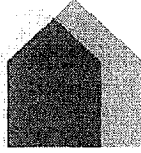


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Residential
Property
TRIBUNAL SERVICE

Case reference: LON/00AG/LVT/2009/0009

**DECISION AND ORDER OF THE LONDON LEASEHOLD VALUATION
TRIBUNAL ON AN APPLICATION UNDER SECTION 35 OF THE
LANDLORD AND TENANT ACT 1987**

Property: Flats 9A and 21 and The Lodge, Brookfield, Highgate
West Hill, London N6 6AS

Applicant: Daejan Investments Limited

Respondents: Robert Andrew Wheeler (Flat 9A)
I Whittaker and L Jourdan-Whittaker (Flat 21)
Mohammed Atif Mughal (The Lodge)

**Determination without an oral hearing in accordance with regulation 13
of the Leasehold Valuation Tribunals (Procedure) (England) Regulations
2003**

Tribunal: Margaret Wilson

Date of decision: 4 February 2010

Background

1. This is an application by Daejan Investments Limited ("the landlord") under section 35 of the Landlord and Tenant Act 1987 ("the Act") to vary the leases of properties on the Brookfield Estate, which is a development of 60 flats in eight purpose built blocks known as Brookfield Mansions, and The Lodge.

2. The determination is made on the basis of the written representations alone and without an oral hearing in accordance with the procedure set out in regulation 13 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 and by a single member of the Panel in accordance with regulation 13(5). In pre-trial directions dated 2 December 2009 the respondents were directed to respond to the application no later than 4 January 2010 but none of them has done so or requested an oral hearing.

3. The landlord was formerly the freehold owner of the whole development. In May 2008 and December 2008 respectively the freehold of Flats 25 to 56 and the freehold of Flats 5 to 8 were acquired by their respective leaseholders under the provisions of Part I of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"). The landlord continues to own the freehold of Flats 1 - 4A and 9 - 24 Brookfield Mansions and The Lodge, comprising 24 properties in all, 21 of them subject to long leases in the same form. The original leases were for terms of 99 years from 29 September 1976, but 12 of them have been extended under the provisions of Chapter 2 of the 1993 Act.

4. Clause 2(2)(a) of the leases provides that the leaseholder must pay a specified percentage of the landlord's costs as a service charge. The percentage in the original leases was based on the rateable value of the demised property such that 100 per cent of the landlord's expenses was recoverable from all the leaseholders together. As a consequence of the enfranchisements the service charge percentages of the properties of which the landlord retains the freehold became less than 100 per cent.

5. Following the enfranchisements the landlord sought to obtain the consent of the leaseholders of the 21 flats on long leases which remained in its freehold ownership to enter into deeds of variation to adjust the service charge percentages so that the recoverable service charges amounted to 100 per cent of the landlord's costs in relation to those flats. At the date of the application, 17 of the 21 leaseholders had entered into or were in the course of entering into deeds of variation to revise the percentage of service charges payable, but the leaseholders of Flats 9, 9A and 21 Brookfield Mansions and The Lodge had not. However the tribunal was informed by a letter dated 13 January 2010 from Wallace LLP, the landlord's solicitors, that Ms Wilcox, the leaseholder of Flat 9, had entered into a deed of variation and, by a letter dated 21 January 2010, that Mr Wheeler, the leaseholder of Flat 9A, had agreed to so. I assume that the deed relating to Flat 9A is not complete and that an order is still required.

6. The service charge percentages which the landlord proposes in respect of Flats 9A and 21 and The Lodge are set out in appendix 1 to the application. I am told and accept that they are based on the floor areas of the properties as found from a measured survey carried out on the instructions of the landlord. The proposed percentages are: 2.624167 for Flat 9A, 5.018973 for Flat 21 and 0.898895 for The Lodge. A copy of the proposed form of deed of variation is attached to the application as appendix 3.

The law

7. Subsection 35(1) of the Act provides that:

any party of a long lease of a flat may make an application to a leasehold valuation tribunal for an order varying the lease in such manner as is specified in the application.

8. The grounds upon which such an application may be made include that the lease fails to make satisfactory provision with respect to:

(f) the computation of a service charge payable under the lease.

By subsection 35(4)(c), for the purposes of subsection 2(f) a lease fails to make satisfactory provision with respect to the computation of a service charge if:

the aggregate of the amounts that would, in any particular case, be payable by reference to ... proportions [payable by other tenants]... would either exceed or be less than the whole of such expenditure.

9. By subsection 38(8) of the Act:

A tribunal may, instead of making an order varying a lease ... make an order directing the parties to the lease to vary it in such manner as is specified in the order ...

Decision

10. I am satisfied that the leases of Flats 9A and 21 and The Lodge fail, within the meaning of subsection 35(2)(f) of the Act, to make satisfactory provision with respect to the computation of a service charge and that it is appropriate to direct that these leases be varied by deed to provide for the service charge proportion payable by each of the leaseholders of those flats to be in the proportion set out in appendix 1 to the application.

11. My only misgiving is that it may be that The Lodge is, in law, not a flat but a house. I have not seen The Lodge, nor a photograph of it, but the lease plan appears to suggest that it may not be a flat which would fall within the definition of a flat for the purpose of Chapters 1 and 2 of the 1993 Act. Subsection 35(1) of the Act enables applications to be made by a party to a long lease of a flat. *Flat* is not defined in the Act, but it is notable that section 40, which relates to applications to vary leases of dwellings other than flats,

suggests that the draftsmen of the Act did indeed intend that the provisions of Part IV of the Act, with the exception of section 40, should not apply to houses.

12. Common sense suggests that the order should be made in relation to all three properties held by the respondents, and I am prepared, in the circumstances, to make the order. If indeed The Lodge is not in any sense a flat, and if the point is taken, it may be that the leaseholder of the Lodge cannot be compelled by virtue of this order to complete the proposed deed of variation relating to his property.

13. Accordingly I order that the leases of Flats 9A and 21 and The Lodge be varied by deed in accordance with the landlord's application.

CHAIRMAN.....

DATE.....