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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/LVT/2015/0008**
Property	:	**Carlton Hill Estate**
Applicant	:	**City of Westminster**
Representative	:	**Judge & Priestley**
Respondent	:	**Various Leaseholders as per the application.**
Representative	:	
Appearances at the Hearing	:	**<u>For the Applicants:</u>** **Mr. S. Kokelaar of Counsel** **Mr. M. Oakley – Judge & Priestley Solicitors** **Ms. G. Wingham – Policy and Procedures Manager (City West Homes** **Mr. J. Green – Trainee Solicitor** **Ms. K. James – Observer.** **<u>For the Respondents:</u>** **Mr. R. Taylor** **Mr. L. Curtin** **Mrs. Nakamura** **Ms. A. Thomas** **Mr. L. Falek and Ms. D. Rich**
Type of application	:	**Variation of a lease by a party to the lease**
Tribunal member(s)	:	**Ms. A. Hamilton-Farey** **Mrs. E. Flint**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**8 January 2015.**

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DECISION

Decision:

1. The tribunal determines that the type 'A' Leases shall be varied as follows:-

Clause 3(a) is amended so that the words *'the due proportion'* is amended for *'a fair and reasonable proportion'; that*

Clause 3(b) be amended so that the words *'the due proportion'* is amended to *' a fair and reasonable proportion'; that*

Clause 3(b) be amended so that the words commencing *'such due proportion........ in the said Tenth Schedule is the denominator'* be deleted and substituted with *'such fair and reasonable proportion determined as aforesaid being a proportion of the total sum expended or retained by the Lessor as aforesaid in respect of or otherwise for the benefit or use of the property'.*

Clause 3(c) be amended so that the words *'the Due Proportion'* be amended with *'a fair and reasonable proportion'.*

2. Type B lease shall be amended to record that the words *'the due proportion'* in Clause 3(A), 3(B) and 3(C) shall be substituted with *'A fair and reasonable proportion.*

3. That no compensation be payable to the respondent leaseholders.

Background

a) By an application dated 24 July 2015 the applicants sought a variation of the leases held by the leaseholders of Blocks on the Carlton Hill Estates, London NW8 9XE, known as Bradby, Knoll, Elmfield, Foss and Garland House. The Estate comprises 52 flats, spread over 5 blocks (named above) 48 of which are occupied on long leases, 3 are let on secure tenancies and one is occupied by a resident caretaker.

b) The application was opposed by 9 of the leaseholders.

c) It is common ground that all of the leases impose an obligation on the respondent leaseholders to pay service charges to the applicants. It is also common ground that there are three different forms of lease, known as A, B and C.

d) Of the 48 leases, the tribunal was informed that 42 are Type A or B with 6 being Type C.

e) Directions were issued by the tribunal on 18 August 2015 which required amongst other things the exchange of statements of case and reply and any other documents on which the parties wished to rely. Specimen copies of the leases and the variations sought were included with the application.

f) A hearing of the application took place on 17 November at which the parties listed above attended. Various authorities and other tribunal decisions were produced in evidence, they have been considered by the tribunal although not individually referred to. On 19 November the tribunal received copies of the track-changed documents in relation to the Type A leases.

g) Mr. Kokelaar on behalf of the applicants took the tribunal through the documents and the leases. He drew attention to the definitions of the estate, block and common parts, and in relation to the Type A lease the 10th Schedule. He informed us that each of the leases placed an obligation on the leaseholder to pay a due proportion of the management charges incurred by the lessor. The management charges included the costs and expenses incurred by the lessor in carrying out its obligations under the lease.

h) Clause 3(b) of the lease Type A defines the due proportion as;

'..a percentage of the total sum expended or retained by the Lessor as aforesaid in respect of the Property and shown in the Schedule of percentages being the Tenth Schedule hereto which percentage shall be calculated as a fraction of the total Management Charges of which fraction the full purchase price of the demised premises as shown in the said Tenth Schedule is the numerator and the total purchase price for the total number of the flats in the property as shown in the said Tenth Schedule is the denominator.'

i) The said Tenth Schedule contains a table that identifies the Schedule of Percentages for Hamilton Terrace/Carlton Hill Estate. The total purchase price for the number of the flats was identified at £716,600 (the denominator) with the individual purchase prices for the flats of which there are four different amounts being the numerator. It is not known from where these values derive as they do not correspond with the actual sales prices of the flats when originally sold, and identified on the individual leases.

j) Although the schedule refers to 51 units on the estate it has been agreed by the parties that there are in fact 52 units and the tribunal therefore does not have to rule on this issue.

k) Mr. Kokelaar said that the applicants wished to vary the service charge provisions in the Type A and Type B leases because they did not allow the lessor to recover 100% of the service charges in each block. He said

that the clauses in those leases allowed for a contribution by reference to the Tenth Schedule (contained in the Type A lease) which in effect was a fixed percentage, calculated on an 'estate-wide' basis. The Type C lease allowed for a 'fair proportion' to be charged and made no reference to the 10th Schedule. The applicants wished to change each of the leases to record a contribution by each lessee based on a 'fair proportion' basis.

l) It was agreed by the parties that the Type B lease calculates the proportion of the service charge on the same basis as Type A, and contains the same proportions, even though Schedule 10 does not form part of the lesae.

m) Currently the applicants calculate the fair and reasonable proportion by calculating the number of bed-spaces in any block and apportioning costs on that basis. Mr. Kokelaar said that this method was found to be fair and reasonable in a previous case involving the applicants and *3 -5 Orsett Terrace, London W2 6AJ [LON/00BK/LSC/2009/0573]*.

n) He referred to the applicants statement of case and Appendix 3 **[127]** where he said that it could be seen that because of the estate-wide calculation basis, the applicant was unable to recover all of the costs claimed for any particular block-specific costs, and therefore would have to recover any shortfall from the remainder of the estate, or absorb it itself. He said that the applicant currently aggregated all of the service charge expenditure over the estate and then apportioned those costs in accordance with the lease.

o) That on a true construction of the leases the landlord was unable to spread the costs in this manner and wished to regularise the position.

p) He said that this was unsatisfactory, and that there was no good reason why leaseholders should not bear the costs in relation to the expenditure on their individual blocks, and that leaseholders in one block should not subsidise the block expenditure of other leaseholders. There appeared to be no dispute that there was an estate charge which was payable by each leaseholder.

q) He demonstrated this 'unfairness' when considering the costs for the proposed major works, which if the current system persisted would involve those leaseholders of Bradby and Knoll Houses contributing approximately £46,000 of costs incurred on the other blocks.

r) In the applicants' opinion the variation sought would address the problems of under/over recovery; enable the landlord to apply different percentages between the blocks and estate. That a fair and reasonable proportion calculation was more modern and more flexible in that it allowed for changes in the percentage charges if for example there were changes to the bed-space allocations.

s) Mr. Kokelaar confirmed that, in the applicants' view the Type A and Type B leases met the tests under S.35(2)(e) and (f) of the 1987 Act, in

that the leases failed to make satisfactory provision for the recovery by one party to the lease from another party, and that it failed to make satisfactory provision for the computation of service charge payable under the lease. He also said that if the respondents accepted there was a problem with the Type B lease, then by definition there was a problem with the Type A lease as well.

t) A schedule of the current and proposed percentage charges to leaseholders and the resultant costs was included in the bundle.

The Respondents' case:

u) Mr. Taylor on behalf of the respondents said that in their view the leases entitled the applicants to recover 100% of the costs over all of the estate. They believed that it was right and proper that the applicants should be able to do so, and that there was no dispute over that issue.

v) The respondents believed that the most appropriate course of action would be to vary Lease Type C so that it corresponded with Types A and B. That Type B should be varied to link it to the Schedule 10 in Type A and that would remedy any problems. It was accepted by the respondents that the Type B lease entitled the applicants to recover costs on an estate-wide basis.

w) It does not appear from the correspondence and the evidence of the parties that there is any dispute that each property should pay a proportion of the estate costs.

x) The respondents relied on a strict interpretation of Clause 3(b) of the lease (see (h) above), and suggested that the applicants should add the percentages relevant to each block and then divide them by the total x 100 to arrive at the percentage to be charged to each lessee. For example in Bradbury House there were 5 x 1bed units, each liable for 1.35% and 5 x 4 beds, each liable for 2.85%, making a total of 21%.

y) If the respondents calculations were adopted this would result in a calculation based on the values in the 10th Schedule for Bradbury of 1.35/21 x 100 = 6.42% (1 bed) or 13.57% for a 4 bed. Leading to a total contribution of 99.95%, plus an estate charge to each person of 2.797% (4 bed) and 1.323% (1 bed).

z) If the applicants calculations were approved, then these figures would change to 16.66% (block 4 bed) and 3.33% estate (4 bed) and 3.333% (1 bed) and 0.667% estate (1 bed).

aa) The respondents considered that their method of apportionment was more fair and that the winners and losers on the estate accepted that the leases as presently drawn.

bb) The table of the resultant service charges was at pages **[210-211]** in the bundle.

cc) The respondents did not support that view that the leases required re-writing, they felt that all service charges should be spread on a community basis across the estate and that an amendment to the 10th Schedule would achieve the required result. They also felt that by staying with the current arrangements, leaseholders could check their costs, that they could be certain that major works, that had been put on hold due, they thought to this application, would go ahead and that they would be able to compare like for like calculations.

Compensation:

I. As far as the respondents were concerned they said there would be substantial prejudice if the leases were amended as suggested.

II. They produced a table that utilised the last major works contract and therefore used historic costs. They had discounted these amounts, but then extrapolated them into perpetuity because they considered that any prejudice would continue past any lease variation date, and that higher service charges would have a negative effect on the value of the leasehold interests..

III. They also felt that, if the major works contract proceeded with the new percentages then several leaseholders would be prejudiced because they would pay more towards the cost, and that it was right that the leaseholders should share the costs equally.

IV. Mr. Kokelaar said that no compensation was payable to the respondents under S.38(6) of the Act, that there was a windfall to some leaseholders under the current arrangements that was not fair or reasonable to other leaseholders or the landlord. That there could not be any prejudice if a leaseholder was deprived of something they never should have had in the first place.

Reasons for the Decision:

V. The tribunal has considered all of the evidence and finds that the leases do not make satisfactory provision for the calculation of service charges in relation to the blocks and also that they do not provide for the recovery from one party to the lease from the other.

VI. In essence the problem for the landlord is that the current leases have evolved over time, and the Type C lease being more modern has dispensed with the 10th Schedule, using a fair proportion mechanism.

VII. The tribunal agrees that it is not possible with the current drafting of the Type A or B leases for the landlord to recover the costs on a block by block basis, and that it is not reasonable to expect leaseholders to pay for works carried out on other blocks on the estate as under the current arrangements.

VIII. The applicants have used the 'bed-space' apportionment method which in this tribunal's view is a fair and reasonable way of splitting costs

between the blocks. The respondents have accepted that the leaseholders are liable for an estate charge and it is, in our opinion, fair and reasonable that this should be split on a similar basis.

IX. The schedules produced at pages **210 – 211** show that there will be advantages and disadvantages to individual leaseholders, but some have received a windfall in not having paid the full service charge for the property for several years. It is only right, in this tribunal's view, that leaseholders pay the due amount for their individual block, and that neither the leaseholders nor the landlord should not be required to subsidise the expenditure because there is an inconsistency in the drafting of the leases.

X. No cross application was made by the respondents Under S.36 of the Act to vary the leases in any other way, and the respondents' case does not appear to be supported by a majority of the leasehold owners.

XI. With respect to compensation payable, it is for the respondents to show that there would be substantial prejudice to them if the variation took place. Although they have referred to previous major works costs and extrapolated them into perpetuity, with respect, in this tribunal's view that is not the correct approach. The respondents referred to a possible diminution in the value of the leasehold interests, but produced no evidence to support that claim. Their view that the winners and losers should share the costs is not supported by the majority of leaseholders, and given that some leaseholders have received a windfall by not paying their full contribution for several years, cannot amount to a prejudice in our view. Also in our view, there cannot be any compensation payable where a leaseholder is required to pay a fair and reasonable proportion of expenditure for their block.

XII. We therefore determine that the lease Type A should be varied in accordance with the track changed documents submitted to the tribunal, and that no compensation be payable to the respondents.

XIII. In order to ensure that all leases applied the same method of service calculation, the Tribunal also varies Clause 3(A), (B) and (C) to record that 'the due proportion' calculation is substituted by 'a fair and reasonable proportion'.

Tribunal: Ms. A. Hamilton-Farey

Mrs. E. Flint FRICS, IRRV.

<u>Section 35 of the Landlord and Tenant Act 1987</u>

35.— Application by party to lease for variation of lease.

(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) 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 any such common parts.

(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 amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.

(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 3 the whole of any such expenditure.

(5) Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002 and Tribunal Procedure Rules shall make provision—

(a) for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and

(b) for enabling persons served with any such notice to be joined as parties to the proceedings.

(6) For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—

(a) the demised premises consist of or include three or more flats contained in the same building; or

(b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

(8) In this section "service charge" has the meaning given by section 18(1) of the 1985 Act.

(9) For the purposes of this section and sections 36 to 39, "appropriate tribunal" means—

(a) if one or more of the long leases concerned relates to property in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) if one or more of the long leases concerned relates to property in Wales, a leasehold valuation tribunal.