(2194)

Ref: LON/00AM/LIS/2006/0027

LEASEHOLD VALUATION TRIBUNAL

LONDON RENT ASSESSMENT PANEL

DETERMINATION

RE APPLICATIONS UNDER

SECTION 27A OF THE LANDLORD AND TENANT ACT 1985 AND

SECTION 35 OF LANDLORD AND TENANT ACT 1987

Premises:	**Second Floor Flat, 38 Brooke Road, London N16 7LS**
Applicants:	Mr P A Ridgeley & Ms Nina Lakhani
Represented by:	Messrs Pearson & Winston Solicitors
Respondent:	Mr Mohammed Taj
Meeting:	7 June 2006
Inspection:	N/A
Tribunal:	Professor J T Farrand QC LLD FCIArb Solicitor Mr. C White FRICS Mrs M B Colville JP LLB

1. Originating Applications in respect of the Premises, each dated 3 March 2006, were submitted on behalf of the Applicants in the capacity of Landlords. Evidently, 38 Brooke Road consists of a converted block with three flats of which the Applicants have acquired the freehold whilst remaining individual Tenants of flats on the ground and first floors respectively. The Respondent is the Tenant of the Premises, ie the flat on the second floor, under a Lease dated 21 December 1988 for a term of 99 years from 16 December 1988 made between Woodcroft Properties Ltd and G P McMullen and S Bakurt. The Respondent was registered as the leasehold proprietor of the Premises on 17 April 1996.

2. The Application made under s.27A of the 1985 Act sought a determination as to service charges for 2005. A Schedule of Costs of Repairs totalling £28,339.41p was attached together with copies of supporting estimates and invoices. The Tribunal was asked to determine: "That the costs are reasonable and that the Respondent should pay his share (subject to prior determination of the application to vary the terms of the Lease by changing the Respondent's service charge proportion)". It was indicated that the Applicants "would be happy for the case to be dealt with on paper if the Tribunal thinks it is appropriate".

3. The other Application made under s.35 of the 1987 Act sought a variation of the Respondent's Lease so as to provide for a service charge contribution of one quarter (25%) of expenditure instead of the existing one sixth provision (16.67%). It was indicated that the ground for the Application was that the other existing Leases provided for a one fourth (25%) contribution to be made by each of the Tenants of the other two flats. The unsatisfactory result, therefore, was that overall provision was made for less than 100% of expenditure to be recovered as service charges (ie 66.67%). It was also indicated that the Applicants proposed that a 50% contribution should be made by the Tenant of the ground floor flat, so that the total would become 100%, but the Tribunal was not asked to vary the Lease of that flat as well since that variation had been agreed.

4. Following a pre-trial review on 29 March 2006, attended by the Applicants who were represented by a solicitor but not attended by the Respondent who was also not represented, various Directions were issued. Primarily, it was directed that "the case will be determined without an oral hearing unless either party requests an oral hearing". It was then directed that the Applicants should lodge with the Tribunal and serve on the

Respondent a Witness Statement in detailed support of both Applications. After this the Respondent was directed to lodge and serve a detailed Witness Statement in Response. Then the Applicants could lodge and serve a short reply. The Directions ended with a warning note in bold type that: "Non-compliance with the Tribunal's Directions may result in prejudice to a party's case".

5. The Applicants duly complied with the Direction to lodge and serve a supporting Witness Statement but no response or other communication has been received from the Respondent.

6. Having made enquiries and considered the available documents, the Tribunal is satisfied that the Respondent has been properly served with all appropriate notices in connection with these proceedings. Accordingly, the Tribunal has proceeded on the basis that the Respondent has chosen not to participate and to refrain from challenging the Applications.

7. Firstly, as requested by the Applicants, the Tribunal considered the Application to vary the Lease of the Second Floor Flat.

8. It was clear, as a matter of law, that the three Leases of flats at 38 Brooke Road together currently fail to make satisfactory provision for the computation of service charges within s.35(2)(f) of the 1987 Act. This is because the aggregate of the proportionate amounts payable will be less than the whole of the expenditure occurred (see subs.(4) of s.35 of the 1987 Act.). It is equally clear, as a matter of fact, that the Applicants' proposals, which include an agreed variation of the Lease of the ground floor flat, would produce satisfactory provisions in this respect.

9. Accordingly, under s.38(1) of the 1987 Act, the Tribunal orders that para.1 of the Fifth Schedule to the Lease of the Premises is hereby varied so as to provide: '(ii) "the Service Charge" means a one quarter part of the Total Expenditure'.

10. The Tribunal has, in addition, a jurisdiction (under s.38(10) 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.

11. Secondly, the Tribunal considered the Application to determine, in effect, the Respondent's liability to pay 'his share' of the service costs incurred in 2005.

12. Having considered the documentary evidence provided by the Applicants in pursuance of Directions, which has not been challenged in any respect by the Respondent, the Tribunal is sufficiently satisfied that repairs had been carried out in 2005 and that a total cost of £28,339.41 had been incurred by the Applicants. The Tribunal was further sufficiently satisfied that these works were carried out after appropriate estimates had been obtained and due consultations undertaken. In the absence of any challenge from the Respondent, the Tribunal is prepared to accept that these costs were reasonably incurred and the works of reasonable standard for the purposes of inclusion in a service charge account payable by a tenant under s.19(1) of the 1985 Act.

13. The Tribunal is also satisfied that the repair works involved came within the Landlord's obligations according to the Sixth Schedule of the Respondent's Lease. From this it follows that the costs form part of the Total Expenditure incurred and that part of this constitutes the Service Charge payable by the Respondent according to the Fifth Schedule of his Lease. The Tenant's covenant to pay an Interim as well as the Service Charge "in the manner provided in" that Schedule is to be found in Clause 4(6)).

14. However, the Tribunal is not satisfied that the procedural provisions of the Lease have been observed. The Charges must relate to an Accounting Period which does not refer to calendar years but means a period ending on 29 September in any year: para.1(iv) of the Fifth Schedule. The Landlord may specify another period but no evidence has been seen as to this or as to any Interim Charges being specified or paid, nor has anything been stated about surpluses from previous periods.

15. The procedure for collection of the Service Charge is that any excess over the Interim Charge in respect of an Accounting Period shall be paid by the tenant to the Landlord within 28 days of service upon the Tenant of "a Certificate signed by such Accountants/Agents containing [specified information]": para.s 5 and 6 of the Fifth Schedule. Although it may be assumed here that the Interim Charge paid was nil so that the excess is the full amount, the Tribunal has no evidence of service of the requisite Certificate. Accordingly, it is not possible to determine that the Respondent is liable to pay any particular amount of service charge.

16. Further, the Tribunal has noted that of the six sums included in the Applicant's Schedule of Costs of Repairs, only one became payable in the period ending 29 September 2005. This one sum was £815.74 payable to Charles Harris & Partners, Consulting Structural Engineers, whose invoice is dated 16 September 2005. The four invoices (all marked as paid) from Redbridge Construction are dated between 18 October and 6 December 2005. The last invoice from MetroRod (also marked as paid) is dated 16 December 2005. In other words, only the sum of £814.74 is properly included as a cost incurred in the Accounting Period ending in 2005. The other sums are attributable to the Accounting Period ending on 29 September 2006 and, unless an Interim Charge has been specified, the Respondent has not yet become liable to pay a share of them.

17. The Application referred to the Respondent paying "his share" of the 2005 costs and the Tribunal has inferred that this contemplates one quarter (25%) in accordance with the variation ordered of his Lease. However, the Tribunal is not aware of any provision whereby the variation ordered would have retrospective effect. Nevertheless, in the opinion of the Tribunal, the variation should have effect in relation to any Service Charge payable by the Respondent following expiry of the current Accounting Period on 29 September 2006.

18. Finally, a consequential application has been made by the Applicants' representatives for an order that the Respondent pay their costs and disbursements in the matter (letter dated 22 May 2006). It was stated that the costs were £2,000 plus VAT as well as the Tribunal fees. The ground given for the application was that "our clients have been driven to this application, through the complete lack of cooperation from the Respondent from the beginning".

19. The Tribunal does have jurisdiction to require reimbursement of fees by any other party (under para.9(1) of the LVT (Fees) (England) Regulations 2003). No criteria are indicated for the exercise of this jurisdiction.

20. The Tribunal also has jurisdiction to determine that the Applicants' costs should be paid by the Respondent, but not exceeding £500 and on the ground that "he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously abusively, disruptively or otherwise unreasonably in connection with the proceedings" (under para.s 10(1)-(3) of Sched.12 to the Commonhold and Leasehold Reform Act 2002).

21. The Tribunal has considered this application for costs and fees in the light of all the known circumstance of the case and of the various decisions made and conclusions reached in respect of the two principal Applications. As to the first, the unsatisfactory provisions for service charge proportions were not the Respondent's fault and, because of the variation of his Lease, his liability will be increased without compensation. As to the second, the Applicants have not complied properly with the procedural provisions of the Respondent's Lease and, therefore, failed to establish liability on his part. In addition, the Tribunal is concerned about condemning the conduct of an absentee Tenant. The Applications were made by the Applicants as Landlords presumably without expecting to recover their costs and fees, except in the ordinary way as service charge expenditure. The Respondent's non-participation in the proceedings will not have increased costs as compared with his participation and cannot properly be treated as unreasonable within the context of para.10 of Schedule 12 to the 2002 Act.

22. In the result, the Tribunal has decided that it would not be appropriate to accede to the consequential application for costs and fees.

Julian Faward

CHAIRMAN

DATE **12th June 2006**