RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property
TRIBUNAL SERVICE

DECISION AND REASONS

Property:	Little Courtenay Courtenay Terrace HOVE East Sussex BN3 2WF
Case Number:	**CHI/00ML/LSC/2008/0020**

S.27A & 20C Landlord & Tenant Act 1985 as amended

Applicant (Lessee):	Mr J F Farrow (Flat 1)
Respondent (Landlord):	Ms G Davoudi
Case Number:	**CHI/00ML/LVT/2008/0002**

S.37 Landlord & Tenant Act 1987

Applicants:	Ms G Davoudi (Flat 2 & Freeholder) Dr S Worrell & Mr C Dickins (Flat 3)
Respondent:	Mr J F Farrow (Flat 1)
Appearances:	For Mr Farrow – Mr Al Hogarth of Counsel For Ms Davoudi – Ms Alex Frith of Counsel Dr S Worrell
In Attendance:	Mr J F Farrow (Lessee Flat 1) Mr G Hibbert (Mr Farrow's business partner) Miss C Doran (Dean Wilson Laing Solicitors) Ms G Davoudi (Lessee Flat 2 & Freeholder) Dr S Worrell (Lessee Flat 3)
Tribunal Members:	Mr B H R Simms FRICS MCIArb (Chairman) Mr R P Long LLB (Legal Member) Mrs J Playfair (Lay Member)
Date of Hearing:	Friday 23 May 2008
Date of Decision:	17 June 2008

BACKGROUND

1. This is an application under S.27A of the Landlord & Tenant Act 1985 (the 1985 Act) for the Tribunal to determine the liability to pay a service charge for the year ended 25 December 2007 and for the limitation of costs under S.20C of the 1985 Act.

2. The Hearing was convened and held at Hove Town Hall, Norton Road, HOVE.

3. At the Hearing, Ms Frith on behalf of the freeholder and lessee of Flat 2, Ms Davoudi, and Dr Simon Worrell, wished to make a further application under Part IV of the Landlord & Tenant Act 1987 (the 1987 Act). No formal application form had been completed, but as all parties were present and wanted the new application heard in order to save the costs of another hearing, the Tribunal decided to accept a second application to be heard at the same time. This was subject to an undertaking given by Ms Frith on instructions of Ms Davoudi's solicitor to complete the appropriate application form and subject to receipt of the balance of £80 in respect of the fee due. The £80 fee was duly paid at the Hearing and subsequently the application form was received in accordance with the undertakings given.

4. The S.27A application challenges a demand upon Mr Farrow of 1/3rd of the total service charge for the year, whereas the lease specifies a different proportion based on rateable values. This application was heard during the morning.

5. In the afternoon the Tribunal heard the application under Part IV of the 1987 Act which is a request for the variation of the terms of all 3 leases in the building so that clause 2(20)(a) in the lease of Flat 1, and clause 2(22)(a) in the leases of Flats 2 and 3 are amended so that "the amount of the maintenance charge shall be 33.3% of the said costs, expenses and outgoings and other matters".

INSPECTION

6. The Tribunal had received an expert's report from Mr Stuart Gray FRICS describing the premises in detail. Following the Hearing the Tribunal briefly inspected each flat internally and externally accompanied by counsel and the lessees.

7. The property comprises an end of terrace three storey building with cement rendered elevation located on the south side of the main A259 seafront road in Hove. The southern garden, which is demised to the middle Flat 2, has direct access to the foreshore and there is a decking area for the use of Flat 1.

8. The building was constructed at least 100 years ago and is now arranged as 3 flats each occupying the whole of each floor. The internal layout of each flat is different and each has different amenities and entrances.

THE LEASES

9. For the purpose of this Determination the leases can be said to be in similar terms whereby the lessor is responsible for the maintenance of the structural parts of the building, external decorations, common ways, common services and insurance, and recovers the cost by way of a service charge.

10. The lease of Flat 1, the lower flat, is dated 3 October 1997 and is for a term from 24 June 1997 of 99 years.

11. The lease of Flat 2, the middle flat, is dated 11 November 1986 and is for a term from 25 March 1977 for 99 years.

12. The lease of Flat 3, the top flat, is dated 13 May 1977 and is for a term from 25 March 1977 for 99 years.

13. In the lease of Flat 1 clause 2(20) requires the lessee to pay a proportion of the maintenance charge calculated in accordance with sub clause (a) as follows:-

"(a) The amount of the maintenance charge shall be calculated by dividing the aggregate of the said costs expenses and outgoings and other matters by the aggregate of the most recently assessed rateable values of all the flats in the Building and then multiplying the resultant amount by the last assessed rateable value of the Premises"

14. The leases of Flats 2 and 3 have similar but not identical clauses but at clause 2(22) with the calculation at sub clause (a) in the following terms:-

"(a) The amount of the maintenance charge shall be calculated by dividing the aggregate of the said costs expenses and outgoings and other matters by the aggregate of the rateable values (in force at the end of each year) of all the flats in the Building and then multiplying the resultant amount by the rateable value (in force at the same date) of the demised premises"

15. The difference being that, in the case of Flats 2 and 3 the rateable values used in the calculation are the rateable values *in force at the end of each year* rather than the most *recently assessed rateable values*.

16. Both applications turn on the interpretation of this part of the lease only, so for the purpose of this Determination it is not necessary to describe the leases in further detail.

SECTION 27A THE 1985 ACT

RELEVANT LAW

17. The Tribunal's jurisdiction derives from the Landlord & Tenant Act 1985 as amended. In coming to our decision we have had regard to the 1985 Act in full but include a summary here for the assistance of the parties:

18. S.18 defines the meaning of a service charge as being *"...an amount payable by a tenant ... in addition to the rent – (a) which is payable directly or indirectly, for services, repairs, maintenance, improvements, insurance, or the landlord's costs of management and (b) the whole or part of which varies or may vary according to the relevant costs".*

19. S.19 limits the relevant costs to be taken into account in determining the amount of service charge only to the extent that they are reasonably incurred and only if the services or works are of a reasonable standard.

20. S.27A provides that a Leasehold Valuation Tribunal may determine whether a service charge is payable and if it is, the Tribunal may also determine the person by whom it is payable, the person to whom it is payable, the amount which is payable, the date at or by which it is payable and the manner in which it is payable. These determinations can (with certain exceptions) be made for current or previous years and also for service charges payable in the future.

21. There was no dispute under this application that a service charge is payable or, to whom or, its total amount, it is only the proportion of the total amount payable by the lessee of Flat 1 that is in dispute.

EVIDENCE

22. Mr Hogarth for the Applicant referred directly to clause 2(20)(a) in the Applicant's lease which specifically refers to the method for calculating the service charge. The rateable values are available and a letter from Brighton & Hove City Council was produced showing the rateable value for Flat 1 (basement or garden flat) at £218; Flat 2 (ground floor flat) at £417; and Flat 3 (first floor flat) at £513. With some general rounding this shows a liability for Flat 1 of 19% of the total, whereas the lessor is seeking to charge 33.3%.

23. Ms Davoudi as lessor confirmed that prior to the most recent demands the service charges had been divided so that Flat 1 would pay 19%. However during a meeting to discuss proposed alterations to the garden flat Mr Hibbert did not see a problem with changing the percentages to 33.3% for each of the 3 flats. Mr Hibbert has no recollection of this agreement and no evidence could be produced to confirm the agreement. Ms Davoudi confirmed that she had not intended to make an application to vary the leases at that time as she felt that the conversation and agreement was sufficient. She was unclear whether or not she was aware that it would be possible to make an application to the Tribunal to vary the leases.

24. Ms Frith pointed out that as rateable values had not changed from year to year since the introduction of Council Tax it was not possible to interpret the lease clauses on the basis of rateable values in the force at the end of each year. Rateable values are obsolete and it would be more reasonable to consider what would be fair to take account of the actual position. Mr Stuart Gray had provided an Expert's Report and considers that a division at 1/3rd for each flat would be the best way of apportioning the service charge.

25. Mr Hogarth could see no reason why Mr Hibbert would have readily agreed to change the proportion of the service charge payable from 19% to 33.3%. The focus of any discussion would have been in the context of the proposed alterations rather than a substantial variation in the lease terms. At all times the appropriate proportion had been described as 19%.

26. Dr Worrell had made written submissions but confirmed that in his view rateable values were obsolete and had no relevance to current values which were constantly changing. A share on the basis of 1/3rd was the reasonable solution.

27. Mr Hogarth considered whether the alleged agreement could in effect be a promissory estoppel. He had no doubt that the meeting between Mr Hibbert and Ms Davoudi had been to discuss something completely different and the focus of the meeting would have been directed towards the proposed alterations to the flat. It would have been extraordinary if Mr Hibbert had agreed to a 33.3% charge. At all times Mr Farrow had placed a value on his property based upon the expectation that the service charge payable for the lower Flat 1 would only be 19% of the total. Any variation would require a substantial compensation.

CONSIDERATION

28. The Tribunal is required to construe the lease and the formal arrangements for the apportionment and payment of any service charge before taking into account any question of reasonableness.

29. The Tribunal could not override any clear lease clause regarding the apportionment of a service charge simply because that apportionment might be considered unreasonable. If the parties consider that the lease clauses need to be varied then the proper place to consider this would be a Part IV application under the 1987 Act. Evidence was produced to show that rateable values were still available and in practice had remained the same each year since the revaluation in 1973. Accordingly a mathematical calculation in accordance with the lease terms is straightforward. In fact, all parties agreed that the apportionments that had previously been imposed were based upon rateable values and were quite capable of continuing. In his expert report Mr Gray states that the floor areas of each flat have remained the same and there is nothing before us to indicate that the comparative rateable values would have changed even if they had remained subject to reassessment.

30. The evidence available in respect of a possible promissory estoppel was unclear and unsubstantiated. If Ms Davoudi had been aware of the possibility of making an application to vary the lease she would no doubt have done so earlier than the date of the Hearing. We preferred the Applicant's evidence as being inherently more probable. Ms Davoudi was uncertain in some of her evidence which did not give us confidence in the strength of her recollection. We are not satisfied that there are any circumstances to interpret the lease in any way differently from that proposed by Mr Farrow.

DECISION

31. The lessee of Flat 1 is to pay a proportion of the service charge calculated in accordance with clause 2(20)(a) of the lease which, from evidence submitted, is 19% of the total.

S.20C LANDLORD & TENANT ACT 1985

32. As part of the 27A application an application is included under S. 20C of the 1985 Act for an Order that all or any of the costs incurred by the Landlord in connection with proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable.

33. The Applicant believes that the Landlord arbitrarily changed the clear apportionment set out in the lease and he had no alternative but to challenge this in front of the Tribunal. He should not be penalised by having to pay the landlord's costs as part of an increased service charge.

34. The Respondent believes that it is quite reasonable for a new proportion to be used to recover the service charge as the current apportionments are unfair.

35. The Tribunal considered that the Applicant had made it perfectly clear to the Respondent throughout correspondence prior to the hearing that the apportionment clause in the lease was capable of being interpreted clearly and in fact had always previously been interpreted on the basis that 19% of the total costs would be paid by the Applicant. The Tribunal considers that it is just and equitable that an Order should be made restricting the recovery of costs in respect of the Applicant's flat and such an Order is made.

S.37 LANDLORD & TENANT ACT 1987

36. The Tribunal now considered the second application made with the consent of all parties, pursuant to Part IV the 1987 Act.

37. The applicant in this case is the lessee of Flat 2 and freeholder Ms Davoudi together with the lessee of Flat 3 Dr Simon Worrell and Mr Christopher Dickins. The Respondent is Mr Farrow of Flat 1.

38. The application requires a variation of the lease to allow the maintenance and service charges to be apportioned so that each flat pays 1/3rd of the total cost. The Tribunal was not provided with the wording of the variation sought. The application form which was subsequently received does include a draft of the variation sought but as this was received after the Hearing was concluded it has not been considered as part of the application.

39. The application is made under S.37 by a majority of the parties. The Tribunal is satisfied that S.37(5)(a) permits an application by two of the three parties or three of the four parties if Ms Davoudi is counted as both freeholder and lessee (there are less than nine flats and *all but one of the parties consent to it*).

RELEVANT LAW

40. The Tribunal's jurisdiction in this case derives from the Landlord & Tenant Act 1987. In coming to our decision we have had regard to the 1987 Act in full but include a summary here of some of the relevant clauses for the assistance of the parties.

41. S.37 of the 1987 Act provides for an application to be made to a Leasehold Valuation Tribunal for an Order varying each of the leases in the manner specified in the application.

42. Sub clause (3) provides that *"the grounds on which an application may be made...are that the object to be varied by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect".*

43. When making the Order the Tribunal will have regard to S.38(8). In this case as there was no formal wording in front of it the Tribunal *"...may...make an Order directing the parties to the lease to vary it in such manner as is so specified [in the Order]..."*.

EVIDENCE

44. Ms Frith for Ms Davoudi pointed out that the rateable value apportionment at 19% for the basement Flat 1, 36% for Ms Davoudi Flat 2, and 45% for Flat 3, is unfair, outmoded and is no longer applicable. The apportionment clause and the leases for Flats 2 and 3 require the calculation to be carried out on the basis of a rateable value available at the end of each year.

45. Rateable values have not changed since 1990 in spite of the fact that the basement Flat has been developed and there have been changes elsewhere to other flats in the block but not to such a great extent which might have varied the rateable values. The clause has no provision for updating and rateable values have not been changed to reflect the differing current values of the flats. Various figures for the values of the flats were given without any expert evidence in support.

46. The Applicants require the relevant clauses in each lease to be varied so that 1/3rd of the service charge is payable by each flat. Here the evidence of the promissory estoppel referred to in the earlier S.27A application should be taken into account by the Tribunal as it equally applies to this application. Mr Hibbert on behalf of Mr Farrow had agreed to vary the proportions to 1/3rd each flat.

47. Under questioning Ms Frith indicated that there should be no compensation payable for the variation of the leases as no valuation evidence was available.

48. The Tribunal confirmed that in the absence of specific wording the parties agreed that if an Order to vary were made S.38(8) directing the manner of variation would be the appropriate section to apply and proper wording to give effect to the Tribunal's decision would subsequently have to be agreed by the parties.

49. Dr. Worrell, acting for himself, had not been present at the meeting between Mr Hibbert and Ms Davoudi but relied on Ms Davoudi's account of the agreement he believed had been reached between them. He quite clearly thought that the apportionment was going to be changed to a fairer 1/3rd of the service charge payable by each lessee.

50. Mr Hogarth for the Respondent referred to the wording of the legislation and in particular clause 37(3) which requires the Tribunal only to make an Order if the object to be achieved cannot be satisfactorily achieved unless all the leases are varied to the same effect. He submitted that is quite possible to interpret the lease clause without the need for any variation.

51. Earlier Mr Hogarth had provided evidence to the Tribunal to show that rateable values were published and available and this would enable the mathematical calculation required by clause 2(20)(a) of the lease to be completed quite satisfactorily. The proportions added up to 100% so there was nothing further in that regard.

52. There is little guidance in S.37 for the Tribunal, said Mr Hogarth, but fairness is not one of the reasons put forward in this section for varying the lease. If the object to be achieved is capable of interpretation then the lease clause wording is sacrosanct and there is no requirement for the Tribunal to make a variation.

53. It might be argued that the current arrangement is not just or proportionate. It is quite common for different flats to pay different levels of service charge but there is a clear and satisfactory provision in this lease to calculate the different proportions.

54. The method is not outmoded, rateable values exist, and to change the lease to reflect a Council Tax Banding or some other valuation approach is not required. It would be a dangerous precedent to vary the lease just because rateable values are no longer changing.

55. Although the basement flat has been developed the floor area is the same and Mr Gray's Expert Report states that each flat occupies a similar floor area and has always done so.

56. Mr Gray confirms that the development of Flat 1 has had no affect on its floor area. His opinion, that the apportionment should be on a 1/3rd basis, is a simplistic approach and was formulated without reference to any statutory requirements, to which he makes no reference in his report.

57. Mr Hogarth used the guidance in S.35 of the 1987 Act to assist the Tribunal although he accepted that the tests in S.35 do not directly apply to S.37.

58. S.38.6 directs that a Tribunal should not make an order under that section affecting a variation of a lease if it appears that the variation would be likely to substantially prejudice any Respondent to the application or any person who is not a party. In this case there would be substantial prejudice to Mr Farrow whereby his proportion would increase substantially and this would reduce the value of his property because an extra 14% of all costs would be payable and on a continuing basis contrary to the terms of the lease.

59. The Tribunal then heard legal submissions in respect of the effect that ***Pole Properties Ltd – v- Feinberg – Court of Appeal 1981*** might have on its decision. Here a substantial change to the heating system in the building was proposed by the landlord. A new building was to be heated throughout whereas in the old building only some of the rooms were heated. It was held that there was such a radical change of circumstances that the terms of the lease no longer applied. As a result of Lord Denning's consideration of the matter he reversed the decision of the Judge at first instance. Lord Denning says *"...the whole situation was changed when the new building was erected. ....this is such a radical change as to warrant a change in the method of computation [in the lease]...."*

60. In ***Broomley Housing Association Ltd v Hughes 1999*** , the case turned on the interpretation of the service charge arrangement where there was a stated percentage in the lease. A fairness test was not applied and the Judge held that whatever percentage was fixed in the lease would have to apply, whether or not the tenant benefited.

61. Ms Frith was concerned that the tests set out in S.35 were not imported into the decision of the Tribunal under S.37. The provisions of The Act are tight and only the relevant parts of the relevant sections should be applied. The submission is on the basis of fairness to all parties. Mr Hogarth accepted that there was no authority to import the provisions of S.35 but The Tribunal could use it for guidance if it was found of assistance.

CONSIDERATION

62. The Tribunal considers that it is established that the clauses in the leases are quite capable of interpretation. Rateable values exist and in fact have been used for the calculation of the apportionment up to now. The situation of the agreement between the parties had to be considered and whether a promissory estoppel exists so as to make the variation of the leases inevitable.

63. There was conflicting evidence about the terms of any agreement that might have been reached and the Tribunal preferred the evidence from Mr Hibbert and Mr Farrow.

64. There was little support for the contention by the Applicants in this case that the lessees of Flat 1 would readily agree to an increase of 14% of their share of the service charge costs without having at least recorded something indicating agreement to such a major change. We preferred Mr Hibbert's evidence of the meeting with Ms Davoudi for the reasons already given in para. 30.

65. There are numerous differences between the flats and it is not unreasonable to consider the rateable value test as being an appropriate percentage for the apportionment of the service charge in the absence of any other stated means of calculation. The parties had apparently accepted the established rateable value proportions when they took or purchased their leases.

DECISION

66. There would be substantial prejudice to the Respondent if the variation sought was Ordered and there should therefore be no change in the lease terms. No Order is made to vary the leases.

SUMMARY OF DECISIONS

S.27A

67. The service charge payable in each year in respect of Flat 1 is to be calculated in accordance with the rateable values and clause 2(20)(a) of the lease which evidence shows is 19% of the total.

S.37

68. No Order is made to vary the leases.

ORDER

69. It is Ordered that all or any of the costs incurred or to be incurred by the Landlord in connection with proceedings before this Leasehold Valuation Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Tenant of Flat 1, Little Courtenay.

Dated 17 June 2008

Signed

Brandon H R Simms FRICS MCIArb
Chairman