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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CHI/29UC/LVL/2014/0004**
Property	:	**26 Kings Road,** **Herne Bay,** **Kent CT6 5DA**
Applicant	:	**Waterglen Ltd.**
Represented by	:	**David Bland LLB (Hons)**
Respondents	:	**Kim Hennelly (first floor flat)** **Clare Louise West and Simona Sala (ground floor flat)**
Represented by	:	**Themselves, Ms. West not being in attendance**
Date of Application	:	**12th September 2014**
Type of Application	:	**Application to vary leases (Part IV Landlord and Tenant Act 1987 as amended)**
The Tribunal	:	**Judge Bruce Edgington (chair)** **Judge Michael Tildesley OBE**
Date and venue of hearing	:	**27th January 2015, Court 1, Canterbury Magistrates' Court, Broad Street, Canterbury CT1 2UE**

DECISION

UPON the Applicant agreeing that it will keep any claim for service charges incurred prior to the date of this decision at the 'old' proportion of one fifth per flat and will not claim any service charges incurred during any period prior to the date of this decision at the 'new' proportion of one half per flat:-

1. The Tribunal grants the application to vary clause 1 of the two leases to reflect a change in the proportion of service charges payable by the lessee of each flat from "one equal fifth share" to "one equal half share" to be effective from the date of this decision.

2. The parties are ordered to endorse a memorandum of this variation on the

originals and the counterparts of each of the 2 leases and apply to the Land Registry for a record of the variation to be placed in the property registers of the various titles by 4.00pm on the 27th February 2015.

3. The Tribunal refuses an order to pay compensation to the Respondents in accordance with section 38(10) of the **Landlord and Tenant Act 1987** ("the Act")

4. An order is made pursuant to section 20C of the **Landlord and Tenant Act 1985** preventing the Respondent from recovering its costs of and incidental to its representation before this Tribunal as part of any service charge.

5. The Tribunal refuses to make an order that the Applicant pays costs and expenses incurred by or on behalf of the Respondents.

Reasons

Introduction

6. The terraced property known as 26 Kings Road, Herne Bay, Kent CT6 5DA is split into 2 flats which are both let on 99 year terms from 1st January 1991. The Applicant and the Respondents are the current freehold and long leasehold owners respectively.

7. The Applicant says that there are defects in the leases which mean that the landlord can only recover one fifth of the service charges from each of the lessees of the 2 flats which, so they say, prevents recovery of all of their expenditure. They ask for the split to be half and half between the 2 flats.

8. The Respondents' cases on the papers are to say (a) that this was the bargain reached when the leases were entered into and should not be changed (b) it could have reflected a larger development and should stay as it is (c) the Applicant must have known of this when it purchased the reversion. As a fallback position, they go on to say that they are entitled to compensation in the sum of £125,848.99 each. This is worked out as the anticipated extra cost in future years if they have to pay one half rather than one fifth of the service charges.

9. The written cases of the Respondents also contain a great deal of information about the past history of the Applicant and its predecessors in title and also a full history of the involvement of the Respondent Kim Hennelly in property investment/management. Interesting though it was, the Tribunal had some difficulty in understanding the relevance of any of this to the issues in the case. For example, however badly the Applicant or its agents may have behaved – upon which no determination is made in this decision – cannot have relevance to the basic issue raised in the application i.e. are the leases defective and should they be varied?

10. An interlocutory application has been made on behalf of the Respondents for the application to be struck out on various grounds including that the application has not been properly served. By order of Judge Agnew dated 20th November 2014, such application was dismissed and Clare Louise West was added as a Respondent so that all the lessees are now parties.

The Property

11. As there were copies of both leases in the hearing bundle together with lease plans and two surveyors' reports including photographs, the members of the Tribunal decided that a physical inspection of the property before the hearing was not necessary.

12. According to the survey report of 9th January 2014, the property is a 2 storey terraced house built at the turn of the last century and later converted into 2 flats. This report was prepared for the Tribunal to give a view of how the service charge costs should be apportioned between the 2 flats and concludes that it should be 50/50.

13. The flats are almost identical in internal floor area but the ground floor flat has the benefit of the rear garden being included in the demise. Although the report does not say so specifically, it would presumably be argued that although the ground floor flat has the garden, such garden would have little effect on the level of service charges. Both flats have the benefit of being able to park on what was the front garden although whether it is possible to park 2 cars is unclear from the photographs.

14. Also in the hearing bundle is another report from the same firm of surveyors dated 20th January 2014. The inspection for the 2 reports was undertaken on the same date (25th November 2013) by Paul Howard MRICS, who describes himself as a building surveyor, but the earlier report is prepared by Paul Holford BSc (Hons) MRICS. It is not clear why 2 reports had to be prepared by 2 different surveyors following the inspection by one of them, but the second report seems to have been prepared in anticipation of substantial works to the property. It sets out a number of recommendations for maintenance and repair which are clearly going to cost a considerable amount to undertake. The report is said to provide 'advice on section 20 works'.

The Leases

15. All references to service charges in the leases describe them as relating to "the building". In other words, the landlord is to insure and maintain "the building" and the cost is the service charge. The building is defined in the recitals to the leases as being "*the freehold property known as 26 Kings Road, Herne Bay in the County of Kent which are* (sic) *divided into two flats*". It is said to include the 'grounds'. In other words there does not seem to be any doubt that the service charge provisions only relate to this 1 building and these 2 flats.

16. This is important because of the assertion made by Ms. Hennelly that there might have been the intention to develop the property into 5 flats. It is clear to this Tribunal from the wording used to define the building that the intention was to convert this terraced house into 2 flats only. There would simply be no room for 5 flats in a conversion of this one terraced house.

17. In clause 1 of the 2 leases, the requirement to pay service charges is set out as follows:-

> *"There shall also be paid by way of further or additional rent such sum or sums to be assessed in manner referred to in this Clause as shall be a one equal fifth share of the amount which the Lessor may from time to time expend and as may reasonably be required on account of anticipated expenditure"*

18. The leases then go on, in sub-clauses 4(10) onwards, to set out the service charge regime. This makes it clear that the landlord has to keep proper books of account. On the 1st February in each year of the term, service charge accounts have to be drawn up to record the service charges incurred since the last account. The requirements go on in the next clause to say:-

> *"The account taken in pursuance of the said last preceding clause shall be prepared and audited by a qualified accountant who shall certify the total amount of the said costs charges and expense (including the audit fee of the said accountant) for the period to which the account relates and the proportionate amount due from the Lessee to the Lessor under this lease shall be conclusive and binding upon the Lessee"*

19. The 3rd mention of any proportion of service charges comes in the 3rd Schedule which purports to be 'Regulations'. Regulation 12 says:-

> *"To pay a one half part of the costs and expenses incurred by the Lessor in maintaining and repairing the communal parts of the Building"*

20. Thus, it is at least arguable that the 3 parts of the lease quoted are inconsistent and ambiguous. Clause 1 is clear in providing that one fifth of the monies expended or required on account for the landlord to comply with its maintaining, repairing and insuring obligations in the respect of 'the Building' is payable by the lessee of each flat. Clause 4 says that the proportion is to be certified by the accountant and the 'regulation' suggests one half. As a matter of comment only, clause 12 of the 3rd Schedule is immediately before the signature block in the lease and is clearly not a 'regulation', which suggests that it may have been added as an afterthought.

The Law

21. Section 35 of the Act permits any party to a long lease of a flat (not commercial premises) to apply to this Tribunal for an order varying such lease if it *"fails to make satisfactory provision with regard to one or more of the following matters"*. There then follows a list of matters such as repair or maintenance of the building, insurance, repair or maintenance of 'installations' or services and the ability to recover all the service charges from the tenants.

22. Section 35(4) is, perhaps, the most relevant in view of the dispute which has arisen in this case. It says that a lease *"fails to make satisfactory provision with respect to the computation of a service charge payable under it if....the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions....would either exceed or be less than the whole of*

such expenditure".

23. The Applicant has referred to a number of decided cases. Two which the Tribunal found to be of assistance were **Morgan v Fletcher** [2009] UKUT 186 (LC) and **Brickfield Properties Ltd. v Botten** [2013] UKUT 0133 (LC).

24. In the **Morgan** case, HHJ Jarman QC was considering whether section 35 could be used to determine the proportion of service charges as between lessees. His ruling was that, on a strict interpretation of the Act, this was not possible. It could only be used if the total collectable service charges amounted to more or less that 100%. As this was a new point of law and arose from an apparent ambiguity in the Act, he was able to hear evidence about what happened when the Act was considered by Parliament and the reports which gave rise to the Bill.

25. He concluded that the Act was intended to cure 2 problems i.e. (a) when the leases did not enable the landlord to collect 100% of the cost of maintaining etc. a building and (b) when the leases gave the landlord more than 100% of such cost. That part of the Act was designed to remedy those 2 defects.

26. In **Brickfield**, the issue was whether variations of the kind sought in this case can be backdated. In that case the landlord owned 7 blocks of flats which were managed together and the service charge liabilities were split between all the lessees. The lessees of one block applied for and obtained collective enfranchisement which left 6 blocks. This left a shortfall in the service charge regime as the landlord could only collect 85.5% of the cost of maintenance etc. through service charges.

27. The variation was allowed and main question was whether it could and should be backdated to the date of the transfer of the 7th block. HHJ Huskinson allowed the appeal and said that it should. He reminded himself of the finding of the LVT that "*it was satisfied that Daejan had consulted with the respondents and informed all of them of the steps they were taking, including assignees of any of the flats that were assigned after the process was started*". Daejan were the landlords at the time and had warned the lessees that unless they agreed to the variation, an application would be made to vary. Thus it was clear that the landlord made all the lessees aware of the problem from the outset, and of its intention to apply for a variation if such variation was not agreed voluntarily.

28. The judge also took the opportunity to talk about compensation and this is relevant to this decision. He referred to lessees who had the 'windfall' of not having to pay for all the repairs and maintenance of a building, as in this case. He reminded himself, in paragraph 34 of his judgment, that in circumstances such as in this case, a variation would mean that the lessees would have to pay more in service charges than before. He then went on to say that this was not the 'prejudice' referred to in section 38(6) and (10) which should give rise to compensation. He went on to say:-

> "*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".

The Hearing

29. The hearing was attended by David Bland and Alex Dray for the Applicant and Mrs. Hennelly and Miss. Sala. Miss. Sala explained that Ms. West was her former partner and did not live at the flat now. She is aware of these proceedings and previous hearings. As she had taken no part in the proceedings, Mrs. Hennelly had travelled from Spain to be at the hearing and all parties wanted this issue determined, the Tribunal agreed to continue with the hearing.

30. Mr. Bland then produced a short skeleton argument and copies of the cases he wanted to rely upon. As these had not been seen by Mrs. Hennelly and Miss. Sala, they were asked what they wanted to do. The Tribunal chair indicated that if they wanted to apply for an adjournment so that these could be considered, then the Tribunal would be amenable to this. They assured the Tribunal that they wanted to proceed and it was agreed that there should be a 30 minute break for them to consider this new material.

31. The Tribunal chair asked Mr. Bland exactly what he was saying about backdating any variation because it was not mentioned in the application and had only arisen as an issue since then. He gave the Tribunal as assurance that if the variation was granted, then there would be no claim against the lessees in respect of any period prior to the hearing for anything more than one fifth of the service charges each. In other words, it was agreed that the variation would only take effect as from the decision.

32. It was then put to him that he had not followed the Tribunal's directions by including "*a precise draft of the variation sought*" in the hearing bundle. Whilst he did apologise, he said that he was only asking for the deletion of one word i.e. "fifth" from clause 1. It was suggested to him by the Tribunal chair that this would still create a possibly ambiguity and this would be removed by substituting "fifth" with "half". Mr. Bland agreed and, in effect, adopted that suggestion. No other variations were sought.

33. The Respondents made it clear that they were aggrieved by the behaviour of the Applicant and its agents. They asserted that an 'undertaking' had been given to a previous Tribunal by Mr. Bland that there would be negotiations to resolve the issues. There had been a meeting on the 19th February 2014. There was a minute of this meeting in the hearing bundle which had been written or transcribed many months later. The content of that minute was contested by Mr. Bland. However, as far as the Tribunal could see, the minute simply recorded discussions about possible ways to resolve the issues with Mr. Bland saying he would seek instructions.

34. Mrs. Hennelly in particular felt that no attempt had been made by the Applicant

to resolve issues. She accepted that she had not put forward any specific proposals when she knew that this application had been made. Mr. Bland referred to Mrs. Hennelly making an offer of £1 for the freehold and a claim for substantial compensation neither of which his client would accept.

35. Following general evidence from Mrs. Hennelly that emergency remedial works had to be undertaken in August 2014 as a result of a failure to maintain and repair the building, the Tribunal tried to obtain details of this. She said that she had stayed in her flat between sub-lettings for 2 weeks during which the weather was very wet and windy. There was significant water penetration to both flats through the roof and the front door. She had asked the Applicant's managing agent to deal with this but to no avail. She had therefore instructed contractors to repair guttering, the roof, boarding out the loft to take buckets etc. whilst the repairs were being undertaken and renewal of the front door and cill. She believed the cost to be £1,400. The costings she was able to produce amounted to £1,342.95. The invoices had been sent to Mr. Bland.

36. During discussions on this point, Mr. Bland, on behalf of the Applicant, agreed that there would be a refund of three fifths such of those costs as they determined to be reasonable. As all the works were either indicated in the Applicant's surveyor's report at page 208 as being needed or were incidental thereto, the Tribunal trusts that there will be no prevarication on the part of the Applicant.

37. Towards the end of the hearing, it was explained to Mrs. Hennelly that this Tribunal would be bound to follow the Statute and the decided cases of the Upper Tribunal. She was asked whether there was anything she wished to address the Tribunal about arising from the **Brickfield c**ase in particular. She said that she was unaware that this Tribunal would have to follow the Upper Tribunal's decided cases. The Tribunal again asked if she wanted an adjournment to consider that issue. She said that she definitely did not want an adjournment to another day, but asked for some time to again consider the cases produced by Mr. Bland. She was given such further time but then made no particular submissions on either the **Morgan** or the **Brickfield** cases.

Discussion

38. The most significant wording in section 35 of the 1987 Act is that there is a requirement that the lease "*fails to make satisfactory provision*". Subsection 35(4) helps by saying that the failure to make satisfactory provision relates to whether the service charges collectable under a lease amount to more or less than 100% of the cost of such service charges. In this case, the proportion of service charges collectable is just two fifths from all the flats in the building.

39. The Respondents' position is that it is basically unfair to change the arrangements now. A contract is a contract. The Tribunal asked Mrs. Hennelly what the position would have been if the amount recoverable had been more than 100%. She said that she would not have bought the flat as she had legal advice when she bought. One inference to be drawn from this is that she knew that she would not be contractually bound to pay for all the service charges incurred. If she had legal advice, she would no doubt have been told that the landlord could apply to vary the lease under statutory provisions designed to deal with exactly

this sort of situation.

40. As far as the effective date is concerned, the assurance given by the Applicant about not claiming past service charges at the new proportion was very helpful. This makes any need to consider backdating the variation redundant.

41. Turning to the issue of compensation, the Tribunal was concerned about the clear evidence of a lack of maintenance and repairs. The Applicant's own surveyor's report prepared by Mr. Howard at page 208 in the hearing bundle set out a list of no less than 13 substantial repairs needed to the building in November 2013, quite apart from any routine decoration and maintenance. The Tribunal noted that none of this work had been carried out over a year later apart from the emergency repairs which had to be undertaken by Mrs. Hennelly and her contractors. The difficulty was that the evidence put before the Tribunal was not sufficient for it to make any real determination about (a) how much repairs would cost and (b) the proportion of that cost attributable to any lack of maintenance.

42. However, the Respondents should not think that there is nothing they can do. If the repairs are undertaken and the claim made for the cost, they should take professional advice about whether the cost of repairs has been inflated because of a lack of maintenance. Having said that, just turning up at a Tribunal hearing without evidence and asserting that the cost is too much will not be sufficient. If a lessee is disputing the reasonableness of the cost of a repair, it is up to that lessee to provide some evidence which suggests overcharging or unreasonable work. It is only then that the onus shifts to the landlord to prove reasonableness. (**Schilling v Canary Riverside Development PTD Ltd** LRX/26/2005; LRX/31/2005 & LRX/47/2005)

43. One problem may well be that no or insufficient legal advice has been taken. If legal advice was taken, as stated, when the first floor flat was purchased, then Mrs. Hennelly would have been aware that she was buying a property with terms that she only had to pay a small proportion of the service charges but that this could be remedied by the landlord. If the landlord refused to obey the terms of the lease by keeping the property in repair, as seems probable in this case, then there is a remedy in the county court for breach of contract.

Conclusions

44. The application to vary the leases is granted. The Tribunal takes the view that Section 35 was introduced to deal with just such a problem as there is in this case where the landlord could only recover two fifths of the costs of insuring and maintaining the property.

45. As to any backdating, the Tribunal was troubled by this suggestion as the **Brickfield** case is only authority for backdating in the particular circumstances of that case where the landlord had identified a problem before it arose, kept the lessees informed of the progress of the problem and asked the lessees to agree the variation before making the application. The circumstances in this case as to the delay in making this application and apparently making the decision not to do anything at the property until the variation was granted do not put the Applicant in a good light.

46. No doubt because of this, the assurance was given by the Applicant, which is recorded as part of the order made, and makes any consideration of this issue redundant.

47. As to compensation, the authority of **Brickfield** is clear and the Tribunal considers itself bound by the decision that future losses caused by the fact that the lessees were now having to pay their fair share of the service charges cannot be properly described as 'prejudice' for the purpose of subsection 38(6) or 'compensation' for the purpose of subsection 38(10). Very careful consideration was given to whether there should be compensation for the past failure to maintain the building, but, as has been said, the Tribunal had insufficient evidence to calculate an amount.

Costs

48. The application itself said that the Applicant would not seek to recover any costs of representation and when Mr. Bland was asked whether he would object to an order under section 20C of the **Landlord and Tenant Act 1985**, he said not.

49. The Respondents then made application for expenses incurred by them, presumably pursuant to rule 13 of the **Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**. Miss. Sala claimed £80 for loss of earnings for the day and Mrs. Hennelly claimed a total of £240.90 to cover her air fare from Spain, luggage allowance for the paperwork, train fare, bed and breakfast and bus fare.

50. Proceedings before this Tribunal are sometimes called 'no costs' proceedings which means that the 'winning' party is not able to recover costs and expenses. However, a party can recover costs and expenses if the other part has acted "*unreasonably in bringing, defending or conducting proceedings*". The assertion made by Mrs. Hennelly is that a previous Tribunal had been given an undertaking that efforts should be made to settle the case and that the failure of the Applicant to exhaust negotiations before starting this application amounted, in effect, to unreasonable behaviour. She added that, in her view, the Applicant had behaved improperly in not fully completing the application form so as to mislead the Tribunal and had disobeyed a previous Tribunal's orders.

51. This Tribunal carefully considered these claims. It determined that based on the information given to the Tribunal about the negotiations, they were unlikely to succeed. Mrs. Hennelly made it clear that she would not have agreed to the variation without substantial concessions. It was equally clear that those concessions would not be agreed to by the Applicant. The Tribunal also concluded that there was insufficient, if any, evidence if any misbehaviour on Mr. Bland's part.

52. It was determined that the conduct of the Applicant was not sufficient to amount to unreasonable conduct for the purpose of rule 13. No order for the Applicant to pay the Respondents' expenses is therefore made.

Bruce Edgington
Regional Judge
28th January 2015