



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference	:	CAM/26UG/LVL/2017/0002
Property	:	1, 2, 4, 5, 7, 8, 9, 13, 14, 16, 17, 19, 20, 21, 25, 32, 36, 44 & 45 Jordans, Hillyfields, Welwyn Garden City, Hertford AL7 2HD
Applicant	:	Aldwyck Housing Association Ltd
Representative	:	Devonshires Solicitors
Respondents	:	Ms J Milburn and others, as listed in the Schedule to the application, being the current leaseholders of the 19 flats concerned
Representatives	:	Bottrills (for Ms Timpson, flat 4) Ms Cherry (flat 32) in person
Type of Application	1	For variation of the terms of each of the 19 leases, namely by equalising the service charge contribution in paragraph 1(2) of the 4 th Schedule to each lease at 1/46 th share of total expenditure [LTA 1987, s.35]
	2	(By Ms Timpson) For an order that the lessor's costs of and occasioned by this application be disregarded when calculating any service charge that she may be required to pay [LTA 1985, s.20C]
Tribunal Members	:	Judge G K Sinclair & Judge G M Jones
Date of determination	:	20 th December 2017
Date of decision	:	2 nd February 2018

DECISION FOLLOWING A PAPER DETERMINATION

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- Background paras 3–7
- Material statutory provisions paras 8–10
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1. For the reasons which follow the tribunal is not satisfied that the leases in this residential development fail to make satisfactory provision for the computation of a service charge payable under the lease, as required by section 35(2)(f). There are therefore no proper grounds for the tribunal to make the variation sought, and the application must be dismissed.
2. While the lessor has stated expressly that it does not wish to recover by way of service charge its costs of bringing its application to vary each and every lease the tribunal, for the avoidance of any doubt, agrees to make an order under section 20C confirming that fact.

Background

3. The background facts are gleaned from the papers filed and served, as neither party sought an oral hearing and, in view of the specific variation sought by the lessor, the tribunal undertook no inspection.
4. The development concerned comprises 46 flats, but while most leases specify a contribution towards the service charge of 1/45th a few are required to contribute only a 1/66th share. This, says the lessor, “does not therefore allow for 100% of service charge recovery due to the apportionments.” The application goes on to say that “Each flat is broadly the same in size and composition. Consequently, the applicant seeks to vary the apportionments so that each leaseholder is responsible for 1/46 of the total expenditure, on the basis that there are 46 flats in the block.”
5. This last suggestion that the flats are broadly the same in size and composition has been contested most vehemently by two of the lessees adversely affected by the proposed variation, i.e. those currently obliged to pay only a 1/66th share.
6. In fact nobody has been charged strictly in accordance with the provisions of their lease, with the result that the lessor has been writing to them all, offering to reimburse those charged 1/45th instead of only 1/46th, but without requiring those with the lower contribution to pay any backdated arrears.
7. By this application the lessor seeks to ensure equality. Those respondents who have chosen to participate in these proceedings reject the notion that equality is, in the circumstances, fair for the reasons they explain.

Material statutory provisions

8. Part IV of the Landlord and Tenant Act 1987 enables a tribunal to vary certain lease provisions. These may be limited to a single lease or every similar one, in very specific circumstances, or the application can instead reflect the desire by

both the lessor and the overwhelming majority of the lessees for a variation of their choosing, this to affect every single lease and bind every lessee.

9. This application has been brought under section 35 of the Landlord and Tenant Act 1985, the power to vary being exercisable only for very limited purposes. The material parts of the section read as follows :

(1) Any party to a long lease of a flat may make an application to the appropriate tribunal for an order varying the lease in such manner as is specified in the application.

(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;

(b) the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);

(c) the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;

(d) the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);

(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;

(g) such other matters as may be prescribed by regulations made by the Secretary of State.

(3) *[not relevant]*

(4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if –

(a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and

(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs

(a) and (b) would either exceed or be less than the whole of any such expenditure.

10. In this case the applicant landlord seeks to rely upon subsection (2)(f), namely that the provision in the lease for the computation of the service charge is not satisfactory because three flats are required to pay a lower proportion than all of the others (or those others which are let on long leases, the lessor assuming a similar liability for those that it retains but lets on short tenancies).

Relevant lease provisions

11. The leases, each granted for a term of 125 years from its commencement date at a fixed annual ground rent of £10 plus an additional insurance rent, are broadly the same in format. By clause 4(xiii) the lessee covenants to pay the interim charge and service charge as defined in the Fourth Schedule. In default it is said to be recoverable as rent in arrears. At paragraph 1(2) of that Schedule the service charge is expressed to be “one forty-fifth part of total expenditure”, save that in three leases – for flats 4, 20 & 32 Jordans – the proportion is expressed as only “One sixty sixth part...”

Discussion and findings

12. The tribunal had before it two files, a large lever arch file and a smaller one, comprising in total 482 pages. There was no applicant’s statement of case, or even a witness statement, but instead voluminous amounts of correspondence with the lessees. In response two lessees – Ms Timpson and Ms Cherry – filed statements in reply with supporting documents, including some annotated photographs showing the boundaries of flats so as to illustrate the range of sizes.
13. The second file also included Ms Timpson’s section 20C application.
14. The tribunal is satisfied that the flats are of differing size, with some much larger than the one bedroom flats that these respondents lease. However, another of the three flats paying the lower contribution is somewhat bigger. The tribunal is not particularly impressed with the argument that larger flats, or those with balconies, must necessarily pay larger contributions for repairs, maintenance, etc. How a developer chooses to apportion the service charge contributions by lessees may follow various paths : by net internal area, by fixed percentages based on the number of rooms, or by absolute equality (even if ground floor tenants are thus obliged to pay for services such as lifts and stairs that they may never use).
15. In this case there is a more fundamental objection to the application. The lessor states that due to the fractions involved “This does not therefore allow for 100% of service charge recovery...” As the Americans might say : “Do the math!” This is not true.

No of flats	Proportion	as a percentage	Total %
43	1/45	0.02222	95.5555
3	1/66	0.01515	4.5454
46			100.00

16. Precisely why the original lessor chose to differentiate between these 3 flats and all the others may never be discovered, but the figures do add up so as to ensure complete recovery of all service charge expenditure. The criteria necessary for a successful application to vary under section 35(2)(f), as explained in subsection (4), have therefore not been met and this application must fail.
17. The tribunal notes the arguments raised by the two respondents, but they play no part in the reasoning for this decision.
18. Although there appears to be no provision in the current leases which entitles the lessor to include the costs of and occasioned by this application as relevant costs in the calculation of the service charge for this or any future accounting year the tribunal, for the avoidance of doubt, makes an order under section 20C of the Landlord and Tenant Act 1985 preventing the lessor from so doing in respect of any service charges to be incurred by the named respondents.

Dated 2nd February 2018

Graham Sinclair

Graham Sinclair
Tribunal Judge