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RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

COMMONHOLD AND LEASEHOLD REFORM ACT 2002 - SCHEDULE 11
PARAGRAPH 5

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

LON/OOAG/LSC/2009/0172

Premises: 33 Broadhurst Gardens, London NW6 3QT

Applicant: Rosebury Properties Limited

Represented by: Ms. E Gibbons, counsel

Respondents: Satwinder Bal (Flat 1)
Satwinder Bal & Amrit Bal (Flat 2)
Eileen Hauptman (Flat 3)
Eric Bergsagel (Flat 4)
Georgio Taverniti (Flat 5)

Represented by: Mr. G Taverniti (in person for himself only)

Tribunal: Ms. LM Tagliavini, Barrister & Attorney-at-Law
(NY)
Mr. I Thompson, BSc, FRICS
Mrs. J Clark JP

Hearing Date: 25 May 2010

1. This matter concerns the resumption of the adjourned application, made by the Applicant freehold company, seeking a variation of each of the Respondent's leases in the terms proposed, and set out in the (final) draft (see Appendix 1) pursuant to the provisions of section 35 of the Landlord and Tenant Act 1987 ("the Act").
2. The subject premises comprise a Victorian building converted into 5 flats. The interests of the lessees are held 999 year leases (less 10 days) from 25th December 1971. The lessees are all shareholders of the Respondent Company, whose only asset is the freehold of the building. Each lessee is required to contribute one fifth of the costs and charges incurred by the Lessor in accordance with the terms of the lease. Of the Respondent lessees it is only Mr. Taverniti that opposes some or all of the proposed variations.
3. At the hearing of the application the Applicant sought to rely upon the skeleton argument of Ms. Gibbons who expanded on her arguments to the Tribunal at the oral hearing. The Tribunal's powers under section 35 of the Landlord and Tenant Act 1987 were set out and state:

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 -

(a) the repair and 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 the occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installation 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 the service charge payable under the lease;

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

(3) For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include-

(a) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and

(b) other factors relating to the condition of the common parts."

4. It was noted by the Tribunal that the final draft of proposed amendments as set out in Appendix I differed significantly in some respects to those originally drafted and included in the bundles of documents relied upon by the Applicant at the hearing; see *Appendix II*).

5. It was submitted that variations referring to the deletion of references to the Headlease (now removed from the Land Register due to the merger of the freehold and leasehold interests) are not within the Tribunal's jurisdiction and therefore cannot be subject a determination. In respect of the other proposed variations the Applicant sought to rely on section 35(2)(e) of the Act, in that the lease fails to make satisfactory provision to the recovery by the Lessor from the tenants of expenditure incurred or to be incurred by the Lessor, or on its behalf, for the benefit of the tenants. However, a variation in respect of building insurance sought to omit reference to the Headlease (now non-existent) was said to be within the provisions of section 5(2)(b)

6. Further, the Applicant sought to rely upon the provisions of section 35(2)(a)(i)&(ii) for the justification to seek to vary the service charge payment on account to have reference to estimated costs, rather than the previous service charge year. In this way estimated costs for proposed major works could be recovered in advance of their being carried out. It was also proposed that there should be a variation to the timing of the collection of the service charges, with the currently existing quarter days being replaced by the payment of one sum in advance. It was noted by the Tribunal that this proposed amendment had not been included in the draft variations put before the Tribunal at the hearing but was presented only after the conclusion of the hearing, permission having been given by the Tribunal for these late amendments to be reduced to writing. It was said on behalf of the Applicant that this would prevent delays in payment of service charges if all money were due "up front".

7. A further variation was based on the correction of a typographical error having occurred in the "old" lease, which required correction in order to make sense of its provisions. A further variation sought in reliance on section 35(2)(e) was the inclusion of a term allowing the recovery of costs where the Lessor was required to expend sums ensuring

funds in advance of major works and lack of provision for the Lessor's cost in relation to enforcement of covenants. The Tribunal has now been provided with the final draft of the amendments sought by the Applicant dated 8/6/10, and Mr. Taveniiti's objections dated 21/6/10. The Tribunal took all these late submissions into account when reaching its decision.

12. The Tribunal accepts the arguments put forward by Ms. Gibbons on behalf of the Applicant. and therefore, the Tribunal finds and accepts that variations in the terms proposed by the Applicant are reasonable and necessary to make the terms of the lease for the maintenance of, and the cost of the upkeep of this building, workable and reasonable to all lessees. The Tribunal finds particularly, that there is a requirement for the lease to provide for the collection of service charge in advance of major works being carried out in order to make proper provision for their payment as well as the other more usual services provided in these modern times.

12. The Tribunal approves the proposed variations to the lease as provided by the Applicant in its document dated 8 June 2010 (Appendix I). The Tribunal accepts that provision needs to be made to ensure that the running of the property can be properly carried out by the freehold company of whom all the lessees are shareholders and that it is their mutual interest to do so.

Costs:

13. As previously found by the Tribunal in its earlier decision referred to above, the lease in its current does not make provision for the recovery of costs through the service charge and the Tribunal cannot now override that before the lease variations have come into effect.

Whether the costs of this litigation can be recovered from the lessee shareholders of the freehold company is a separate issue and not within the jurisdiction of this Tribunal.


Chairman: LM Tagliavini

Dated: 30 August 2010

Appendix I

SCHEDULE

Variations to the Lease

1. Clauses 2 and 3 shall be deleted.
2. Clause 15 to the Sixth Schedule shall be deleted.
3. In clause 17 to the Sixth Schedule, the words "reasonable registration fee" shall be substituted for "registration fee of £6.30".
4. Clause 18 to the Sixth Schedule shall be deleted and substituted by the following:-

"The Lessee shall keep the Lessor indemnified from and against one fifth of all the costs charges and expenses incurred by the Lessor in carrying out its obligations under the Seventh Schedule together with one fifth of all legal and other costs and fees incurred by the Lessor in any proceedings concerning ~~legal forum~~ in connection with any arrears of payments due and/or any other breaches of covenant on the part of any Lessee in the Property, the Flats or the leases thereof and the provision of information or documents requested by the Lessee from the Landlord or its managing agents, to the extent that any of the costs charges and expenses are not recovered from a Lessee of any part of the Property.

5. Clause 19 to the Sixth Schedule shall be deleted and substituted by the following:-

"The Lessees shall on the 26th December usual quarter days in each year (the first payment to be a proportion from the date hereof to the next ensuing quarter day) in each and every year during the continuance of this demise (the first payment to be a proportion from the date hereof to the 26th December next following) pay to the Lessor on account of the Lessee's obligations under the last preceding clause a sum equal to one fifth of the estimate of the costs charges and expenses for each ~~that~~ accounting year in accordance with clause 8 of the Seventh Schedule. The estimate shall be prepared by the Landlord or its managing agents in accordance with the statutory provisions from time to time in force.

6. In clause 20 to the Sixth Schedule "18" shall be substituted for "19".
7. There shall be added the following clauses to the Sixth Schedule:-

"2829 The Lessee shall pay and indemnify the Lessor against all reasonable legal surveyor's managing agents and other professional costs charges and

expenses which may be incurred by the Lessor (~~which shall include any costs incurred in connection with any legal proceedings in any legal forum~~):-

- (a) ~~in or in contemplation of a notice under Section 146 and 147 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the court; and~~
- (b) ~~in connection with any arrears of rent and payments due pursuant to clauses 18, 19 and 20 of this Schedule; and~~
- (c) ~~the provision of information or documents requested by the Lessee from the Lessor or its managing agents; and~~
- (d) ~~in connection with any proceedings to which the Lessee is a party concerning the Property, the Flats or the leases thereof in connection with any other matter arising under this lease.~~

8. Clause 2 to the Seventh Schedule shall be deleted and substituted by the following:-

“The Lessor shall insure the Property with a reputable insurance company and keep it insured against fire, storm, tempest flood, lightning, earthquake, explosion, bursting and overflowing of water tanks apparatus or pipes, escape of water, impact by vehicles and aircraft (and articles dropped from them), riot, civil commotion, malicious damage, falling trees and branches and aerials, accidental damage, subsidence, landslip, heave, public liability and any other risks against which the Landlord reasonably decides to insure from time to time in an amount equal to the full reinstatement value of the Property together with all costs of diminution and architects and surveyor’s fees. The Lessor shall make all payments necessary for those purposes within seven days after the same became payable and shall produce to the Lessee on demand the policies of such insurance or evidence of the existence thereof and the receipt for every such payment in the current year’s schedule.

9. Clause 7 to the Seventh Schedule should be deleted.
10. The following clauses shall be added to the Seventh Schedule.

“11. The Lessor shall carry out such work and do all such other things as are required in order to comply with all statutory requirements relating to the Reserved Property”.

12. The Where the Lessor is a company whose shareholders are all Lessees and the Lessor does not own or have any interest in any other property the Lessor shall prepare and file all accounts and returns and other documents which are required by law and shall pay all accountant's fees incurred in connection therewith and shall pay all premiums due in respect of directors' liability insurance which may from time to time be effected by the Lessor.

13. If so requested by the Lessee the Lessor shall use all reasonable efforts to enforce the covenants contained in the Leases of the flats in the Property upon the Lessee indemnifying the Landlord in full on demand against all costs and expenses in respect of such enforcement and providing from time to time security in respect of such costs and expenses as the Lessor may reasonably require.