Refs: LON/00AW/LVL/2006/001
LON/00AW/LVL/2006/004

**LEASEHOLD VALUATION TRIBUNAL**

LONDON RENT ASSESSMENT PANEL

**DETERMINATION**

RE APPLICATIONS UNDER

SECTION 35 & 36 OF LANDLORD AND TENANT ACT 1987

**PREMISES: 11 Bramham Gardens, London, SW5 0JQ**

**Parties**: (1) Mr N P Woolven (Flats 1A & 1B), Mr D J Collins (Flats 1 & 2), Miss I C MacKenzie (Flat 2A), Mr L & Mrs A L Richardson (Flat 3), Mr M H Amiss (Flat 4) and Mr G B H Wightman (Flat 5)

***[Lessees]***

(2) Eleven Bramham Gardens Limited

***[Lessor]***

**Hearing**: 12 May 2006

**Inspection**: 11 May 2006

**Representatives**: Mr M Palfrey of Counsel with Mr A Premont of Messrs Humphries

***[for Lessees]***

Mr C Coney of Counsel

***[for Lessor]***

**Members of the Leasehold Valuation Tribunal:**

Prof. J T FARRAND QC LLD FCIArb Solicitor ***[Chairman]***
Mr F L Coffey FRICS
Dr A M Fox BSc PhD MCIArb

1. Originally Mr Collins had made an Application under s27A of the Landlord and Tenant Act 1985 (as amended in 2002) as to his liability to pay and/or the reasonableness of service charges for the years 2000-2007. At the Hearing of this Application on 14 December 2005 the Tribunal had ruled that it did not have jurisdiction to consider whether the apportionment of service charge liability between the flats in the Premises was unfair (LON/00AW/LSC/2005/0232; see Decision dated 15 February 2006).

2. Accordingly, Mr Collins made another Application, dated 22 December 2005, under s.35 of the 1987 Act (as amended) for the variation of leases on the statutory ground that they failed to make satisfactory provision for the computation of service charges. The Respondent was named as Eleven Bramham Gardens Limited (the Lessor) and the Lessees of other Flats were included in a list of persons likely to be affected. Mr Richardson and Miss MacKenzie each made similar Applications dated 16 and 20 February 2006 respectively.

3. At an oral Pre-Trial Review on 8 February 2006, the Tribunal expressed the view that there was no jurisdiction on Applications under s.35 of the 1987 Act to vary any leases to which the applicants were not parties. In the light of this, an Application dated 19 February 2006 was made by the Lessor under s.36 of the 1987 Act, in effect, for an order making corresponding variations to any decided by the Tribunal of the leases of all the other flats in the Premises. All the Lessees were listed as Respondents.

4. The background, by way of explanation and motivation for these Applications, was not too complicated. The Premises were a large terraced house, built apparently in 1886, which had been converted into 7 flats in the late 1970s of which long leases (99 year term from 25 March 1978) were granted in consideration of premiums and ground rents. Each of the 7 leases contains a covenant by the Lessee to pay, by way of service charge, a specified fraction of the sums expended by the Lessor in respect of its obligations. Essentially, this meant contributing proportionately to the costs of insurance and structural repairs of the Premises.

5. The specified service charge fractions are as follows: Flat 1A – $1/10^{th}$ and Flat 1B – $1/10^{th}$ (both basement); Flat 1 – $1/5^{th}$ (ground floor); Flat 2 – $1/5^{th}$ (first floor); Flat 2A – $2/15^{th}$ (mezzanine and third floor); Flat 3 – $2/15^{th}$ (second floor); and Flat 4 – $2/15^{th}$ (fourth floor). These fractions total 100% of the service charges.

6. Although Mr Woolven is the Lessee of Flats 1A and 1B these remain separate flats. In contrast, Mr Collins as Lessee of both Flats 1 and 2 has

combined them into one maisonette but the leases remain separate. In 2005 the Lessor granted an extended lease (162 year term from 25 March 1978) of Flat 4 to the then Lessee for a premium and a lower ground rent but otherwise subject to covenants in the original lease.

7. Mr Wightman, the original Lessee of Flat 4, with the then Lessees of Flats 1 and 2 had formed the Lessor company in 1980 to acquire the freehold of the Premises. He remains a director and company secretary of the Lessor. An eighth flat, Flat 5, was constructed out of roof space as a fifth floor of the Premises and on 28 August 2002 the Lessor granted a long lease of it (189 year term from 25 March 1978) to Mr Wightman in consideration of a nominal premium and a rising ground rent. In that lease, the Lessee covenanted to pay $1/10^{th}$ as his fraction of the service charges. In consequence, the eight leases of flats in the Premises together made provision for an aggregate amount of 110% of expenditure to be paid as service charges.

8. It was not and indeed could not be disputed that that the leases of the flats in the Premises failed to make satisfactory provision with respect to the computation of service charges payable because the aggregate of the proportions payable by the Lessees exceed expenditure incurred by the Lessor. Reference should be made to sub-s.(2)(f) of s.35 as qualified by sub-s.(4) which was amended in 2002: these provide that, as a matter of law, if proportionate service charge payments will produce an excess or shortfall on expenditure, the provision is unsatisfactory for present purposes.

9. In his Application, Mr Collins had proposed that the leases of Flats 1 and 2 should each be varied from specifying a $1/5^{th}$ payment to specifying a payment of "16.52% or such other percentage as the tribunal considers appropriate" and that the lease of Flat 5 should be similarly varied from specifying $1/10^{th}$ to specifying 18.07%. These percentages were, evidently, derived from his assessment of the comparative floor areas of the flats and were subsequently adjusted for the Hearing. Similarly, in their Applications, Mr Richardson had proposed that 9.39% should be specified in the lease of Flat 3 and Miss MacKenzie had proposed that 5.41% be specified for Flat 2A.

10. The proposed reference to the percentage the Tribunal would consider appropriate is not apt wording to include in the leases but it did reflect the power of the Tribunal to order a variation as specified in an application "or such other variation as [the tribunal] thinks fit" (see s.38(4) of the 1987 Act).

11. In contrast, the Lessor in its Application proposed that the proportions specified in all the leases should be reduced, in effect, by a consequential scaling down from the 110% produced by the addition of 10% for Flat 5 so as to produce a total 100%. This would mean 9.10% for each of Flats 1A & 1B, 18.20% for each of Flats 1 & 2, 12.10% for each of Flats 2, 2A and 3, plus 9.10% for Flat 5.

12. In a Statement in Reply to Mr Collins' Application, the Lessor first insisted that the proportions specified in the 7 original leases did not fail to make 'satisfactory' provisions and that the $1/10^{th}$ or 10% proportion specified for Flat 5 had been appropriate. In particular, it was objected that the proposed apportionment by reference to floor area alone would not be satisfactory, partly because it would not recognise the greater volume of the Premises occupied by Flats 1 and 2, by virtue of their high ceilings, and partly because a substantial area of uninhabitable roof terrace had been included for Flat 5.

13. However, in the light of a re-measurement survey undertaken by Robert Edward Associates in April 2006, the Lessor recognised that Flat 2A was noticeably the smallest flat in the Premises and was amenable to adjusting the service charge apportionments to take this into account. Accordingly, two options were offered to achieve such an adjustment whilst otherwise retaining the existing proportions so as to total 100%.

14. At the Hearing, Mr Palfrey began by accepting that the Lessor's proposed reduction pro rata from the current 110% would be appropriate but only if the 10% attributed to Flat 5 was right, which was not accepted. He submitted that an apportionment of service charge liability between the flats by reference to the gross floor areas of the property actually demised by the respective leases would be objectively satisfactory. This would mean including the areas of the terraces demised with Flat 2 and, especially, Flat 5 which would mean that 10% was too low a percentage for the latter flat. With regard to Flat 5, he sought to support inclusion of the terrace by suggesting that its existence would increase the Lessor's insurance and repairs costs for service charge purposes. He rejected any contention that reference should be had to the volumes occupied by the flats as both simplistic and impractical.

15. On this floor area basis and using the measurements made by Robert Edward Associates, Mr Palfrey supported variations of the leases by insertion, in place of the present fractions, the following percentages:

Flat 1A 10.86%

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15. On this floor area basis and using the measurements made by Robert Edward Associates, Mr Palfrey supported variations of the leases by insertion, in place of the present fractions, the following percentages:

Flat 1A 10.86%

| | |
|---|---|
| Flat 1B | 9.60% |
| Flat 1 | 16.66% |
| Flat 2 | 19.36% |
| Flat 2A | 5.28% |
| Flat 3 | 10.38% |
| Flat 4 | 13.76% |
| Flat 5 | 14.11% |

16. Mr Coney on behalf of the Lessor primarily emphasised that the original apportionments were clearly acceptable as involving rounded and workable proportions and that they could not be regarded as failing to make satisfactory provision for the computation of service charges merely because they did not correspond precisely to a surveyor's measurements of areas. He further submitted that a 10% proportion was a reasonable provision for Flat 5: based on its volume within the Premises the percentage would be 9.05%. He submitted that there was no good reason to take account of the area of the terrace which had not been shown to increase service charge costs and that, without the terrace, the 'habitable' area of Flat 5 equated to ½ or less of the other floors of the Premises to which an acceptable 20% apportionment had been attributed.

17. Accordingly, the Lessor's position was that the existing proportions were satisfactory so that the only variation should be to scale them down pro rata to produce 100% instead of 110%. However, it was accepted that an 'anomaly' had emerged in relation to Flat 2A and that the present proceedings afforded an opportunity to rectify this.

18. The Tribunal generally agreed with Mr Coney's primary approach to the determination of satisfactory service charge apportionments: exact calculations producing varied percentages plus decimal points and places were less likely to prove satisfactory in practice than rounded amounts of roughly equal per floor and flat apportionments as in the present case. Thus the Tribunal would be content, but for one significant aspect, to adopt the option proposed by the Lessor which was based on the current percentages but which made adjustments to cater for the Flat 2A anomaly whilst not involving differing percentages and decimal points/places. This option produced the following percentages:

| | |
|---|---|
| Flat 1A | 10.00% |
| Flat 1B | 10.00% |
| Flat 1 | 19.00% |
| Flat 2 | 19.00% |

| | |
|---|---|
| Flat 2A | 6.00% |
| Flat 3 | 13.00% |
| Flat 4 | 13.00% |
| Flat 5 | 10.00% |

19. However, the one significant aspect mentioned relates to exclusion of the terrace area for present purposes. The Tribunal agrees that it cannot be shown that the terrace's existence increases the potential service charge liability: rebuilding values for insurance do not ordinarily treat such areas as within the gross external area of a building and any repairing costs would be payable by the Lessee of the Flat rather than the Lessor. Nevertheless, the terrace area was explicitly demised by reference to the plan attached to the Lease of Flat 5 (as similarly with the lease of Flat 2) and should, in the Tribunal's opinion be taken into account for present purposes. In any event, it was apparent from the lease plan as well as from inspection, that the terrace did not constitute half of the demised area of Flat 5 but more probably a quarter. Accordingly, the Tribunal considered that, as indicated by the table in para.14 above, the appropriate percentage for Flat 5 would be a rounded 14% and that the other percentages in the table in the preceding paragraph should be slightly but appropriately adjusted as follows:

| | |
|---|---|
| Flat 1A | 10.00% |
| Flat 1B | 9.00% |
| Flat 1 | 19.00% |
| Flat 2 | 18.00% |
| Flat 2A | 6.00% |
| Flat 3 | 12.00% |
| Flat 4 | 12.00% |
| Flat 5 | 14.00% |
| | 100% |

20. In the counter-Application under s.36 of the 1987 Act, the Lessor had also applied for the leases to be varied by the insertion of a provision for interest to be paid by Lessees upon late payment of service charges. Such a provision would be in accordance with s.35(2)(e) and (3A) of the 1987 Act as amended in 2002. However, the Tribunal was informed at the Hearing that a variation to this effect had been agreed by the Lessees so that this aspect of the Application did not require determination.

21. The Tribunal has, in addition, a jurisdiction (under s.38(1) of the 1987 Act) when varying leases:

> "...if it thinks fit, [to] make an order 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 that the court considers he is likely to suffer as a result of the variation."

No request for a compensation order has been submitted and the Tribunal does not consider that it would be justifiable in the circumstances of this case to make any such order of its own motion.

22. In the result, therefore, on the basis that no formal draft of the variations has been submitted to the Tribunal for approval, instead of ordering the variations the Tribunal, under s.38(8) of the 1987 Act, hereby orders and directs that the parties to the relevant leases shall forthwith vary their leases in order to provide that the percentage proportions of the contributions to service charge expenditure are as set out in para.18 above.

23. Applications were also incidentally made for an order, in effect ,that the costs incurred by the Lessor in connection with the proceedings should not be included in any future service charges account (ie under s.20C of the 1985 Act). This was supported by Mr Palfrey at length but essentially on the basis that the Lessor was responsible for the situation that the leases in the Premises together required payment of 110% of expenditure because of its construction of Flat 5 and its grant of the lease of it. In consequence of this, the leases failed to make satisfactory provisions for computation of service charges (within s.35(2)(f) and (4) of the 1987 Act as amended). Therefore, it was incumbent upon the Lessor to take active steps to secure appropriate variations of the leases by agreement with the Lessees without need for the present Applications to the Tribunal. He drew attention to documentary evidence that the Lessor had not taken such steps. Against this, Mr Coney stated that the Lessor's position was that the provisions in the Leases as to service charge percentages following the grant of the lease of Flat 5 were satisfactory and he submitted that it was, therefore, reasonable for the Lessor to take no action.

24. The Tribunal considered the s.20C applications in the light of the guidance given in *Langford Tenants v Doren Ltd* 2001, at para.23, (LRX/37/2000). There HH Judge Rich QC first emphasised that the only applicable principle was what was just and equitable in the circumstances, ie in accordance with s.20C(3). Nevertheless, he proceeded to be more specific by also pointing out that excessive costs unreasonably incurred would not be recoverable anyway by a lessor (because of s.19(1)(a) of the

1985 Act), so that the s.20C power should be used only to avoid the unjust payment of otherwise recoverable costs (para.31).

25. It is not open to the Tribunal now to consider whether the costs incurred by the Lessor in these proceedings were excessive and, therefore, not payable by the Lessees, since that, as Judge Rich indicated, should be the subject of a later s.27A application. Nor, for similar reasons, should the Tribunal consider whether the terms of the leases actually enable recovery from the Lessees of such costs, which arguably were not incurred in pursuance of any obligations or administration under the leases. What has to be considered in accordance with the above guidance is whether it would be just and equitable in the circumstances of this case to make the order applied for.

26. The Tribunal accepts Mr Palfrey's submissions that the Lessor should have taken active steps with a view to securing variations of the leases by agreement and, contrary to Mr Coney's submissions, considers that the Lessor's position that this was unnecessary was unreasonable in that it was inconsistent with the relevant statutory provisions. It follows that the Tribunal determines that there is sufficient basis on which it can properly be considered just and equitable to make the s.20C order sought. Accordingly, the applications are acceded to and it is hereby ordered that none of the costs incurred by the Lessor in connection with the proceedings before this Tribunal shall be regarded as relevant in calculating any service charges payable by the Lessees.

27. No applications have made by any party for the Tribunal to require reimbursement of fees by any other party (ie under para.9(1) of the LVT (Fees) (England) Regulations 2003). Again, in the circumstances of this case, the Tribunal does not consider that it should of its own motion impose such a requirement.

Julian Faward

**CHAIRMAN**

**DATE** **15 May 2006**