LON/00/BG/LVT/2010//0007

RESIDENTIAL PROPERTY TRIBUNAL

RE: LANDLORD & TENANT ACT 1987 – SECTION 35
LANDLORD & TENANT ACT 1985 – SECTION 20

PREMISES: LOWESWATER HOUSE, SOUTHERN GROVE, LONDON E3 4PY

B E T W E E N:

EASTEND HOMES LTD

Applicant

and

THE LEASEHOLDERS OF LOWESWATER HOUSE, SOUTHERN GROVE, LONDON E3 4PY

Respondents

RESPONDENTS' SUBMISSIONS - filed and served pursuant to paragraph 14 of the LVT's directions made on 14th September 2010

Introduction, the Contended Procedural Defects and Request for Further Disclosure

1. The Applicant does not appear to have bought this Application with the benefit of any specialist legal advice. In order to avoid the Respondents incurring further irrecoverable expenditure in opposing this claim (which, it is submitted is largely without any jurisdictional basis), it is respectfully requested that the Applicant do so now.

2. It is not evident, either on the face of the Application, or otherwise, that notice of this Application has been given to the Respondents' mortgagees: As holders of registered charges over those of the leasehold interests that are mortgaged, it is self-evident that mortgagees are "*persons likely to be affected by any variation specified in the*

Application"[1]: see regulation 4 of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 ("the 2003 Regs") as to the obligation to give notice of any Application under Part 4 of the 1987 Act to all known affected persons. See also the power under section 39(3) to award damages for breach of statutory duty in respect of an Applicant's failure to serve a notice on known persons likely to be affected by a variation order and the power under section 39(4) to cancel or modify a variation order on the Application of affected persons who are not served with notice of the Application.

3. Subject to any argument to the contrary that the Applicant may have, it is respectfully submitted that the Application should be struck out, alternatively, stayed in order to allow notice of the Application to be given to the mortgagees of all of the flats whose leases it is proposed should be amended by this Application.

4. It is not known when the Applicant became the landlord under the Respondents' leases, however, it occurred by way of a stock transfer from the local housing authority to the Applicant who is an RSL. In doing so, the Applicant knowingly and voluntarily assumed the rights and obligations of the landlord under the terms of the Respondents' leases. In this connection, disclosure is sought of the contract governing the stock transfer, and all warranties and indemnities given by the local authority to the Applicant in respect of the obligations that the Applicant has assumed by becoming the landlord under the Respondents' leases.

The proposed amendment to clause 3

5. With respect, this proposed amendment is simply breath-taking. Its effect would be to remove any concept of a level playing field and negate one of Parliament's principal intentions in transferring service charge disputes to the LVT, namely, that they be adjudicated on in a cost neutral environment.

6. The proposed amendment would have the effect of creating a serious asymmetry on the cost dynamics of litigation before the LVT in that, win or lose, the landlord would, as a matter of contract, be entitled to recover its costs of the proceedings and, win or lose, the leaseholder would bear its own costs: it is precisely the sort of unfair, unbalanced

[1] as these mortgages are registered, the Applicant must be taken to have at least constructive or deemed notice of them.

and disproportionate provision that the Office of Fair Trading considers to be an unfair term in a tenancy agreement (residential tenancies falling, as they do, within the Unfair Terms in Consumer Contracts Regulations 1999). Attention is drawn to the Office of Fair Trading Guidance on Unfair Terms in Tenancy Agreements. If this type of provision is contained in any leases that the Applicant has already granted, the Applicant is invited to disclose whether it has sought the guidance of the Office of Fair Trading and, if not, whether it proposes to do so.

7. However, general expressions of outrage, are not necessary. It is clear that the LVT does not have jurisdiction to order the proposed amendment. The Applicant relies on section 35(2)(e), which provides for the variation of leases if they do not make satisfactory provision for:

> "*the recovery by one party to the lease from another 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.*"

Hence, in order to fall within this provision, expenditure must be incurred by one party to the lease (in this case the landlord incurring the costs of bringing proceedings in either a court or tribunal or similar body against the lessee to recover arrears) that are for the benefit of the other party (in this case the lessee against whom the postulated proceedings have been bought.

8. Self-evidently, having proceedings brought against you is in no way a benefit to you. In ordinary practical terms being the object of legal proceedings is very much a detriment. It is therefore respectfully submitted that there can be no question of this proposed amendment falling within the Tribunal's jurisdiction.

9. Further, or in the alternative, if the proposed amendment were to fall within section 35(2)(e), it is submitted that extending the landlord's contractual powers to recover its costs of litigation would be substantially prejudicial to the Respondents within the meaning of section 38(6) and therefore cannot be ordered.

10. In the further alternative, it is submitted that, if the proposed amendment were to fall within section 35(2)(e), and that the LVT were not precluded from making the order by section 38(6), then, the variation could only be ordered if substantial compensation

were granted to each of the leaseholders under section 38(10). No such offer of compensation is proposed by the landlord.

11. For completeness, it is queried whether, if the proposed amendment were made, the sums payable under it in respect of court and tribunal proceedings would fall within the statutory definition of "service charges" and therefore be subject to a debarring order under section 20C. The point being that it is not obvious that such charges would be "service charges", as defined by section 18 of the Landlord & Tenant Act 1985, rather than "administrative charges" falling within schedule 11 to the Commonhold and Leasehold Reform Act 2002: if they be administrative charges, then, they would not fall within the scope of the protection afforded by section 20C.

12. The Applicant is invited to set out its views on this point in its Reply to this Response.

The proposed amendment to clause 4(1)

13. Again, it is submitted that this proposed amendment, which is to extend the scope of the lessee's repairing covenant so as to obligate lessees to provide annual gas and electricity safety certificates, is not within the scope of section 35(2).

14. The lease already provides for the repair of gas and electrical apparatus (clause 4(1)) by the lessee. Moreover, the lessee is covenanted to comply, at its own cost, with the provisions of any statute, statutory instrument, rule, order or regulation and of any other direction or requirement made or given by any authority or the appropriate Minister or Court so far as the same affect the demised premises (clause 3(12). It is respectfully submitted that a combination of these two provisions makes satisfactory provision for the repair and maintenance of the gas and electrical installations so as to ensure a reasonable standard of accommodation, taking such factors as the safety and the security of the flat and its occupants into account.

15. Further, or in the alternative, requiring annual gas safety certificates for all lessees (including owner occupiers) will fall into one of the following two mutually exclusive categories:

    15.1. either there is a current obligation, as a matter of general law, to do so. In which case the lessees are already covenanted to do so under clause 3(12) and

therefore the proposed amendment adds nothing of substance to the pre-existing position; or

15.2. there isn't a current obligation as a matter of general law to do so, in which case for, reasons that are not articulated, the Applicant seeks to impose a more exacting standard on leasehold owners of flats in this block than are imposed on leasehold owners of flats elsewhere in London and the rest of the country under the general law.

16. In the first alternative (paragraph 14.1) it is submitted that the proposed amendment adds nothing ad therefore cannot be/alternatively should not be ordered. In the second alternative (paragraph 14.2), it is submitted that the obligations and protections conferred by the general law are sufficient to secure for the occupants of the flats a reasonable standard of accommodation within the meaning of the applicable provisions of the 1987 Act.

17. In the further alternative, it is submitted that imposing an obligation in excess of the general law, which is inevitably going to put leaseholders to considerable annual expense, is likely to be substantially prejudicial within the meaning of section 38(5) and is therefore an amendment that the LVT cannot order.

18. In the further alternative, if such an order is an order that may be made, it should only be made on terms that compensation is payable to affected leaseholders under section 38(10). As to which, it is noted that the landlord makes no proposals as to compensation.

19. It is noted that this may, in theory, be the sort of amendment that could be made under section 37 (Application by majority of parties for variation of leases) should the landlord be able to command the requisite level of support to bring a majority application for a variation.

The proposal to introduce an interest penalty for late payments

20. It is admitted that this proposal falls within the jurisdiction conferred by the LVT under section 35.

21. However, it is submitted that the order should not be made for reasons including that it is likely to be substantially prejudicial within the meaning of section 38(6) to leaseholders, who, under the terms of the leases that they have taken, are not burdened with any such obligation. Accordingly, it is submitted that this proposed variation therefore cannot be ordered by reason of the operation of section 38(6).

22. In the alternative, if such a variation is one that may be ordered, it should only be ordered on terms that compensation is payable to leaseholders under section 38(10): - the compensation to equate with any interest charges as may be levied against leaseholders in the future.

23. It is noted that, in support of this proposed amendment the Applicant relies upon its charitable status and its funding arrangements. Full particulars of all of the Applicant's sources of funding are requested, including details of how it presently funds any shortfall in service charge recoupment.

The proposed amendment to clause 3(9)

24. This proposed amendment is also disputed.

25. As presently drawn, these leases allow for the recoupment of 100% of the service charge expenditure. It is therefore submitted that the LVT has no jurisdiction under section 35 to order this variation. It simply cannot be said that the leases in their present form *"fail to make satisfactory provision with respect to the computation of a service charge payable"*, within the meaning of section 35(2)(f) & 35(4) of the 1987 Act.

26. By paragraph 1(2) of the fifth schedule to the LBTH Leases the lessees are covenanted to pay a "reasonable proportion" of the Total Expenditure (which expression is defined at paragraph 1(1)). The GLC Leases have a rateable value apportionment mechanism and a floor area apportionment mechanism in default. Accordingly, under both types of the leases, the landlord is able to recover the whole of its relevant expenditure as service charge.

27. The statutory definition of a failure (for the purposes of subsection 35(2)(f)) to make satisfactory provision with respect to the computation of a service charge is prescribed by the three cumulative limbs of sub-section 35(4). Attention is drawn, in particular, to

the wording of the third limb of this test at subsection 35(4)(c), which requires, in order for the failure to make satisfactory provision test to be made out, the following :

> *"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 such expenditure."*

28. Accordingly, as noted above, the leases in their present form allow for the full recoupment of service charge expenditure. Consequently the service charge recoupment provisions of the leases are not defective within the meaning of the legislation. Therefore the LVT simply has no jurisdiction to vary the apportionment mechanism under section 35.

29. It would of course be open to the Applicant to consider an application under section 37 (Applications by the majority of parties for variation of leases) if it were prepared to consult with leaseholders and generate sufficient leaseholder support for such an application.

30. The essence of the Applicant's case seems to be a perceived problem in accommodating dwellings in new builds (that will not have a rateable value) within the existing service charge regime.

31. This problem does not apply at all in respect of the GLC leases, which already have a floor area apportionment mechanism where rateable values are not available. As to what to do with the LBTH leases that have the reasonable proportion machinery established by the existing leases, with respect, the answer is clear. The answer is to simply continue to charge those leaseholders holding under the existing LBTH leases a reasonable proportion and to also charge the leaseholders holding under any leases demising new build units a reasonable proportion:- whether assessed across all of the dwellings on an estate (both older dwellings with rateable values and new builds without rateable values) on a floor area, or some other reasonable basis of apportionment. It is simply a matter of ensuring that all new leases that granted contain a covenant to contribute a reasonable proportion of the total service charge.

32. It should be respectfully noted that there is a potentially serious drafting/ logic error in the proposed amendment to para 1(2) of the Fifth Schedule - the effect of it, as drafted,

is to only trigger a floor area apportionment in circumstances where the flat (i.e. the premises demised by the existing lease in question) does not have an historic rateable value. All of the flats in Loweswater House have historic rateable values as the building was built before 1990. Going forward into the future all of these flats will continue to have historic rateable values whether or not any additional new build units are added to the estate and (under the proposed new clause) the obligation of the existing leaseholders to contribute would not change upon the introduction of any additional units. Hence, the very problem that the Applicant seeks to address (i.e. of what happens if and when additional new build units without rateable values are introduced) is not addressed by the proposed amendment. For example, under the proposed new wording, additional units could be added e.g. on the roof of the existing building, or in the grounds, which would not have rateable values, yet the leaseholders of the existing flats would still be liable to pay their current proportionate share calculated by reference to the historic rateable value of their flat .

33. That is to say, under the proposed amendment, the leases would end up paying the whole of the cost of maintaining the estate in the event that any new units were added. Whereas, under the terms of their existing LBTH leases, they would only pay a reasonable proportion and hence, if more units were added to the estate their proportionate share would go down. That is to say, the proposed amendment, as drafted, is entirely counter-productive

34. It is not for the Respondents to tell the Applicant how to re-draft its proposed amending provisions (even if the LVT had jurisdiction to order the variation)- but surely, the default floor area apportionment mechanism should be triggered by the introduction into the service charge scheme of any additional units that do not have a rateable value.

35. For the reasons set out above all of the proposed amendments are disputed.

36. Further, the Respondents seek an order under section 20C preventing the Applicant from exercising any contractual power it may have (if any) to include the cost of this Application as part of the service charge.

37. In addition, the Respondents seek an order under paragraph 10 of schedule 12 to the 2002 Act for their costs up to the maximum that the LVT may order by reason of the

Applicant’s unreasonable conduct in making an application the bulk of which is outside the LVT's jurisdiction.

The Respondents believe that the facts stated in this Response are true

Signed……

Dated……..