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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AY/LVL/2016/0006**
Property	:	**37 Croydon Road, London SE20 7TJ**
Applicant	:	**(1) Goodluck Cooperations Limited** **(2) Mr Omolulu Goodluck**
Representative	:	**Mr Yode Balogun, Alfred James and Co, Solicitors**
Respondent	:	**(1) Ms Leslie Apablaza** **(2) Ms Servet Salih**
Representative	:	**No appearance**
Type of Application	:	**Variation of a lease by a party to a lease**
Tribunal Members	:	**Tribunal Judge Percival** **Mrs Sarah Redmond MRICS BSc(Econ)**
Date and venue of Hearing	:	**10 August 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**26 August 2016**

DECISION

The application

1. The Applicants seek to vary the leases of four flats under section 35 of the Landlord and Tenant Act 1987 ("the 1987 Act").

Background

2. The property is a semi-detached Victorian house converted into four self-contained flats. Mr Goodluck owns the leasehold interest in the two upstairs flats, Flats C and D. He lives in Flat C, which is a studio flat. Flat D is tenanted. Ms Apablaza and Ms Salih are the leaseholders of Flats A and B respectively, and both are reside in their flats. Flats A, B and D are two bedroom flats. Mr Goodluck acquired the freehold of the property in April 2016, through his company, the first applicant.

3. The leases of the four flats are substantively the same (save that, irrelevantly, a housing association was fourth party to that of Flat A), although the terms of years vary (those of both flats C and D having been extended). The leases are tripartite between the lessor, the lessees and the Management Company. The Management Company was owned by the lessees.

4. The leases provide that the Management Company is responsible for the repair of the un-demised parts of the building, exterior decoration, insurance of the building, the cleaning and lighting of common parts and general management (clause 4). Provision is made for the payment of a service charge by the lessees to the Management Company (clause 3). The proportion of expenditure payable as service charge is one seventh in the case of the smaller Flat C, and two sevenths in respect of the other three flats. There is no provision for these obligations to devolve on the freeholder in the event of the dissolution of the Management Company.

5. In 1992, the Management Company was dissolved.

6. In 2002, no doubt in an attempt to mitigate the effects of the dissolution of the Management Company, the four lessees executed a deed ("the 2002 deed"). This deed, which was expressed as being "supplemental to each of the leases", provided for the lessees to jointly undertake, and pay for, "the shared obligations". The shared obligations, which are set out in the first schedule, are similar (although not identical) to those imposed on the Management Company by clause 4 of the lease. In addition to obligations to repair, insure and so on, there is a sweep-up general management clause which includes within the category of "shared obligations" such other expenditure as is considered necessary or advisable by a majority of the lessees. The costs

of undertaking the "shared obligations" are split equally between the four flats.

7. The 2002 deed requires a lessee, on conveying his or her interest, to execute a deed the effect of which is to transfer the obligations under the deed to the new lessee. This requirement is registered as a restriction on the registered titles to each of the flats.

The hearing and the issues

The application

8. The respondents had been informed of the application and the hearing, but had not responded to those communications, and did not appear. Goodluck Cooperations Limited and Mr Goodluck were represented by their solicitor, by Mr Balogun.

9. Mr Balogun submitted that while the lease did make provision for the repair, insurance and management of the building, that provision was not satisfactory, once the Management Company was dissolved. The lease lacked a default clause by which the freeholder would step into the shoes of the Management Company if the Company became insolvent. In the result, Mr Balogun submitted, each of the matters set out in section 35(a) to (e) of the 1985 Act were made out.

10. In respect of the 2002 deed, Mr Balogun argued that it did not adequately substitute for the variation in the lease for which he contended.

11. First, the only parties to the deed where the lessees. The freeholder was absent, even though it was the freeholder who was most concerned with the structure of the building and common parts. As a result, Mr Balogun argued, the freeholder could do nothing if its interests were deleteriously affected by any inadequacy in the workings of the arrangements under the deed. If, as was possible, the parties to the deed simply did nothing, the freeholder had no remedy.

12. Secondly, Mr Balogun argued that the 2002 deed was (at least probably) unenforceable between the lessees, once the original signatory lessees conveyed their interests. Rather than relying on the transfer of liability provided for by the deed itself, a new deed should have been signed by each lessee every time a leasehold interest was conveyed.

13. Thirdly, under the 2002 deed, Mr Goodluck was liable for a quarter of the expenditure of Flat C, rather than the one seventh required under the lease. The move to the arrangement in the deed had thus resulted in a greater burden being imposed on Mr Goodluck in respect of that flat.

14. Fourthly, under the terms of the 2002 deed, Mr Balogun submitted, a majority of lessees could prevent necessary work being undertaken.

15. Fifthly, unlike proper provision for a service charge in the lease, the "shared obligations" charges were not subject to the jurisdiction of the Tribunal. Thus, for instance, neither party could make an application under section 27A of the Landlord and Tenant Act 1985 in respect of the payablity and reasonableness of a demand under the deed. Similarly, the protection of the consultation requirements under section 20 of the same Act did not extend to the lessees if the procedure in the deed were used. In support of this contention, Mr Balogun argued that the use of the words "an amount payable by a tenant ... *as part of, or in addition to rent*" in the definition of "service charge" in section 19 of the 1985 Act meant that a service charge must be a charge under a lease in respect of the relevant expenditures.

16. Finally, Mr Balogun argued that the 2002 deed mechanism, in particular the registered restriction, caused unnecessary difficulty and expense for those selling their leaseholds.

17. Mr Goodluck's evidence was to the effect that, as a matter of fact, the 2002 deed arrangement was not working. He said that the physical state of the property was poor. The main roof needed attention, as did some of the windows, and the exterior decoration was in a very poor state.

18. The cleaning and decoration of the common parts was haphazard. He himself cleaned the common parts, and he had noticed that one of the other lessees had also done some cleaning. He had decorated the upstairs landing himself. In neither case had he received any reimbursement from the other lessees.

19. Each of the flats took out its own insurance, so there was no insurance cover for the common parts. Mr Goodluck said he had obtained quotations for overall building insurance, and had discussed the question with the other lessees, but in the absence of a procedure for enforcing the insuring obligation, nothing came of his efforts.

20. A further example of the failings of the 2002 deed process was provided by the electricity bill for the common areas. Before he acquired the freehold, the relevant account was in the name of one of the lessees, and it seems that bills where paid by the lessees. When it became known that he had acquired the freehold, that lessee had transferred the account to him, with his agreement, but it had not proved possible to collect the contributions from the other lessees (although Mr Goodluck did say that he had used the lease proportions, rather than those in the 2002 deed).

21. Mr Goodluck said that he had not undertaken asbestos and fire risk assessments that he believed were a statutory responsibility imposed on him by virtue of being the freeholder, because he would have been unable to recover any of the costs of doing so.

Conclusions on the application

22. The Tribunal is satisfied that the grounds upon which the application is made are established. Given the dissolution of the Management Company, the leases fail to provide a mechanism for the discharge of those obligations that are imposed on the Management Company. Those obligations are fundamental to the protection of the interests of all of the parties to the lease, and in their absence the lease does not make satisfactory provision as to the matters set out in section 35(2)(a) to (e) of the Landlord and Tenant Act 1987.

23. We accept that the 2002 deed does not constitute a satisfactory alternative to a variation of the lease. In particular, we agree that it is fundamentally unsatisfactory that the freeholder is not a party to the deed, and is thus unable to protect its interests in the common parts, which the deed purports to serve. We also accept Mr Balogun's submission, and Mr Goodluck's evidence, to the effect that the 2002 deed process is not working in practice.

24. We doubt Mr Balogun's argument that the deed is not enforceable, even between the lessees, following transfer of one or more of the leases, but are not called upon to make a definitive ruling in respect of it.

25. Mr Balogun did not argue that we should not take the existence of the 2002 deed into account when considering the statutory question, which is confined to whether *the lease* makes satisfactory provision for the matters therein enumerated. We see merit in such an argument, but again do not need to come to a concluded view on the matter, given our view on the inadequacy of the deed as an alternative to the lease, as argued by Mr Balogun.

26. Following the variation of the lease that we order, the 2002 deed is unnecessary. We have concluded that the Tribunal has no power to order that the deed should be discharged. However, the effect of the variation order we make is to remove any utility that the deed may have had as a substitute for proper provision in the lease, however limited that might have been. The obligations now placed on the freeholder – and the corresponding provision for a service charge – means that the deed will not be needed, and (assuming the freeholder discharges its obligations) there will be no occasion upon which it could reasonably be relied upon. It is also clearly in the interests of all of the parties to discharge the deed, and we urge them to do so.

27. There have been no applications for compensation from other parties to the leases, and we make no order in relation to compensation.

Order

28. The Tribunal orders that each of the leases of the four flats in the subject premises are varied in such manner as is specified in the draft Deed of Variation to be found at the appendix hereunder.

Appeal

29. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

30. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

31. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

32. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Name: Tribunal Judge Richard Percival **Date:** 26 August 2016

Appendix: draft Deed of Variation

DRAFT DEED OF VARIATION

THIS *DEED* OF VARIATION is made the day of Two Thousand and Sixteen is made B E T W E E N GOODLUCK COOPERATIONS LIMITED whose registered office is situated at 37c Croydon Road London SE20 7TJ hereinafter referred to as "the Landlord" of the one part and LESSEE of 37B Croydon Road London SE20 7TJ hereinafter referred to as "the Tenant" of the other part

W H E R E A S:-

(1) This Deed is supplemental to the Lease dated the 3rd of March 1989 (full particulars of which are set out in the Schedule to this Deed) between Cloakbury Limited (1) hereinafter referred to as the "First Landlord", 37 Croydon Road (Management Company) Limited (2) hereinafter referred to as "the Management Company" and ..... hereinafter referred to as "the Tenant"

(2) The Lease remains vested in the Tenant and the reversion expected thereon is vested in the Landlord

(3) The Landlord and the Tenant acknowledge that the Management Company Limited no longer exist the same having since been dissolved.

(3) The entire covenants in so far as the obligations to repair, maintain insure and manage the common parts of the building and grounds of the Property 37 Croydon Road London SE20 7TJ is vested in the Management Company in Clause 4 of the Lease and the parties herein acknowledge that in view of the Management Company having been dissolved there is no covenant in the Lease on the part of either the Landlord or the Tenant to comply with all the covenants of the Management Company as set out in Clause 4 of the Lease in the absence of the Management Company. To rectify the resulting defect in the Lease caused as a result of the Management Company being dissolved the parties have agreed to vary the terms of the Lease as mentioned below

NOW THIS DEED WITNESSETH as follows:-

1. In consideration of the mutual covenants on the part of the Landlord and the Tenant contained in the Lease and also herein contained the Landlord and the Tenant covenant to vary the Lease as follows;

10

EXECUTED as a Deed by the said
GOODLUCK COOPERATIONS LIMITED

Director:

in the presence of:-

Witness
Signature .....

Witness
to print full names .....

Address .....

.....

.....

Occupation .....

EXECUTED as a Deed by the said
Lessee
in the presence of:-

Witness
Signature .....

Witness
to print full names .....

Address .....

.....

.....

Occupation .....