



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

Case Reference : CHI/21UD/LVT/2014/0002

Property : Flats 1-6 Priory View, 121 Priory Road,
Hastings East Sussex TN34 3JQ

Applicant : 121 Priory Road Ltd (landlord)

Representative : Butters David Grey LLP, solicitors

Respondent : (1) Robert David Baker and Darren
Shane Rabbetts (Flat 1)
(2) Brian Michael Burke (Flat 2)
(3) Baker Boys Enterprises Ltd (Flat 3)
(4) Paul Martin Buck (Flat 4)
(5) Darren Shane Rabbetts and Robert
David Baker (Flat 5)
(6) David John Newell (Flat 6)

Representative : Thompson Allen LLP (for Sixth
Respondent). Fourth Respondent in
person.

Type of Application : Landlord and Tenant Act 1987 Part IV
(variation of lease)

Tribunal Member(s) : Judge Mark Loveday

**Date and venue of
hearing** : Paper track

Date of Decision : 1 August 2014

DETERMINATION

Background

1. This is an application by the freehold owner of Priory View, 121 Priory Road Hastings to vary the leases of six flats under Part IV of the Landlord and Tenant Act 1987. The application dated 21 March 2014 seeks to vary the service charge apportionments in the leases so that each lessee will pay an equal contribution of 16.67% towards the landlord's relevant costs.
2. On 26 March 2014, the Tribunal directed that the application shall be dealt with on the paper track without a hearing on the basis of written submissions only. The directions required the Respondents to indicate by 22 May 2014 whether they objected to the application and to submit any claim for compensation under s.38(1) of the Act.

The leases

3. By six leases dated 27 October 2003, 121 Priory Road (Hastings) Ltd demised the flats to Marcel Sulc for a term of 99 years. In each case the leases provided for a ground rent of £125pa and for a premium of £80,000. The Tribunal has been provided with copies of the leases and they contain service charge provisions in common form. The material provisions are as follows:
 - (a) By clause 1(3), the Lessee covenanted with the Lessor "To pay the maintenance charge at the times and in the manner hereinafter provided such charge to be recoverable in default as rent in arrear together with interest thereon at the rate of four per cent above the Base Rate from time to time of Royal Bank of Scotland plc from the date on which such monies become due until payment thereof."
 - (b) The maintenance charge was defined by clause 2(19)(b) as "an annual amount ... equal to the percentage specified in Part IV of the Second Schedule of the expenses and outgoings more particularly set out in the Fifth Schedule hereto incurred by the Lessor in connection with the performance and observance during each and every year of the term hereby granted of the covenants on the part of the [Lessor]¹ contained in Clause 3 hereof..."
 - (c) The Fifth Schedule sets out the relevant costs that may be included in the maintenance charge. By paragraph (1), these primarily relate to the cost of complying with the Lessor's obligations in clause 3 of the Lease. It is not necessary to set out all the obligations of the Lessor in clause 3, save that the obligations in each case relate to the "Building".
 - (d) The "Building" is in turn defined by the recitals as "the buildings its surround and curtilage in which the Premises hereby demised are situate and known as Priory View 121 Priory Road Hastings East Sussex TN34 3JQ ..."
4. Part IV of the Second Schedule of the leases give the following management charge percentages:

¹ The lease actually says "Lessee", but this is an obvious error. Clause 3 sets out the landlord's covenants.

- (a) Flat 1² (first floor): 4%
- (b) Flat 2 (ground floor): 4%
- (c) Flat 3 (ground floor): 4%
- (d) Flat 4 (first floor): 16%
- (e) Flat 5 (Basement/lower ground floor): 4%
- (f) Flat 6 (Basement and lower ground floor): 16%

5. The leases of flats 2, 3 and 5 were varied by Deeds of Variation made in 2011 and 2012. None of these variations are material to the issues in this application.

The Applicant's case

6. The application includes a draft deed of variation for each flat. The applications are supported by a statement of Mr Darren Rabbetts dated 22 April 2014. Mr Rabbetts is a director of the Applicant Company and joint lessee of Flat 1. It seems that the original Lessor sold the freehold to the Applicant Company, and that at least some of the lessees are involved with the freehold company. Mr Rabbetts states that when the Applicant purchased Flat 1, the vendor stated that the service charge apportionments "payable by all lessees were equal in the sum of 16.67%". He also produces service charge demands for each flat made by the managing agents We Love Property dated 17 November 2010. Each demand seeks a contribution towards Lessor's management fees of £201.30 and states that the lessee's "share" is 16.67%. At that time, the Fourth and Sixth Respondents were already the lessees of Flats 4 and 6 and they are named on the relevant service charge demands. Mr Rabbetts states that he believed all the lessees were aware that the percentages in the leases needed to be altered and that they were originally going to join in the purchase of the Applicant so the changes could be made. Mr Rabbetts suggested the contributions should each be varied to 16.67% since the aggregate of the lessee's contributions did not equate to 100% of the landlord's relevant costs. By a letter dated 19 June 2014, Butters David Grey stated that the 2010 invoices showed that "all of the lessees have always contributed 16.67% being an equal share."

The Sixth and Fourth Respondents' cases

7. By a letter dated 12 May 2014, Thompson Allen LLP solicitors indicated that the Sixth Respondent (the lessee of Flat 6) was considering whether to approve or oppose the application, but that in any event he would seek compensation under s.38(10) of the 1987 Act. On 19 May 2014 the solicitors sought an extension of time to respond, on the basis that they had only recently instructed a valuer in respect of the s.38(10) claim. On 31 May 2014, the Sixth Applicant wrote a personal letter to the Tribunal. He objected to the application to vary and stating that he was seeking compensation for any variation. The objection was on the basis that the suggested variation would amount to a 400% increase in his contribution.

² Each flat is described in the leases as an apartment.

8. The Sixth Respondent sought compensation of £20,000. This was calculated as follows:
 - (a) The Lessor's most recent estimated annual relevant costs were £2,422.00 (see 2013/24 budget estimate)
 - (b) A 4% contribution would be £96.88, whilst a 16.67% contribution would be £403.67. The difference is £306.79.
 - (c) There is also a scheme of major works with anticipated relevant costs of £121,586.30 (see application for payment dated 9 April 2014). A 4% contribution towards the cost of those works in 2013/14 alone would be £4860.44, whilst a 16.67% contribution would be £20264.38. The difference is £15,403.94. In a letter dated 24 June 2014, the Sixth Respondent further denied there had ever been an agreement with the Applicant to change the apportionment for Flat 6 from 4% to 16%. Since the present managing agents FPE Management Ltd had taken over, he had tried to "obtain recompense for overpayments". He had not paid any money to the present managing agents (except for ground rent) for over 18 months while he had been requesting a corrected invoice.
9. By a letter dated 21 May 2014, the Fourth Respondent (lessee of Flat 4) formally objected to the application to vary his lease. He stated that the suggested variation was not proportionate to the footprint of each of the six flats. He did not believe this was "equitable".

Conclusions - merits

10. The Tribunal makes one finding of fact that is material to its conclusions. It finds that prior to the involvement of the present managing agents FPE Management, some lessees (and in particular the Sixth Respondent) paid service charge demands calculated on the basis of an equal apportionment for each flat. The Tribunal relies on the brief statement to this effect in the solicitors' letter of 19 June 2014, but supported by the Sixth Respondent's letter dated 24 June 2014. The Sixth Respondent makes it clear he had for over 18 months been seeking "recompense for overpayments". This can only really mean that the Sixth Respondent paid invoices in similar form to the demands for payment dated 17 November 2010. In short, the Sixth Respondent has previously "contributed" a 16.67% share – even though more recently he has refused to do so.
11. Turning now to the statutory requirements, the material provisions of Part IV of the 1987 Act are set out in the Appendix to this decision.
12. The Tribunal finds that each of the leases as drafted failed to make satisfactory provision for the computation of a service charge payable under the lease and that the Applicant has satisfied the ground set out in s.35(2)(f) of the Act. The reason for this is that the conditions in s.35(4) is met in this case:
 - (a) The leases each provide at clause 2(19)(b) that the maintenance charge is a proportion of the expenditure incurred or to be incurred by or on behalf of the landlord: s.35(4)(a).
 - (b) The other leases all have similar provisions: s.35(4)(b).

(c) The aggregate of the amounts payable by reference to the proportions set out in the six leases is 48%. This is less than the whole of the Applicant's expenditure: s.35(4)(c).

Indeed, neither the Fourth nor the Sixth Respondent suggest the s.35(4) condition is not met.

13. Under s.38(1) of the Act, the Tribunal has discretion to make an order, and the Tribunal is satisfied that it would be reasonable to vary the leases. The contractual apportionments in the leases mean there will be shortfall in the recovery of over half of the Lessor's relevant costs. That will not only be inequitable to the Lessor (a company which at least some of the lessees are involved in), but it will also significantly prejudice the efficient and effective management of the premises. The Tribunal also considers it is material that previous service charge demands for each flat had sought equal contributions from each lessee, and that they specifically referred to a 16.67% "share" payable by the lessees of flats 4 and 6. Moreover, as the Tribunal has already found, the Sixth Respondent has in the past paid invoices based on a 16.67% contribution. The Fourth and Sixth Respondents do of course point out that their contractual liability will inevitably increase if any variations are made. However, where (as in this case), there is a substantial shortfall in apportionments, it is inevitable that the contractual liability of some lessees will have to increase.
14. The main issue is the form of the proposed variation, which imposes a large increase in the contractual liability of two lessees, and a very small increase in contractual liability of the other four. However, the Tribunal accepts it is appropriate to make the form of lease variations proposed by the Applicant. This is for a number of reasons:
- (a) First, there is some evidence that it was always intended that all the flats should make equal service charge contributions. The Tribunal notes that the leases provide for the same premiums and ground rents payable for each flat, irrespective of floor areas or other features. This is supported by the uncontested evidence of what Mr Rabbetts says was stated by the vendors when the Applicant acquired the freehold.
 - (b) Secondly, an equal apportionment is not an uncommon method of apportioning liability for service charges. It has the distinct advantage of simplicity and reflects the assumption that each flat has an equal 'demand' on landlord services.
 - (c) The Respondents do not suggest any other method of apportionment which could make up the 52% deficit in recovery of the landlord's relevant costs. We are not told the GIAs of the flats or the GIA of the whole building in order to apply apportionments based on floor areas. We are not told about historic rateable values (if they exist) to apportion based on rateable values. We know nothing about capital values – apart from the fact that all six flats were sold for the same amount in 2003.
 - (d) The Fourth Respondent says an apportionment based on floor areas may be more "equitable" in some situations. However, the Tribunal considers this does not mean it is unreasonable to adopt the equal contributions suggested by the Applicant. Indeed, equity requires one to consider the position of all the parties, including the other lessees

and the freeholder. If the contributions of the Fourth and Sixth Respondents are not to increase substantially, presumably the other lessees will have to increase their existing 16% contributions very substantially indeed.

- (e) In any event, leaving the status quo would mean that some lessees paid four times the service charge of other lessees. Whatever the difference in floor areas, there is no suggestion that Flats 1, 2, 3 and 5 are four times the size of Flats 4 and 6.
 - (f) The Tribunal relies on its finding that historically demands for service charges have been made on the basis of an equal apportionment, and that in some cases the lessees of Flats 4 and 6 paid on this basis.
15. Next, the Tribunal considers s.38(7) of the Act, namely whether the variation would be “likely substantially to prejudice” any Respondent and that a s.38(10) award would not afford him adequate compensation. As far as the Sixth Respondent is concerned, both he and his solicitors appear to accept that a s.38(10) award would afford adequate compensation, since the Sixth Respondent seeks such an award. However, the Tribunal does not consider there is substantial prejudice. The lessees of Flats 4 and 6 have at least in theory enjoyed a very low level of contractual liability for service charges – and the variation simply remedies the situation. In any event, even had they suffered such prejudice, it could be compensated for by a s.38(10) award.
16. Finally, should compensation be ordered? The Fourth Respondent has not sought an award under s.38(10), but the Sixth Respondent seeks £20,000 in compensation. The Tribunal declines to make an award for the following reasons:
- (a) First, for the reasons given above, the Tribunal does not consider the Sixth Respondent has suffered prejudice.
 - (b) Secondly, no valuation evidence has been forthcoming to support a loss of £20,000, despite the indications given by the Sixth Respondent’s solicitors that their client had sought valuation advice. The Tribunal requires expert valuation evidence to support a claim for £20,000.
 - (c) The Sixth Respondent’s evidence to support a claim for £20,000 is unsustainable. He mentions two measures of possible increase in exposure to service charges derived from estimates of the annual relevant costs of the landlord (namely £2,422 and £15,403.94) – although in the case of the major works figure, this cost will be spread over more than one service charge year. Be that as it may, no attempt is then made to capitalise these annual costs to arrive at a lump sum loss. The £20,000 claimed is little more than a guess.
 - (d) It is at least arguable that other considerations are ignored. For example, no account is taken of the possible negative effect the status quo may have on the existing value of the lease of Flat 6. A potential buyer of this lease will know there are currently lease problems that may well impact on the level of services in the Building.
- In short, the Tribunal declines to make any award under s.38(10) of the Act.

Conclusions

17. The Tribunal makes an order varying the leases of each the six flats by deleting the percentage specified in Part IV of the Second Schedule and substituting the words "Sixteen point six seven per centum per annum (16.67%)."
18. No award of compensation is made under s.38(10) of the Act.

Judge Mark Loveday
1 August 2014

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Appendix A: LEGISLATION REFERRED TO IN DECISION

Applications relating to flats

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 the court 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

Orders varying leases

38 Orders by the court 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 court, the court 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

...

(6) The court shall not make an order under this section effecting any variation of a lease if it appears to the court—

(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

...

(8) The court may, instead of making an order varying a lease in such 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 to effect a variation of it or (as the case may be) a reference to any variation effected in pursuance of such an order

(9) The court 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 the court makes an order under this section varying a lease the court 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 or disadvantage that the court considers he is likely to suffer as a result of the variation