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Residential
Property
TRIBUNAL SERVICE

**LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL**

Landlord and Tenant Act 1985 – Section 27A

Landlord and Tenant Act 1987 – Section 35

LON/00AW/LSC/2010/0203

Property : 192 Cromwell Road London SW5 0SN

Applicant : C H Chesterford Limited **Landlord**

Represented by : Mr A Tilsiter, Director

Respondents : **Group A**
See Appendix 1 Attached

Represented by : **Miss Rosemary Toppin Flat 1**
Group B
See Appendix 1 Attached

Represented by : **Miss Anna Vuckovic** **GF (Rear)**

Date of Applications: 18 March 2010

Date of Hearing : 17 June 2010

Date of Decision : 16 August 2010

Tribunal : **Mr John Hewitt** **Chairman**
Mr Neil Martindale
Ms Sue Wilby

Decision

1. The decision of the Tribunal is that:
 - 1.1 It is noted that the application made pursuant to s27A landlord and Tenant Act 1985 (LTA 1985) was withdrawn by the Applicant;
 - 1.2 The application made pursuant to s35 Landlord and Tenant Act 1987 (LTA1987) is dismissed.

NB Later reference in this Decision to a number in square brackets ([]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Background

2. The Property was constructed or adapted in or about 1976 to comprise a number of residential flats with communal parts. A communal boiler was installed providing hot water and central heating to the flats. A sample lease of that era is the lease granted to Miss Rosemary Toppin [23].
3. Subsequently the Property was further adapted and currently it comprises ten flats:

Lower ground floor:	2 flats;
Ground floor:	2 flats;
1 st floor:	2 flats;
2 nd floor:	2 flats;
3 rd floor;	1 flat; and
4 th floor:	1 flat.
4. On 15 October 2003 the Applicant was registered at the Land Registry as the proprietor of the freehold interest of the Property. At that time the freehold was subject to and with the benefit of ten residential leases. Relevant details are set out in Appendix 1 to this Decision. It will be noted that the Respondents are split into two groups; Group A

and Group B. The reason for this is simply that historically Group A lessees have been charged for boiler repairs and hot water costs whereas the Group B tenants have not.

5. Following acquisition of the Property in 2003 the Applicant appointed HML Hawksworth Limited to be its managing agents. A dispute arose as to the service charge contributions payable by some tenants. In essence the Group B tenants, who have their own individual boilers and who do not rely on the communal system, objected to contributing to the costs associated with the communal system. The Group A tenants asserted that the leases as drawn provide (or should provide) for fixed percentages of all costs (including heating and hot water) across all ten flats and this apportionment should be applied by the freeholder regardless of whether or not some individual tenants have their own independent boiler.

6. On 18 March 2010 The Applicant made two applications to the Tribunal:
 1. Pursuant to s27A LTA 1985 [6]; and
 2. Pursuant to s35 LTA 1987 [13].Directions were given on 14 April 2010 [42]

7. The applications came on for hearing before us on 17 June 2010. Mr A Tilsiter said that he was a director of the Applicant company and he presented the case on behalf of the Applicant. Two tenants, Miss Toppin and Miss Vuckovic attended and represented themselves in person. Miss Rosemary Toppin was supported by Mr Parker. Miss Toppin is a Group A Respondent but she was not formally appointed to represent the all of the Group A tenants. Miss Anna Vuckovic is a Group B Respondent but she was not formally appointed to represent all of the Group B tenants.

8. At the outset we were told that the matters raised in the S27A LTA 1985 application were all now resolved by agreement and Mr Tilsiter requested that the application be withdrawn. This was agreed.
9. The only issue to be determined was that raised in the s35 LTA 1987 application.

The leases

10. All ten flats are now let on long leases. The leases have been registered at the Land Registry. Copies of the leases and recent Land Registry Official Copies of the respective registrations are at [86-352]. Relevant information is summarised in Appendix 1 for ease of reference.
11. To a large extent the leases are in common form; but there are some key differences.
12. The lease structure and the general provisions were not in issue.
13. It is helpful to note that each lease contains a 'Terms of other leases' covenant on the part of the landlord (generally clause 5.2):

"That every lease or tenancy agreement of a flat in the Building hereafter granted by the Landlord shall contain regulations to be observed by the tenant thereof in similar Terms (mutatis mutandis) as those contained in the Fourth Schedule hereto and also covenants of a similar nature (mutatis mutandis) to those contained in Clause 4 of this Lease."

Clause 4 sets out covenants on the part of the tenant which include the obligations to pay the service charge. Clause 4(4) in each lease reads:

"Pay the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule hereto both such Charges to be recoverable in default as rent in arrear"

14. All leases (save for one) include a covenant on the part of the landlord to provide and maintain a system for the supply of hot water and central heating. The wording varies (slightly) in some leases but a common example of the covenant is [152]:

“To use reasonable endeavours to maintain at all reasonable hours through any system existing at the date hereof for the supply of hot water from a central heating system but not otherwise an adequate supply of hot water to the Building and during the period from the First day of October to the First day of May next following to provide sufficient and adequate heat to the radiators (if any) for the time being fixed in the Demised Premises or in any other part of the Building unless the Landlord shall be unable to perform this covenant by reason of the act neglect or default of the Tenant ... or by reason of any breakdown or interruption of the supply of fuel or current or other cause whatsoever over which the Landlord has no control and the Landlord shall not be liable for any loss ... which the tenant may sustain through the imperfect or irregular supply of hot water or heating to the Demised Premises”

15. The one exception is ground floor rear flat let to Miss Vuckovic which provides in clause 5(5)(g) a covenant on the part of the landlord as follows:

“To maintain and renew when required any existing central heating and hot water apparatus in the Building and all ancillary equipment thereto other than that contained in and solely serving the Demised Premises”

The gist of the case for the Applicant

16. Mr Tilsiter had no contemporaneous information as to the circumstances prevailing when the respective leases were granted. His company acquired the freehold reversion in 2003 and thus inherited the service regime as set out in the leases.

17. Mr Tilsiter suggested that in essence there is an anomaly with regard to the treatment of the running costs of the communal boiler and the provision of hot water. This appears to have arisen due to adaptations carried out to the building since 1976 coupled possibly with poor drafting of some of the later leases. It seems that initially the service charge strategy was that there were to be 2 flats per floor save for the 3rd and 4th floors where there would (or might) be one flat only; but that these two flats would be close to twice as big as the others. The service charge was divided into 12 units with one unit applied to each flat save for the 3rd and 4th floor flats which were apportioned two units each i.e. one sixth each. Most leases make reference to one twelfth or one sixth rather than to percentages (for ease of computation in the Appendix we have adopted the percentages which the Applicant has applied and used for service charge recovery purposes. Evidently it was also envisaged in the late 1970s that the communal boiler would serve each of the flats in the Property.

18. It seems that between 1988 and 1990 three more flats were modernised or upgraded by the landlord and new long leases of them sold off. The landlord installed individual boilers into these flats and they do not appear to be connected to the communal system. Nevertheless two of the leases oblige the landlord to provide and maintain the existing central heating and a supply of hot water, see [274 and 305] and in both of those cases the lessees' contribution to the service charge was one twelfth. The third lease granted in 1990 also records the tenants' contribution to the service charge to be one twelfth but omitted an obligation on the landlord to provide and maintain the central heating system and a supply of hot water. Tucked away in clause 7(5) [246] was a clear statement to the effect that the tenant was not to be in any way responsible for the costs and expenses incurred in connection with the maintenance, renewal or repair or supply of central heating and hot water.

19. In 1999 a long lease of the third floor flat was sold. Prior to sale the then landlord had installed into the flat an independent central heating and hot water system. The Tenant's Share of Total Expenditure was defined to be:

"16.666% excluding boiler and gas supply expenses and 22.50% boiler and gas supply expenses (subject to the provisions for variation hereinafter contained)"

Mr Tilsiter was unable to explain why it was that a flat with its own independent supply of central heating and hot water should pay in effect an additional surcharge on these items over and above its basic service charge liability.

Nevertheless clause 5.5.9 of the lease [336] imposes an obligation on the landlord provide a central heating and hot water system to the building.

The variation provision referred to was in the following terms:

"If at any time during the term the demised Premises and/or the Building enjoying or capable of enjoying the benefit of any if the services hereunder is increased or decreased on a permanent basis or the benefit of any of the services is extended on a like basis to any adjoining or neighbouring property or if some other event occurs a result of which is that the Tenant's share of Total Expenditure is no longer appropriate to the Demised Premises the service charge percentage shall be varied with effect from the quarter day following such event by the Landlord in such manner as it shall determine to be fair and reasonable in the light of the event in question and whose decision shall be binding on the Tenant (except in case of manifest error) except that nothing contained in this lease shall imply an obligation on the part of the Landlord to provide the services/items to any adjoining or neighbouring property"

20. Mr Tilsiter asserted that from about the late 1980s the then landlord had prepared two service charge schedules; 1 and 2 and that the costs

of running the boiler and the supply of heating and hot water were dealt with in Schedule 2. Mr Tilsiter did not produce any evidence to support this assertion. The Schedule 2 percentages the Applicant has adopted for the years 2007 to 2009 are as set out in the appropriate column of Appendix 1.

21. Mr Tilsiter said that the current boiler was installed into the basement of the building some 5 or 6 years ago and that it was a gas fired boiler. It appeared to be common ground that two tenants in Group A (highlighted in green in Appendix 1) had unilaterally installed independent boilers into their respective flats with seeking landlord's consent or a variation of their leases.
22. Mr Tilsiter submitted that the leases should be varied to correct the anomaly and to make it clear what the service charge liability was for each tenant. The text of his proposed variation is at [3]. In essence he submitted that the boiler, hot water and heating costs should be borne solely by the Group A tenants. Also he sought a variation to each lease so that the proportion of expenditure payable by each tenant would be "*as the Landlord shall reasonably determine.*" Mr Tilsiter indicated that if given the power to vary the service charge proportions the Applicant would seek to recover the boiler and gas costs from those lessees who had the benefit of and took advantage of the communal system. If only one lessee did so that lessee would bear 100% of the costs incurred.
23. In his final submissions Mr Tilsiter said that the Applicant took a neutral position; it simply wants clarity and to recover 100% of outlay. He said that the Tribunal has the power to vary the leases if it considers it reasonable to do so. He said that the test of reasonableness should apply to the landlord, the tenants in general or to a group of tenants. In response to submissions of unfairness raised by Miss Toppin, Mr Tilsiter submitted that the Act was not concerned with fairness.

The gist of the case for Miss Toppin

24. Miss Toppin opposed the application. Evidently Miss Toppin is the longest serving resident in the building. Miss Toppin told us that she moved into the building in 1975 and originally she rented her flat. The then landlord offered to sell her a long lease of her flat and she agreed terms. Her lease is at [23]. At that time the building was served by a communal boiler and her flat did not have its own individual boiler. Miss Toppin said that her lease obliges the landlord to provide a supply of hot water and heating. Her lease obliges her to contribute one twelfth of the costs incurred by the landlord and this includes the costs of the supply of hot water and heating. Miss Toppin said that continues to be willing to contribute her one twelfth share. She does not see why an obligation to pay a higher share should be foisted upon her. She said that it was unfair that the landlord should seek to increase the burden upon her. She also was strongly opposed to the landlord having the right to unilaterally increase or decrease the percentage of service charge expenditure payable by her.
25. Miss Toppin also explained that in the late 1980s the then landlord recovered possession of the basement and ground floor of the building and he carried out works of refurbishment and created the flats as they are today. She said that she was aware that the landlord had put independent boilers into some flats. She also said that at about that time the managing agents changed the service charge proportions and introduced the Schedule 2. She said that the then landlord sought to recover from her an increased proportion of the costs attributed to the communal boiler and the supply of heating and hot water. Miss Topping said that she queried this with the landlord at the time and she has continued to query it ever since.
26. Miss Toppin is concerned that if she were to be the only tenant taking heating and hot water from the communal system she could be saddled with 100% of the costs associated with that system. This is not just the cost of fuel but also repairs and maintenance to (and if

necessary renewal of) the communal boiler and its related equipment and pipe work.

27. Miss Toppin is also wary and she explained that she has had several landlords over the years and she is not confident that they can be trusted. She does not consider that the Applicant should be given carte blanche.
28. Mr Parker in supporting Miss Toppin submitted that having granted the original leases if the then landlord refurbished part of the building and sold new long leases which granted concessions to the tenant (e.g. by way of independent boilers), any irrecoverable service charge contributions should be borne by the landlord, not shared among the original lessees. He also submitted that the Applicant was seeking to vary the leases so that tenants paid what the landlord considered to be fair and reasonable but that it was plain that some tenants would be disadvantaged but the Applicant was not saying who or in what respect.

The gist of the case for Miss Vuckovic

29. Miss Vuckovic purchased her lease in 1989. It is at [298]. Miss Vuckovic said that she was not aware until recently that there was a communal boiler in the building. She said that it was not until last year that the landlord has sought to recover from her any contribution to the communal boiler. She said that she had only ever been asked to pay Schedule 1 expenditure. Miss Vuckovic submitted that that she was not connected to the communal system and did not enjoy any benefit from it and should not be obliged to contribute to the cost of it. Miss Vuckovic thus supported the Applicant's application.
30. Miss Vuckovic accepted that in her lease her contribution to Tenant's Share of Total Expenditure was one twelfth and that the landlord was obliged by clause 5(5)(g) [305] to maintain and renew when required

any existing central heating system and hot water apparatus in the building.

The law

31. Section 35 of the LTA 1987 permits any party to a long lease of a flat to make an application to the Tribunal for an order varying the lease in such manner as is specified in the application.

Subsection 35(2) sets out the grounds on which such an application may be made and broadly these are that the lease fails to make satisfactory provision with respect to a number of matters including:

(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 a number of persons who include that other party; and

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

Subsection 35(4) provides that 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.

32. Further provisions are set out in section 38 which provides that the Tribunal may vary the lease(s) as it thinks fit. By subsection 38(6) the Tribunal may not make an order if it appears to the Tribunal:

(a) that the variation would be likely substantially to prejudice
(i) any respondent to the application, or

- (ii) any person who is not a party to the application and that an award under subsection 10 (compensation) would not afford him adequate compensation, or
- (b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected.

Findings of fact

33. Unhappily the background facts were relatively sparse. Miss Toppin has lived in her flat since the mid 1970's and spoke about matters going back to that year. Miss Vuckovic has lived in her flat since 1989 and spoke about matters going back to that year. We found both of them to be honest and careful witnesses upon whom we can rely with confidence and we have no hesitation in accepting the evidence which they gave to us.

34. From this evidence we infer that in the 1970's the then landlord carried out adaptations to the building with a view to creating or refurbishing flats for sale on long leases. At that time the whole of the building was not available to the landlord and thus the project would take some time. The then landlord installed a communal boiler to serve the existing flats available to him flats and, we infer, the remaining flats as and when he obtained possession or permission to carry out works.

35. We infer that the landlord contemplated two flats per floor and so anticipated creating twelve units within the building and established a service charge regime obliging each tenant to contribute one twelfth of expenditure. However in the event that one of more flats should comprise the whole of a floor, that flat would contribute one sixth of expenditure i.e. twice as much.
Between 1977 and 1982 five leases were granted on this basis. All of them were connected to and enjoyed the provision of the communal hot water and central heating system.
We find that service charge demands were raised by the then landlord and that each of the five tenants concerned were billed for the one

sixth or one twelfth of the costs of the heating and hot water system, as the case may be. Miss Toppin's evidence on these matters was compelling.

36. Between 1988 and 1990 the landlord was able to refurbish three further flats and to sell long leases of them. These are the first three of the Group B flats listed in the Appendix. The evidence before us suggests that these flats were not connected to the communal system and that the then landlord appears to have installed independent boilers into each of them. We accept Miss Vuckovic' evidence and we find that she has her own independent boiler in her flat. We also find that she was unaware of the communal boiler until quite recently.
37. The leases of these three flats are different in different respects. Two of them oblige the landlord to provide and maintain provision for the supply of heating and hot water and both of those leases oblige the tenant to contribute to the costs incurred. It is only the lower ground floor front flat lease which does not. The lease of this flat expressly excludes an obligation to contribute to the costs of the boiler and gas supply. It is unfortunate that the Applicant did not adduce any evidence concerning the circumstances in which the decision was taken to install independent boilers into these flats and what the thinking or strategy was as regards the implications for the service charge regime. We find that following the grant of these leases the then landlord sought to adjust the service charge liability for the Group A lessees and sought to impose the Schedule 2 apportionment of the costs of the boiler and gas.
38. Subsequently the confusion was compounded by the grant of long leases in 1999 and 2001 for flats each with an independent boiler but in both cases the landlord is obliged to provide a central system and in both cases the tenant is obliged to contribute to the costs incurred.

Discussion

39. The original scheme and the service charge regime set up in the late 1970s seems to have been logical. There was a communal boiler servicing each of the flats and the service charge contribution was to be one twelfth where the flat was half a floor and one sixth where a flat was the whole of a floor. This basic system provided the landlord with 100% recovery of service charge expenditure. It is also clear that this regime was to be replicated in each of the long leases subsequently to be granted by the landlord. In particular the obligation to pay the service charge and the interim charge as defined was to be replicated – see the ‘Terms of other leases’ clause in each of the leases.
40. The current problem has arisen because it appears that in breach of the ‘Terms of other leases’ clause the then landlord granted leases which have different service charge obligations. This appears to have come about partly possibly due to the installation of independent boilers in those flats and partly possibly due to other commercial factors; we simply do not know.
41. It seems to us fundamentally wrong in principle that the Group A tenants should be affected adversely by reason of the landlord’s breach of covenant. The tenants who covenanted to pay one twelfth or one sixth of expenditure, as the case may be, ought not be obliged to contribute a higher percentage of certain expenditure simply because the then landlord has decided to ‘soften’ the service charge obligations in the leases granted at a later date. It seems to us that if the then landlord granted ‘softer’ leases which resulted in a failure to recover 100% of service charge expenditure any shortfall should be borne by the landlord. The more so where this arises due to the apparent breach of covenant on the part of the landlord. Because no evidence was called by the Applicant as to the circumstances in which the leases later than the late 1970s were granted it is mere speculation as to what the landlord’s thinking was. It may have been that the landlord was able to achieve sales of the leases or more advantageous premiums by making the modification which it did. There may have been other

commercial imperatives or it may simply have an oversight or lack of attention to detail.

42. Two of the Group A tenants have installed their own independent boilers, evidently without the landlord's formal consent. It is wholly unrealistic for those two tenants to expect that they should no longer contribute to the communal system. Lessees in a community cannot simply opt in and opt out of the services they will or will not contribute to. We cannot see any case why their leases should be varied, still less if the variation is at the expense of other tenants. We find that those two tenants should continue to be obliged to pay the 'Tenant's share of Total Expenditure' provided for in their respective leases.
43. Section 35(2) of the Act sets out the circumstances in which an application for variation of the terms of a lease may be made. The Tribunal has to be satisfied that the applicant has made out his or her case (s38). S38(6) sets out the circumstances in which the Tribunal may not make an order; in essence substantial prejudice to a party to the lease and/or that it would not be reasonable for the variation to be made.
44. There has been little judicial guidance as to what matters the Tribunal ought to bear in mind when determining applications such as these. *Morgan v Fletcher and others* [2009] UKUT 186 (LC) concludes that for the purposes of s35(2)(f) a service provision does not fail to make satisfactory provision where the recoverable expenditure adds up to 100%, even if this is 'unfairly' divided between the relevant lessees. In the present case the original service charge regime did enable the landlord to recover 100% of service charge expenditure; provided of course that the landlord complied with its obligations and granted subsequent leases in appropriate form and did not grant leases with a 'softer' service charge liability. For these reasons we conclude that it would not be right to vary the leases of the Group A tenants.

We also note *Anna Gianfrancesco v Derek Haughton* [2007] LRX/10, a decision of Mr George Bartlett QC, then President of the Lands Tribunal. He concluded that a lease does not fail to make satisfactory provision simply because it could have been better or more explicitly drafted. He commented that s35 was of limited use, lease provisions have to be unworkable not merely practically difficult to achieve or extremely expensive to achieve before the terms of a lease should be varied. Here the lease provisions are perfectly workable. All that happens is that the landlord is unable to achieve 100% recovery of expenditure on the boiler and gas. This is due to the breach of covenant on the part of the Applicant's predecessor in title. The Applicant can be in no better a position than its predecessor in title. No doubt before acquiring the freehold reversion the Applicant took professional advice on the service regime and took a view on any issues or imperfections associated with it.

45. We are reinforced in this view by the nature of the variation sought by the Applicant. The Applicant seeks to vary eight of the ten leases so as to include the power for the landlord to vary the service charge percentages as it shall see fit. The Applicant seeks to include the terms of a 'variation 'power' in the terms of that set out in paragraph 17 above. Two of the ten leases already include such a provision. We have no hesitation in concluding that such a variation is far too wide and unreasonable and unrealistic. It seems to us that to grant such an unfettered power to a landlord would be likely substantially to prejudice lessees including the Respondents to this application. Whilst the current landlord, the Applicant, might see fit to use any such power in a proper and restrained way we cannot be confident that all future landlords who may acquire the freehold reversion would act in a similar manner. We thus conclude that the variation sought is too wide and we reject the application.
46. In any event we are far from satisfied that the terms of the variation clause would enable the Applicant to vary the leases in the way in

which it suggested it might. It seems to us that the clause, properly construed, will only permit a variation where a change or event has occurred 'during the term'. Here in relation to the Group B tenants the boilers were installed by the landlord prior to the grant of the respective leases and so the fact of the independent boilers being in the flats will not be an event which has occurred during the term; it was an event which occurred prior to the commencement of the term. Thus it seems to us that the fact of a flat having an independent boiler will not be an event which will trigger the right to vary the service charge provisions.

47. The Group B tenants did not make a formal application to vary their leases by deleting the obligation to contribute to the costs of the communal boiler and gas. Miss Vuckovic submitted that it was unfair that they should be obliged to contribute to such expenditure because they did not use the service and had their own boilers.
48. We have some sympathy with the Group B tenants in this respect but the time at which to raise such matters is prior to the grant of the leases. Three of the four Group B tenants voluntarily took on the service charges obligations as set out in their leases. They also have the benefit of a covenant on the part of the landlord with regard to the provision of a communal heating and hot water system.
49. It is an inevitable fact of life that in any community of lessees in a building some will use or enjoy facilities on offer more than others; yet part of the community arrangement is that costs are often shared between all. A classic example is the lessee on the ground floor who is obliged to contribute to the costs of the lift, a service they have no practical use for and may not even have a legal entitlement to.
50. In the absence of evidence as to the circumstances in which the Group B leases were granted we cannot make any further useful comment save to say that in the absence of any application to vary those leases we decline to do so.

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John Hewitt

Chairman

16 August 2010

