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Residential Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

DECISION ON AN APPLICATION UNDER SECTION 35 LANDLORD AND TENANT ACT 1987

Ref : LON/00AY/LVL/2010/0011

Property:	54-56 Norwood Road, London SE24 9BH
Applicant:	Cormorant Limited
Respondents:	Ms M Noon (leaseholder of Flat 1), S & NK Vijh (leaseholder of Flat 2), Y O'Carroll & A Hasnani (leaseholder of Flat 3), Mrs J Laly (leaseholder of Flats 4 and 6), Mr a & Mrs E Masoud (leaseholder of Flat 5), Mr DM Cahill (leaseholder of 54a Norwood Road) and Messrs AJ Read and HR Gordon-Smith (leaseholder of 56a Norwood Road)
Interested Persons:	The mortgages in respect of Flats 1-4, Flat 6 and 54a and 56a Norwood Road
Decision date:	18th August 2010
Tribunal:	Mr P Korn

BACKGROUND

1. The Applicant is the Respondents' landlord at the Property under various leases, as subsequently varied in the case of Flats 1 and 5 (together "**the Leases**"). Copies of each lease together with copies of

the deeds of variation of Flats 1 and 5 have been supplied to the Tribunal.

2. On 7th June 2010 the Tribunal received an application from the Applicant under Section 35 Landlord and Tenant Act 1987 ("**the 1987 Act**") seeking a variation of each of the Leases.

3. Directions were issued on 11th June 2010. The Applicant had requested that the application be determined on the basis of the documentation alone without an oral hearing and the Tribunal at the Directions stage agreed that it was appropriate to do so. None of the Respondents has requested an oral hearing and therefore the application is indeed being considered on the basis of the documentation alone.

4. The only Respondent from whom the Tribunal has received written representations is Ms O'Carroll, one of the leaseholders of Flat 3. Notice of the application has been served on all Respondents and on all Interested Persons.

THE APPLICANT'S CASE

5. The grounds of the application are as follows:-

- to provide a fairer allocation of the service charge proportions based on the floor area of each of the 8 flats, based on recent measurements undertaken by the Applicant's surveyor; and

- to divide the service charge into two parts, namely (i) a block service charge covering insurance, maintenance of the structure and external decoration – to which all 8 flats would contribute, and (ii) an internal common parts service charge covering maintenance, decoration and cleaning of the internal common parts – to which the flats numbered 54a and 56a would not contribute.

6. Each Lease obliges the relevant leaseholder to contribute a fixed percentage towards the service charge, and no distinction is made between the percentage payable in respect of the structure/exterior and the percentage payable in respect of the internal common parts. The percentages are as follows:-

Flat 1	*5%*
Flat 2	*5%*
Flat 3	*8%*
Flat 4	*25%*
Flat 5	*8%*
Flat 6	*25%*
Flat 54a	*12%*
Flat 56a	*12%*

7. The Applicant acknowledges that the percentages add up to 100% but argues that these fixed percentages do not accurately reflect the respective floor areas of each flat. In other words, for example, Flat 4 pays 25% but – based on floor area – it is considered that Flat 4 should only pay 9.54% of the block service charge.

8. As regards the proposal to split the service charge into two separate components, the Applicant's argument is that Flats 54a and 56a are self-contained and therefore the leaseholders of these two flats should not have to contribute towards that element of the service charge which relates to the internal common parts enjoyed by Flats 1 to 6.

9. The Applicant's statement of case includes a statement from Mr C Case, an employee of Hampton Wick Estates Ltd, the Applicant's managing agents. This statement does not add very much to the information contained in the application, save that it states that the Applicant instructed Mr Paul Blount Dip Arch RIBA MRICS MIOB to measure the internal floor area "of the four flats" (presumably he meant the **eight** flats) and that the Applicant believes that it is in the best interests of the leaseholders that the application be granted on the basis that a fair and effective service charge liability allocation provision is conducive to the effective management of the Property and the marketability of individual flats.

RESPONSE FROM MS O'CARROLL (ONE OF THE RESPONDENTS)

10. Ms O'Carroll, one of the two joint leaseholders of Flat 3, is the only one of the Respondents or the Interested Persons to have made any submissions. The Tribunal is not aware of any of the other Respondents having made any statements either in support of or in opposition to the application.

11. Ms O'Carroll opposes the application on the basis that the Leases are not defective. The present service charge contributions add up to 100% and therefore the Leases already make satisfactory provision for the Applicant to recover all costs expended by it in connection with the Property.

12. In the alternative, Ms O'Carroll argues that – even if the application does fall within the provisions of Section 35 – it would be inequitable to benefit one individual to the detriment of the majority. In this context, Ms O'Carroll has drawn the Tribunal's attention to a dispute concerning damp which (in her submission) was penetrating into her flat from a leaking flat roof above. Her evidence is that the Applicant failed to treat the matter with the urgency that it warranted and she suggests that the Applicant is delaying the matter until after the Leases have been varied (if the Tribunal determines that they should be). She notes that Mrs J Laly, as the leaseholder of Flats 4 and 6, would appear to have the most to gain by the proposed variations and suggests that "a strong

presumption arises" that the Applicant and Mrs Laly are in some way connected and that therefore the Applicant's managing agents have been instructed to delay dealing with the roof repairs until the level of Mrs Laly's contributions has been reduced.

13. Ms O'Carroll also seeks an order under Section 20C of the Landlord and Tenant Act 1985 that none of the Applicant's costs in connection with this application are to be regarded as relevant costs in determining the amount of any service charge payable by the Respondents, i.e. (in layman's terms) that the Applicant's costs should not be added to the service charge. The grounds on which she seeks such an order are (i) that the Applicant's Section 35 application is misconceived and therefore it would be unjust for the Respondents to have to pay the Applicant's costs and (ii) if the application is successful she (in common with the leaseholders of Flats 1, 2 and 5) will have to pay significantly higher service charges in future as a result.

THE LAW

14. Under Section 35(1) of the 1987 Act, *"any party to a long lease of a flat may make an application to a leasehold valuation tribunal for an order varying the lease in such manner as is specified in the application."*

15. Under the preamble to Section 35(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-"*. Section 35(2) then goes on to list the matters in respect of which a lease could have failed to make satisfactory provision such that the Tribunal therefore has power to order a variation.

16. The Applicant has not specified by reference to the statutory provisions which matter or matters it is relying on for the purpose of the application. However, it seems to the Tribunal that the only relevant matters are those set out in paragraphs (e) and (f), which read as follows:-

"(e) the recovery by one party to the lease from another party to it of expenditure incurred or 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".

17. Sub-sections (3A) and (4) of Section 35 expand on paragraphs (e) and (f) above as follows:-

"(3A) For the purposes of subsection 2(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an

the fact (as the Applicant readily accepts) that the Leases as drafted allow for 100% service charge recovery the Tribunal does not consider that any of the Leases fail to make satisfactory provision for "the recovery by [the landlord] from [the tenant] of expenditure incurred or to be incurred by him". In the Tribunal's view it would be stretching the meaning of 'satisfactory' too far to imply into the meaning of this subsection that it includes a situation in which a landlord believes that it would simply be fairer to change the percentages as between the different leaseholders. This is particularly the case given that it is the landlord who is the Applicant, and from the landlord's perspective it should be 'satisfactory' that the Leases provide for 100% recovery.

22. The Tribunal is not aware of any authority or precedent that would require it to find otherwise and the Applicant has not offered any detailed arguments on the point.

23. Ground (f), in that it relates generally to the computation of the service charge, is in the Tribunal's view potentially more relevant to the facts of this case. However, again the Applicant is faced with the fact that the Leases as currently drafted provide for 100% service charge recovery. Subsection (4) of Section 35, quoted above, expands on Ground (f) and the circumstance in which it envisages Ground (f) applying is where the aggregate of the service charges payable amounts to either more or less than 100%. Interestingly, subsection (4) does not use the same formulation as subsection (3A) in that in specifying a circumstance in which the ground would apply it does not state "the factors for determining ... whether the lease makes satisfactory provision include ...". On the contrary, it appears to be specifying the circumstance of the leases providing for either more or less than 100% recovery as the **only** circumstance in which Ground (f) applies.

24. The Applicant has not argued its case by reference to the detailed wording of Section 35 and has not brought any cases or other legal authority for its application. In the Tribunal's view Section 35 is simply not wide enough to justify its granting an order to change the computation of the service charge in circumstances where it currently provides for 100% recovery. Section 37 of the 1987 Act on the other hand is much wider in its scope, and if the majority of the parties to the Leases were in agreement that the Leases should be varied it would in principle be open to them to make a joint application under Section 37.

25. Ms O'Carroll has suggested that the Applicant has an ulterior motive for making this application and that it and Mrs Laly (the leaseholder who Ms O'Carroll submits is most likely to benefit from the proposed variation) are connected in some way. This seems to be pure speculation on Ms O'Carroll's part and the Tribunal does not derive any assistance from this submission. However, equally the Tribunal is not satisfied that it has sufficient evidence from the Applicant from which to conclude – even if it were to feel that Section 35 was wide enough – that the existing service charge percentages are clearly unfair.

Respective net internal areas are one way to calculate service charges, but they are not the only way, and there may have been some logic to the original basis of calculation. It is also curious that there should be such a large discrepancy between the percentages specified in the Leases and what the Applicant considers the percentages should be (and presumably what they should have been from the start). As regards the evidence of the measurement of each flat, the Tribunal also notes that it has not been informed who Mr Blount is and there is no supporting statement from him, which weakens the reliability of this evidence.

DETERMINATION

26. The Tribunal hereby determines **not** to make an order under Section 35 of the 1987 Act varying all or any of the Leases

27. Ms O'Carroll has made a Section 20C cost application. In view of the fact that, in the Tribunal's view, this application has been misconceived, the Tribunal orders that none of the costs incurred by the Applicant in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by any of the Respondents (i.e. the Applicant's costs cannot be added to the service charge).

28. No other cost applications have been made.

Chairman: P Korn

Dated: 18th August 2010