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HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

In the matter of an Application under Section 35 of the Landlord & Tenant Act 1987
(Variation of Leases)

Case Nos.	**CHI/21UD/LVL/2013/0002** **CHI/21UD/LVL/2013/0003** **CHI/21UD/LVL/2013/0004**
Property:	**2 Boscobel Road** **St. Leonards-on-Sea** **East Sussex** **TN38 0LU**
Between:	**Grace Lines Limited** **("the Applicant")**
	And
	Mr. Smith and Ms Garton (Flat 1) **Mr. Harston (Flat 2)** **Mr. and Mrs. Carter (Flat 3)** **("the Respondents")**
Date of Consideration:	**15th March 2013**
Members of the Tribunal:	**Mr. R. Norman** **Mr. R. Athow FRICS MIRPM**
Date Decision Issued:	**20th March 2013**

2 BOSCOBEL ROAD, ST. LEONARDS-ON-SEA, EAST SUSSEX TN38 0LU

Decision

1. The Tribunal makes the following orders:

(a) Pursuant to Section 35 of the Landlord and Tenant Act 1987 ("the 1987 Act") the leases of Flats 1, 2 and 3 at 2 Boscobel Road, St. Leonards-on-Sea ("the subject property") shall not be varied.

(b) Under Section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") all or any of the costs incurred or to be incurred by Grace Lines Limited ("the Applicant") (including the fees paid or to be paid to the Tribunal in respect of these applications) in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by Mr. Smith and Ms Garton, Mr. Harston and Mr. and Mrs. Carter (referred to collectively as "the Respondents")

Background

2. The Applicant is the freeholder of the subject property and the Respondents are lessees. Mr. Smith and Ms Garton are the lessees of Flat 1, Mr. Harston is the lessee of Flat 2 and Mr. and Mrs. Carter are the lessees of Flat 3.

3. Three applications were made under Section 35 of the 1987 Act for variation of the leases of Flats 1, 2 and 3 at the subject property. The applications were in similar terms and requested a variation of Paragraph 1 of Schedule 7 to the leases which sets out the lessee's proportion of the Maintenance Expenses.

4. On 17th January 2013 directions were issued and with those directions the Tribunal gave notice to the parties under Regulation 13 of the Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003, as amended by Regulation 5 of the Leasehold Valuation Tribunals (Procedure) (Amendment) (England) Regulations 2004, that the Tribunal intended to proceed to determine the matter on the basis only of written representations and without an oral hearing. Also that if the matter were dealt with in that fashion it might be considered by a Chairman sitting alone, or alternatively with another Member of the Panel, rather than by a full tribunal of three members. The parties were given the opportunity to object to that procedure by writing to the Tribunal no later than 28 days from the 17th January 2013. No written objection has been received and the matter is being deal with on the basis only of written representations and without an oral hearing.

5. The Applicant has supplied documents to the Tribunal in which it has set out its case which can be summarised as follows:

(a) The Applicant described the subject property as a "converted four storey Victorian sandstone building with redundant basement, sub-divided into 3 Flats" and explained that the existing and proposed percentages of the Maintenance Expenses payable in respect of Flats 1, 2 and 3 were as follows:

Existing	Proposed
Flat 1: 20%	24.10%
Flat 2: 25%	30.12%
Flat 3: 38%.	45.78%

Total: 83% 100%

(b) The existing proportions leave a shortfall for every expense of 17%.

(c) In the view of the Applicant any situation which does not allow 100% of the maintenance expenses to be paid is fundamentally defective.

(d) As a result, the subject property has fallen into decline and has the beginnings of dilapidation which is likely to continue until the situation is resolved.

(e) The former freeholder had hoped to convert the basement into a fourth flat to which would have been attributed the remaining 17% but planning consent had repeatedly been refused. Apparently the basement has a 62 year history of failed applications relating to the use of the basement as an independent unit of accommodation or commercial use. The basement is a redundant space with nil use and it appears impossible that the basement will ever gain formal planning consent to be used as a separate flat or otherwise. Copies of planning refusals from 2000 and 2006 were supplied by way of example. The former freeholder went out of business in 2009.

(f) In the Applicant's view the current structure is untenable; circumstances and events make it necessary to vary the leases to make provision for 100% of the service charges to be paid.

(g) The basement cannot be used for storage because it does not and cannot be altered to satisfy building regulation requirements as an independent unit of accommodation/storage. A copy of a letter dated 18th February 2013 from FireRiskAssessments.com was supplied.

(h) As to costs, the Applicant asked for the following to be taken into consideration:

(i) The objective of the Applications was to make management of the subject property a viable prospect.

(ii) The Applicant wrote to all the lessees in an attempt to resolve the matter privately, which would have avoided the cost of the applications. All lessees confirmed in writing that they did not consent to the variation.

(iii) As a consequence of the 17% shortfall the Applicant has already subsidised the Respondents in the order of £1,000 in the last statement period. While the Applicant can understand that it is appealing to the Respondents to have the Applicant further subsidise them by bearing the costs of these applications, it is precisely that way of thinking that has led to the serious decline in the state of the subject property and the former freeholder going out of business with debts owing.

(iv) In order to minimise costs, the Applicant had prepared the applications itself thus avoiding solicitor's fees and other legal expenses. The Applicant asks permission for the Leasehold Valuation Tribunal application fees to be borne by the Respondents via the maintenance expenses provided for in Paragraph 15 of the Sixth Schedule to the leases.

6. The Respondents have supplied documents to the Tribunal in which they have set out their case which can be summarised as follows:

(a) They purchased their flats on the basis of the percentages provided in the leases and would not have gone forward if the leases had stated that they would be required to pay a proportion of the uninhabited basement flat costs. The leases refer to four flats.

(b) They do not in any way benefit from or have use of any part of the basement and do not consider that it is a "common area" and therefore does not constitute any part of their financial responsibilities.

(c) They drew attention to, and provided a copy of, the auctioneer's details in which it is stated "The property is to be sold with vacant possession of the lower ground floor unit, which has potential for conversion into a studio flat, subject to all necessary consents being obtainable. Interested applicants are advised to make their own enquiries with the Local Authority, the Hastings Borough Council.....". It was on that basis that the Applicant purchased the freehold in 2011. The Respondents do not consider that their percentage of the maintenance expenses should increase because the prospective purchaser did not carry out planning permission research prior to purchase. The Applicant bought the freehold knowing the basement was included and the Respondents do not feel it is fair or their responsibility to cover expenses of a property that the Applicant owns and which has no use to the Respondents. The situation with the basement and the current lease arrangement existed at the time of purchase and it is likely this was reflected in the purchase price.

(d) They do not consider that they should have to take on any of the 17% shortfall because the Applicant is unable to gain planning consent in respect of the basement flat. There is no such requirement in the leases.

(e) The Applicant owns the basement along with the freehold of the subject property therefore the basement share (17%) of the maintenance expenses should be the Applicant's responsibility.

(f) Although planning permission for the basement as a residential dwelling has failed to be obtained, the basement has other uses and the Applicant still has the keys etc. for it. The Respondents have no interest in the basement. The Respondents are not aware whether any planning refusal was referred to the Planning Inspector for determination. The Respondents ask what would happen if they agreed to the variation and then the Applicant gained planning permission for the use of the basement as a flat.

(g) Mr. Smith and Miss Garton had asked Mr. and Mrs. Angell whether the Applicant would be interested in purchasing their flat as it could be converted with the basement into a maisonette. Mr. and Mrs. Angell said they would consider that in the future. The Respondents consider that to be an indication of the Applicant's knowledge that the basement forms part of the habitable area of the subject property and not a common part.

As the Applicant owns the basement and would benefit from any such conversion, the Applicant should therefore pay its share of the costs.

(h) The Respondents asked that the Tribunal rule that the Applicant cannot claim costs associated with the preparation of the applications as part of the maintenance expenses of the subject property.

(i) The Respondents have been advised by the Applicant that there is a potential subsidence issue to the front of the subject property. No details have been received but if the subsidence occurred as a result of works undertaken within the basement the conversion of the basement to a common area could have an impact in terms of liability for reinstatement works.

(j) As long as the basement area remains the exclusive property of the Applicant and is excluded from the maintained property then it seems reasonable that the Applicant as owner of the basement contributes towards the upkeep of the subject property.

7. On 7th March 2013 a letter dated 1st March 2013 was received from the Applicant enclosing a copy of an email from the Valuation Office Agency in which it is stated that with effect from January 2013 the basement can be deleted from the rating list on the basis it is incapable of beneficial occupation due to legal restrictions. It is requested in the email that if circumstances change in the future the Agency be informed.

The Law

8. Section 35 of the 1987 Act provides that:

> "(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—
>
> ...
>
> (f) the computation of a service charge payable under the lease;
>
> ...
>
> (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.

..."

9. Section 38 of the 1987 Act provides that:

"(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 subsections (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 subsection (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.

...

(6) A tribunal shall not make an order under this section effecting any variation of a lease 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) 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.

..."

Reasons

10. The Tribunal considered all the documentary evidence which had been provided, and made findings of fact on a balance of probabilities.

11. Clearly from the wording of the leases, the original freeholder' s intention was to create four flats and the service charges were apportioned accordingly. The fact that the total of the service charges payable by the Respondents is 83% of the total arises because

the freeholder has not been able to obtain planning consent or to let the basement. It was not a defect in the leases but a defect in the planning of the project. It would have been wise to obtain planning consent before granting any leases. The alteration to the Rating List is exactly that. It does not mean that the leases fail to make satisfactory provision with respect to the computation of a service charge payable under the leases.

12. When the Respondents purchased their flats they had the opportunity to consider the liability for service charges which they were agreeing to pay and made the decision to purchase on the terms in the leases.

13. Similarly, when the Applicant purchased the basement with vacant possession and the freehold of the subject property there was the opportunity to consider the burdens and benefits being acquired, the possible use of the basement and the possibilities of obtaining planning permission. The decision was made to purchase subject to the terms in the leases. Had the Applicant considered that the burden being taken on was unfair the choice open to the Applicant was clear. The Applicant could have decided not to purchase. The Applicant was not forced to purchase. It was possible to decide whether or not to do so. The Applicant purchased subject to the terms of the leases. If the leases were to be varied as requested then the Respondents would be forced to accept terms which they did not agree to and without the option to decline to purchase.

14. The Applicant suggests that the subject property is falling into disrepair and that that is happening because the Respondents will not pay 100% of the service charges. If the subject property is falling into disrepair then the covenants in the leases require the Applicant to carry out repairs and for the Respondents to contribute the percentages of the cost of repairs as set out in their leases. The remaining 17% is not, as the Applicant sees it, a matter of subsidising the Respondents but is the responsibility of the Applicant.

15. There was no justification for interfering with the original intention of the parties when entering into the leases or the situation which existed at the time of purchase by the Applicant.

16. The Tribunal was not satisfied that the leases fail to make satisfactory provision with respect to the computation of a service charge payable under the leases and therefore a variation of the leases was not required.

17. There is before the Tribunal an application for an order under Section 20C of the 1985 Act. We find that it is just and equitable in the circumstances to make an order under Section 20C. This was not a situation of the Respondents' making and they were justified in refusing to agree to variations of their leases.

(Signed) R. Norman

R. Norman
Chairman