1. The costs charges and expenses incurred by the Lessor in carrying out its obligations under Clauses 5(1) and 6(2) hereof

2. The expenses of management and of the services provided by the Lessor for the benefit of the Lessee and all other expenses reasonably incurred in relation to the Lessor's covenants and obligations hereunder in connection with or in relation to the building property or the demised premises whether the expenses be incurred by the Lessor or its Managing Agents or Surveyors

Clause 5(1) has been detailed in paragraph 3 and clause 6(2) is the arbitration clause. Unfortunately there is no mention of or reference to the First Schedule in the body of the Lease of Flat 32a.

5. The application was on the basis that the Leases did not make satisfactory provision for the repair and maintenance of the Building nor or the recovery of expenditure by the Respondent. The Leases are clearly defective and the matter is before the Tribunal for a determination. It has been agreed that the Tribunal will consider the application on documents only and without a hearing. The Applicant prepared a bundle for the Tribunal to consider.

### **DETERMINATION**

6. The Tribunal agreed that the terms of the Lease were unsatisfactory. Although the Leases both included an obligation on the part of the landlord to maintain and repair the exterior, any party structures and the roof, the fact that this obligation was stated to be subject to a proper proportion being paid by the lessees was not sufficient to create an obligation on the part of the lessees to make any such a payment. There was no corresponding obligation on their part and the inclusion of the First Schedule in the Lease of Flat 32a was meaningless in the absence of any reference to the First Schedule in the body of the Lease. There is clearly an obligation on the part of the landlord to maintain the exterior of the Building but no requirement on the part of the lessees to pay for this maintenance.
7. In the absence of an obligation on the part of the lessees to reimburse the landlord, there is no incentive to the landlord to undertake any work since the commercial reality is that the landlord is receiving a minimal ground rent, currently £25 per Flat and they cannot realistically be enthusiastic about incurring irrecoverable expenditure. This will result in the minimum work being undertaken and this would be to the detriment of the Building and to the Respondents. The Respondents would have a right to pursue the Applicant through the County Court to ensure that it complied with its obligations under the Lease but, in reality this is an expensive and time consuming procedure if routine maintenance needs to be undertaken. This application for variation of the terms of the Leases is the correct approach.
8. The parties were in agreement that the Leases as drawn fell short of providing satisfactory provisions for the repair and maintenance of the Building. The Applicant had produced a form of Deed of Variation and there have been no comments from the Respondents on the form or

content.. It is unfortunate that the parties were unable to agree to complete the Deed of Variation without the need for an order to be made by the Tribunal but the Tribunal was asked to issue an order varying the Lease in accordance with the agreed draft.

## **DECISION**

9. The statutory provisions dealing with variations of leases are contained in Part IV of the Act as amended by the Commonhold and Leasehold Reform Act 2002 ("the "2002 Act"). Section 35(1) provides that any party to a long lease of a flat may make an application to a leasehold valuation tribunal for an order varying a lease. Under Section 35(2) the grounds for making an application are that the lease fails to make satisfactory provision in respect of one or more of the following matters, insofar as they apply to this application:

- (a) the repair or maintenance of the
  - (i) the flat in question, or
  - (ii) the building containing the flat, or
  - (iii) any land or building which is let to the tenant under the lease or in respect of which rights are conferred.

....

- (f) the computation of the service charge

10. Section 35 (4) states that for the purposes of subsection (2) (f) the lease fails to make satisfactory provision with respect to the computation of the service charge payable under it if:

- (a) it provides for any such charge to be a proportion of the expenditure incurred or to be incurred on behalf of the landlord..., and
- (b) other tenants of the landlord are also liable to under their leases to pay by way of service charges proportions of such expenditure, and
- (c) the aggregate of the amounts that would, in a particular case, be payable by reference to the previous proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure.

11. Under Section 38(1) the Tribunal may make an order varying the lease, provided that the variation would not substantially prejudice any respondent or any person who is not a party to the application (Section 38(6) and may, if it thinks fit, make an order under Section 38 (10):

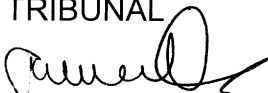
providing for any party to the lease to pay to any other party to the lease or to any other person compensation in respect of any loss or disadvantage the Tribunal considers he is likely to suffer as a result of the variation.

12. The Tribunal found that the terms of the Leases were such that it would be appropriate to order a variation pursuant to Section 35 (2) of the Act since the Leases clearly did not make satisfactory provision for the maintenance of the Building or adequate provisions for the computation of the service charges and it follows that the provisions for maintenance of the Building are not satisfactory. The Tribunal was

satisfied that the terms of the proposed variations were appropriate in that they rectified the lack of procedure for the recovery of the service charges and included provisions that dealt fully with the computation of the service charges. The Tribunal considered that the interest proposed in the new Clause 4(17) was too high and has substitutes a rate of 4% above NatWest Plc. There were also further amendments to correct grammar and syntax and to clarify the obligations where necessary.

13. Under Section 38(10) of the Act, the Tribunal may, if it thinks fit order compensation to be paid in respect of any loss or disadvantage that a person is likely to suffer as a result of an order for variation of a lease. There were no representations on compensation from either party. The Tribunal considered that the Applicant had acquired the Building in the knowledge of the terms of the Leases and that each of the Respondents would have been aware of the terms of the Leases when they acquired them by assignment.
14. The Tribunal found that there was no evidence of any loss to the either of the parties. The Tribunal was dealing with defective leases and the Building is unmanageable with the Leases in their present terms. It is in the interest of the Applicant and the Respondent for the Leases to be varied to provide proper maintenance provisions. The Leases were acquired freely by the parties. Accordingly the Tribunal will make no order for compensation under Section 38(10) of the Act.
15. The Tribunal is empowered to make an order varying the Leases if the grounds upon which the application was made are established to the satisfaction of the Tribunal and the Tribunal is satisfied that the variation would be appropriate. The Order under Section 38 of the Act is attached.

TRIBUNAL



Mrs T I Rabin JP

DATE: 18<sup>th</sup> December 2006.

LON/LVL/39/06

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
LEASEHOLD VALUATION TRIBUNAL**

**IN THE MATTER OF SECTION 38 OF THE LANDLORD AND TENANT ACT 1987  
ON AN APPLICATION MADE UNDER SECTION 35 OF THE 1987 ACT FOR A  
VARIATION OF LONG LEASES OF FLATS**

**ORDER**

**UPON** the application of Sinclair Gardens Investments (Kensington) Limited d under Section 35 of the Landlord and Tenant Act 1987 ("the 1987 Act") for the variation of the two long leases demising Flats 32 & 32a Fairthorn Road London SE7 7RL("the Flats ")

**AND UPON** considering representations on behalf of Sinclair Gardens Investments (Kensington) Limited the landlord of the Flats and the freeholder of 32 Fairthorn Road London SE7 7RL ("the Building") where the Flats are located and representations on behalf of Miss Laura Fernie (Flat 32) and Miss Rachel Mawhood (Flat 32a) Fairthorn Road aforesaid, the lessees of the Flats

**IT IS ORDERED THAT**

1. Pursuant to the power conferred on the Tribunal by Section 38(1) of the 1987 Act the leases of Flats 32 & 32a Fairthorn Road aforesaid ("the Leases") being the leases of the Flats shall be and by virtue of this Order are varied as follows:

(a) By adding a new clause 1(ii) following Clause 1(i) of the Lease as follows:

1. (ii) a sum or sums of money equal to one half of the amount which the Lessor may expend in fulfilling its obligations under the First Schedule.

(b) By adding new clauses 4(17) 4(18) and 4(19) following Clause 4(16) as follows:

- 4(17) to pay interest at the rate of 4% above the NatWest plc base lending rate on any monies due and payable under this Lease should the same remain unpaid for 30 days from the due date such interest to be calculated daily from the date for payment to the date on which payment is actually made
- 4(18) By way of indemnity to pay all proper and reasonable costs charges and expenses to include legal costs

incurred by the Lessor in relation to the enforcement of the covenants contained in the Lease to include the reasonable remuneration of any managing agents

- 4(19)** upon any assignment or disposition by the Lessee to procure that the person becoming the owner of the demised premises as a result of such assignment or disposition shall enter into a Deed of Covenant with the Lessor to observe and perform all covenants on the part by the Lessee with the Lessor in the Lease with the reasonable costs of the Deed of Covenant to be borne by the new owner.

- (c) By the addition of a new First Schedule to the Lease of Flat 32 only as follows:

**FIRST SCHEDULE above referred**

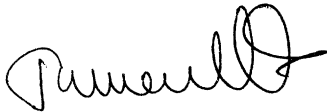
1. The costs charges and expenses incurred by the Lessor in carrying out its obligations under Clauses 5(1) and 6(2) hereof
2. the expenses of management and of the services provided by the Lessor for the benefit of the Lessee and the lessees and occupiers of the other flat on the Building and all other expenses reasonably incurred by the Lessor in relation to its obligations hereunder with or in relation to the Building or the demised premises whether such expenses be incurred by the Lessor or its managing agents or surveyors
3. to pay to the Lessor such sums as the Lessor or its managing agents may reasonably consider sufficient to meet the service charges for the accounting year in the accounting year ending 25<sup>th</sup> December in every year. Such sums are to include the collection of sums towards a reserve fund towards expenditure which is of a periodic or recurring nature whether recurring by regular or irregular periods.
4. the reasonable expenses of the Lessor in employing managing agents accountants or surveyors in relation to the Lessor's covenants and obligations in maintaining the Building.

- (d) By the renaming of the renaming of **"THE SCHEDULE ABOVE REFERRED TO – LESSEE'S REGULATIONS"** as **"THE SECOND SCHEDULE ABOVE REFERRED TO – LESSEE'S REGULATIONS"** in the Lease of Flat 32 only and for the re-named Second Schedule to follow the new First Schedule referred to in sub- clause (c) above

- (e) By the addition of new Clauses 3 and 4 in the First Schedule of the Lease of Flat 32a only as follows:

3. to pay to the Lessor such sums as he Lessor or its managing agents may reasonably consider sufficient to meet the service charges for he accounting year in the accounting year ending 25<sup>th</sup> December in every year. Such sums are to include the collection of sums towards a reserve fund towards expenditure which is of a periodic or recurring nature whether recurring by regular or irregular periods
4. the reasonable expenses of the Lessor in employing managing agents accountants or surveyors in relation to the Lessor's covenants and obligations in maintaining the Building

TRIBUNAL



Mrs. T I Rabin JP

DATE: 18<sup>th</sup> December 2006