



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **MAN/00BY/LVL/2017/0003**

Property : **Flat 1, Lakeside House,
33, Aigburth Drive, Liverpool L17 4JE**

Applicants : **Mr N K Russell**

Respondents : **J H Watson Investment Limited**

Type of Application : **Variation of lease**

Tribunal Members : **Mr J R Rimmer
Mr J Faulkner**

Date of Determination : **14 September 2018**

Date of Decision : **27 September 2018**

DECISION

Order

The Application to vary the lease is refused

A. Application and background

- 1 The Applicant is the leasehold owner of Flat 1 at Lakeside House, 33 Aigburth Drive, Liverpool 17. The Respondent is the landlord and responsible for the day to day management of the building.
- 2 Flat 1 is on the ground floor of the building which is further described in paragraph 13, below.
- 3 The Applicant has previously raised objections to the fact that he is required to pay for the services provided to the common parts of the building, despite having no direct enjoyment of it, or deriving any benefit from them.
- 4 He therefore seeks a variation of the lease to take account of the different position that relates to his flat when compared with those accessed via the common parts. Initially the Applicant referred to the ground for variation within Section 35(2)(f) Landlord and Tenant Act 1987 but later amended this to refer also to Section 35(1)(a)(ii) of the Act (see paragraph 7, below)
- 5 The lease is one dated 27th September 1996 for a period of 125 years from 24th April 1996 at an annual rent of £50.00. It was made between parties who have both disposed of their interests to the current parties to this application. The following provisions are relevant to the application:
 - By Clause 3(b) the lessee covenants to pay 8.333% of the costs incurred by the less or in complying with its obligations under the fifth schedule.
 - That fifth schedule contains obligations:
 - (1) To insure the estate (against usual risks and with a reputable insurer)
 - (2) "Subject to the terms of paragraph 6 of the fourth schedule herein at all times during the term well and substantially to repair cleanse uphold support and maintain the exterior of the estate and the lifts landscaped areas driveways car parking spaces play areas laundry rooms drying rooms tenants clubrooms communal television aerials and entry phone systems and fences and walls (insofar as they exist on the estate at the date hereof) and the entrance ways paths and staircases main walls party walls roof foundations and all structural parts thereof respectively but without prejudice to the generality of the

foregoing all those parts used in common with the lessees of the other flats on the estate and all drains watercourses sewers water pipes gas pipes electric wiring gutters down pipes and other conduction media belonging thereto respectively with all necessary preparations and amendments whatsoever

In this paragraph the expression "structural Parts" shall be deemed to include

- (i) Door frames but not the front door or internal doors to the flat
 - (ii) Window frames but not sashes or glass to windows in the Flat and not to include the interior faces of such parts of the external or internal walls floors and ceilings as bound the flat or the rooms therein.
- (3) As often as may reasonably be required to paint with two coats of good quality paint suitable for outside use all the outside wood iron and other parts of the Estate which are usually or ought to be painted and also to decorate those parts of the interior of the Estate which are used in common with the lessees and occupiers of the other flats in a workmanlike manner
 - (4) To rebuild or reinstate the estate in the event that it shall be destroyed or damaged by any of the events normally covered by a comprehensive policy of insurance.
- 6 Paragraph 6 of the fourth schedule requires the lessee to keep clean the stairways passage ways balconies and other areas used in common with the owners and occupiers of other flats on the Estate if and so often as they may be directed in writing so to do by the lessor.

The Law

7 Section 35 Landlord and Tenant Act 1987 provides that:

- (1) Any party to a long lease of a flat may make an application to (this tribunal) for an order varying the lease in such a 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
 - (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

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

8 Subsection (4) clarifies ground (f) to the extent that it relates only to dealing with issues relating to the proportions of a charge payable by the leaseholders where the total charge is not matched by the addition of the various proportions. It is not therefore relevant to the issue before this Tribunal.

9 Thereafter sections 36 and 37 provide the mechanisms by which either the Respondent, or other leaseholders, may become involved in the process of ascertaining what, if any, variation should take place. In view of the potential cost and complexity of those proceedings the Tribunal took the view that this matter should be considered at the initial level of deciding if the current lease did, or did not, make adequate provision in respect of the matters falling within section 35(2)(a)(ii) of the amended application.

The submissions

10 It has always been clear what the Applicant's objection is and how he feels he has been affected by it. He believes he is paying for services from which others benefit; they having use of common parts that he does not share.

11 He makes this clear in his submission. It may be summarised thus:

- (1) His obligation is to contribute to the cost of the landlord's obligations in Schedule 5 of the lease.
- (2) These refer to the maintenance etc of the building and particularly "all those parts used in common with the lessees of the other flats" which words appear in both paragraphs 2 and 3 of Schedule 5 to the lease.
- (3) The common parts of the interior of the main building are not parts used in common with the lessees of the other flats, but only by some of them (the occupiers of flats 3-12).
- (4) The lease requires amendment to reflect the true position that those occupiers and not he (nor presumably the occupier of Flat 2) should be contributing to those services. And there should not be an overarching provision that splits the cost equally at 8.333% between each leaseholder.
- (5) He is of the clear view that at present the lease makes no provision for any services not enjoyed in common by all 12 leaseholders. Any variation should reflect more accurately which flats benefit from which services.

12 The Respondents views are equally clear:

- (1) There is proper provision for the payment for services for the building – it is equally split, one-twelfth for each leaseholder.
- (2) Clause 2 of Schedule 5 provides for the repair and maintenance generally of the building and then adds that without prejudice to that general obligation there is an obligation in respect of all those parts used in common with the lessees of other flats.
- (3) Clause 3, although using the same wording of “all those parts used in common with the lessees or occupiers of the other flats”, is merely identifying the overall extent of the obligation to decorate in a workmanlike manner the exterior and interior of the building.
- (4) Much of such expenditure as relates to the common hallway and stairs is of a kind that benefits all of the flats in the building.
- (5) Conversely those flats within the main building do not have the use of the area immediately outside Flat 1, but again benefit from its proper maintenance.
- (6) Overall an equal split of expenditure is in the circumstances both fair and easy to apply.

Inspection

13 The Tribunal inspected the Property on the morning of Thursday 30th August and found it to be a large detached former single dwelling-house of three stories plus a basement built in approximately 1900 and since converted into 12 flats. The entrance to 10 of the flats is via a shared front-door entrance on the ground floor leading to a communal hallway and staircase. The subject property is in the basement and has its own entrance via an external staircase from the front of the building to the left side. Flat No. 2 has its own ground floor door to the right side of the building. There are 14 car parking spaces to the front and a communal garden to the rear.

The hearing

14 Later on 30th August the tribunal sat to hear from the parties at the Civil Justice Centre, Vernon Street, Liverpool. The Applicant represented himself while the Respondent was represented by Mr Brewin of counsel.

15 Mr Brewin was able to make an initial concession that it would be appropriate to allow the Applicant to rely upon his amended ground of application, Section 35(2)(a), rather than that originally argued, section 35(2)(f), which was

inappropriate to what was being considered. Indeed the Respondent had not been misled and had responded to the application as if ground (a) was being argued from the outset.

16 The Applicant was content to rely for the most part upon the submissions that he had made earlier and emphasising in particular the references in the lease to common parts shared with the lessees or occupiers of other flats.

17 Mr Brewin addressed the Tribunal at length. His arguments were these:

- (1) Section 35(2)(a) refers to the lease not making satisfactory provision for the repair and maintenance of the building, or the flat. That is the test to be applied.
- (2) It is not really necessary for the Tribunal to explore at length the meaning of the words used in Clauses 2 and 3 of Schedule 5 to the lease, and contrast the use of "used in common with the lessees or occupiers of the other flats" with other possible wordings that might have been used.
- (3) The reason for this was that the lease should be looked at as a whole and considered in the light of what it was seeking to achieve. It makes sense to consider it as making provision for the maintenance and repair of all the common parts of the building and sharing those costs between all the leaseholders.
- (4) It should be noted that in relation to paragraph 2 of Schedule 5 the particular words referred to are contained within a subsidiary part of the clause that is expressed to be without prejudice to what goes before which is a general obligation on the landlord in relation to many of the common parts without express reference to them being common parts
- (5) The use of the words in clause 3 is only to further describe, and not limit, the obligation to paint and decorate in a workmanlike manner.
- (6) The overall intention to be ascertained from the lease is of an equal sharing of the cost of maintaining and repairing the common parts and the use of the particular expression in the places where it appears does not detract from that "broad canvas" of a clear and satisfactory provision in respect of the building.

Determination

18 To the Tribunal's view the lease is in many respects poorly drafted and gives the impression of being hastily pulled together from previous sources. It makes reference to parts of the building that do not exist: play areas, clubrooms and laundry room, for example. Reference is made also to non-existent lifts.

- 19 A more clear intention of what the original parties to the lease intended parts of it to mean, and particularly those now under consideration, might have easily been achieved.
- 20 Taken in isolation, the words "used in common with the lessees or occupiers of the other flats" could have the meaning that the Applicant seeks to apply to them: that the landlord's obligations in relation to the common parts only arises where each and every lessee shares the common parts in question.
- 21 To the Tribunal's mind, however, the intention of the parties is made much clearer in other ways:
- (a) There is an overarching intention that all service costs are simply to be shared equally among the 12 lessees.
 - (b) There is no attempt anywhere in the lease to attempt to impose a more complicated provision for some costs to be paid only by some lessees and different lessees to pay different costs.
 - (c) The generality of Clause 3 of Schedule 5 is such that it includes the maintenance of many items where the benefit accrues more to some lessees rather than others: the exterior of the estate will include that area within the Applicant's gated access, stairways will include those within the main building that the Applicant does not use.
 - (d) Thereafter the use of the words "used in common with the lessees or occupiers of the other flats can only, in the Tribunal's view, to provide an unhelpful attempt to illustrate what might be included within the obligation.
 - (e) The only clear intention that can be ascertained is that the cost of maintaining and repairing any common parts is to be borne equally
- 22 Notwithstanding that view of the meaning of the lease and the intention of the original parties there are two other matters that the Tribunal considers relevant:
- It is neither uncommon, nor improper, for service charges to be paid to maintain the integrity of a building as a whole, externally and internally, provided there is no unreasonable burden placed upon a lessee, or lessees. Benefits are likely to accrue to each contributor, even though not necessarily in equal proportions
 - To seek to attempt to unpick the various obligations of the landlord and seek to allocate them among different lessees would appear to the Tribunal to impose a regime that would do anything but make "satisfactory provision".

- 23 The current position is satisfactory. It may not be ideal from the Applicant's perspective, but it is satisfactory.
- 24 For the above reasons the Application is refused.

Judge J R Rimmer
Tribunal Judge
27 September 2018