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CHI/43UF/LVL/2009/0002

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATION UNDER SECTION 35(1) OF THE LANDLORD & TENANT ACT 1987

Address:	Highview Court, Wray Common Road, Reigate, Surrey, RH2 0RZ
Applicant:	Highview Court Residents Association Ltd
Respondents:	(1) Mr John Aylott and (2) Mrs Margaret Aylott
Application:	19 October 2009
Inspection:	19 April 2010
Determination:	19 April 2010
Reconvene:	13 May 2010

Members of the Tribunal
Mr I Mohabir LLB (Hons)
Miss C. Barton BSc MRICS

IN THE LEASEHOLD VALUATION TRIBUNAL

CHI/43UF/LVL/2009/0002

IN THE MATTER OF SECTION 35(1) OF THE LANDLORD & TENANT ACT 1987

AND IN THE MATTER OF HIGHVIEW COURT, WRAY COMMON ROAD, REIGATE, SURREY, RH2 0RZ

BETWEEN:

HIGHVIEW COURT RESIDENTS ASSOCIATION LTD

Applicant

-and-

(1) JOHN AYLOTT
(2) MARGARET AYLOTT

Respondents

THE TRIBUNAL'S DECISION

Introduction

1. This is an application made by the Applicant under section 35(1) of the Landlord and Tenant Act 1987 (as amended) ("the Act") to vary the terms of the long leases held by the 12 lessees in the building in the same way. Each of the lessees holds a share and is a member of the Applicant company who is the freeholder.

2. The Tribunal was provided with a copy of a specimen lease relating to Flat 2 in the subject property dated 20 August 1970 and made between (1) Highview Court residents Association Ltd (" the Lessor") and (2) Garrad & Sons Ltd and (3) Charles Alan Cotton and Patricia Ann Cotton ("the lease"). The Tribunal was also provided with a copy of the Respondents lease of Flat 6. It appears

that both of these leases and the leases of the other leaseholders were granted in the same terms.

3. In the application, the Applicant is seeking to vary clauses 1 and 4(b) of the lease. Clause 1 of the lease sets out the demised property, the property excepted and reserved to the landlord, the term granted and the rising ground rent. The clause also provides, *inter alia*, for the lessee to:

> *"AND ALSO PAYING by way of further or additional rent from time to time a sum or sums of money equal to a one twelfth part of the amount which the Lessor may expend in effect in all maintaining insurance of the property..... such last mentioned rent to be paid without any deduction on the half yearly day for the payment of rent next ensuing after expenditure thereof."*

4. By clause 4(b) of the lease, the Lessee also covenanted with the Lessor to:

" Pay when demanded by or on behalf of the Lessor as a contribution one equal twelfth part of all the costs expenses and outgoings relating to maintenance and repair of the property and relating in particular to the matters mentioned in the Fifth Schedule hereto...."

The Fifth Schedule sets out the expenditure that the Lessor can recover under this covenant, which includes the cost of repairing and maintaining the property.

5. In relation to clause 1, the variation sought is to delete FROM *"AND ALSO PAYING"* to the end of the paragraph.

6. In relation to clause 4(b) the proposed variation is as follows:

"Pay when demanded by or on behalf of the Lessor a contribution towards the costs expenses and outgoings relating to the maintenance repair and insurance of the property and relating in particular to the matters mentioned in the Fifth Schedule hereto, such contributions to be paid as follows;

> *(i) a fixed sum by either quarterly or monthly instalments according to prior arrangement with the Lessor*

(ii) such sum at the end of each accounting year as is required to make that contribution equal to one twelfth of all the costs expenses and outgoings referred to

(iii) such further sum as may be required by the Lessor from time to time to build a Reserve Fund for the funding of structural and other expensive repairs to the property, such sums to be agreed between the Lessees by a majority vote

(iv) permission to the Lessor to request payment of such contributions in advance

PROVIDED ALWAYS...."

The Relevant Law

7. The grounds relied on by the Applicant in this application sections 35(2)(a), (e), (f) and 3A of the Act. These provide as follows:

"(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely-

(a) the repair or maintenance of-

(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 on him under it;

(e) the recovery by one party to the lease from another party to it of expenditure incurred ought to be incurred by him or on his behalf, for the benefit of that other party or of a number of persons who include that other party;

(f) the computation of a service charge payable under the lease;

[(3A) For the purposes of subsection (2)(e) and (d) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision including whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.]"

8. For the purposes of subsection (2)(f), subsection (4) sets out the statutory considerations that the Tribunal must have regard to when making a finding of whether or not a lease does fail to make satisfactory provision for the computation of a service charge.

Inspection

9. The Tribunal carried out an external inspection of the subject property on 19 April 2010. Highview Court is a three storey purpose built block of twelve flats and twelve garages en bloc with forecourt, and communal gardens. The block has been traditionally built with cavity brick walls, part vertically tile hung, under a flat roof. It is situated in a cul de sac on the Southern side of Wray Common Road in a well established residential area comprising a mixture of purpose built and converted flats and some houses. The block is in 2 parts and has separate entrances and staircases. There are no lifts. The development is believed to have been built during the late 1960s.

Decision

10. The Tribunal's determination took place on 13 May 2010. At the request of the parties, the Tribunal determined the application limited to the respective statements of case and other documentary evidence before it. There was no hearing and the Tribunal heard no oral evidence.

11. The Applicant's submissions are set out in its statement of case dated 16 November 2009. The Respondents did not file or serve any statement of case or written submissions in reply.

12. The Applicant's statement of case does not plead with any particularity, which of the grounds relied on under section 35(2) of the Act is offended by either clauses 1 or 4(b) of the lease. In the absence of this, it is to be assumed that the grounds are pleaded in the alternative in relation to each clause.

13. The Applicant's case was put in the following way. In relation to clause 1, it seems that a practice had arisen whereby a demand for service charges had been added to the demand for any buildings insurance premium paid by the Lessor permitted by this clause. It was contended by the Applicant that the mechanism for the payment of a contribution for the buildings insurance premium under this clause was ambiguous. It refers to an amount that ***may*** be expended by the Lessor in effecting or maintaining insurance and later refers to payment in accordance with this clause ***after*** the expenditure had been

incurred. Payment of any such expenditure was to be made half yearly in accordance with the ground rent, which had since been abolished. It was submitted by the Applicant that the proposed variation to this clause was needed to clarify matters by omitting the words appearing after *"AND ALSO PAYING"* altogether.

14. In relation to clause 4(b), the Applicant contended that the clause failed neither to make any provision for payment of service charges in advance nor to make any provision for the regularity or mode of payment. In particular, the absence of any express provision allowing for service charge contributions to be collected in advance has led to cash flow difficulties in the repair and maintenance of the property and the recovery of service charge arrears from lessees such as the Respondents. Furthermore, the Applicant considers it necessary to build up a Reserve Fund for expensive and structural repairs and this clause does not provide for this.

15. It was first of all necessary for the Tribunal to construe clauses 1 and 4(b) of the lease. Insofar as clause 1 relates to the buildings insurance, it is clear that this was only intended to deal with the recovery of a one twelfth contribution from each of the lessees to the extent that the Lessor had effected such insurance and any such contribution was to be recovered in arrears. This clause is concerned with nothing else. The service charge contribution payable by a lessee is contractually recoverable under clause 4(b) and the lessee is required to do so when it is demanded by the Lessor. This distinction is important in the context of this application.

16. Any ambiguity created by clause 1 on the part of the Applicant has largely been self-inflicted by the practice that has arisen over time to collect service charge contributions in the same manner as prescribed for the buildings insurance premium. It may well be that there are good practical reasons for adopting this approach. However, strictly speaking, the Applicant is not entitled to do so, as the contractual entitlement to collect a service charge contribution only arises under clause 4(b).

17. It cannot, therefore, be said that clause 1 offends either section 35(2)(a), (e) and (f) of the Act to the extent that it is relied upon by the Applicant to collect service charge contributions. It was not the Applicant's case that the buildings insurance policy failed to provide an adequate level of cover and, in the event of a claim, would not make satisfactory provision for the repair and maintenance of any flats, the building or other land or building let under the lease. It follows that the test set out in section 35(2)(a) is not met.

18. Section 35(2)(e) is concerned with the situation where a lease contractually fails to adequately entitle one party to recover from the other actual or intended expenditure incurred for their benefit. As stated above, clause 1 is limited solely to the recovery of the buildings insurance contribution and it was not the Applicant's case that it was defective in this way. Consequently, it was not necessary to go on to consider section 35(3A). Given that clause 1 was never intended to be used in the computation of the service charge liability, section 35(2)(f) is of no effect.

19. Accordingly, the application to vary clause 1 of the lease is dismissed.

20. The Tribunal then considered the application to vary clause 4(b) of the lease. *Prima facie*, this clause entitles the lessor to recover service charge arrears from any lessee provided a demand has been served. To the extent that section 35(2)(e) is relied upon as a ground, the test that it fails to make satisfactory provision in this regard, is not met.

21. The substantive defect in clause 4(b) complained of by the Applicant is that it does not expressly state whether a service charge contribution can be demanded in advance or in arrears nor does it make any provision for the regularity or mode of payment. These matters all relate to the computation of the service charge payable under the terms of the lease (section 35(2)(f)). They cause a cash flow difficulty which, as a matter of causation, leads to possible delay regarding the maintenance and repair of the building (section 35(2)(a)). It is, therefore, appropriate to consider both of these grounds together.

22. The Tribunal, firstly, considered the effect of clause 4(b). The Applicant correctly submitted that the clause is silent as to whether a service charge contribution can be collected from a lessee in advance or in arrear. It was not contended that the lease did not provide for the recovery of 100% of the service charge expenditure incurred by the Applicant. The issue is simply one of timing. Neither party made any submissions on this point and the Tribunal makes no express finding in this regard. However, on the face of the clause, there is nothing to prevent the Lessor from serving a demand in advance and on account of any estimated expenditure it may incur pursuant to the Fifth Schedule. The only requirement is to serve a demand first of all. Equally, the clause does not limit the Lessor to only one demand in any given year. In the event the actual expenditure incurred has exceeded any service charge contributions collected in advance, there is nothing to prevent the Lessor from serving a further demand to collect the shortfall. The Tribunal, therefore, found that clause 4(b) does make satisfactory provision regarding the computation of the service charge contribution and, in turn, the repair and maintenance of the flats, building and any other land or building let under the lease and the application to vary this clause is dismissed.

23. Moreover, the Tribunal considered that it lacked jurisdiction to vary clause 4(b) as sought by the Applicant. In the recent Lands Tribunal decision of ***Morgan v Fletcher & Others*** (LRX/81/2008) HHJ Jarman QC said in his judgement (at paragraph 20) that section 35(2)(f) will is limited to the statutory criteria set out in subsection (4) and was only intended to deal with the situation where the service charges payable amounted to more than or less than 100% of the total service charge expenditure. None of the criteria in subsection (4) exists here. Furthermore, the lease provides for the recovery of 100% of the expenditure incurred by the Lessor. The Learned Judge went on to say (and paragraphs 18 and 19) that the intention of this legislation was to remedy serious defects in a lease. Otherwise, a major policy decision was required to further interfere with the contractual freedom of the parties. This legislation was not intended to interfere with that freedom by putting right perceived defects in a lease, for example, by creating a Reserve Fund where none existed before. For the reasons stated above, the Tribunal did not

consider this lease to be seriously defective in the computation of the service charge. It follows from this, that the grounds relied on under section 35(2)(a) and (f) do not succeed.

24. Accordingly, the application to vary clause 4 (b) of the lease is also dismissed.

Dated the 21 day of June 2010

CHAIRMAN.....
Mr I Mohabir LLB (Hons)