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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BH/LVM/2015/0001**
Property	:	**Blocks 37-47, 49-59 and 97-107 Exeter Road, Walthamstow, London E17**
Applicant	:	**Circle Thirty Three Home Ownership Limited**
Representative	:	**Capsticks Solicitors LLP**
Respondents	:	**The lessees listed in the schedule to the application**
Representative	:	**None**
Type of application	:	**Variation of a lease by a party to the lease**
Tribunal Members	:	**Ms N Hawkes** **Mr L Jarero BSc FRICS**
Date and venue of paper determination	:	**25th March 2015 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**26th March 2014**

DECISION

Decision of the Tribunal

The Tribunal orders that that the "Specified Proportion of Service Provision (Clause 7)" is varied from 5.56% to 16.66% from 25th March 2015.

The application

1. By an application notice dated 12th December 2014, the applicant seeks to vary the leases of 18 flats contained in blocks 37-47, 49-59 and 97-107 Exeter Road, Walthamstow, London E17 ("the Buildings") under Section 35 of the Landlord and Tenant Act 1987 ("the 1987 Act"). The applicant states that, as the leases are currently drafted, the landlord will face a shortfall of 66.64% of the cost if any work is carried out to the Buildings.

2. The applicant seeks an order that the "Specified Proportion of Service Provision (Clause 7)" is varied from 5.56% to 16.66% from the date of the hearing.

The hearing

3. The applicant was represented by Mr Clive Adams of Capstick Solicitors at the hearing. The respondents did not attend the hearing and were not represented. However, the Tribunal received and considered a written statement dated 24th March from Neka Ekine, who was unable to attend the hearing due to long-standing work commitments.

The background

4. The applicant is the registered freehold owner of the Buildings under Title No.EGL357135. The Buildings comprise three blocks of six self-contained flats let on long leases. The applicant informed the Tribunal that the leases are in identical terms save for the premises demised and the description of the Building (which varies from block to block). Each long lease is for a term of 99 years commencing on 1st February 1998.

5. By clause 3(2)(b) of the leases, the respondents covenanted to pay the service charge in accordance with clause 7. The Particulars of each lease provide that the "Specified Proportion of Service Provision (Clause 7)" is 5.56%, i.e. 1/18 of the total expenditure is payable by each lessee.

6. By clause 7(5)(a) of the leases, the relevant expenditure to be included in the service provision comprises all of the expenditure reasonably incurred by the Landlord in connection with:

"the costs of and incidental to the performance of the Landlord's covenants contained in clauses 5(2) and 5(3) and 5(4)"

7. By clause 5(3) of the leases, the Landlord covenanted to:

"maintain, repair, redecorate and renew:-

a. The roof foundations and main structure of the Building..."

8. The Building is defined in the Particulars of the leases as comprising:

"The block of Flats situated upon the property known as [the description of the block in question is given] *and comprised in the title number above referred to".*

9. Accordingly, the lessees of each block are required pay a proportion of the expenses incurred by the applicant in the repair and maintenance of the block in which their flat is situated rather than a share of the costs across all three blocks.

10. In summary, each block contains six flats and but the specified proportion of the service charge costs payable by each lessee is 1/18 rather than 1/6 of the total costs leaving the applicant with a shortfall of 66.64% of the cost of any work undertaken to the Buildings.

The law

8. Subsections 35(1) and 35(2) of the 1987 Act provide:

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 appropriate 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;

9. Subsection 35(4) of the 1987 Act provides:

(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.

10. Subsection 38(6) of the 1987 Act provides that:

(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.

11. Subsection 38(10) of the 1987 Act provides that:

(10) Where a tribunal makes an order under this section varying a lease the 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 or disadvantage that the tribunal considers he is likely to suffer as a result of the variation.

The determination

12. The applicant submits that the draftsman of the leases made a simple arithmetical error in drafting the Specified Proportion. As drafted, the leases fail to make satisfactory provision in respect of the computation of the service charge because the Landlord is unable to recover 100% of its expenditure.

13. The applicant has received seven written responses to the application; two responses agreeing to the proposed variation and five opposing it. In summary, the lessees who sent the applicant written responses opposing the application argued that:

    (i) The leases already include satisfactory provision in respect of the calculation of service charge.

    (ii) Planned major works are due to take place to block 97 to 107, however, the application fails to confirm that the roof has been in need of repair for some time.

    (iii) Leaseholders have yet to respond to a section 20 notice issued in respect of the proposed works to block 97 to 107.

    (iv) Cyclical works in respect of all three blocks is long overdue.

    (v) There is a constant "uprising" of the service charge which is unacceptable when there is no service.

    (vi) Block 37 to 47 contains tenants who are not long leaseholders who are unlikely to be as vigilant as long leaseholders in maintaining their rented properties and it would be unfair to require long leaseholders to pay a proportion of the costs of this block.

14. These arguments were not pursued orally at the hearing. In the second statement dated 24th March 2015, Neka Ekine states that it should be noted that the respondents at 97-207 Exeter Road will suffer a loss and/or disadvantage by the variation.

15. The Tribunal accepts the applicant's contention that the aggregate of the amounts that are payable by the respondents in accordance with the proportions referred to in the leases in respect of service charge expenditure is less than the whole of the Landlord's expenditure.

Accordingly, the criteria set out in section 35(4) of the 1985 Act are satisfied and, for the purposes of subsection 35(2)(f), the leases fail to make satisfactory provision with respect to the computation of a service charge payable.

16. This is simply an arithmetical calculation and the issue of whether or not cyclical repairs have been carried out; whether or not any work is of a reasonable standard etc. are separate matters which do not form any part of this determination and in respect of which the leaseholders may wish to obtain independent legal advice.

17. Having determined that the leases fail to make satisfactory provision with respect to the computation of a service charge payable, the Tribunal must consider the issue of prejudice.

18. In Brickfield Properties Limited v Paul Botten [2013] UKUT 0133 (LC), the Upper Tribunal stated at paragraph 34:

A question arises as to whether an order making a variation which is backdated to the Transfer Date is an order which should not be made having regard to section 38(6) on the basis that (a) the variation would be likely substantially to prejudice the lessees and that an award of compensation under section 38(10) would not afford them adequate compensation, or (b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected. In my view it is clear point (b) does not apply. As regards point (a) it is true that the lessees will, by virtue of the variation, be in a worse position than they would be if for the remainder of their leases they each continued only to be responsible to contribute the original proportion of the costs of the services etc, such that the appellant or its successors had itself to fund out of its own monies the shortfall (here 14.45%). However in my judgment the substantial prejudice contemplated in section 38(6) cannot include the removal of an unintended and undeserved windfall flowing from the inability (because of an enfranchisement of one of the blocks) to recover 100% of the cost of the services etc to the remaining blocks. Similarly the loss to the lessees of this unintended windfall cannot in my view constitute the type of "loss or disadvantage" which is contemplated in section 38(10) and in respect of which compensation should be paid – or if it does fall within such "loss or disadvantage" the Tribunal should not think fit to order compensation in respect of this loss of the windfall. Were it otherwise the power to vary the lease so as to deal with the defect contemplated in section 35(4) would be of little or no value, because the party applying for the variation (which could be the landlord, but also be the tenants in a case where a landlord was entitled to more than 100% of the costs of the services etc) could only obtain the necessary amendment, so as to bring the recovery to 100% of the relevant costs, on payment of a sum by way of compensation which would in effect wipe out the benefit of curing the defect.

19. As the leases are currently drafted, the lessees entitled to receive the benefit of any work which the Landlord carries out to the Buildings in accordance with its repairing and maintenance obligations on the basis that the Landlord funds 66.64% of the costs of the work itself. The Tribunal accepts the applicant's argument that this is a "windfall" which is likely, on the balance of probabilities, to be the result of a drafting error. Having considered the passage of Brickfield set out above, the Tribunal accepts the applicant's argument that the substantial prejudice contemplated in section 38(6) of the 1987 Act cannot include the removal of such a windfall.

20. Further, the Tribunal accepts the applicant's argument that the loss to the lessees of this windfall either does not constitute the type of "loss or disadvantage" which is contemplated in section 38(10) and in respect of which compensation should be paid – or if it does fall within such "loss or disadvantage" the Tribunal should not think fit to order compensation in respect of this loss of the windfall.

21. As stated by the Upper Tribunal in Brickfield, were it otherwise, the power to vary the lease so as to deal with the defect contemplated in section 35(4) would be of little or no value, because the party applying for the variation could only obtain the necessary amendment, so as to bring the recovery to 100% of the relevant costs, on payment of a sum by way of compensation which would in effect wipe out the benefit of curing the defect.

22. Accordingly, the Tribunal orders that that the "Specified Proportion of Service Provision (Clause 7) is varied from 5.56% to 16.66% from 25th March 2015.

Judge N Hawkes

Date 26th March 2015