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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AG/LVL/2017/0007**
Property	:	**Lower Ground Floor Flat, 11 Crossfield Road, NW3 4NS**
Applicant	:	**House of Hector Limited**
Representatives	:	**Ms Katrina Hanstock of Counsel** **Streathers Solicitors LLP**
Respondent	:	**Triplerose Limited**
Representatives	:	**Ms Annette Cafferkey of Counsel** **Scott Cohen Solicitors**
Type of Applications	:	**Application to Vary Terms of Lease and Liability to pay and reasonableness of service and/or administration charges**
Date of Hearing		**22nd March 2018**
Date of Decision		**27th March 2018**
Tribunal Members		**Judge Shaw** **Mrs Redmond MRICS** **Ms Hawkins**
Venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**

DECISION

INTRODUCTION

1. This case involves an application made by House of Hector Limited dated 18 December 2017 for the variation of a lease under the LTA 1987. There is also an application made by Triplerose Limited under s. 27A dated 20 September 2017 for an order as to the reasonableness and payability of service charges. For ease of reference House of Hector Limited will be referred to in this decision as the Applicant, and Triplerose Limited will be referred to as the Respondent. The Property concerned is the lower ground floor flat, 11 Crossfield Road NW3 4NS ('the Property'). The parties have been represented before the Tribunal today by Ms Katrina Hanstock of Counsel on behalf of the Applicant and Ms Annette Cafferkey of Counsel on behalf of the Respondent. Also in attendance have been all but one of the leaseholders, to whom reference will be made below.

2. The property is a four storey, Edwardian house in Belsize Park, converted into four flats. The Respondent's flat is on the lower ground or basement floor. The upper ground floor flat is owned and occupied by Gill Teasdale, who did not attend the hearing and who is a director of the Applicant company. The first floor flat is owned, and let out, by Ms Stride, again, a director of the Applicant company, and the flat above that is owned and occupied by Ms Ging, once more a director of the Applicant company. It should be said that the subject property, the lower ground floor or basement flat, is owned by the Respondent company of which Mr Jack Ost is a director, and Mr Ost also attended the hearing.

APPLICATION

3. Ms Cafferkey applied at the outset of the hearing for an adjournment, at any rate in respect of the application to vary the lease. Her grounds for making the application were that the parties had been very close to an agreement prior to the hearing and indeed had jointly made an application to the Tribunal for today's hearing to be adjourned. That application had been refused largely on the basis that there had

already been several extensions given to the directions which were issued in this case on 21st December 2017 and 6th February 2018. Further that the 27A application was issued about six months ago and the s. 35 application (for variation) was issued approximately three months ago, and in the circumstances there had been ample opportunity for the parties to prepare for this hearing. The second ground of the application was that one leaseholder was not present at the hearing although the Tribunal did not consider that to be a major bar to proceeding, particularly considering that that party was a co-director with the other two directors who were present, and there was no suggestion that there was any disparity between their cases. The next basis for the application on behalf of the Respondent was that it would be procedurally unfair to continue with the case, because in the event that the Tribunal did decide to vary the relevant lease, it would be obliged to consider the question of compensation, and there was no expert evidence before the Tribunal to assist the Tribunal in this regard. Fourthly, it was argued that the parties had proceeded on the basis that there would be an adjournment today, although Ms Hanstock on behalf of the Applicant said that so far as she was concerned that was not the case. Although being dealt with last, the principle ground of the application was that it was having to deal with a different case from that outlined in the application.

4. The Tribunal declined the application to adjourn, but before doing so gave the parties an opportunity given it had been asserted that they were very close to agreement, to see whether an agreement could be reached. In fact, that agreement could not be finalized on the occasion of the hearing and the Applicant urged the Tribunal to make a determination in order to achieve some finality in this case.

5. As indicated, the Tribunal took the view the that this case must now proceed. If there were no expert evidence, the Tribunal was entitled to ask why this was the case. There had been ample opportunity to produce such evidence to the Tribunal, and the asserted change in the case which, as will be amplified below, was a contraction rather than expansion of the case, and did not bear significantly on the question of expert evidence. In later submissions to the Tribunal, it was inferred that in fact a reason for the lack of expert evidence was the expectation that agreement would be reached, and therefore it would be a costs saving exercise to not call upon an expert.

Whilst understandable, it seems to the Tribunal that the parties are obliged to prepare properly for the case which has been listed before the Tribunal, and may not settle. Moreover, again as was pointed out in argument, the Tribunal has an expert member capable of considering such matters, and there were yet further submissions during the case at a later stage, to the effect that these cases are often not greatly assisted by expert evidence in the sense that in many cases there are so many factors going each way, that the decision as to the quantum of compensation is often quite subjective.

6. As to the suggestion that the Respondent was having to meet a new and different case from that set out in the application, the Tribunal did not see great force in this position in that, as observed, the case proceeded with on behalf of the Applicant involved less variation rather than more than had originally been proposed. Finally, this case has been pending for some time, Tribunal time and personnel have been allocated to it, other potential parties have taken their place in the queue behind this case, and in the overall administration of justice and in terms of proportionality generally, the Tribunal took the view that justice required both as regards these particular parties, and the administration of justice generally, that this case now proceed.

SUBMISSIONS OF THE APPLICANT

7. The Tribunal was taken through the relevant statutory provisions by Ms Hanstock on behalf of the Applicant. Section 35 of the Landlord and Tenant Act 1987 gives power to the Tribunal to make an order varying a lease. Under subsection (2) the grounds on which 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—

    a. *The repair or maintenance-*
        i. *The flat in question, or*
        ii. *The building containing the flat...*
    b. *The insurance of the building...*
    c. *The repair or maintenance of any installations...*

d. *The provision or maintenance of any services which are reasonably necessary to ensure that the occupiers of the flat enjoy a reasonable standard of accommodation...*
e. *The recovery by one party to the lease from another party to it of expenditure incurred or to be incurred...*

8. Under subsection (3) of s. 35 it is provided that

> *"for the purposes of subsection (2)(c) and (d) the factors for determining in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include—*
>
> *(a) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and*
>
> *(b) other factors relating to the condition of any such common parts"*

9. The Tribunal was also referred to section 38(4) and subsections (6) and (10) of the Act, which largely deal with the issue of compensation. Subsection (6) provides that a Tribunal shall not make an order under this section effecting any variation of a lease if it appears to the Tribunal that the variation would be likely to substantially prejudice either the Respondent or another party who may not be a party to the application and that an award for compensation would not be adequate. Subsection (10) provides the option for the Tribunal to order compensation if it considers that another party to the lease or any other person is likely to suffer as a result of the variation.

10. The Applicant invited the Tribunal to consider the extent of the variation sought. At page 11 of the bundle containing the draft deeds of variation the variations are succinctly set out. They can be cross referenced to page C16 in the main hearing bundle containing the relevant part of the existing lease.

11. The first variation sought is of clause 3(iii)(a) and in particular the wording *"and one equal one third of such matters mentioned in the fifth schedule hereto"*. It would

have been difficult to resist in principle this variation given that no fifth schedule exists in the lease and the Tribunal did not hear significant argument in this regard.

12. The second variation is in respect of clause 3(e)(iv). The existing original wording of this clause is *"to pay on demand one quarter of the insurance premiums payable by the lessor for maintaining the insurance of the building in accordance with clause 4(g) of this lease."*

13. Clause 4(g) has nothing to do with insurance and is an obvious mistaken reference to clause 4(f). Sensibly, on behalf of the Respondent, Ms Cafferkey did not resist this variation.

14. The real bone of contention in this case was the third and final variation sought which was to the fourth schedule to the lease. It was proposed that the fourth schedule be replaced with the following:

> *"The costs charges expenses and outgoings from time to time incurred by the lessor in performing and carrying out the obligations contained in clause 4(c), (d) and (g)."*

The original lease only referred to a contribution to the painting and decorating of the exterior parts of the building. The insertion of the reference to 4(c) and (g) would make the Respondent also in broad terms responsible for contributing to other works of repair and renewal to the main structure of the building and furthermore to the employment by the lessor of such staff or agents engaged by the lessor for the performance of its obligations as it shall think fit. This variation was strongly contested on behalf of the Respondent.

15. On behalf of the Applicant, it was argued that these are no more than *"absolutely standard"* provisions to be found in most leases and that the lease was obviously unsatisfactory as it stands, and without them. The Applicant company is a corporate vehicle for the holding of the freehold of the building containing the property, with no other assets. Its only income is in effect the service charge. Accordingly, if the Respondent's lease did not provide for it to contribute to these expenses the integrity of the building and its upkeep generally would be at risk, and far from being

prejudiced by the proposed variation, it would be prejudiced if the variation were not made.

16. Further it was contended that although inevitably this would mean the potential for a greater service charge or contribution by the Respondent, that might not necessarily involve prejudice. On the contrary, and this was really an expansion of the first point, the value of the lease may well be enhanced by having proper provision in this regard, rather than the continuation of the current position which was frankly, from a drafting point of view, illogical and something of a mess.

17. Further, the Applicant argued that there was no evidence before the Tribunal to support the contention that the Respondent's lease either when it was purchased or today, would be worth any less as a result of the proposed variation, and therefore on the evidence before the Tribunal there was no real basis for making such an order for compensation.

18. Finally, the Tribunal was taken to a series of cases in which courts and Tribunals had concluded in various different ways that a properly balanced and manageable property (which would be a consequence of thevariation), would compensate in the long term and neutralize any prejudice that might be suffered by having to make contributions which had not previously been provided for.

RESPONDENT'S SUBMISSIONS

19. Ms Cafferkey stressed that the Respondent was presently only liable to make a contribution under clause 4(d). She took the Tribunal to the parcels clause of the lease, and pointed out that the demise gave the Respondent limited rights in respect of any part of the building other than its own flat. On this basis she argued that given that there were relatively few easements or rights of access to other parts of the building, it was right that the Applicant should pay exclusively for the structural and other repairs, and in effect that the Respondent should be immune from such cost. She also contended that such costs should be borne by the Applicant alone, because it was the freehold owner of the building which would enjoy in due course such benefits as might flow from either the remainder and its value, or the cost of extending the current lease or leases. Moreover, she argued that although there is no

significant authority as to how compensation might be assessed, there had been a decision in the Upper Tribunal to the effect that where additional expenditure for lessees was involved *"on the face of it it was difficult to see how this would not be a loss or disadvantage requiring the payment of compensation"* – see ***Cleary v Lakeside Developments Limited 2011 UKUT 264 (LC).*** That case appears cited in the work entitled "Commercial and Residential Service Charges" produced by members of Falcon Chambers, but the work also cites in the footnote the case of ***Brickfield Properties Limited v Botten [2013] UKUT 133 (LC)*** where HHJ Huskinson considered that backdating a variation would not attract compensation, and observed that the loss of an *"unintended windfall"* which would otherwise have resulted was not a *"loss or disadvantage"* within the meaning of subsection (10).

20. In this final regard, it should be recorded that on behalf of the Applicant the Tribunal was urged, if it did make the variation, to backdate the variation to the commencement of the lease in March 1994.

21. Ms Cafferkey also argued that a proper construction of s. 38(10) was to the effect that if the Tribunal concluded that a variation should be made, and that there is prejudice, the Tribunal should effectively adjourn the question of prejudice, so as to allow further evidence of an expert kind upon how to assess such evidence. Having said that, she also pointed out, rightly in this regard in as far as the Tribunal is concerned, that it would be very difficult to assess the loss in this case when the enhanced liability brought about by the proposed variation would in effect involve a sharing of the cost by the Respondent in relation to parts of the Property in respect of which he had no access. How, she rhetorically asked, would a valuer value that in the market place? Given that compensation would not be adequate redress for the prejudice, she therefore argued that no variation order should be made.

22. Principally the Respondent argued that if a variation were to be made, *"the just and equitable"* way to do so would be to limit the Respondent's contribution to such expenditure as was directly beneficial to the property. If the expenditure did not have a bearing on, for example the structure of the Respondent's flat, then no such payment should be made. She also argued that the variation relating to the employment and payment of staff or agents for the assistance of the lessor in

performing its obligations was too wide, and either unnecessary or such that the Respondent should not have to contribute.

23. In one of the several replies in the various arguments on behalf of the Applicant it was pointed out that there were certain rights of access to the rest of the building, and that there was an implied right in any event under the rule in Wheeldon v Burrows.

ANALYSIS

24. The Tribunal concurs with the submissions made on behalf of the Applicant largely for the reasons already set out above and relied upon by the Applicant. The Tribunal is satisfied that for the purposes of s. 35 of the Act this lease fails to make *"satisfactory provision"* in relation to the matters already set out above under section 35(2) and (3) of the Act. The Applicant is a single asset entity and if the outgoings in relation to structural and other repairs and maintenance which would flow from this amendment are not borne proportionately by the Respondent, there could be an impact on the structure of the building generally, which cannot in the view of the Tribunal be satisfactory. Further, how can it be convincingly argued that the Respondent should have the integrity of its property subsidised by the other leaseholders in a way absolving it from contribution, and that this would be amount to *"satisfactory provision"*?

25. The Tribunal agrees that the variations sought are indeed standard provisions and the amendments referred to above are essentially to correct either obvious mistakes or a badly drafted lease.

26. The Tribunal rejects the suggestion that the fair way to bring about the variation would be to limit such contribution as is made by the Respondent exclusively to expenditure in respect of which it enjoys a direct benefit. This is not the standard way in which the costs of such services are generally provided for – and in any event in the view of the Tribunal is storing up trouble for the future in deciding issues about whether there is or is not benefit. The general position in leases of this kind, is that an owner of a basement flat would contribute to roof repairs from which it does not necessarily get much direct benefit, just as the owner of a first floor flat or ground

floor flat would pay for lift maintenance from which again it derives no particular benefit.

27. Given that satisfactory provision is not made in the lease for the matters referred to above, and that the Tribunal is sympathetic to the proposed variations, does this require the Tribunal to order that there should be compensation either today or on such subsequent occasion? First, the Tribunal is not satisfied that the Respondent does on balance suffer a prejudice as a result of these variations. Two of them are fairly obvious mistakes, the third (the most contentious) puts in order an otherwise disordered lease making the property properly manageable and avoiding potential litigation in the future. Indeed, as was ventilated in argument, it is entirely possible that a prospective purchaser looking at this lease either in person or through solicitors, might anticipate problems for the future, making it somewhat less attractive than the varied lease might be. Secondly, if it is indeed the case, contrary to the Tribunal's primary position, that there is a prejudice which requires compensation in monetary terms, there is no evidence before the Tribunal upon which such a finding could be made and it was open to the parties to bring such evidence to the Tribunal. Thirdly, again, if it be the position that prejudice is suffered by the enhanced service charge contribution that will have to be made by the Respondent in the years to come, in the same way as has been found in the various cases submitted on behalf of the Applicant from the work produced by Tanfield Chambers, the Tribunal is satisfied that "*a more hands-on approach with regard to the management and the improved position of the property will benefit the Respondent in the long run.*"

28. The Tribunal has to make a decision as to the date from which the variation shall run. As indicated, the Applicant invited the Tribunal to go back to the inception of the Lease in March 1994 which would require no doubt a trawl of the service charges back to 1994. Even if the same are not recoverable due to limitation, such an approach does not suit the justice of this case given that this application is made by the Applicant in 2017, whereas in theory it could have been made at an earlier stage. The Tribunal is in agreement with the Respondent that the variation should run from the date of the deed of variation and that what is past is past, and the deed should refer to the position for the future. This is so save in respect of one matter which is

that the Respondent has never contested that it should pay an equal contribution to the insurance premium, and therefore for the four years to which the application relates if such an equal contribution has not been made, an adjustment should be made.

SECTION 27A APLICATION

29. It is, as understood by the Tribunal, common ground that the s. 27A application in a sense stands or falls with the application to vary the lease the only ground on which these charges are challenged are that they are not recoverable under the lease as it stands. Given the finding of the Tribunal as to the date from which the variation should run this is perhaps academic save in relation to one matter which is the managing agents fee. Although this was not really argued at the case management conference, the Tribunal allowed some argument on this and considers that again there should be some finality about this argument. The Respondent argued that the fee of £450+VAT was entirely excessive when considered against the level of expenditure and work on the property. It was calculated as about 42% of the cost of maintenance which was far higher than was suggested in the RICS guide. In any event, it was argued that managing agents for a four flat property were unnecessary and that the leaseholders could be left to deal with such management issues on their own.

30. The Tribunal respectfully disagrees with both of these contentions. So far as the first is concerned the Tribunal accepts that the sum claimed is at the upper end of the appropriate range but it may well be that this is the kind of level of fee which has to be paid in this area of London for a small block of four flats. The fact that only four flats are involved makes the building not more, but less, attractive to managing agents than would be a large purpose built block, where they could recover multiple fees. Moreover, there has been a history of disagreement within the block which again makes it not an obvious attraction for managing agents. Accordingly, the Tribunal does not consider that the fee, notwithstanding its relation to expenditure ,is outside the appropriate range or unreasonable. The Tribunal would say however, that every effort should be made by the Applicant company either to negotiate the fee with the present agents downwards, or to endeavor to find more economic ways to manage the building.

31. For the avoidance of doubt therefore, with the exception of the contribution towards insurance premium, the service charges listed in the Respondent's section 27A application are not recoverable, because the lease in its unvaried state did not provide for such contribution. The position after the date of the deed variation, will of course be otherwise. The Applicant indicated an intention to seek variations of the other leases to correspond with the variation now directed, and this would be an obvious and desirable course.

SECTION 20C COSTS APPLICATION

32. The Applicant informed the Tribunal that it does not propose to seek to add the costs of dealing with these two applications to the service charge account. Accordingly the Tribunal accedes to the Respondent's application and makes an order under Section 20C that no such costs should be added to the account.

CONCLUSION

33. The Tribunal therefore finds in favour of the Applicant in relation to the application to vary under s. 35. The consequence of this finding and the date of its commencement, is that the Respondent succeeds on the application under s. 27A of the Act, with the exception of the insurance contributions. The Lease which is the subject matter of these applications shall be varied in accordance with the deed of variation which is attached to this decision and which appears at pages 8 to 12 of the bundle containing the draft deeds of variation. As indicated, the variation should run from the date of the deed when finally executed, save in relation to the insurance costs.

JUDGE SHAW **27th MARCH 2018**