

**SOUTHERN RENT ASSESSMENT PANEL AND
LEASEHOLD VALUATION TRIBUNAL**

In the matter of sections 35, 36, 37 and 38 of the Landlord & Tenant Act 1987

Decision of the Leasehold Valuation Tribunal

Case Number:	CHI/00ML/LVL/2004/0002
The Property:	2- 5 Palmeira Square, Hove, BN3 2JA
The Applicant:	Arthur Wright and Emily Grimward
The Respondent:	Palmeira Square Nos 2-6 Limited
Appearances:	Paul Ashwell of Counsel for the Respondent, Arthur Wright Emily Grimward
Date of the Application:	22nd July 2004
Dates of the Hearing:	10th January 2005 and 7th June 2005
Date Decision issued:	18th July 2005
Members of the Tribunal:	Mr R.T.A.Wilson LL.B Chairman Mr B.H.R.Simms FRICS MCI Arb Mr T.W. Sennett MA FCIEH

1. The Applications

The Applications made in this matter are:-

- 1.1 An application under section 35 of the Landlord and Tenant Act 1987 (The Act) by the Applicants for an order for the variation of their leases of the subject properties; flats 1& 2 of 4-5 Palmeira Square.
- 1.2 An application under section 36 of the Act made by the Respondent for the variation of all the leases in the block known as 2-5 Palmeira Square, Hove.
- 1.3 An application under section 20C of the Landlord and Tenant Act 1985 by the Applicants relating to the costs of and incidental to the above applications.

2. The Decision

- 2.1 The Tribunal orders that the leases referred to in The Schedule to this decision be varied as specified / set out in The Schedule with effect from the date of this decision.
- 2.2 The Tribunal orders that no part of the Landlords costs in connection with these proceedings should fall upon either Applicant without prejudice to the Landlords ability to recover all of their reasonable and proper costs by way of the service charge from the other lessees provided that the relevant payability clauses are contained in those leases.

3. The Reasons

Inspection

The property comprises a group of four Regency terrace houses known as numbers 2, 3, 4 and 5 Palmeira Square, converted and combined probably in the 1980s and later to provide seventeen flats. The buildings, which are in a Conservation area, have painted rendered elevations. The roofs, which were not inspected, are behind parapets and are probably of pitched design and covered with slates. The flats are arranged on the basement floor, ground floor and four upper floors. During conversion of the building a lift was installed between buildings numbered 3 and 4, and some of the flats, but not all, can access this lift. There are two principal entrances at numbers 3 and 4 but also separate entrances to the basement at number 4 and to flat 1 and flat 2A at number 2.

4. Background to the Application

- 4.1 This is an application made initially by Mr Wright and Miss Grimward, lessees of flats 1 & 2 at 4-5 Palmeira Square, Hove, for an order varying their leases on the ground that as drafted, they fail to make satisfactory provision with respect to the matters set out in paragraphs (a) to (f) of section 35(2) of the Act. In particular that their leases fail to make satisfactory provision with regard to the computation of service charges payable in respect of the lift. Briefly, their leases provide for them to

pay a 1/7th part of the lift costs even though the lift is situated in a separate building to which they have no access.

4.2 In the course of proceedings, the Respondent freeholder submitted an application under Section 36 of the Act requesting that in the event of the Tribunal deciding to make an order varying the two Applicants' leases that the Tribunal also make an order effecting a corresponding variation in all of the other leases in the building on the grounds that those leases also fail to make satisfactory provision for the computation of service charge and that it would be in the interests of all flat owners to have all the leases so varied.

4.3 There are a total of 17 flats at the building, which is divided into three blocks (2 Palmeira Square, 3 Palmeira Square & 4-5 Palmeira Square) ("the Block"). There are separate entrances to each of the blocks. The Applicants' flats are on the ground and first floors of 4-5 Palmeira Square and the lessees of 4-5 Palmeira Square have no means of access to the other two blocks and visa versa. There is a lift serving the flats in 3 Palmeira Square but no lift in 4-5 Palmeira Square. There is only one flat in 2 Palmeira Square which is on the ground floor. There are a total of seven flats in 3 Palmeira Square, and four flats in 4-5 Palmeira Square. The remaining five flats are in the basement area under the Block and have separate entrances.

5. The Evidence

5.1 The Applicants' Evidence

5.1.1 The Applicants' primary case is that their leases provide for them to contribute towards the cost of the lift even though they have no physical access to it. In particular by clause 22 of part 1 of the fifth schedule to their leases the Applicants are liable *'to pay to the Lessor one-seventh of the cost to the Lessor of performing its obligations under clause 8 in part I of the sixth schedule (the amount of such payment to be provided for in the Interim Maintenance Charge and Maintenance Charge)'*

5.1.2 Clause 8 in part I of the sixth schedule to their leases provides an obligation on the part of the lessor *'to maintain and where necessary renew or replace any existing lift and ancillary equipment relating thereto and maintain insurance against risks of breakdown and third party claims in respect of the lift equipment and mechanism in such amounts and on such terms as the lessor shall from time to time think fit.'*

5.1.3 The Applicants' contend that section 22 of part 1 of the fifth schedule was inserted in error and should be deleted in its entirety. Their flats derive no benefit from the lift in 3 Palmeira Square. Rather the lift only benefits the flats in 3 Palmeira Square and the cost of maintaining, renewing or replacing the lift and ancillary equipment was originally born solely by the lessees who benefited from the lift. At the time when the Applicants' leases were granted there were seven flats in 3 Palmeira Square who benefited from the lift (Flats 2-8). Since that time flats 7 & 8 of Palmeira Square have been combined into one flat.

5.1.4 Up till 1990 the lift expenditure was dealt with on the basis that only the user apartments contributed.

- 5.1.5 Mr Wright had carried out an analysis of the leases for the various flats at the Block and he believes that a total of ten flats were currently obliged to contribute towards lift maintenance. They are each required to pay 1/7th of such expenditure making a total of 10/7^{ths}!
- 5.1.6 In practice Mr Wright was not asked to contribute a 1/7th proportion towards the lift costs until 1999. Up until 1999 the maintenance costs of the lift had been aggregated with the balance of maintenance and charged as part of the whole.
- 5.1.7 Having regard to the above he contended that his lease and that of Miss Grimward failed to make satisfactory provision with regard to the computation of service charge.

5.2 The Respondent's Evidence

- 5.2.1 Mr Ashwell for the Respondents began his evidence by stating that the Block had had a colourful and largely unsatisfactory history and had been subject to a great deal of internal alteration and reconfiguration over a period of years. In the early nineties the freehold had been owned by a now discredited property owner, and during this time the leases had been dealt with in a shambolic way. It was clear that the previous owners had not been well served by their solicitors as his investigations had revealed a catalogue of obvious drafting errors. In short his clients had not created the current unsatisfactory nature of the leases but had inherited them.
- 5.2.2 Mr Ashwell conceded that the Tribunal did have jurisdiction to make an order under section 35 of the Act as his clients accepted that the leases did not make adequate provision for the computation of service charge. Mr Ashwell stated that his instructing Director had accepted this point some time ago but had required the agreement of all other parties to the leases before agreeing to amendments.
- 5.2.3 Whilst Mr Ashwell accepted that changes were required, he did not have confidence in the proposals put forward by the Applicants, which he considered would simply substitute one unfair regime with another. Instead his client proposed that all the leases in the Block be varied so that the lift expenditure should be shared equally between all the lessees in the property regardless of whether or not they had physical access to the lift.

6 **Tribunals Provisional View at the end of the first day and its directions.**

- 6.1 At the conclusion of the first day of the hearing, the Tribunal directed that the Respondent serve notice of its Section 36 application on each lessee. In its directions, the Tribunal stated its provisional view that neither the Applicants' proposal nor the Respondents' proposal would result in a fair and equitable regime. Instead the Tribunal was minded to make an order which would effect a variation in each of the leases in the Block so that only those flats that had physical access to the lift (including the ground floor flat in 3 Palmeira Square) contributed and that those contributions together should add up to 100% of the expenditure on the lift from time to time.

- 6.2 The Tribunal also directed that any other lessee who wished to become party to these proceedings should file written statements with the Tribunal in accordance with the time limits set.
- 6.3 The S. 36 notice had been served on all lessees and in the event no lessee had indicated their disagreement to the Tribunal's preferred solution and indeed one lessee had signified his approval.

7. Second Days Hearing.

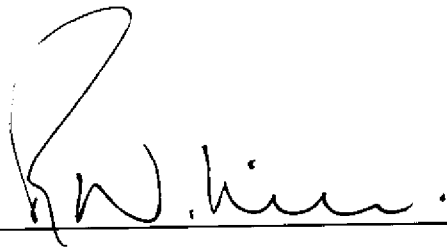
- 7.1 At the commencement of the second days hearing, Mr Ashwell confirmed that the freeholder accepted that the Tribunal's preferred solution would be reasonable in the circumstances and that in the freeholders opinion the variation would not result in material prejudice to any lessee in the Block. Mr Ashwell also confirmed that the issue of compensation would not arise provided that the freeholders remained entitled to collect 100% of the lift expenditure.
- 7.2 Mr Wright also confirmed that he accepted the Tribunal's preferred option as did his fellow Applicant.

8 Determination of the Tribunal

- 8.1 The Tribunal finds that the subject leases as drafted do not make satisfactory provision for the management of the subject properties as particularised in paragraphs (a) to (f) of section 35 (2) of the Act. Most significantly the leases provide for the freeholders to recover more than 100% of expenditure on the lift, and in part recovering that expenditure from flat users who have no physical means of using the lift.
- 8.2 The Tribunal is of the opinion that a fair and reasonable solution is for the relevant leases in the Block to be varied so that only those flats that have physical access to the lift (including the ground floor flat) should contribute and that those contributions together should add up to 100% of the expenditure on the lift from time to time.
- 8.3 The Tribunal acknowledges that the leases as varied will only address the unsatisfactory situation with regard to lift maintenance and not any other issues or unsatisfactory drafting that had come to light during the course of these proceedings. However, the Tribunal had received submissions and evidence, which related almost exclusively to lift issues alone and therefore its decision could only properly be applied to this aspect of the leases and no other.
- 8.4 The Tribunal therefore orders that the subject leases as set out in The Schedule to this decision are varied as specified with effect from the date of this decision.

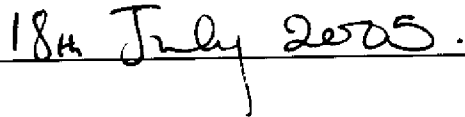
9. The Costs

- 9.1 The Applicants' seek a declaration pursuant to section 20C of the Landlord and Tenant Act 1985 that none of the costs incurred by the Respondent in relation to this application should be charged to the service charge account for the Block in future years.
- 9.2 Mr Wright submitted that the relevant clauses in his lease were included in error and that the same provisions had already been deleted from some of the other leases in the Block. He considered that all these matters could have been satisfactory resolved without recourse to the Tribunal and he saw no reason why he should be penalised financially. He had been treated differently from other lessees and as a consequence it was not reasonable that he should have to bear the costs of sorting out what was clearly an unsatisfactory situation.
- 9.3 Mr Ashwell for the Respondents reminded the Tribunal that his clients had not created the unsatisfactory situation but had inherited it. This was a uniquely difficult situation and it was reasonable that the freeholders be legally advised. Whilst he accepted that his clients preferred solution did not find favour with the Tribunal, his clients had throughout assisted the Tribunal in what was a very complex situation. Mr Ashwell considered that it would have been difficult for the Tribunal to have resolved matters without his clients' cooperation. In the circumstances it was fair and reasonable that the freeholders' costs should be shared equally between all the lessees including Mr Wright. Alternatively, if the Tribunal were minded to make an order that no part of the costs should fall upon Mr Wright, then it was just and equitable that the freeholder should be able to recover 100% of its costs against the remaining lessees who would benefit from the Tribunal's decision.
- 9.4 In coming to its decision the Tribunal accepted that the situation was a uniquely complex one and not brought about by the Respondent but inherited by it.
- 9.5 The Tribunal also accepted that the Respondent had assisted the Tribunal throughout complying with all the directions and by fully briefing counsel to carry out a thorough forensic investigation into the leases many of which were found to be defective and containing basic drafting errors.
- 9.6 The Tribunal accepted that it would have been difficult for the Tribunal to make an effective decision without the considerable input from Mr Ashwell and his clients.
- 9.7 That said Mr Wright and Miss Grimward have both expended considerable monies on legal advice and that their actions would benefit all the other lessees, even those who had not played a constructive role.
- 9.8 In the circumstances the Tribunal felt it just and equitable to make a limited order under section 20C of the Act namely that no part of the Landlords costs in connection with these proceedings should fall upon either Applicant without prejudice to the Landlords ability to recover all of their reasonable and proper costs by way of the service charge from the other lessees provided that the relevant payability clauses were contained in those leases.

A handwritten signature in black ink, appearing to read 'R. Wilson', written over a horizontal line.

Robert Wilson (Chairman)

A Member of the Panel appointed by the Lord Chancellor

A handwritten date '18th July 2005' written in black ink over a horizontal line.

Dated

Schedule

Leases to be varied and the nature of the Variations

2 - 5 PALMEIRA SQUARE, HOVE SCHEDULE TO ORDER OF LEASEHOLD VALUATION TRIBUNAL

Flat no. as in lease	Flat no. as registered	Floor	Date of lease	Lessor	Lessee	Registered title no.	Registered proprietor	Variations ordered
Flat 1 No. 2	Flat 1 No. 2	Ground	11.08.1999	Palmeira Square Nos. 2 - 6 Limited	Michael Shalabi	ESX 245355	Paul Andrzej Furlepa	Delete par. 22 of Pt I of 5th Sch. Delete par. 8 of Pt I of 6th Sch.
Flat 1 No. 3	Flat 1 No. 3	Ground	18.02.2002	Palmeira Square Nos. 2 - 6 Limited	George Daniel	ESX 243370	George Daniel & Karon Ann Daniel	None.
Flat 2 No. 3	Flat 2 No. 3	First	23.01.1993	Palmeira Square Nos. 2 - 6 Limited	Carlo Roberto Nucera	ESX 226030	Laurence Dallaserra	None.
Flat 3 No. 3	Flat 3 No. 3	Second	13.12.1996	Palmeira Square Nos. 2 - 6 Limited	Terence McEvoy & Richard John Fuller	ESX 220291	Terence McEvoy & Richard John Fuller	In par. 22 of Pt I of 5th Sch. delete "the reasonable and proper" and insert "one seventh of the"
Flat 4 No. 4-5	Flat 4 No. 4-5	Second	17.01.1997	Palmeira Square Nos. 2 - 6 Limited	Simon Anthony Murray Sattin	ESX 223704	Paul Trevor Evans	In par. 22 of Pt I of 5th Sch. delete "the reasonable and proper" and insert "one seventh of the".
Flat 5 No. 2-5	Flat 5 No. 3	Third	05.07.85	Palmeira Square Properties Limited	Stuart Grosvenor Priestly & Tudor Aaron McGuffie	ESX 112057	Stuart Grosvenor Priestly	None.
Flat 6 No. 2-5	Flat 6 No. 2-5	Third	30.11.1984	Palmeira Square Properties Limited	Harold Austin Tuckwell & Nancy Violet Tuckwell	ESX 105067	Ronald Skelton & Grania Skelton	None.
Flat 7 No. 2-5	Flat 7 No. 2-5	Top	14.01.1987	London Residential Property Limited	Oliver Maland	ESX 167395	Oliver Maland	None.
Flat 8 No. 3	Flat 8 No. 3	Top	03.07.1998	Palmeira Square Nos. 2 - 6 Limited	Oliver Maland	ESX 232863	Oliver Maland	None.

Flat 1 Nos. 2,3,4 and 5	Flat 1 No. 4	Ground	25.04.1997	Palmeira Square Nos. 2 - 6 Limited	Raymond Barry & Iris Barry	ESX 222745	Emelie Mae Coffey	Delete par. 22 of Pt I of 5th Sch. Delete par. 8 of Pt I of 6th Sch.
Flat 2 No. 2-5	Flat 2 No. 2-5	First	04.09.1989	London Residential Property plc	David Anthony Hayward & Debra Louise Hayward	ESX 166444	Arthur David Wright	Delete par. 22 of Pt I of 5th Sch. Delete par. 8 of Pt I of 6th Sch.
Flat 3 No. 2-5	Flat 3 No. 3-4	First	27.03.1986	Palmeira Square Properties Limited	Harold Smethurst, Archibald Douglas Boniface & Robin Johnston Bannister	ESX 121834	Steven Gardner & Corinna Wilmott	None.
Flat 4 No. 4	Flat 4 No. 4	Ground	08.08.1997	Palmeira Square Nos. 2 - 6 Limited	Vivienne Elizabeth Hayes	ESX 223499	David Anthony Cotton & Angela Sarojani Cotton	Delete par. 8 of Pt I of 6th Sch.
Flat 2A No. 2-5	Flat 2A Lower ground	Lower Ground	12.12.1986 variation 06.05.1997	Palmeira Square Properties Limited Palmeira Square Nos. 2 - 6 Limited	Timothy John Kirkup & Diane Ruth Kirkup Timothy John Kirkup & Diane Ruth Kirkup	ESX 129218	Timothy John Kirkup & Diane Ruth Kirkup	Delete par. 22 of Pt I of 5th Sch. None.
Flat 3A No 2-5	Flat 3A	Lower Ground	01.10.2002	Palmeira Square Nos. 2 - 6 Limited	George Daniel	ESX 268205	George Daniel	Delete par. 22 of Pt I of 5th Sch. Delete par. 8 of Pt I of 6th Sch.
Flat 4A No. 2-5	Flat 4A	Lower Ground	21.10.1986 Transfer of part 24.08.1987	Palmeira Square Properties Limited Geoffrey Stephen Hibbert	Geoffrey Stephen Hibbert Gary Martin Watson & Simone Velia Boyson	ESX 147479	Philip Sheppard, Yvonne Barbara Sheppard & Benjamin Philip Sheppard	None. None.
Base- ment No. 2-5	Flat 4B	Lower Ground	12.05.1997	Palmeira Square Nos. 2 - 6 Limited	Michael Shalabi	ESX 222329	Richard Bell	Delete par. 22 of Pt I of 5th Sch. Delete par. 8 of Pt I of 6th Sch.
Flat 5A No. 2-5	Flat 5A	Lower Ground	21.10.1986	Palmeira Square Properties Limited	Geoffrey Stephen Hibbert	ESX 141051	Mark John Cannon	None.