SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case Number CHI/18UH/LVT/2008/0006

In the matter of Part IV of the Landlord & Tenant Act 1987 (as amended) ("the Act")
and
In the matter of Trehill House, Kenn, Exeter, Devon ("the property")

BETWEEN

Michael Chevalier — Applicant

and

The lessees of flats at Trehill House — Respondents

Decision

Hearings 16th March and 11th May 2009

Further written representations received 15th June and 30th June 2009

Date of Issue: 21st August 2009

Tribunal:
Mr R P Long LLB (Chairman)
Ms C A Rai LLB, Solicitor
Mr T E Dickinson FRICS

Background

1. The Tribunal heard Mr Chevalier's application for the variation of the leases at Trehill House on 16th March 2009. It issued an interim decision on 6th May 2009 ("the Interim Decision") in which it indicated that it would be prepared to make an Order varying the leases in four respects namely:

    a) to adjust the fractional contributions to the cost of upkeep of common items

    b) to enable the employment and remuneration of professionals to assist in this process.

    c) to give the ability to comply with legislative changes

    d) to deal with the provision of other services

    but that it was not prepared to make an Order in the terms of the drafts that had been put before it. It offered certain observations upon the drafting of the Orders, and gave directions that further draft Orders may be placed before it dealing with the above matters, and providing then for observations by interested parties upon those drafts. It gave notice that it would then consider the matter without an oral hearing unless a request for such a hearing was received. No such request was made.

2. At the same time it stated that it was not prepared to include other variations that had been sought within its Orders, and gave reasons in each instance why that was so.

3. Further draft Orders were sent to the Tribunal by the Applicant on 12th June 2009 and copies were sent to Mr & Mrs B A Walshe at Flat 3 Trehill House, who had objected to the variations. Mr & Mrs Walshe sent observations in support of their objections on 24th June 2009. Successive absences of members of the Tribunal on holiday since shortly after that date have resulted in the fact that the Tribunal was not able finally to consider the matter collectively until 7th August 2009.

Decision

4. For the reasons indicated below, and with some reluctance, the Tribunal finds that it is unable to make the Orders sought in their revised forms. It has however made what it regards as a relatively temporary Order so that the fire safety work necessary at Trehill House can proceed, as to which see paragraph 28 below.

Reasons

5. The background and the law relating to this matter have been set out in the Interim Decision. In that decision the Tribunal also set out at some length the reservations that it had with regard to the drafting of the draft Orders that were then before it. It is plainly not for the Tribunal to inflict a draft of its own upon the parties. Because of its concern that if possible steps should be taken within this application to bring about what it sees as appropriate variations at Trehill

House it invited the Applicant to submit revised draft Orders in the light of its comments in the manner referred to in paragraph 1 above. It made plain that it would not then make the Orders unless it was entirely satisfied with their terms and that if it declined so to do at that time the application would then be determined as having failed.

6. The terms of the leases that it is sought to vary have rather more than nine hundred and seventy years to run. It is therefore especially important in the Tribunal's judgement that any variations made to them are soundly prepared in order to seek as far as possible to avoid within the foreseeable future the sort of problems at Trehill House of which it heard during the course both of hearing this matter and of hearing another quite separate matter concerning Trehill House. Its comments concerning the drafts contained in the Interim Decision were directed to the achievement of that end.

7. After very careful consideration, however, it concluded that the draft Orders now placed before it still did not meet that standard necessary to avoid a possibility of further conflict. It has carefully considered whether any minor amendments on its part might overcome that problem, but concluded that such a course was not practical. The purpose of the limitation upon the Tribunal's further consideration of the matter contained in its further directions and described in paragraph 5 above was to ensure that this application be dealt with one way or another in a finite period, and not least to avoid an inappropriate situation whereby the Tribunal may appear to be seeking to negotiate the terms of the proposed variation with the parties.

8. There are three draft Orders. They deal respectively with Flat 1, with Flats 2-9 inclusive, and with Flats 10 and 11. As now presented they vary only very slightly and can be dealt with together. The variations are dealt with in this note in the order in which they are presented in the draft Orders before the Tribunal (which explains the fact the numerical order does not follow precisely).

Definition of "the Building"

9. The first proposed amendment in all three drafts is that a definition be introduced in an unspecified position (within the leases) of the expression "the Building". That expression does not appear in the drafts now presented. The Tribunal has not been referred to a place or places in the leases of the various flats where the expression is used and without having read each lease verbatim for the purpose but having examined the lease of flat 2 (which is representative of the majority of the leases), cannot see that it is used in the leases either. There are many references to "Trehill House" and some to "the Property" but there appear to be none to "the Building". Mr & Mrs Walshe say nothing about the matter in their further objections of 24th and 27th June. The Tribunal does not understand the purpose of the variation, and in any event it does not appear to be such a variation as falls within the provisions of subsections 35(2)(a-g) of the Act, so that the Tribunal appears to have no jurisdiction to order the variation sought anyway.

Clause 5(b)(i)

10. This clause requires the payment by the lessee of a varying proportion of the costs of maintenance and redecoration of the building and the garages, and of insuring the building and the garage blocks. In the case of flat 1 it also requires payment of a proportion of the cost of maintaining the north drive. The proposed variation would relieve flat 1 of that additional cost of drive maintenance in the sense that the cost is now to be spread between all the flats if the variations were approved so that its contribution would reduce. It would also add to the service charge costs that are shared at differential rates the expenses of the cost of maintaining the common parts. The Tribunal indicated in the Interim Decision that it regarded these variations as beneficial, but for the reasons given at paragraphs 19 - 21 below is unable to make an Order in the terms in which they are proposed.

Clause 5(b)(ii) or (4(b)(ii))

11. Clause 5(b)(ii) referred to in this draft variation appears in the leases of flats 1-9. In the leases of flats 10 and 11 it appears as clause 4(b)(ii). Their terms appear identical in each case except as to the fractions to which they refer, and the clauses can conveniently be dealt with together. Thus in what follows a reference to clause 5(b)(ii) is to be read as a reference to clause 4(b)(ii) in the cases of flats 10 and 11.

12. The effect of clause 5(b)(ii) in the leases as they stand is to provide for the apportionment of expenses incurred by the lessor in respect of the shared gardens (or parts of the drive as well as the gardens in the case of flats 10 and 11). Presently the proportions vary between 1/9, 1/10 and 1/11. The effect of the proposed variation would be to require the lessees of all the flats to bear "an equal share of the costs equally divided by the units as determined from time to time incurred by the lessor" in respect not only of the gardens but of repairing the north drive, of complying with statutory obligations, of providing fire fighting equipment, or maintaining the common parts, of providing a communal laundry (which already exists on the site but is not referred to in the present leases) and of implementing and maintaining an asbestos management programme.

13. Mr & Mrs Walshe protested strongly about the provision relating to the cost of the common laundry on their letters of objection.

14. The Tribunal accepts that the issues with regard to the fire fighting equipment and the asbestos programme in particular are of some urgency and has given careful thought to whether or not it would be possible for it to find a way to make an Order in respect of them. It accepts too that the present apportionments do not allow the recovery of the full cost of expenditure upon the gardens so that the leases can be said not to make satisfactory provision in that respect (section 35(2)(e)). So far as the fire fighting and asbestos elements at least are concerned it does not make satisfactory provision for the provision or maintenance of services reasonably necessary to ensure a reasonable standard of accommodation (section 35(2)(d)). In the light of the Tribunal's decision it is not necessary for it to consider the situation as the repair of the drive, the laundry and the common parts.

15. However it is quite unable to sanction the drafting of the draft Order as it stands. In particular it finds the wording quoted above, namely "an equal share of the costs equally divided by the units as determined from time to time incurred by the lessor", unacceptable because it is neither sufficiently clear nor precise. There is no indication who might determine the number of units from time to time or how they might do it.

16. The matter may appear to be factual at the present time, but there have already been variations in the manner of division of Trehill House, and there is no reason to suppose, especially given that one of the flats occupies rather more than a quarter of the entire building, that there may not be further subdivisions at some future time. How those might be effected, and whether or not the manner of so doing may lead to dispute, is a matter of speculation.

17. Furthermore neither the leases nor the proposed amendment makes provision about how often the service charge is payable. The proposed wording of the draft order does nothing to clarify the point.

18. Clearer and more precise wording might have provided for something along the lines of "payment of a share of the costs.... calculated by dividing the costs incurred between the number of units (which in the event of a dispute as to their number shall be conclusively determined by the lessor's surveyor acting as expert and not as arbitrator) existing at the time when the costs were incurred."

Clause 5(b)(iii)

19. The proposed clause 5(b)(iii) seeks to address the difficulty described by the Applicant that all the flats are required to contribute equally towards the upkeep of the garage block notwithstanding the fact that not all of them have garages. The Applicant has not entirely assisted the Tribunal with regard to the factual situation. In its written "overview" the Applicant referred to flats 7 and 11 as lacking constructed garages. Mr Oliver says in an email to the Tribunal dated 12 May 2009 that Flat 10 has no garage. The service charge matrix supplied by the Applicant shows contributions received from flats 1-8 and not from flats 9-11.

20. It appears to the Tribunal that the factual basis is that flats 1-9 were first let, and that flat 7 did not have a garage. Nonetheless, all the flats were required to contribute 1/9 of the cost to the upkeep of the garages. When flats 10 and 11 were let at a later date they were required to contribute 1/11 of the cost of upkeep of the garages. The Tribunal accepts that in the circumstances as they now exist the leases do not make satisfactory provision for the recovery of expenditure incurred by the landlord (or the RTM company in the present circumstances) from the tenants of the cost of upkeep of the garages because the position has become unfair to some tenants. So that section 35(2(e) is engaged. That makes it unnecessary for it to consider whether the provisions of section 35(2)(f) relating to computation of service charge are limited to the circumstances mentioned in section 354) or whether that section is merely illustrative.

21. Once more the Tribunal is sympathetic to the object that the Applicant seeks to achieve, but the terms in which the proposed new clause is drafted remain unacceptable. The criticism of the words "an equal share of the costs equally divided by the units as determined from time to time incurred by the lessor" set out in paragraphs 15 and 16 above applies equally here because the same formula is used. It is followed by a reference to "the number of flats at Trehill House which have a constructed garage such share to be assessed on the date when the payments are demanded". That number may be factual, but who is to assess it? Again it is not at all impossible to anticipate that difficulties might arise if there is any further subdivision of Trehill House, and that some form of determination may be required. The draft does not address that issue just as it does not address the issue of determination of the number of flats.

Clause 5(b)(iv)

22. This proposed variation is very widely drawn. It would require the lessee to pay costs of any actions that the landlord, acting reasonably, may consider necessary from time to time, as well as the cost of collecting the service charge with all other incidental expenditure that the landlord, acting reasonably, may consider necessary including cleaning common parts and the cost of employing persons whom the landlord may think fit to fulfil such obligations. The clause is drawn in such a way that its operation may in practice be limited to the recovery of the costs specifically described, despite its apparent intention that it should operate to cover a considerably wider class of expenses. There is no indication in the text (as for example "without prejudice to the generality of the foregoing", or some such formula) that the items specifically mentioned to seek to prevent such an interpretation. There appear possibly to be a word or words missing in the first two lines of the draft of this clause as it appears in the draft Orders.

23. The words "an equal share of the costs equally divided by the units as determined from time to time incurred by the lessor" appear also in its sub clause. The same criticism of those words as appears twice above applies here as well. The Tribunal would have been hesitant in any case to approve a clause that conferred an ability to recover expenditure as wide as it anticipates that the draft was intended to cover, although it would not (other things having been equal) have found it difficult to approve a clause simply allowing the recovery of the cost of cleaning common parts. Had it been required to look at that possibility (which its finding about the words dealing with apportionment renders unnecessary) it could not have done so without clarifying just what was the intention of this draft clause.

24. A well drafted Order may, by way only of illustration, have used some such words as a reference to any costs incurred by the Lessor (acting reasonably) in complying with its obligations as Lessor (and perhaps referred to by reference to the numbers of the clauses in the lease containing the obligations in question); it might also offer an ability to recover payment on account of future liabilities.

25. The Tribunal would have had some reservations about the question of charging the cost of obtaining payment of service charges to the service charge

payers. That seems to it ordinarily to be an expense for the landlord. It considers more generally that the Applicants may wish to consider precisely what this proposed clause is intended to achieve overall before taking the issue of variation further.

Various Clause 6 Additions

26. The effect of the proposed amendments to clauses 5(b)(i) and (ii) when taken with the proposed deletions was to allow the recovery of the cost of complying with statutory requirements, of providing fire safety equipment, of keeping the common parts in good repair and condition, of providing for the cost of providing a communal laundry to be borne out of the service charges, of the provision of the intercom system, and of covering the cost of an asbestos management programme and of recovering all other payments and expenses properly or reasonably incurred in the maintenance decoration repair and good management of Trehill House. It is not quite clear to what if any extent the provisions of this last mentioned proposed variation duplicated the intended provisions of clause 5(b)(iv) mentioned above. Mr & Mrs Walshe were particularly opposed to the provisions relating to the common laundry as they said it benefited only some flats.

27. These provisions necessarily fail (subject to the matters referred to in the following paragraph) in this application because of the view that the Tribunal has taken of the provisions that govern them, that is to say clauses 5(b)(i) and (ii). Nonetheless it may be helpful to offer some observations about them in the hope that they may assist in any future application that is made. The Tribunal took the view that it was important, especially in a building of this nature, that there should be provision for fire safety equipment to be provided. The proposed asbestos management programme equally was of importance to the health and safety of the occupiers. They appear to be services that are reasonably necessary within the terms of section 35(2)(d) of the Act. The same might be said of the provision of the upkeep and maintenance of the common parts.

28. The Tribunal was made aware at the hearing on 11th May 2009 that there was some urgency in the matter of the fire safety works. The Right to Manage company that now manages Trehill House was coming under pressure from the local fire authority to undertake certain fire safety works. Those related to matters that arose from statutory obligation. Despite its reluctance to make wholesale changes to the drafts that have been put before it, the Tribunal took the view that it is important for the safety of the occupants of Trehill House that those works can be put in hand, and has determined that it should make a short Order to allow the recovery of the cost of statutory works to enable this to be done.

29. It envisages that the Order will be of a temporary nature only, as the Applicants will no doubt wish to pursue the other possible changes n a further application. For that reason it has referred in it only to the cost of the works being recoverable equally from each of the present eleven flats. It reminds the parties that the Order will require to be registered at HM Land Registry and

that they should seek legal advice with regard to that aspect if they are in any doubt over it.

30. The position with regard to the communal laundry is less clear than is the case with the works mentioned in paragraph 27. It is undoubtedly of advantage to some of the lessees, but not to others. It might be expected that its cost should be covered by the payments made by those who use it rather than that it should be subsidised by those who do not, and to this extent Mr & Mrs Walshe's concerns have some force. Finally it is arguable whether or not such a provision might properly be said to fall within the provisions of section 35(2)(d) in that it is arguably not reasonably necessary to ensure that occupiers have a reasonable standard of occupation. On the other hand the proposal appears to be supported by the other lessees than Mr & Mrs Walshe, and possibly by the landlord. There is on the face of the matter a possibility that such a provision is more appropriately dealt with under section 37 of the Act relating to variations with majority approval.

31. The provision relating to statutory obligations appears to the Tribunal to be one that probably is capable of being brought within the limited classes in section 35(2) of the Act. However, the clause is less than clear as drawn. The obligation to comply with legislation and with statutory obligations seems to the Tribunal to amount to the same thing. No clarification has been offered to explain why both terms are used, and what is the expected effect of doing so.

32. As to the "sweeping up" clause relating to other expenses, the Tribunal felt that lessees may be entitled to some better definition of just what was to be covered here, especially as the qualification expressed is that the expenses should be "reasonably or properly incurred" which might be said to imply a provision that if an expense was "proper" it does not need to be reasonable. Similar observations apply here as apply to the proposed clause 5(b)(iv) amendments mentioned above.

Generally

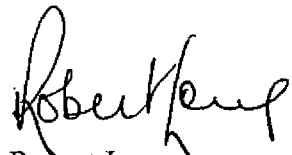
33. It is with some reluctance that the Tribunal has reached the decision that it has made. It recognises in particular that there is an element of urgency about dealing with the fire safety issues, and its members would very much have wished to be able to deal with that aspect, if no other, more positively. Having tried to assist the parties by giving an opportunity for revised draft orders that may be more acceptable the Tribunal was therefore disappointed to find that the drafts now produced remained unacceptable. In considering the drafts it bore in mind that their terms will govern the relation between landlord and tenants at Trehill House (whether or not there is always a right to manage company in place there) for the rest of the terms of the leases, and that the variations are not to be looked at simply as matters of expediency that may assist in the short term.

34. As to Mr & Mrs Walshe's objections the Tribunal has recorded a degree of sympathy with the points that they make over the communal laundry (which was never provided for in any form in the original leases). They did not seem to have appreciated that three draft Orders were produced. The Tribunal certainly had received three, and can only assume that Mr & Mrs Walshe did

too. Their comment about a variation in clause 1 of Schedule 4 overlooks the purpose of Section 35 of the lease, which the Tribunal spent some time explaining at the hearing. Their comments on the proposed clause 6(m) were noted by the Tribunal but given its conclusions it is not necessary to express any view about them. The Tribunal is unable to comment upon the question of the times for payment of service charge in the light of its findings. It can only observe that the leases presently make no provision about times of payment of anything other than the rent and that, in its view, that is a serious omission from them.

35. In short the drafts produced, where they relate to matter with which the Tribunal may deal under section 35, fall short of the degree of precision that should be expected of variations to leases whose terms have more than nine hundred and seventy years still to run. It would be unhelpful for the Tribunal to approve them. It is not for the Tribunal to inflict substituted drafting of its own upon the parties, and so it has simply sought to indicate the areas where it felt that the major problems arose. It may perhaps have been able to correct minor inaccuracies having first put them to the parties, but the matters that have arisen are matters of drafting and perhaps in some instances of principle.

36. The application was made under section 35 of the Act. The Tribunal has understood that it had the support of all the lessees except Mr & Mrs Walshe, and perhaps of the landlord as well. That being the case it was somewhat surprised that the application had not been made under section 37, which allows wider variations than the more limited categories mentioned in section 35. The parties may wish to consider the application of section 37 in the light of the Tribunal's comments, although they will need to take great care with their drafting, for whilst section 35 may allow the Tribunal to make small alterations to the drafting if that will help, section 37 does not.



Robert Long
Chairman
20th August 2009

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LEASEHOLD VALUATION TRIBUNAL

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In the matter of Part IV of the Landlord & Tenant Act 1987 (as amended) ("the Act")
and
In the matter of Trehill House, Kenn, Exeter, Devon ("the property")

BETWEEN

Michael Chevalier — Applicant

and

The lessees of flats at Trehill House — Respondents

ORDER

Pursuant to the powers contained in section 37 (1) of the Landlord & Tenant Act 1987 (as amended) the Tribunal Orders:

1. That the leases referred to in the Schedule annexed hereto shall be varied in manner following, that is to say:

   there shall be inserted after clause 5(a) in each lease a clause in the following terms:

   "5(ab) To pay to the Lessor upon demand one eleventh part of all reasonable costs or expenditure incurred by it or by any manager acting on its behalf or in its place in complying with any statutory obligations placed upon it relating to Trehill House."

2. That a memorandum of this Order shall be endorsed upon the said leases and the counterparts thereof.

Robert Long
Chairman
20th August 2009

Schedule of Flats at Trehill House, Kenn, Exeter affected by the Order of the Leasehold Valuation Tribunal dated 20th August 2009

Flat No.	Date of Lease	Parties to Lease
1	10th October 1986	Drawpass Limited (1) and William Henry Desmond (2)
2	27th February 1987	Drawpass Limited (1) and Paul Norman Mallett and Lindsay Anne Cox(2)
3	30th December 1987	Drawpass Limited (1) and Nigel John Howells (2)
4	3rd May 1988	Drawpass Limited (1) and Roger David Chubb (2)
5	3rd May 1988	Drawpass Limited (1) and Roger David Chubb(2)
6	30th November 1987	Drawpass Limited (1) and Julia Chappell (2)
7	30th October 1987	Drawpass Limited (1) and Jayant Ruparelia (2)
8	30th October 1987	Drawpass Limited (1) and Richard Charles Beechener and Marjorie Beechener (2)
9	29th February 1988	Drawpass Limited (1) and Clifford Hugh Chubb and Susan Violet Chubb
10	18th July 1990	Drawpass Limited (1) and Roger David Chubb (2)
11	18th July 1990	Drawpass Limited (1) and Roger David Chubb (2)