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

Case Reference : **LON/00AG/LVL/2013/0018**

Property : **Ground Floor & Basement 158-164
Royal College Street, Flats 1& 2, 158
Royal College Street & Flats 1-6,
160-164 Royal College Street,
London NW1**

Applicant : **Notting Hill Home Ownership Ltd.**

Representative : **Glazer Delmar**

Respondent : **Elizabeth Powell
Mark Cridge & Neema Cridge
Laura Meikle
Christone Nicolaou
Rachel Leaver
Denise Morton
Nadarajan Ratnarajan & Janakan
Ratnarajan
Louis Michaelides & Assinetti
Michaelides
One HousingGroup Ltd.**

Representative : **None**

Type of Application : **To vary a lease / leases pursuant to
s.35 of the Landlord and Tenant Act
1987**

Tribunal Members : **Judge F Dickie
Mr P Tobin, FRICS MCI Arb**

**Date and venue of
hearing** : **4 February 2014, 10 Alfred Place,
London WC1E 7LR**

Date of Decision : **14 February 2014**

DECISION AND REASONS

Background

1. By a re-amended application under section 35 of the Landlord and Tenant Act 1987 (“the Act”) the Applicant Notting Hill Home Ownership Limited seeks an order varying the leases of the following properties:

Ground Floor & Basement, 158 – 160 & 164 Royal College Street
Flat 1, 158 Royal College Street
Flat 2, 158 Royal College Street
Flat 1, 160 – 164 Royal College Street
Flat 2, 160 – 164 Royal College Street
Flat 3, 160 – 164 Royal College Street
Flat 4, 160 – 164 Royal College Street
Flat 5, 160 – 164 Royal College Street
Flat 6, 160 – 164 Royal College Street
2. The persons listed in the heading as Respondents to this application are the current owners of the said leases. The Applicant is the freeholder of the buildings at numbers 158 & 160 – 164 Royal College Street, London NW1. The title is registered at HM Land Registry under title numbers NGL590458 and 260834.
3. The application was first listed for hearing on 25 November 2013, and the Tribunal inspected the buildings on the morning of that day. However, the previous leaseholder of the Ground Floor & Basement, 158 & 160-164 Royal College Street had been named as Respondent, instead of One Housing Group Limited (the current leaseholder). The hearing was therefore adjourned upon amendment of the application to the correct Respondent, and appropriate directions were issued.
4. The Applicant was represented by Mr Ben Maltz of counsel. Mr Louis Michaelides, leaseholder of Flat 6, 160 – 164 Royal College Street appeared in person at both hearings. Mr Marcus Affleck, employee of the Respondent One Housing Group Ltd. attended the adjourned hearing. No other Respondent attended a hearing or responded to the application in any way.

The Premises

5. The premises at 160–164 Royal College Street are a purpose-built block of six flats originally built in the 1970s, with the ground floor and basement premises originally left as commercial premises, and believed to have been a supermarket and subsequently a tool hire shop. Number 158 is a three-storey townhouse of similar construction style and date adjoining 160–164 Royal College Street. It also has a ground floor and basement which was originally separately let as commercial premises, possibly a restaurant. The six flats at 160-164 and the two flats at 158 Royal College Street are referred to in this decision as the “residential leases”
6. At some time in the past, the ground floor and basement of both buildings were knocked through and amalgamated into one unit extending across and below both buildings. This unit was subsequently converted into residential accommodation and the lease of the ground

floor and basement varied accordingly in 2009. The lease was assigned to One Housing Group Ltd. in 2011, which sublets the six flats within it on assured tenancies.

The Grounds for the Application

7. At present the provisions for the calculation of service charge payable by the leaseholders are said by the Applicant to be wholly unsatisfactory, unmanageable and the aggregate of the specified percentages prescribed in the leases exceeds 100%. The application seeks to vary the definition of the building in each lease to a definition common to all the leases, and the proportion payable by each leaseholder so as to achieve a reasonable and equitable apportionment of the service charge costs which then correctly accounts for 100% of the proper expenditure.
8. The application proposed fixed percentages for the varied leases, based on a per square metre floor area. The landlord's proposal was premised on the basis that number 158 and number 160 – 164 are treated as one building.
9. The grounds on which this application was made are that the leases fail to make satisfactory provision with respect to the following matters, under section 35(e) and (f) of the Act:
 - 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 at the party or of a number of persons who include that other party;
 - The computation of a service charge payable under the lease.
10. Pursuant to Section 35(2)(f) of the Act, 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 portion of expenditure incurred, all 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

Particulars of the Application

11. The definition of “building” for which the services are provided varies between the leases:

Flat 1, 158 Royal College Street

The definition of building is as follows:

“The buildings situate upon the Property comprising Flats 1 and 2, 158 Royal College Street”

Flat 2, 158 Royal College Street, and Flats 1, 2, 3, 4 and 5, 160 - 164 Royal College Street

The definition of the “building” is as follows:

“The buildings situate upon the Property comprising Flats 1 – 5, 160 – 164 Royal College Street and Flat 2, 158 Royal College Street”

Flat 6, 160 – 164 Royal College Street

The definition of building is as follows:

“160 – 164 Royal College Street, London NW1 0TA”

Ground Floor & Basement, 158 – 160 & 164 Royal College Street

The building is defined as follows:

“158 and 160/164 Royal College Street NW1”

12. The individual specified proportions of the service charge then fall as follows:

Flat 1, 158 Royal College Street	16.66%
Flat 2, 158 Royal College Street	16.66%
Flat 1, 160 – 164 Royal College Street	16.66%
Flat 2, 160 – 164 Royal College Street	16.66%
Flat 3, 160 – 164 Royal College Street	16.66%
Flat 4, 160 – 164 Royal College Street	16.66%
Flat 5, 160 – 164 Royal College Street	16.66%
Flat 6, 160 – 164 Royal College Street	16.00%
GF & B, 158 – 160 & 164 Royal College Street	“a fair proportion”

13. It was the Applicant's case that the resulting variations between the extent of the building in each case upon the service charge levied results in recovery of either more or less than 100% of the total expenditure, depending upon the part of the building upon which costs may be incurred. The Applicant is about to embark upon major works, and seeks clarity and certainty about recovering this significant expenditure.
14. One Housing Group has no obligation to pay a reserve fund contribution or for a block service charge (for internal common parts)

in the ground floor and basement, since the entire area is demised. The residential leases contain an obligation to pay both a block and building service charge). Mr Maltz explained that, to date, they have been charged 12.5% of total expenditure, and no service charge had been demanded from One Housing Group Ltd.

Decision and Reasons

15. The Tribunal agrees that the outcome of the inconsistent treatment of the definition of the Building and the proportion of service charge expenditure payable is most unsatisfactory. It fails to make an adequate or proper provision for the service charge and its recovery. The two buildings cannot practically be managed separately, given the common basement. The Tribunal finds that the asserted grounds in Section 35(e) and (f) of the Act are made out. The Tribunal therefore considers it is appropriate for the lease terms to be varied to make proper provision, and to include a common definition of the Building to include both 158 and 160-164 Royal College Street, and turns to consider the appropriate terms of such variations.
16. Section 38 of the Act sets out the powers of this Tribunal, and provides so far as is relevant:

Orders ... varying leases.

- (1) If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the tribunal, the tribunal may (subject to subsections (6) and (7)) make an order varying the lease specified in the application in such manner as is specified in the order.
 - (4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the tribunal thinks fit.
17. The proposed variation according to floor area was supported by expert evidence from the Applicant's surveyor, who had taken detailed measurements of the majority of the flats (access had not been obtained to two flats sublet by One Housing Group). According to those measurements, the proposed proportion of expenditure payable by One Housing Group would be 48.4%. However, the measurements were not accepted by One Housing Group and Mr Affleck further objected to the proposal on the grounds that the measurements included the common parts, but the proposed proportions of the building service charge payable by the other flats did not bear reference to their proportionate use and enjoyment of their common parts.
 18. Mr Michaelides considered that the proposed proportion of the expenditure to be payable in respect of his lease was too high and unfair. He had submitted a written statement of case setting out the history of his occupation and his points of concern.
 19. The Tribunal considered carefully the proposal in the application, which resulted in contributions from the holders of the residential

leases of between 6% and 22% of expenditure relating to the common parts, and between 3.5 and 11.6% of expenditure on the building.

20. The Tribunal bears in mind the bargain entered into by the original parties to the residential leases, all of which (except for Flat 6), contained a covenant to pay a uniform percentage of expenditure (noting, of course, that the definition of Building in the lease for Flat 1, 158 is different to that in the remainder of those leases). Those flats differ significantly in size - ranging from 34.72m² to 88.94 m². An apportionment of service charge expenditure proportionate to floor area would be an equitable option upon the grant of new leases. However, the Tribunal has regard to the fact that the current service charge apportionment would have been reflected in the value of those properties for the purpose of sale / resale.
21. The significant adjustment of service charge contributions now – from parity to reflecting floor area - would lead to a windfall in respect of service charge and major works contributions, as well as resale value, for the smaller flats, and the reverse for the larger flats. The Tribunal considers that a more appropriate approach to variation of the lease terms on this application would reflect more closely the bargain between the original parties to the leases, upon which sale prices have been valued.
22. The Tribunal has determined not to order the variation sought by the Applicant, which it considers would do too much violence to the original intention of the parties to the leases. Mr Maltz made clear in the hearing that the position of the Applicant was neutral on the form of the variation, as long as it resulted in a workable service charge regime which permitted recovery of 100% of expenditure. Furthermore, owing to the two discrepancies raised by One Housing Group, there would be obstacles to ordering variation according to floor area without first giving the parties a further opportunity to submit evidence and representations, but yet another adjournment of these proceedings would not be desirable or in the interests of the administration of justice.
23. The Tribunal considers that there is good justification for identical variation of the lease terms for the residential leases (other than Flat 6 of 160 – 164 Royal College Street) to reflect identical service charge proportions, and that it is appropriate, straightforward and reasonable to extend equivalent service charge proportions to the flats within One Housing Group's demise. There is some rationale for slightly different treatment of the service charge proportion in the lease for Flat 6 of 160 – 164 Royal College Street (which did not have equivalent terms to the other residential leases). At 116.91 m² that flat is the largest of them all, by a significant margin.
24. The Tribunal has formed the view that an apportionment of 7% of the building service charge for each flat, except Flat 6 of 160 – 164 Royal College Street for which the proportion would be 9%, represents a fitting variation to the lease terms which adequately respects the perceived intention of the original parties. There is no necessity to reflect the demise to One Housing Group of the common parts of the

basement and ground floor, or the shared enjoyment of the common parts in the remainder of the building by the leaseholders of the residential flats. The common parts service charge, paid only by the residential leaseholders, should similarly be payable at an almost equivalent proportion of 12% each, with 16% payable under the lease for Flat 6 of 160-164 Royal College Street. The full terms of the variation should be interpreted only from the attached Order.

25. No party present raised any objection to this approach, as set out by the Tribunal at the adjourned hearing. It may be observed that, the proportion payable by the One Housing Group being thus defined, once such contributions are sought, all other Respondents will overall be in an improved position compared to that set out in the existing terms of their leases and to the proportions actually demanded of them to date. The Tribunal determined that it was not appropriate to further adjourn the hearing for representations on the terms now contained in the attached Order. The Act empowers the Tribunal to vary the lease terms in such manner it thinks fit, and no other Respondent has made any response to these proceedings, either to the Tribunal or to the Applicant.
26. Accordingly, the leases that are the subject of this application are varied according to the attached Order. The Tribunal is satisfied that it is reasonable in the circumstances to make the Order attached, that no Respondent or other person would be substantially prejudiced by the variation, and that no issue of compensation under Section 38(10) arises.
27. While Mr Affleck sought an Order for the Applicant to pay the costs of effecting the variation of the leases, since that Respondent had obtained no substantial benefit by the variation, the Tribunal did not consider that these costs equated to significant prejudice, nor did it consider it fitting that the lease terms should be varied to require the Applicant to pay them. Notwithstanding the situation in practice regarding One Housing Group's service charges, the Tribunal considers that it is of benefit to all parties of the leases that clarity and certainty has resulted from this application.

Name: F Dickie

Date: 14 February 2014



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(RESIDENTIAL PROPERTY)**

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Applicant : **Notting Hill Home Ownership Ltd.**
**Elizabeth Powell
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Respondent : **Denise Morton
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Louis Michaelides & Assinetti
Michaelides
One Housing Group Ltd.**

Tribunal Members : **Judge F Dickie
Mr P Tobin, FRICS MCI Arb**

Date of Order : **14 February 2014**

ORDER

Upon an application under S.35 of the Landlord and Tenant Act 1987, and pursuant to S.38 of that Act, the Tribunal makes the following Order:

28. The terms of the subject leases are varied from the date of this Order in the terms of the attached Schedule - Re-Amended Draft Lease Terms.

29. Pursuant to subsection 38(9), a note of the variation shall be recorded in the schedule of notices of leases to freehold title numbers NGL590458 and 260834 and in the property registers of all the individual flat leasehold titles.

30. No order as to compensation under Section 38(10).

31. No order as to costs or fees.

Name: F Dickie

Date: 14 February 2014

SCHEDULE C - RE-AMENDED DRAFT LEASE TERMS

1. In respect of Flat 1, 158 Royal College Street, London NW1, amend the Lease as follows:
 - 1.1 Redefine the Building as “The Building situate upon the property comprising 158 and 160-164 Royal College Street, London NW1 OTA”
 - Substitute, on page 2 of the lease, the following wording in respect of the definition of the “*Service Charge, Specified Proportion of Service Provision (Clause 7)*”:

12% of the service provision in relation to the performance of the Landlord’s covenants at clauses 5(3)(c) and 5(4).
7% of the remaining service provision.

2. In respect of Flat 2, 158 Royal College Street, London NW1, amend the Lease as follows:
 - 2.1 Redefine the Building as “*The Building situate upon the property comprising 158 and 160-164 Royal College Street, London NW1 OTA*”
 - 2.2 Substitute, on page 2 of the lease, the following wording in respect of the definition of the “*Service Charge, Specified Proportion of Service Provision (Clause 7)*”:
 - 12% of the service provision in relation to the performance of the Landlord’s covenants at clauses 5(3)(c) and 5(4).
 - 7% of the remaining service provision.

32. In respect of Flat 1, 160-164 Royal College Street, London NW1, amend the Lease as follows:
 - 3.1 Redefine the Building as “*The Building situate upon the property comprising 158 and 160-164 Royal College Street, London NW1 OTA*”
 - 3.2 Substitute, on page 2 of the lease, the following wording in respect of the definition of the “*Service Charge, Specified Proportion of Service Provision (Clause 7)*”:

12% of the service provision in relation to the performance of the Landlord's covenants at clauses 5(3)(c) and 5(4).
7% of the remaining service provision.

33. In respect of Flat 2, 160-164 Royal College Street, London NW1, amend the Lease as follows:

4.1 Redefine the Building as "*The Building situate upon the property comprising 158 and 160-164 Royal College Street, London NW1 OTA*"

4.2 Substitute, on page 2 of the lease, the following wording in respect of the definition of the "*Service Charge, Specified Proportion of Service Provision (Clause 7)*":

12% of the service provision in relation to the performance of the Landlord's covenants at clauses 5(3)(c) and 5(4).
7% of the remaining service provision.

34. In respect of Flat 3, 160-164 Royal College Street, London NW1, amend the Lease, as follows:

5.1 Redefine the Building as "*The Building situate upon the property comprising 158 and 160-164 Royal College Street, London NW1 OTA*"

5.2 Substitute, on page 2 of the lease, the following wording in respect of the definition of the "*Service Charge, Specified Proportion of Service Provision (Clause 7)*":

12% of the service provision in relation to the performance of the Landlord's covenants at clauses 5(3)(c) and 5(4).
7% of the remaining service provision.

35. In respect of Flat 4, 160-164 Royal College Street, London NW1, amend the Lease as follows:

6.1 Redefine the Building as "*The Building situate upon the Property comprising 158 and 160-164 Royal College Street, London NW1 OTA*"

6.2 Substitute, on page 2 of the lease, the following wording in respect of the definition of the "*Service Charge, Specified Proportion of Service Provision (Clause 7)*":

12% of the service provision in relation to the performance of the Landlord's covenants at clauses 5(3)(c) and 5(4).
7% of the remaining service provision.

36. In respect of Flat 5, 160-164 Royal College Street, London NW1, amend the Lease, as follows:
- 7.1 Redefine the Building as *“The Building situate upon the property comprising 158 and 160-164 Royal College Street, London NW1 OTA”*
- 7.2 Substitute, on page 2 of the lease, the following wording in respect of the definition of the *“Service Charge, Specified Proportion of Service Provision (Clause 7)”*::
- 12% of the service provision in relation to the performance of the Landlord’s covenants at clauses 5(3)(c) and 5(4).
7% of the remaining service provision.
37. In respect of Flat 6, 160-164 Royal College Street, London NW1, amend the Lease as follows:
- 8.1 Redefine the Building as *“The Building situate upon the Property comprising 158 and 160-164 Royal College Street, London NW1 OTA”*
- 8.2 Substitute, in place of the figure of 16% at paragraph 7 on the first page of the Lease (under the heading *“Tenant’s share”*), the following wording:
- *16% of the total expenditure incurred by the Landlord in carrying out its obligations under clauses 4(5)(a)(ii) (on page 14 of the Lease relating to the Common Parts), 4(5)(b)(ii), 4(5)(d), 4(5)(h), 4(5)(i) and 4(5)(k).*
 - *9% of the total expenditure incurred by the Landlord in carrying out all its obligations under clause 4(5) save for its obligations under clauses 4(5)(a)(ii) (on page 14 of the Lease relating to the Common Parts), 4(5)(b)(ii), 4(5)(d), 4(5)(h), 4(5)(i) and 4(5)(k).*
38. In respect of the Ground Floor and Basement, 158, 160-164 Royal College Street London NW1, amend the Lease as follows:
- 9.1 Redefine the Building as *“The Building situate upon the property comprising 158 and 160-164 Royal College Street London NW1 OTA”*
- 9.2 Substitute, in place of the wording set out at paragraph 2.2(1), to pay a fair proportion, the following:
- “Within 14 days of demand, 42% of the amount from time to time properly incurred by the Landlord in effecting insurance pursuant to the Landlord’s obligations under clause 4.2 of this Lease”*

- 9.3 Substitute, in place of the wording set out at paragraph 2.2(2), to pay a fair proportion of the service charges, the following:

“Within 14 days of demand, 42% of the amount (including professional fees, and any irrecoverable input value added tax properly incurred) from time to time incurred by the landlord in performing its obligations under clause 4.3 of this lease including reasonable and proper managing agents fees but not in respect of collection of the rents hereby reserved (or, if the Landlord does not employ management agents, a reasonable sum by way of a management charge but not in respect of collection of rents hereby reserved).”