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**HM COURTS AND TRIBUNAL SERVICE**

LEASEHOLD VALUATION TRIBUNAL  
CASE NO CHI/00MS/LVT/2013/0004

**Application:** Section 35 of the Landlord & Tenant Act 1987 (the Act)

**Applicant:** Tyrell Investments Ltd

**Respondents:** The Lessees of Flats 1-9 at the Premises

**Premises:** Flats 1-9, 26 St Anne's Road, Southampton, Hampshire, SO19 9FF

**Date of Hearing:** 31 May 2013

**Venue:** The Holiday Inn, Eastleigh, Leigh Road, Eastleigh, SO50 9PG

**Appearances for the Applicant:** Ian Newberry Solicitor, Anne Bebb, and Susan Ivers both of Napier & Tyrell

**Appearances for the Respondents:** None

**Date of Tribunal's Reasons:**

**Members of the Tribunal:** Mr N P Jutton BSc (Chairman) and Mr P D Turner-Powell FRICS

**1 Introduction**

2 On 22 March 2013 the Applicant applied under section 35 of the Act for an order that each of the leases of Flats 1-9 inclusive at the Premises be varied as specified in the application.

3 On 10 April 2013 the Tribunal made directions which provided for the Respondents, being the lessees of Flat 1-9 at the Premises, to if they wished file and serve a reply to the application. Further, to provide that the Respondents if they wished to submit an application to apply for compensation pursuant to section 38(10) of the Act.

4 In the event none of the Respondents served a reply or made an application pursuant to section 38(10).

**5 Documents**

6 The documents before the Tribunal were:

- i The Applicant's application form LVT5.
- ii A schedule of the leases of Flats 1-9 at the Premises.
- iii The Applicant's proposed draft variation.
- iv A copy of each lease for Flats 1-9 inclusive at the Premises.

7 **The Law**

8 The relevant statutory provisions in the Act are as follows:

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 a leasehold valuation 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 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*

.....  
*(3A) For the purposes of sub-section (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 sub-section (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.*

.....  
**38 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 sub-sections (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 sub-section (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*

.....

(9) *A tribunal may by order direct that a memorandum of any variation of a lease effected by an order under this section shall be endorsed on such documents as are specified in the order.*

(10) *Where a tribunal makes an order under this section varying a lease, the tribunal may, if it thinks fit, make an order providing for any party to the lease to pay, to any other party to the lease or to any other person, compensation in respect of any loss or disadvantage that the tribunal considers he is likely to suffer as a result of the variation.*

## 9 **The Leases**

10 The leases of Flats 1-9 of the Premises were examined by the Tribunal.

11 The leases of Flats 1-7 inclusive are in identical form and the pertinent provisions (or lack of them) may be summarised as follows:

- a. The leases are for a term of 999 years from 25 March 1967.
- b. Clause 1 provides in each case for the lessee to pay during the term ground rent and also by way of additional rent, a share of the maintenance charge.
- c. Clause 4 sets out the lessor's covenants in respect of maintenance and repair to parts of the Premises retained by the lessor, the maintenance and repair of fixtures and fittings, the painting of the exterior of the building on the Premises, the maintenance of the gardens and grounds, the discharge of rates, taxes etc in respect of the gardens or grounds, and to insure.
- d. Clause 5 provides for the calculation and payment of the maintenance charge.

## 12 **Flat 8**

13 Flat 8 is contained in that part of the building at the Premises, together with Flat 9 which is referred to in the draft variation as 'the extension'. The relevant provisions are:

- a. A term of 999 years from 25 March 1967.

- b. Payment by way of additional rent of one half of the maintenance charge payable in arrears.
- c. Clause 4 sets out the lessor's covenants to maintain and keep in good repair those parts of the Premises retained by the lessor, to keep all fixtures and fittings of those parts of the Premises retained by the lessor in good condition and repair, to paint the exterior of the building at the Premises, to maintain the garden and grounds, to maintain the electric lights on the exterior of the extension, to pay all rates and taxes in respect of the gardens or grounds, and to insure.
- d. Clause 5 sets out provisions for the calculation and determination of the amount of the maintenance charge.

14 **Flat 9**

- 15 The provisions of the lease to Flat 9 are the same as those for Flat 8 save that the numbering of the covenants in clause 4 differ slightly to the corresponding provisions in the lease to Flat 8.

16 **The Hearing**

- 17 Mr Newberry explained that the Applicant sought an Order varying the terms of the leases to Flats 1-9 at the Premises on two grounds.
- i. That the leases were defective in respect of their combined failure to allow the Applicant recover by way of service charge the total amount of the Applicant's expenditure in complying with its obligations under clause 4 of each lease. That as such, each lease failed to make satisfactory provision with respect to the computation of service charge payable.
  - ii. The leases made no provision for payment of service charges in advance or for the establishment of a sinking fund, both being Mr Newberry said were provisions that he would expect to see in a modern lease to allow the lessor to properly manage, maintain and repair the Premises for the benefit of the lessees.

18 Mr Newberry relied in particular on grounds (e) and (f) of section 35(2) of the Act.

19 Mr Newberry said that he understood that the extension to the building at the Premises had been built prior to 1967. That the extension contained Flats 8 and 9. That the remainder of the building, described by Mr Newberry as the main block, had subsequently been converted into Flats 1-7.

20 The relevant provisions in relation to the calculation of the maintenance charge in each lease were in short as follows:

21 **Flat 1**

Clause 1 The lessee will pay  $\frac{5}{63}$  of the maintenance charge.

Clause 5 The maintenance charge is defined as being a  $\frac{5}{63}$  part of the expenditure incurred by the lessor.

22 **Flat 2**

Clause 1 The lessee will pay  $\frac{6}{63}$  of the maintenance charge.

Clause 5 The maintenance charge is defined as being a  $\frac{6}{63}$  part of the expenditure incurred by the lessor.

23 **Flat 3**

Clause 1 The lessee will pay  $\frac{5}{63}$  of the maintenance charge.

Clause 5 The maintenance charge is defined as being a  $\frac{5}{63}$  part of the expenditure incurred by the lessor.

24 **Flat 4**

Clause 1 The lessee will pay  $\frac{5}{63}$  of the maintenance charge.

Clause 5 The maintenance charge is defined as being a  $\frac{5}{63}$  part of the expenditure incurred by the lessor.

25 **Flat 5**

Clause 1 The lessee will pay  $\frac{5}{63}$  of the maintenance charge.

Clause 5 The maintenance charge is defined as being a  $\frac{5}{9}$  part of the expenditure incurred by the lessor.

26 **Flat 6**

Clause 1 The lessee will pay  $\frac{5}{63}$  of the maintenance charge.

Clause 5 The maintenance charge is defined as being a  $\frac{5}{63}$  part of the expenditure incurred by the lessor.

27 **Flat 7**

Clause 1 The lessee will pay  $\frac{1}{18}$  of the maintenance charge.

Clause 5 The maintenance charge is defined as being a  $\frac{5}{9}$  part of the expenditure incurred by the lessor.

28 **Flat 8**

The lessee will pay one half of  $\frac{2}{9}$  of certain items of expenditure, and one half of the entirety of items of expenditure relating just to the extension.

29 **Flat 9**

The lessee will pay one half of  $\frac{2}{9}$  of certain items of expenditure, and one half of the entirety of items of expenditure relating just to the extension.

30 Mr Newberry explained that the effect was that the Applicant suffered what he described as an enormous shortfall.

31 Mr Newberry explained that his proposed variation allowed the Applicant to recover the entirety of its expenditure in complying with the provisions of clause 4 of each lease whilst at the same time maintaining the distinction which exists in the leases to some extent as regards Flats 1-7 in the main block of the Premises and Flats 8 and 9 in the extension. For example, he said that Flats 1-7 in the main block have their own entrance and Flats 8-9 in the extension also have their own entrance. As such, it was he submitted only reasonable and further consistent with the original leases for certain items of expenditure that just related to the main block to be paid solely by Flats 1-7 and other items of expenditure which related just to the extension to be paid solely by Flats 8 and 9.

32 Mr Newberry said that this application had been brought at the Applicant's expense for the benefit of the Respondents. The application had been made at no cost to the Respondents.

33 The Tribunal considered the wording of the proposed variation in detail clause by clause and Mr Newberry was asked to comment on each point arising.

34 **Determination**

35 The Tribunal is satisfied that it is in the interests of both the Applicant and the Respondents for the leases of Flat 1-9 to be varied in order to make satisfactory provision for the computation of service charges to include the introduction of a proper service charge regime. The current position was unsatisfactory to all parties. Mr Newberry said he understood that the said defects with the leases had caused practical difficulties for lessees who were looking to sell their flats. The Tribunal is of the view that the said defects were likely to have not just a negative practical impact, but may affect the ability of lessees to sell their properties and have an adverse impact on the market value of each flat.

36 No application was made for compensation under section 38(10) of the Act and the Tribunal does not find that compensation should be paid to any party.

37 Pursuant to section 38(4) of the Act, the variations ordered by the Tribunal are not precisely in the same terms as set out in the original draft produced by the Applicant. The changes made by the Tribunal are as follows:

- i. The replacement wording in clause 1 shall be "*the Maintenance Charge as set out in clause 5 hereof*".
- ii. That the definition in clause 5(1) of "*the insurance charge*" is deleted as being unnecessary.
- iii. That the definition in the proposed clause 5 of "*Maintenance Charge*" in the leases of Flats 1-7 inclusive be changed so that the contribution to the expenses incurred by the lessor in carrying its obligations under clause



4(5) be  $\frac{1}{7}$  of the 'Main Block' and not  $\frac{1}{9}$  of the building. The reason being that clause 4(5) in the leases of Flats 1-7 inclusive provides for the lessor to decorate the exterior of the building once in every five years. The term 'building' in the lease as it exists is not defined. The term 'the building' in the proposed variation is defined as meaning all of the buildings on the Premises. The corresponding provision in the leases to Flats 8 and 9 is clause 4(iv). However that provision only provides for a contribution to be made by the lessee in each case to the cost of painting the exterior of the extension. The effect of the variation as drafted by the Applicant would mean that the Applicant would recover  $\frac{7}{9}$  of the cost of painting the 'main block' (as defined in the draft) from Flats 1-7 but nothing from Flats 8 and 9. It would recover half of the cost of painting the exterior of the extension from each of Flats 8 and 9, plus a further  $\frac{7}{9}$  from Flats 1-7. The Tribunal suggested to Mr Newberry and he agreed, that it would be logical in the context of his draft variation to provide that the lessees of Flats 1-7 inclusive would pay a  $\frac{1}{7}$  share of the cost of the external decoration to the main block, and the lessees of Flats 8-9 would pay a one half share each of the costs of the external decoration to the extension. That would allow the Applicant lessor to recover the entire expenditure incurred by it in carrying out the external decoration of the building as a whole.

- iv. The wording of the definition of 'Sinking Fund Charge' is amended so that it relates not just to unexpected or irregularly occurring expenses but also those occurring periodically. The Tribunal in particular made reference to the provision in each lease for the lessor to carry out external decoration once in every five years. That being a regular periodic expense.
- v. The Tribunal amends the wording of the proposed clause 5(2) to make it clear that the payments thereunder being sought by the lessor in relation

to an annual budget were payments 'on account' of the maintenance charge.

vi. The Tribunal also amends the proposed clause 5(3) to provide that the payment on account to be made by lessees will be paid within 21 days of the delivery of a demand made by the lessor.

vii. The Tribunal makes corresponding changes to the proposed clause 5(4) which allows the Applicant to recover additional sums from the lessees in the event that the annual budget proves to be insufficient to meet the actual costs incurred by the lessor.

38 Mr Newberry said that the Applicant removed under the proposed definition in clause 5 of 'Management Fees' the wording "... and including the cost of reasonable modernisation and improvements ...". The Tribunal agree to that amendment.

39 As to the proposal under the definition of 'Management Fees' that these should include the cost of bringing or defending any claims or potential claims in respect of the Premises, Mr Newberry explained that this was intended to cover a circumstance such as a claim made by a third party to have acquired adverse possession of part of the garden. This would allow in such circumstances the Applicant to take action in respect of such a claim for the benefit of the lessees and to recover the cost of doing so from the lessees. Mr Newberry relied upon section 35(2)(e) of the Act.


40 The Tribunal accepts that the proposed wording has the effect of making satisfactory provision in accordance with section 35(2)(e) for the recovery by the Applicant of expenses incurred by it for the benefit of the lessees.

#### 41 **The Tribunal's Decision**

42 Pursuant to section 38(3) of the Act, the leases of Flats 1-7 inclusive at the Premises are ordered to be varied as set out in Appendix 1 to this Decision.

- 43 Pursuant to section 38(3) of the Act, the lease of Flat 8 at the Premises is ordered to be varied as set out in Appendix 2 to this Decision.
- 44 Pursuant to section 38(3) of the Act, the lease of Flat 9 at the Premises is ordered to be varied as set out in Appendix 3 to this Decision.
- 45 Pursuant to section 38(9) of the Act, the Tribunal directs that a memorandum of the said variations be endorsed on every lease and recorded against the registered title for each lease.

Dated this 10<sup>th</sup> day of June 2013

A handwritten signature in black ink, appearing to be 'NPJ', written over a horizontal dotted line.

N P Jutton (Chairman)

A Member of the Tribunal appointed by the Lord Chancellor

## Appendix 1

### LEASES OF FLATS 1-7

#### Clause 1

Delete the words

*"a (5/63) (6/63) (1/18) (as appropriate) part of the maintenance charge to be ascertained in the manner hereinafter contained and to be paid in arrears without any deduction on the 25<sup>th</sup> day of March in every year during the same term"*

and replace with

*"the Maintenance Charge as set out in Clause 5 hereof".*

#### Clause 5

Delete in its entirety and replace with:

*"5(1) Definitions*

*In this clause the following words shall have the following meanings*

- |                                 |   |
|---------------------------------|---|
| <i>"the Building"</i>           | <i>means all of the buildings for the time being on the premises</i>  |
| <i>"the Extension"</i>          | <i>means that part of the Building containing Flats 8 and 9 but excluding the Main Block</i>  |
| <i>"the Main Block"</i>         | <i>means that part of the Building containing Flats 1, 2, 3, 4, 5, 6 and 7 but excluding the Extension</i>  |
| <i>"the Maintenance Charge"</i> | <i>means one seventh of the costs incurred by the Lessor in carrying out its obligations under clauses 4(3), 4(4) and 4(5) insofar as they relate to the Main Block TOGETHER WITH one ninth of the Sinking Fund Charge and of the Management Fees and of the costs incurred by the Lessor in carrying out its obligations under clauses 4(6), 4(7) and 4(8)</i> |
| <i>"Maintenance Year"</i>       | <i>means the period from 1 September in one year to 31 August in the following year</i>   |
| <i>"Management Fees"</i>        | <i>means the fees of managing agents and other persons employed or retained by the Lessor from time to time for the purpose of carrying out its obligations under clause 4 and including the cost of bringing or defending any claims or potential claims in respect of the Premises</i>  |
| <i>"Sinking Fund Charge"</i>    | <i>means such reasonable sum as the Lessor shall determine from time to time to be added to a reserve or sinking fund to provide for the payment of unexpected</i>  |

*or irregularly or periodically occurring but substantial costs of carrying out its obligations under clause 4*

- 5(2) The Lessor shall prepare an annual budget of anticipated expenditure for each Maintenance Year (the Annual Budget) and shall deliver a copy thereof together with a demand for payment on account of the Maintenance Charge to the Tenant as soon as reasonably practicable.*
- 5(3) The Tenant shall pay the demand within 21 days of delivery.*
- 5(4) If in any Maintenance Year the Annual Budget shall be insufficient to meet all the costs incurred or to be incurred by the Lessor carrying out its obligations under clause 4 then the Lessor shall be at liberty to raise a supplemental demand to cover such shortfall or anticipated shortfall which shall be payable by the Tenant on demand within 21 days of delivery.*
- 5(5) Interest shall be payable by the Tenant on the Maintenance Charge or any part thereof owing from time to time at the rate of 5% per annum (compounded on 31 August in each year) above the Bank of England Minimum Lending rate."*

## Appendix 2

### LEASE OF FLAT 8

#### Clause 1

Delete the words

*"one half part of the maintenance charge to be ascertained in the manner hereinafter contained and to be paid in arrears without any deduction on the 25<sup>th</sup> day of March in every year during the said term"*

and replace with

*"the Maintenance Charge as set out in Clause 5 hereof"*

#### Clause 5

Delete in its entirety and replace with:

*"5(1) Definitions*

*In this clause the following words shall have the following meanings*

|                                 |   |
|---------------------------------|---|
| <i>"the Building"</i>           | <i>means all of the buildings for the time being on the premises</i>  |
| <i>"the Extension"</i>          | <i>means that part of the Building containing Flats 8 and 9 but excluding the Main Block</i>  |
| <i>"the Main Block"</i>         | <i>means that part of the Building containing Flats 1, 2, 3, 4, 5, 6 and 7 but excluding the Extension</i>  |
| <i>"the Maintenance Charge"</i> | <i>one half of the costs incurred by the Lessor in carrying out its obligations under clause 4(ii) 4(iii), 4(iv) and 4(vi) insofar as they relate to the Extension TOGETHER WITH one ninth of the Sinking Fund Charge and of the Management Fees and of the costs incurred by the Lessor in carrying out its obligations under clauses 4(v), 4(vii) and 4(viii)</i> |
| <i>"Maintenance Year"</i>       | <i>means the period from 1 September in one year to 31 August in the following year</i>   |
| <i>"Management Fees"</i>        | <i>means the fees of managing agents and other persons employed or retained by the Lessor from time to time for the purpose of carrying out its obligations under clause 4 and including the cost of bringing or defending any claims or potential claims in respect of the Premises</i>  |
| <i>"Sinking Fund Charge"</i>    | <i>means such reasonable sum as the Lessor shall determine from time to time to be added to a reserve or sinking fund to provide for the payment of unexpected</i>  |

*or irregularly or periodically occurring but substantial costs of carrying out its obligations under clause 4*

- 5(2) The Lessor shall prepare an annual budget of anticipated expenditure for each Maintenance Year (the Annual Budget) and shall deliver a copy thereof together with a demand for payment on account of the Maintenance Charge to the Tenant as soon as reasonably practicable.*
- 5(3) The Tenant shall pay the demand within 21 days of delivery.*
- 5(4) If in any Maintenance Year the Annual Budget shall be insufficient to meet all the costs incurred or to be incurred by the Lessor carrying out its obligations under clause 4 then the Lessor shall be at liberty to raise a supplemental demand to cover such shortfall or anticipated shortfall which shall be payable by the Tenant on demand within 21 days of delivery.*
- 5(5) Interest shall be payable by the Tenant on the Maintenance Charge or any part thereof owing from time to time at the rate of 5% per annum (compounded on 31 August in each year) above the Bank of England Minimum Lending rate."*

### Appendix 3

#### LEASE OF FLAT 9

##### Clause 1

Delete the words

*"one half part of the maintenance charge to be ascertained in the manner hereinafter contained and to be paid in arrears without any deduction on the 25<sup>th</sup> day of March in every year during the said term"*

and replace with

*"the Maintenance Charge as set out in Clause 5 hereof"*

##### Clause 5

Delete in its entirety and replace with:

*"5(1) Definitions*

*In this clause the following words shall have the following meanings*

*"the Building" means all of the buildings for the time being on the premises*

*"the Extension" means that part of the Building containing Flats 8 and 9 but excluding the Main Block*

*"the Main Block" means that part of the Building containing Flats 1, 2, 3, 4, 5, 6 and 7 but excluding the Extension*

*"the Maintenance Charge" one half of the costs incurred by the Lessor in carrying out its obligations under clause 4(ii) 4(iii), 4(iv) and 4(vii) insofar as they relate to the Extension TOGETHER WITH one ninth of the Sinking Fund Charge and of the Management Fees and of the costs incurred by the Lessor in carrying out its obligations under clauses 4(vi), 4(viii) and 4(ix)*

*"Maintenance Year" means the period from 1 September in one year to 31 August in the following year*

*"Management Fees" means the fees of managing agents and other persons employed or retained by the Lessor from time to time for the purpose of carrying out its obligations under clause 4 and including the cost of bringing or defending any claims or potential claims in respect of the Premises*

*"Sinking Fund Charge" means such reasonable sum as the Lessor shall determine from time to time to be added to a reserve or sinking fund to provide for the payment of unexpected*



*or irregularly or periodically occurring but substantial costs of carrying out its obligations under clause 4*

- 5(2) The Lessor shall prepare an annual budget of anticipated expenditure for each Maintenance Year (the Annual Budget) and shall deliver a copy thereof together with a demand for payment on account of the Maintenance Charge to the Tenant as soon as reasonably practicable.*
- 5(3) The Tenant shall pay the demand within 21 days of delivery.*
- 5(4) If in any Maintenance Year the Annual Budget shall be insufficient to meet all the costs incurred or to be incurred by the Lessor carrying out its obligations under clause 4 then the Lessor shall be at liberty to raise a supplemental demand to cover such shortfall or anticipated shortfall which shall be payable by the Tenant on demand within 21 days of delivery.*
- 5(5) Interest shall be payable by the Tenant on the Maintenance Charge or any part thereof owing from time to time at the rate of 5% per annum (compounded on 31 August in each year) above the Bank of England Minimum Lending rate."*