91173

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/16UD/LVL/2013/0002**
Property	:	**26 Willowbank, Carlisle, Cumbria, CA2 5RY**
Applicant	:	**Mr M. Harris (Apt 26)** **Mr M. Davidson (Apt 24)** **(Leaseholders)**
Representative	:	**Mr M. Harris**
Respondent	:	**Willow Holme Lofts Management Company Ltd**
Representative	:	**Mr R. Thomas, Director**
	:	**Mr A. Storey; Property Manager; Leasehold Services Ltd (managing agent)**
Type of Application	:	**Landlord and Tenant Act 1987 Section 35 (Variation of Lease)**
Tribunal Members	:	**Mr L. W. G. Robson LLB (Hons)** **Mr A. Robertson JP FRICS**
Date and venue of Hearing	:	**Carlisle County Court, Earl Street, Carlisle**
Date of Decision	:	**8th August 2013**

DECISION

Decision Summary

(1) The Tribunal decided to make NO order for variation of the Leases under Part IV of the Landlord and Tenant Act 1987.

(2) The Tribunal makes NO order under section 20C of the Landlord and Tenant Act 1985 limiting the landlord's costs chargeable to the Respondent under the service charge or otherwise in connection with this application, the Applicant having withdrawn the application.

The application

1. By an (amended) application dated 28th March 2013 the Applicants seek an order pursuant to s.35 of the Landlord and Tenant Act 1987 ("the Act") to vary the leases of a number of units in the block known as Willowbank by reference to the terms of a specimen lease of Apartment 26 dated 26th October 2002 (the Lease). Extracts of relevant legislation are also attached as Appendix 1 to this decision. Directions by the Tribunal were given on 27th March 2013. As a result of serving notice on all relevant parties pursuant to the Directions, Mr Davidson requested to be joined as an Applicant.

Hearing

2. At the hearing, the first Applicant, Mr Harris made submissions following his written statement of case and answered questions from the Respondent and the Tribunal. He outlined the history of the matter. The problem had occurred on the grant of the leases on the property, when the service charge percentages quoted for each flat in the developer's handbook had not been followed. The problem affected the leases of 15 out of the 29 units in the block. This had not been a significant problem until 2009. In many cases the error was very small, but in several cases the error led to a significant under or over contribution to the service charge. Matters had come to a head when Mr Thomas had applied to the Tribunal for a determination of his service charge, asserting that his contribution should be calculated according to his lease, rather than on any other basis.

3. The parties had been attempting to resolve this problem for a number of years, but the opinions of the various leaseholders were very disparate, and no agreement could be reached. The Applicant had invited the Respondent to exercise powers it had to alter the terms of leases in paragraph 7 of the Second Schedule to the Lease. After taking advice, the Respondent had declined to do so, as it had been advised that there was an arguable case that no event had occurred which engaged the relevant provision in the Lease. Several other ways of resolving the situation were considered, but none had received universal support. The first Applicant, who was one of the leaseholders

significantly affected to his detriment, had then brought this application. He estimated that this year he was paying an additional £200 in a service charge contribution of £1,000. He proposed that the service charge percentages noted in the developer's handbook be used to vary the service charge contributions currently set out in the leases.

4. Mr Storey for the Respondent submitted that in view of the advice received, it would not support the application, but neither would it argue to oppose it. It had made a decision on 27th June 2011 that the best course was for the matter to be referred to the LVT, but that the responsibility for initiating action should be left to lessees. The company would continue to charge in accordance with the leases but would support any genuine attempt to resolve the service charge percentage anomalies fairly.

5. Mr Thomas, who was also one of the leaseholders likely to be most greatly disadvantaged by the proposed variation, asked to be heard also. The Tribunal agreed subject to the proviso that it might have to exclude any matters which had not been raised before. He stated that the history of the case was not quite as suggested by Mr Harris. The previous managing agents had not used the developer's handbook percentages to charge the leaseholders, but had made an estimate of their own relating to the floor areas, and used this estimate to calculate apportionments. Further they had, from time to time levied further charges in equal proportion to the number of flats, without regard to floor areas, when deficits or unexpected expenditure occurred. Service charges were fluctuating as was the basis of the charge. Mr Thomas made a Section 27A application to the LVT (subsequently withdrawn) but following that application the then directors (including Mr Harris) resigned and the managing agents had been sacked. Much effort had gone into trying to find an agreeable solution, but without success. Mr Thomas was not prepared to support Mr Harris' application.

6. In answer to questions from the Tribunal the parties confirmed that the percentages in the developer's handbook added up to 99.98%. The under-recovery of 0.02% based on the total service charge for the current year of about £26,000 would have amounted to a negligible £5.20. The percentages stated in the leases added up to 101.57%. The cost of rectifying the leases would greatly exceed the benefit to the company of the current overpayment. No consistency in the errors in the lease percentages had been identified. Some seemed merely the product of calculating to 2 decimal places instead of 3, others seemed due to plot renumbering by the Council as number 13 had been originally omitted but then reinstated by the Council, but others were greater, and just seemed to be wrong. The service charge percentages were based on floor areas. Flats 20 – 25 were duplexes, i.e. they had a mezzanine floor. While the floor areas of the mezzanine floors appeared to have been included in the calculations, it had not been possible to have them measured accurately, nor was it clear what reductions had been applied to the areas of the mezzanine floors resulting from reduced headroom, or if these were in accordance with the RICS code of measurement. No "as built" drawings had been discovered despite an application to the Planning Authority (The records

had apparently been lost in the floods in Carlisle in 2005), so it had not been possible to use these to check the calculations.

Decision

7. The Tribunal stated at the hearing that without a surveyor's report following the RICS measurement code confirming the measurements for all flats, it should be reluctant to alter the service charge percentages. While it was satisfied that the current percentages were unfair, thus engaging its jurisdiction, there was insufficient evidence before it to vary the percentages in the way proposed by the Applicant. The danger was that by adopting the Applicant's proposed solution it might inadvertently create more unfairness than it reduced. The parties and the Tribunal discussed what might be satisfactory evidence. The Tribunal suggested a possible adjournment to allow the Applicant to obtain a surveyor's report. The Applicant stated that the likely cost was too high for him to consider, as it would almost certainly require a number of visits to the property, even if all leaseholders were prepared to co-operate, which was not clear. The Tribunal suggested he might consider withdrawing the application, but the Applicant considered that the problem had gone on for too long and needed a resolution. He asked the Tribunal to make a decision based on the evidence before it.

8. For the reasons noted above, the Tribunal thus decided that although it was satisfied the existing percentages in 15 of the leases were unfair, it would make no order to vary the leases as it was not satisfied that there was sufficient evidence before it that the proposed variations to the leases would be fair.

Section 20C Application

9. The Applicant had made a section 20c application to limit the landlord's costs of this application being charged to the service charge. Mr Harris considered that his application had lanced a boil relating to the property, but he accepted Mr Storey's view that if the Tribunal made such an order it would be of little effect, given that the Respondent was owned by the leaseholders. After discussion he withdrew his application.

Appendix 1

Extracts of relevant legislation

Landlord & Tenant Act 1987; Section 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 te following matters, namely –

(a) – (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 the 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 superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of 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.

(5) Procedure regulations under schedule 12 to the Commonhold and Leasehold Reform Act 2002 shall make provision-

(a) for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or

has reason to believe is likely to be affected by any variation specified in the application, and

(b) for enabling persons served with any such notice to be joined as parties to the proceedings

(6) ...

36 Application by respondent for variation of other leases
(1) – (3) ....

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 subsections (6) and (7)) make an order varying the lease specified in the application in such manner as is specified in the order.

(2) – (5) ...

(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 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

(7) a tribunal shall not, on an application relating to the provision to be made by a lease with respect to insurance, ...

(8) A tribunal may, instead of making an order varying the lease ins uch manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified; and accordingly any reference in this Part (however expressed) to an order which effects any variation of a lease or to any variation effected by an order shall include a reference to an order which directs the parties to a lease a variation of it ot (as the case may be) a reference to any variation effected pursuant to such order.

(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 leasethe 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 that the tribunal considers he is likely to suffer as a result of the variation.

Landlord & Tenant Act 1985; Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, 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 or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
- (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.