12994

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	LON/00AH/LVT/2018/0007
Property	:	1-8 Wiltshire Court & 1-30 Mill Court, Nottingham Road, South Croydon Surrey CR2 6AR
Applicants	:	Proxima GR Properties Limited
Representative	:	Mr McIntosh-Solicitor, Estates and Management Ltd.
Respondent	:	Donald Horace Anderson and others
Representative	:	Ms M Winter in person Mr Goodwin Solicitor on behalf of Sage Management Ltd.
Type of application	:	Variation of a lease by a party to the lease
Tribunal members	:	Judge Daley Mr P Roberts DipArch RIBA
Date and venue of hearing	:	13 June 2018 and 11 September 2018 at 10 Alfred Place, London WC1E 7LR
Date of decision	:	31 October 2018

DECISION

Decisions of the tribunal

(1) The Tribunal makes the determinations as set out under paragraphs 64- 71 below.

The application

1. The Applicant sought a determination pursuant to Section 35 of the Landlord and Tenant Act 1987 (the Act) to vary the lease of the property on terms set out in Schedule A attached to this decision.

2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. At the directions hearing on 16 March 2018 the tribunal directed that -: *Other leaseholders in Wiltshire and Mill Court may be affected by the application. By 29 March 2018 the applicant shall give notice to persons he knows or believes are likely to be affected by the proposed variation of the lease(s) and inform them they may apply to the tribunal to be joined as a party (either applicant or respondent) and shall confirm that this had been done with details to the tribunal."*

4. On 3 April 2018 Mr and Mrs Davis of flat 8 were joined to these proceedings pursuant to the above direction.

5. The Applicant was represented by Mr Mackintosh, Solicitor (of Estates & Management Limited). Two of the Respondents were in attendance, or otherwise represented they were Mr Sage of Sage Property Management represented by David Goodwin Solicitor and Ms Marion Winter (of flat 29) who appeared in person.

6. On the 11 September 2018, Mr Sage was not in attendance, although he continued to be represented by Mr Goodwin.

7. Also in attendance on 11 September 2018, was Mr Peter Redman of Resi Retirement Rentals Limited pursuant to an oral direction of the Tribunal that the leaseholder of flat 28 ought to be invited to attend the hearing or be joined as an interested party."

The issues

8. The tribunal at the hearing on 16 March 2018 identified the following issues in paragraph 5 of the Directions, they were as follows:

   (i) Should the tribunal order the proposed variations to be made to the leases?

   (ii) Do the proposed variations fall within the grounds set out in section 35(2) of the Act, that is to say does the lease fail to make satisfactory provision for one of the matters set out in that section?

   (iii) If it does make an order varying the leases, should the tribunal order any person to pay compensation to any other person?

The argument of the Applicant on the lease fractions

9. Mr McIntosh set out that the application was made pursuant to section 35 of the 1987 Act.

10. He set out the background to the Application. The application related to a two block retirement development known as Mill and Wiltshire Court. He also provided details of the relevant lease terms.

11. He helpfully provided a skeleton argument which also set out the background and why the application was being made, at paragraph 4 of the Skeleton argument. He stated as follows-: "*The Development was constructed in or around 1989 in two phases. Phase one was the construction of Mill Court. Mill Court is a block of 29 flats (plus a house manager's flat) along with communal facilities including kitchen, lounge, laundry room, guest suite, car park and gardens.*"

12. Mill Court comprised 29 flats (excluding the housing managers flat) and was made up of 22 one bedroom flats (also including a reception area and 7 two bedroom flats. Wiltshire Court (from the date of the lease) was constructed in or around 1991. Wiltshire court is a smaller block consisting of 8 flats, which have access to the communal facilities in Mill Court.

13. The terms of the lease which were material to this application were: clause 5(2) which deals with the landlord's obligation to insure the premises, clause 4(A) provides for the repairing covenant, and clause 3 (2) provided an obligation on the leaseholder to pay service charges. Clause 3(2) and 3(2)a enables the landlord to make a charge for the management of adjoining premises, which meant that the landlord

could charge/seek a contribution from the leaseholders of Wiltshire court, for the management of the common parts which were shared with Mill Court.

14. The Tribunal was informed that the fractional contribution to be made by the leaseholders for cost expended by the landlord on service charges, was defined as the " service charge fraction" and the details of this were set out in clause 1 and 3(2) of the lease. Mr McIntosh informed the Tribunal that the formula used by the freeholder related to habitable rooms, so that a one bedroom flat had two habitable rooms; the bedroom and the living/ sitting room, being habitable rooms. This meant that a two bedroom flat had 3 habitable rooms. By using this formula Mill Court had 65 habitable rooms 22 x 1 bedroom flats (44 habitable rooms) and 7 x 2 bedroom flats (21 habitable rooms). Also Wiltshire court comprised of only 2 bedroom flats the total number of habitable rooms was calculated as 8 x 3 = 24 habitable rooms.

15. A copy of the lease in relation to flat 1 Mill Court was included in the bundle. The lease specified the proportion of service charges specified as payable, as a 2/89 share of the service charges.

16. Mr McIntosh dealt with the issue of under recovery of the service charge in paragraphs 9, 10 and 11 of the Skeleton Argument. Stating as follows-: " *In most of the leases of Mill Court, the Service Charge Fraction has as its denominator "65"... which reflects the total number of habitable rooms in the block, and has as its numerator the number of habitable rooms in the particular flat... Unfortunately there were errors and inconsistencies in the drafting of the lease...*"

17. The errors were set out as Flat 1 Mill Court (1 bed) as having the incorrect fraction of 2/89 instead of 2/65, 22 Mill Court (a 2 bed) had an incorrect fraction of 2/65 and 29 Mill Court (2 bed) had 2/89 instead of 3/65. Flat 16 Mill Court (1 bed) stated "_/89" and was incomplete. Whereas flat 21 (2 bed) had no fraction stated at all. Overall there were inconsistencies between the apportionments attributed to the various flats.

18. In respect of Wiltshire Court, Mr McIntosh informed the Tribunal that although Wiltshire Court did not have communal facilities, they had equal access to the communal facilities at Mill Court, and also contributed to the services provided by way of service charges. Mr McIntosh informed the Tribunal that the development of Wiltshire Court brought the number of habitable rooms to 89. Paragraph 17 of the Skeleton Argument stated-: *"It appears that the draftsman, in setting the Wiltshire Court Service Charge Fractions, was seeking to reflect the increase in the total number of habitable rooms brought about by the construction of Wiltshire Court. However, there are two problems with the approach adopted by the draftsman. Firstly, the*

vast majority (25 out of 29) of the Mill Court leases made reference to a Service Charge Fraction denominator of "65" but the leases contained no mechanism for adjusting the denominator to "89" to reflect the change in the number of habitable rooms in the Development. Secondly, despite all the flats in Wiltshire Court being of the same size, inconsistent Fractions were inserted in the leases..."

19. Flats 1, 3, 5, 6 & 8 Wiltshire Court stated "3/89" and 4 & 7 Wiltshire Court had fractions of "2/89" ; 2 Wiltshire Court had an incomplete fraction.

20. The Tribunal was informed that flats 2, 3, 4 and 6 Wiltshire Court had voluntarily entered into deeds of variation to correct the errors in the lease fractions. However, this left flats 1, 5, 7 & 8 Wiltshire court to be corrected, as well as the flats in Mill Court which were referred to above.

21. The Tribunal was referred to a letter dated 29 March 2017 written to the leaseholders on behalf of the Applicant, which explained that there was a short fall-: *"...Currently the landlord is recovering 98.87% of service charge expenditure and is being invoiced the remaining 1.13% by the managing agent, First Port Retirement Property Services ("First Port"). In the letter the landlord proposed that, the service charge expenditure for Mill Court and Wiltshire Court should be treated separately, with both Mill Court and Wiltshire contributing towards the service charge expenditure for their own block and estate. It was also proposed that Wiltshire Court should contribute towards the shared facilities at Mill Court i.e. gardening costs, parking costs, manager/emergency call and also the professional services. The landlord proposed that a new service charge matrix would be proposed to achieve 100%..."*

22. In his submissions to the Tribunal on 11 September 2018, Mr McIntosh informed the Tribunal that the position of the Landlord had somewhat evolved, from that which had been set out in the letter and also from the landlord's position at the first hearing. The landlord's position is referred to below.

23. Mr McIntosh referred the Tribunal to *Morgan and Morgan –v- Fletcher and others [2009] UKUT 186 (LC)* At paragraph 8 of the decision, which dealt with the submissions before the court the judge was referred to the *Nugee Report 1985 (Report of the Committee of Enquiry on the Management of Privately Owned Blocks of Flats HMSO 1985.* The report authors considered that variations of leases of flats in the same building was justified without majority approval where the scheme set out in the lease was seriously defective and the defects had a direct bearing on the upkeep and fitness for habitation of the flats in the block. This included situations where the aggregate of the percentages of service charges payable was more or less than 100%.

Court... should be increased to 3/89... If these simple amendments are made so that all one bedroomed flats pay 2/89 and all two bedroomed flats pay 3/89, there is no shortfall." In paragraph 10, he proposed that -: "*...the present lease granted of the Warden's Flat should also be amended and it should be recorded that if the Warden's Flat ceases to be used as a resident warden's flat, then the lessee of that flat should pay an identical fraction towards the costs as the lessees of the other two blocks on the development...*"

30. Mr Goodwin submitted that he was concerned that if the percentages were altered and they did not include the warden's flat, and if that property ceased to be a warden's flat, then the percentages could not be altered at that stage.

31. The Tribunal asked about why the warden's flat was not part of the computation. The Tribunal was informed by Mr McIntosh that the lease was separately owned and as such was not part of the freehold owned by the Applicant. The Tribunal orally directed that the leaseholder/ freeholder of the property should be invited to attend the resumed hearing of this matter. The Tribunal was invited to consider the lease for flat 28, (the warden's flat) the leaseholder was Peverel Operations PD Limited.

32. The matter resumed on 11 September 2018, the ownership of the flat had transferred and the director of the company, Mr Peter Redman of Resi Retirement Rentals Limited, who owned flat 28 together with his colleague Sergio Pichugin, attended the hearing.

33. At the resumed hearing, Mr McIntosh had provided a Matrix which set out the current position, the proposed changes, and the addition of the warden's flat in the computation (this document was prepared at the request of the Tribunal). He also stated that the other leaseholder who had chosen to act as a respondent and who had been present at the hearing on the 13 June and was also presented at the hearing on 11 September was Ms Winter. The Matrix contained information that the plan, should the lease be amended, was for Ms Winter, (the leaseholder of 29 Mills Court) to contribute 3/89 instead of 2/89. As Ms Winter had 3 habitable rooms and there was no obvious reason why Ms Winter should have had 2/89 as her computation in the past.

34. The current rate for the service charges based on the recoverable service charges was 97.75281% leaving a shortfall of 2.24719%. Mr McIntosh stated that whilst flat 28 remained as the housing manager's flat, it was outside the calculations. If the leases were amended, and the leaseholders subsequently voted not to have a housing manager, then if that flat was included in the service charges there was a potential that the landlord would over recover as the percentage would be 101.01368%. The overall proportions would change from "_/89" to "_/92".

35. Ms Winter had provided a witness statement dated 26 April 2018. In her statement, she set out her case opposing the application to vary the lease. She set out what she foresaw as a number of problems with the suggested proposals, firstly she stated that in practice each leaseholder had been required to contribute to both properties, however the landlord was proposing to treat each block separately so that Wiltshire Court would pay a share to the upkeep of Wiltshire court based on 24 habitable rooms whereas Mills Court would pay a share based on 65 habitable rooms, she considered that this would mean-: " *Wiltshire Court would take on payment of all repairs to their block and the cost would be divided by the 8 flats in that block... The residents were strongly in favour of both blocks continuing to share the costs between the two blocks i.e. based on 89 habitable rooms...*"

36. She also noted that there would, in her view, be a lack of clarity around the costs of the communal facilities which were based at Mill Court. However her main concern was that this would disproportionately affect her flat, as the proposals based on the current year's contribution would mean that rather than paying the current charge of £2,610.30, she would be paying £3,915.00 per year based on a 3/89 share.

37. Ms Winter was currently contributing 2/89, she considered this to be reasonable. She stated that she had purchased her flat in good faith, and had considered the charge of 2/89 to be reflective of the size of her flat. She stated that because of its location on the top floor and the intrusion of the eaves based on the design of the flat, she had far less usable space than the average 2 bedroom flat at the property. Ms Winter provided photographs of her flat. Due to the slope of the roof and dormer windows, there was a loss of some space within Ms Winter's premises.

38. However the Tribunal was informed that flats 24 and 30 were similarly affected. The Tribunal noted that although Ms Winter's bedrooms, based on the photograph did appear smaller, her lounge appeared to be wider than the other properties. Ms Winter considered that the measurement of the usable floor area, and then allocating percentage shares based on the total floor area, would offer an equitable way of dealing with the matter. She also considered that the manager's flat should be contributing to the costs of the service charges. She was concerned as to what was likely to happen if it was no longer occupied by a residential manager.

The Applicant's reply

39. In his reply Mr McIntosh rejected Ms Winter's proposals he stated that Applications to vary were required to do the minimum necessary to given efficacy to the lease. The scheme envisaged by the landlord was based on habitable rooms and the amendment should use this method of apportionment.

40. He referred to the fact that 7 Wiltshire Court had also provided the stated 2/89 contribution. However the leaseholder had voluntarily made up the short fall, and had contributed 3/89. The habitable rooms approach was correct, although there had been multiple drafting errors. He noted the effect that the variation would have on Ms Winter personally, although he considered that there were inevitably "swings and roundabouts". By analogy he noted that although Wiltshire Court contributed on an equal basis to the communal facilities, they had to walk across to Mills Court to use the facilities, which meant that it was less convenient to them.

41. Mr McIntosh referred the Tribunal to the first instance decision of-: *Michael Rossman –v- The Crown Estate Commissioners Lon/BK/LVL/2011/0013*, he commended the approach adopted by the Tribunal in this case, which was set out in paragraph 124 -: *"...the tribunal should strive to keep as close to the contractual scheme as is possible... Further that the extent of the intervention should be the minimum possible to rectify the defect to achieve the objective which is the upkeep and fitness for habitation of the flats. In short the approach to intervention should be a minimalist approach..."*

42. Mr McIntosh referred to his Skeleton Argument; he invited the Tribunal to find that ground 2, in respect of the issues was made out. That is that it was necessary for the leases to be varied.

43. In respect of what scheme to adopt issue 1, he considered that there were three options, which were to amend only the affected leases, this approach had originally been favoured by the landlord (Option A). The scheme proposed by Mr Goodwin on behalf of Sage, which was to vary all of the leases so that the numerator was 92 (Option B) and measure the floor areas and then amend the contributions based on the floor space (Option C).

44. Mr McIntosh commented on all of these schemes; he noted that whilst the landlord had originally favoured option A, the Applicant now considered option B to be preferable. In paragraph 43 of the Applicant's statement of case is stated as follows-: *"... it... has come to light that the changes suggested by Sage ...have already been effected via the HMF [Housing Manager's Flat) Lease...44. In order to make this Scheme fully coherent, all of the other leases in Mill and Wiltshire Court need to be varied. 45 Though Scheme B is not the minimum required to rectify the current shortfall defect, it is the minimum needed to deal with the prospective over-recovery issue of the HMF coming into the service charge matrix."*

The common part of the estate.

45. In respect of the communal parts of the premises, Mr McIntosh referred to clause 3 (2) of the lease. This was a charging clause which as well as providing for the payment of managing agent's fees also stated - "... and further that management of the Estate as provided for hereunder may be undertaken in conjunction with similar management of adjoining premises (including the provision of the service of a warden to the adjoining premises from the wardens' flat) and the overall costs apportioned between the Estate and adjoining premises as the Lessor considers fair and reasonable.

46. Mr Goodwin noted that if the Housing Manager's flat contributed to the service charges, there would be no need to adjust the service charge contributions of flat 29 Mills Court, and flat 8 Wiltshire Court to the service charges.

47. Mr Goodwin in respect of the other variations noted that the lease for Wiltshire Court referred to 33 Mill Court. He considered that the lease needed to be amended to deal with all of the anomalies in the lease.

48. The Tribunal asked for Mr Redman's views concerning the submissions. He stated that he recognised that a solution was needed to the under recovery of the charges. He was however content for the Tribunal to make a decision on whether the flat should make a contribution. In respect of the contribution to be paid for the use of the common parts at Mill Court, Mr Redman did not consider that the lease needed to be amended he felt that it made adequate provision for recovery of the charges.

49. In respect of the closing arguments, the parties largely repeated their assertions. Mr McIntosh invited the Tribunal to adopt a two stage approach firstly was an amendment necessary? And if so what was the minimum necessary to give effect the intention of the draftsman of the lease. The Respondent also argues that if the service charge percentages are going to be increased, the increase should not be borne solely by the Respondent but also by the lessees of the other flats including the lessees of Flats 4, 5 and 6.

Compensation under section 38(6)

50. Ms Winter asked the Tribunal to consider making an order for compensation, the grounds advanced by her was that she would be considerable worse off as a result of any amendment, that that the

service charges currently paid by her was reflected by the relatively small size of her premises.

51. In paragraph 4 of her letter to the Tribunal, dated 5 September 2018, Ms Winter stated-: "*Notwithstanding that I believe all top floor properties of Mill Court have less habitable space than others in the block (including one bedroomed flats), as already outlined, I am the most prejudiced by the Applicant's proposal to vary my Lease to the tune of an additional £1000.00 per annum. I previously attempted to reach a compromise and some compensation with the Applicant based on the fact that my flat has less habitable area than other 2 bedroomed flats. All suggestions however were turned down...*"

52. Mr McIntosh was asked about the Applicant's position on whether compensation ought to be paid. Mr McIntosh stated that the Tribunal ought to consider the issue of compensation in three stages, as suggested in *Frank Parkinson and Keeley Constructions Limited [2015] UKUT 0607 (LC).* The Tribunal should firstly consider whether any lessee has suffered loss or disadvantage; then whether the Tribunal ought to exercise its discretion to award compensation and thirdly if compensation is to be awarded, then the Tribunal should quantify the compensation.

53. With regard to the first issue, the Tribunal was referred to paragraph 19 of *Frank Parkinson and Keeley*, which stated-: "*... Where the existing leases of the flats in the building do not make satisfactory provision in this regard, then an amendment to secure that satisfactory provisions are made... is not an amendment which necessarily brings loss or disadvantage to a lessee even though that lessee may be paying a higher percentage of the service charges than previously...these lessees should not recover compensation merely because of the higher percentage of the normal yearly expenditure which they would in future have to pay...*"

54. Mr McIntosh stated that in his submission, the Tribunal should take into account the fact that the leaseholder had underpaid for six years, and should exercise its discretion not to pay any compensation. However, he stated that if the Tribunal was against the Applicant it should in determining compensation decide only to pay a nominal sum taking into account the Respondents' past underpayment.

55. Mr Redman stated that care needed to be taken about the payment of compensation as it would be money which was simply redistributed through the service charges.

The Definitional issues

56. The Applicant also proposed the making of an order for variation in respect of definitional issues. In respect of these issues they were set out in paragraph 28 of the Skeleton Argument. -: "... In addition, the applicant suggests that the definition of "*Building*" and "*Estate*" be varied to make them more consistent across the development..."

57. This proposed variation was not contested, and the Respondents did not make any submissions oppose the amendment.

58. In conclusion Mr McIntosh stated that he was now proposing that all of the leases be varied to include 92 as the denominator and that the consequential definitions set out in the Skeleton argument be varied. He did not consider that it was necessary to amend the lease to provide further clarification of the shared costs between the two blocks in relation to the common parts.

COSTS under rule 13

59. In respect of the costs of the hearing, Mr Goodwin asked that the Tribunal make an order under rule 13 of the Tribunal Procedure Rules, on the grounds that the proposal now put forward by Mr McIntosh was substantially the same as the scheme that Mr Goodwin had mooted in his letter dated 24 May 2018, in addition the Tribunal had before it the email dated 30 August 2018 in which Mr Goodwin stated-: *"... the proposals seem to be in line with those I was putting forward at the Tribunal and which the Tribunal itself was putting forward as a solution. May I suggest a stay of the proceedings so that we do not waste our time and the time of the Tribunal when I hope that the new deeds of variation can be drafted and agreed without the involvement of the Tribunal..."*

60. At the hearing he also referred to the fact that the Applicant had also created a further lease in respect of flat 28 which had the denominator of 92. Accordingly, he submitted that the applicant could have agreed this matter without the need for a hearing and that costs should be awarded under rule 13.

61. Mr McIntosh stated that the lease had been drafted without any reference to him. The Tribunal determined that Mr McIntosh should have 14 days to respond to the application.

62. Mr McIntosh provided the Tribunal with further written submissions dated 24 September 2018.

63. In his submissions, he referred the Tribunal to *Willow Court Management –v- Alexander [2016] UKUT 290, i*n particular paragraph

27 which stated-: *"...When considering the rule 13(1) b power attention should focus on the permissive and conditional language in which it is framed 'the Tribunal may make an order in respect of costs only...if a person has acted unreasonably...'* We make two obvious points: firstly that unreasonable conduct is an essential pre-condition of the power to order costs under that rule; secondly once the existence of the power has been established its exercise is a matter for the discretion of the tribunal.

64. Mr McIntosh in his written submissions, acknowledged that the Applicant ought to have informed the Tribunal about the new lease and the side letter which set out the denominator of 92, however he stated that this was an oversight, however he submitted that rule 13 was to deal with unreasonable conduct rather than human error or an oversight. He submitted that the time allowed by the Tribunal for the hearing on 13 June 2018 was not sufficient and that as a result it was inevitable (through no fault of the Applicant) that additional time was needed to deal with the hearing; he also referred to the fact that Sage considered the application to be misguided and as a result they would have needed to attend in any event to set out their position.

65. Accordingly, he submitted that rule 13 costs ought not to be awarded.

The Tribunal's decision

66. The Tribunal determines the issues before it as follows:

(i) The Tribunal is satisfied that the leases for Mills Court and Wiltshire Court ought to be amended as the current arrangement is unsatisfactory in that it does not provide for payment of 100% of the services incurred at the property, by reasons of defects in leases for individual flats which currently mean that only 97.75281% of the service charge is recoverable under the existing lease provisions.

(ii) The Tribunal determines that in order to adequately provide for the service charges to be recovered it is necessary to vary all of the leases to include 2/92 for the 1 bedroom flats and 3/92 in respect of the 2 bedroom flats at Wiltshire and Mills court.

(iii) The Tribunal is satisfied that there is no need for an amendment/ variation in respect of the shared facilities at Mill Court as the wording in clause 3(2) of the lease is sufficient.

(iv) The variation shall have effect on execution of the variation of the leases, no Application for backdating having been made.

(v) The Tribunal determines that no compensation is payable to any party pursuant to Section 38(10) of the Landlord & Tenant Act 1987 in respect of the variations determined above.

(vi) The Tribunal makes no order for costs under rule 13 of the Tribunal Procedure Rules 2013

Reasons for the Tribunal's decision

67. The Tribunal considers that section 35(2) of the Act has been satisfied in that the lease of the property fails to make satisfactory provision for the computation of service charges for the property. The Tribunal accepted that the use by the Freeholder of habitable rooms is a satisfactory measure of apportionment and that it should be retained. The Tribunal accepts that in granting the variation it should adopt a scheme which in so far as possible gives effect to the intention of the original draftsman. Accordingly, it is appropriate that the leases are varied by changing both the numerator and denominator.

68. The Tribunal also considered the scheme put forward by Mr Goodwin on behalf of Sage. Although this scheme is similar to the scheme directed by the Tribunal, his scheme was dependent on who and the circumstances of the occupation of the Warden's flat. In respect of Ms Winter's scheme, the Tribunal noted that it has a degree of complexity, which although it may appear fair to Ms Winter, was not intended by the original draftsman, it is also not the scheme signed up for by the leaseholder who purchased the premises, as such this option did not commend itself to the Tribunal.

69. Accordingly the Tribunal has determined that the service charges should be apportioned by reference to habitable rooms as suggested above.

70. The Tribunal finds that the un-amended lease in its current form, enables the costs of the facilities used in common, to be paid for on an equitable basis by all leaseholders, accordingly, the Tribunal makes no order to amend clause 3(2) of the lease. Insofar as the leaseholders consider that the landlord in future years, may not have applied the service charges in a manner that is considered "fair and reasonable"

then the leaseholders may, (should they consider it necessary), seek a determination on the reasonableness and payability of the charges.

71. The Tribunal considered the submissions of Ms Winter concerning the payment of compensation. It noted that the proposed amendment was likely to cause her some hardship; it considered that although this was inescapable, given that she would be required to pay a larger share of the service charge, it was, on balance, the right decision. This decision is made in the interest of all of the leaseholders of the 2 blocks within the estate.

72. The Tribunal was aware that her flat was smaller than others within the block. The Tribunal considers that the relative size of the block is a factor which is more properly reflected as a commercial matter, in the purchase price. It also considers that by reference to what was required under the lease, there has been a degree of under payment for a number of years, and given this, any compensation to be paid would be at the expense of other leaseholders within the development. Accordingly, the Tribunal in applying the decision in *Frank Parkinson and Keeley Constructions Limited [2015] UKUT 0607 (LC)* determines that no order be made for compensation.

73. The Tribunal having considered the application under rule 13 considers that the conduct of the Applicant did not meet the threshold of unreasonable behaviour provided for under the act. The Tribunal is concerned that the Applicant has made this application in circumstances where it has acted inconsistently, by drafting a lease in the manner contended for by Mr Goodwin. However, the Tribunal is satisfied that in all the circumstances it was appropriate for the Applicant to make this application. There was a diversity of approach suggested by both leaseholders, who were materially affected by the proposed amendment.

74. The Tribunal therefore determines that if it is wrong concerning the conduct of the applicant it is still not satisfied that this is an appropriate case in which to make a cost award. The Tribunal accordingly exercises its discretion not to make an order.

Next steps

75. The parties are ordered forthwith to arrange for endorsements to be executed and attached to the lease, then register notice of the variations of the lease at the Land Registry. In such cases the costs are normally borne by the Applicant.

Judge Daley
31 October
2018

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. If the application is not made within the 28 days' time limit, such application must include a request for an extension of time and the reason for not complying with the 28 days' 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.

4. 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.

Appendix of relevant legislation

VARIATION OF LEASES

Applications relating to flats

S35 Application by party to lease for variation of lease.

(1) Any party to a long lease of a flat may make an application to [a leasehold valuation tribunal] [FN1] 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—

(a) the repair or maintenance of—

(i) the flat in question, or

(ii) the building containing the flat, or

(iii) any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it;

(b) the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);

(c) the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;

(d) the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);

(e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;

(f) the computation of a service charge payable under the lease;

(g) such other matters as may be prescribed by regulations made by the Secretary of State.

(3) 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.

(3A) For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.

(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.

(5) [Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002] [FN2] shall make provision—

(a) for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and

(b) for enabling persons served with any such notice to be joined as parties to the proceedings.

(6) For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—

(a) the demised premises consist of or include three or more flats contained in the same building; or

(b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

(8) In this section "service charge" has the meaning given by section 18(1) of the 1985 Act.[...] **S36 Application by respondent for variation of other leases.**

(1) Where an application ("the original application") is made under section 35 by any party to a lease, any other party to the lease may make an application to the [tribunal] [FN1] asking it, in the event of its deciding to make an order effecting any variation of the lease in pursuance of the original application, to make an order which effects a corresponding variation of each of such one or more other leases as are specified in the application.

(2) Any lease so specified—

(a) must be a long lease of a flat under which the landlord is the same person as the landlord under the lease specified in the original application; but

(b) need not be a lease of a flat which is in the same building as the flat let under that lease, nor a lease drafted in terms identical to those of that lease.

(3) The grounds on which an application may be made under this section are—

(a) that each of the leases specified in the application fails to make satisfactory provision with respect to the matter or matters specified in the original application; and

(b) that, if any variation is effected in pursuance of the original application, it would be in the interests of the person making the application under this section, or in the interests of the other persons who are parties to the leases specified in that application, to have all of the leases in question (that is to say, the ones specified in that application together with the one specified in the original application) varied to the same effect. [...] [FN2]

[FN1] word substituted by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (3)

[FN2] word substituted by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (3)

S37 Application by majority of parties for variation of leases.

(1) Subject to the following provisions of this section, an application may be made to [a leasehold valuation tribunal] [FN1] in respect of two or more leases for an order varying each of those leases in such manner as is specified in the application.

(2) Those leases must be long leases of flats under which the landlord is the same person, but they need not be leases of flats which are in the same building, nor leases which are drafted in identical terms.

(3) The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.

(4) An application under this section in respect of any leases may be made by the landlord or any of the tenants under the leases.

(5) Any such application shall only be made if—

(a) in a case where the application is in respect of less than nine leases, all, or all obut one, of the parties concerned consent to it; or

(b) in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10 per cent. of the total number of the parties concerned and at least 75 per cent. of that number consent to it.

(6) For the purposes of subsection (5)—

(a) in the case of each lease in respect of which the application is made, the tenant under the lease shall constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such leases shall be regarded as constituting a corresponding number of the parties concerned); and

(b) the landlord shall also constitute one of the parties concerned. [...] [FN2]

[FN1] words substituted by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (4)

[FN2] words substituted by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (4)

Orders varying leases

S38 Orders 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 tribunal, the tribunal 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.

(2) If—

(a) an application under section 36 was made in connection with that application, and

(b) the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application under section 36,

the tribunal may (subject to subsections (6) and (7)) also make an order varying each of those leases in such manner as is specified in the order.

(3) If, on an application under section 37, the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application, the tribunal may (subject to subsections (6) and (7)) make an order varying each of those leases in such manner as is specified in the order.

(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the tribunal thinks fit.

(5) If the grounds referred to in subsection (2) or (3) (as the case may be) are established to the satisfaction of the tribunal with respect to some but not all of the leases specified in the application, the power to make an order under that subsection shall extend to those leases only.

(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.

(7) A tribunal shall not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under this section effecting any variation of the lease—

(a) which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes; or

(b) which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes; or

(c) which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer.

(8) A tribunal 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) A tribunal 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 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 court considers he is likely to suffer as a result of the variation.[...] [FN2]

[FN1] words repealed subject to savings specified in SI 2004/669 Sch.2 para.12 by Commonhold and Leasehold Reform Act (2002 c.15), Sch 14 Para 1

[FN2] words repealed subject to savings specified in SI 2004/669 Sch.2 para.12 by Commonhold and Leasehold Reform Act (2002 c.15), Sch 14 Para 1

S39 Effect of orders varying leases: applications by third parties.

(1) Any variation effected by an order under section 38 shall be binding not only on the parties to the lease for the time being but also on other persons (including any predecessors in title of those parties), whether or not they were parties to the proceedings in which the order was made or were served with a notice by virtue of section 35(5).

(2) Without prejudice to the generality of subsection (1), any variation effected by any such order shall be binding on any surety who has guaranteed the performance of any obligation varied by the order; and the surety shall accordingly be taken to have guaranteed the performance of that obligation as so varied.

(3) Where any such order has been made and a person was, by virtue of section 35(5), required to be served with a notice relating to the proceedings in which it was made, but he was not so served, he may—

(a) bring an action for damages for breach of statutory duty against the person by whom any such notice was so required to be served in respect of that person's failure to serve it; (b) apply to [a leasehold valuation tribunal] [FN1] for the cancellation or modification of the variation in question.

(4) [A tribunal] [FN2] may, on an application under subsection (3)(b) with respect to any variation of a lease—

(a) by order cancel that variation or modify it in such manner as is specified in the order, or

(b) make such an order as is mentioned in section 38(10) in favour of the person making the application,

as it thinks fit.

(5) Where a variation is cancelled or modified under paragraph (a) of subsection (4)

(a) the cancellation or modification shall take effect as from the date of the making of the order under that paragraph or as from such later date as may be specified in the order, and

(b) the [tribunal] [FN3] may by order direct that a memorandum of the cancellation or modification shall be endorsed on such documents as are specified in the order;

and, in a case where a variation is so modified, subsections (1) and (2) above shall, as from the date when the modification takes effect, apply to the variation as modified.[...] [FN4]

[FN1] modified by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (6)
[FN2] modified by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (6)
[FN3] modified by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (6)
[FN4] modified by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (6)

Applications relating to dwellings other than flats

S40 Application for variation of insurance provisions of lease of dwelling other than a flat.

(1) Any party to a long lease of a dwelling may make an application to [a leasehold valuation tribunal] [FN1] for an order varying the lease, in such manner as is specified in the application, on the grounds that the lease fails to make satisfactory provision with respect to any matter relating to the insurance of the dwelling, including the recovery of the costs of such insurance.

(2) Sections 36 and 38 shall apply to an application under subsection (1) subject to the modifications specified in subsection (3).

(3) Those modifications are as follows—

(a) in section 36—

(i) in subsection (1), the reference to section 35 shall be read as a reference to subsection (1) above, and

(ii) in subsection (2), any reference to a flat shall be read as a reference to a dwelling; and

(b) in section 38—

(i) any reference to an application under section 35 shall be read as a reference to an application under subsection (1) above, and (ii) any reference to an application under section 36 shall be read as a reference to an application under section 36 as applied by subsection (2) above.

(4) For the purpose of this section, a long lease shall not be regarded as a long lease of a dwelling if—

(a) the demised premises consist of three or more dwellings; or

(b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

(4A) Without prejudice to subsection (4), an application under sub-section (1) may not be made by a person who is a tenant under a long lease of a dwelling if, by virtue of that lease and one or more other long leases of dwellings, he is also a tenant from the same landlord of at least two other dwellings.

(4B) For the purposes of subsection (4A), any tenant of a dwelling who is a body corporate shall be treated as a tenant of any other dwelling held from the same landlord which is let under a long lease to an associated company, as defined in section 20(1).

(5) In this section "dwelling" means a dwelling other than a flat. [...] [FN2]

[FN1] words substituted by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (7)
[FN2] words substituted by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (7)