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**FIRST - TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | : | **MAN/00CB/LVL/2017/0001** |
| **Property** | : | **Flat 1, 37, Devonshire Road, Prenton, Birkenhead CH43 4UP** |
| **Applicant** | : | **The Riverside Group Limited** |
| **Represented by** | : | **Trowers & Hamlins** |
| **First Respondent** | : | **Ms K McMillan** |
| **Case Reference** | : | **MAN/00CB/LVL/2017/0002** |
| **Property** | : | **Flat 4, 37, Devonshire Road, Prenton, Birkenhead CH43 4UP** |
| **Applicant** | : | **The Riverside Group Limited** |
| **Represented by** | : | **Trowers & Hamlins** |
| **Second Respondent** | : | **Ms D Devoy** |
| **Type of Applications** | : | **Landlord and Tenant Act 1987 – Section 35** |
| **Tribunal Members** | : | **Judge.C.Wood**<br>**Ms S Latham** |
| **Date of Decision** | : | **13 December 2017** |

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**DECISION**

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## ORDER

1. The Tribunal refuses the Applicant's applications for the variation of each of the leases of the Properties, (together "the Leases"), as the Applicant has not established that the Leases fail to make satisfactory provision with respect to the matters set out in section 35(2)(e) and (f) of the Landlord and Tenant Act 1987, ("the 1987 Act").

## BACKGROUND

2. By applications each dated 28 July 2017, ("the Applications"), the Applicant sought a variation to each of the Leases on the grounds detailed therein and in the accompanying statements of case also dated 28 July 2017.

3. Directions dated 21 September 2017 were issued in response to which the following were received from the parties:

   3.1 Flat 1: statement dated 25 September 2017 from the First Respondent; Applicant's Reply dated 4 October 2017;

   3.2 Flat 4: statements dated 27 September and 10 October 2017 from the Second Respondent; Applicant's reply dated 4 October 2017.

4. None of the parties requested a hearing so the matter was scheduled for determination on the papers on 1 November 2017.

## LAW

5. The provisions of section 35 of the Act relevant to the Applications provide as follows:

   (1) Any party to a long lease of a flat may make an application...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)...
   (b)...
   (c)...
   (d)...

   (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)...

(3)...

(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 the whole of any such expenditure.

**EVIDENCE**

6. The Applicant's statements of case in support of the Applications are, in all material respects, in identical form. Their submissions are summarised as follows:

6.1 the block in which the Properties are located comprises a total of 6 flats;

6.2 only 5 of the flats use the communal entrance and internal common areas;

6.3 both of the Properties use the communal entrance and internal common areas;

6.4 all of the leases registered at the Land Registry are of substantially similar content. Specifically, in the Particulars of the Leases, the definition of "Service Charge Specified Proportion of Service Charge (clause 7), appears as:

Flat 1: "A fair proportion" and "A reasonable proportion" (There are 2 sets of Particulars.)

Flat 4: "A fair proportion";

6.5 in the Particulars in the counterparts of the Leases, as signed by each of the Respondents, the "Service Charge Specified Proportion of Service Charge (clause 7)" is defined as one-sixth. In the counterparts of the leases to the other flats this charge is defined as "a fair proportion" ;

6.6 the purpose of the Applications is to seek a variation of each of the Leases so that the counterparts and the versions registered at the Land Registry are the same and to bring each of the Leases "into line" with the leases of the other flats;

6.7 there are circumstances where, because of the layout of the block, a one-sixth apportionment of the service charge expenditure is "not appropriate" and a more appropriate allocation would be on the basis of a "fair proportion" as set out in the other leases;

6.8 if the Leases are to remain in their present form, the following would result:

(a) a lack of clarity because of the existence of two versions of each of the Leases; and,

(b) where a one-sixth apportionment is not appropriate, either other leaseholders or the Applicant have to make up the shortfall to ensure that there is recovery of 100% of the expenditure. This is clearly not what was intended as the Applicant is entitled to recover 100% of the cost of the service charge expenditure;

6.9 a draft Deed of Variation is attached to the statements of case which would vary the Leases by replacing "one-sixth" with "a fair proportion".

7. In her statement dated 25 September 2017, the First Respondent sets out her reasons for opposing the Application as follows:

7.1 if, when she purchased the Property in 2013, she had been given a lease which defined her contribution towards service charge expenditure as a "fair proportion" rather than "one-sixth", it would have affected her decision to proceed with the purchase;

7.2 whilst the error in the Lease is that of the Applicant, it appears that the proposed action to rectify this error will "penalise" the leaseholders of Flats 1 – 5;

7.3 to allow the variation will enable the Applicant to continue to increase "the already financially crippling service charge" that she and the other four lessees who use the communal areas are charged.

8. In her statements dated 27 September and 10 October 2017, the Second Respondent sets out her reasons for opposing the Application as follows:

8.1 whilst the error is the Applicant's, they are seeking by the variation to pass on the burden of additional costs to the Respondents;

8.2 the change in wording from "one-sixth" to a "fair proportion" will allow the Applicant a far greater latitude in determining the amount of the Respondents' liability for service charge;

8.3 the protection afforded by section 19 of the Landlord and Tenant Act 1985 Act, ("the 1985 Act"), has so far failed to protect the lessees from significant increases in the service charges, which is the reason why the Second Respondent has also brought an application under section 27A of the 1985 Act.

9. In the Applicant's Replies each dated 4 October 2017, the Applicant makes substantially the same points as follows:

9.1 they re-state that the Leases are different from those of the other lessees in the block, and also from the version of the Leases as registered at the Land Registry;

9.2 they refute the First Respondent's suggestion that the variation of the Lease would "penalise" the lessees of Flats 1-5;

9.3 they respond to the Second Respondent's claim that the Applicant repeated its "mistake" by entering into a lease in 2013 (assumed to be the lease of Flat 1) containing the same one-sixth provision by explaining that this lease had originally been granted in 2005 and was merely assigned in its original form in 2013 to the First Respondent;

9.4 they refute the claims of both Respondents that a variation would enable the Applicant to increase the service charges unreasonably by explaining that the protections afforded by section 19 of the 1985 Act would be unaffected by the variation of the Leases;

9.5 the confusion currently caused by the discrepancy between the Leases and the leases of the other flats in the block, and its impact on the apportionment of the service charge needs rectification and this is only possible by varying the terms of each of the Leases.

## TRIBUNAL'S REASONS

10. In making its determination, the Tribunal took into account the following:

10.1 in each of the Applications, the Applicant states that the Leases fail to make satisfactory provision with respect to the matters set out in section 35(2)(e) and section 35(2)(f) of the 1987 Act;

10.2 with regard to section 35(2)(e), the Applicant has failed to provide any evidence in support of this application. The Tribunal notes that each of the Leases contain service charge provisions including as follows:

(i) clause 7.5: details all of the expenditure which may be included in the Service Provision from which the Service Charge is then calculated;

(ii) clause 6.1: the rights of the Landlord to take action if (inter alia) Service Charge is unpaid for 21 days;

(iii) clause 3.4(b): the rights of the Landlord to recover the costs of persons engaged in the computation and collection of Service Charge; and,

(iv) clause 3.2(b): a right for the Landlord to charge interest on unpaid Service Charge;

10.3 The Tribunal concludes that the Applicant has failed to establish that the Leases fail to make satisfactory provision for the recovery by the Applicant, as Landlord, of expenditure incurred or to be incurred by it, or on its behalf, for the benefit of the Leaseholders, including, without limitation, the Respondents.

10.4 with regard to section 35(2)(e), the Tribunal concludes that:

(a) the Leases provide that the service charge payable shall be a proportion of the expenditure incurred, or to be incurred by the Landlord;

(b) the other leaseholders are also liable under their leases to pay by way of service charges proportions of that expenditure;

(c) the aggregate of the amounts payable by the Respondents under the Leases and the other leaseholders under their leases need never exceed or be less than 100% of the expenditure incurred.

10.5 The Tribunal acknowledges that, whilst this may mean that the liability of the Respondents to contribute to the service charge expenditure is less than the other leaseholders, this in itself is not sufficient reason for it to determine that the Leases failed to make satisfactory provision for the purposes of section 35(2)(f). The Tribunal was satisfied that when the 1987 Act speaks of "satisfactory provision" this does not necessarily mean equal apportionment of the liability to contribute to the service charge expenditure as between all relevant leaseholders.

10.6 The Tribunal noted that the circumstances in which the leaseholders would be liable to pay unequal amounts was limited to service charge expenditure incurred under clause 5.4 (cleaning, lighting and maintenance of the Common Areas) of the leases where, as a matter of practice, it appears that the Applicant had determined that only five of the six lessees should contribute. The Tribunal considered that it was reasonable to assume that, in respect of all other service charge expenditure, a "fair proportion" would equate to one-sixth.