

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL**

Property : Flats 1-12
Bishops Walk
Aylesbury
Buckinghamshire
HP21 7LF

Applicants : Mr. P. & Mrs. M. Scott-Smith (1)
Mr. & Mrs. M. Temple (2)
Mr. A. Smith (3)
Mr. & Mrs. Marino (4)
Mr. Humphrey (5)
Mr. Gilson (7)
Mr. Oliver (9)
Mr. Sandhu (11)

Respondent : Hilliard & Co Limited

Case numbers : CAM/11UB/LVL/2010/0001

Date of Applications : 21st December 2009 and 7th June 2010

Type of Applications : Applications to vary the terms of the lease, pursuant to section 35 of the Landlord and Tenant Act 1987

Dates of Hearing : 5th May 2010 (oral) and
26th July 2010 (paper)

Tribunal : Mrs. Joanne Oxlade
Mrs. Sarah Redmond BSc ECON MRICS
Mr. Adarsh Kapur

DECISION

Pursuant to section 35 of the 1987 Act we vary the leases of flats 1-12 Bishops Walk by adding clauses 4(4) and 4(5) in accordance with the wording contained within paragraph 34 of the Reasons below and

Direct that the Applicants do notify the Land Registry, in order to annex the decision to the freehold and leasehold titles.

REASONS

Background

1. On 21st December 2009, Stephen David Gilson ("the Lessee") made an application to the Tribunal pursuant to section 35 of the Landlord and Tenant Act 1987 ("the 1987 Act") for variation of the lease of 7 Bishops Walk, Aylesbury, Bucks ("the premises").
2. The justification for seeking a variation was because whilst the lease provided that the Lessor recover costs incurred in maintaining the roof, foundations, and common parts of the building, garage etc there was no corresponding obligation on the Lessor to maintain the roof, foundations, or common parts. Indeed, the leases only imposed obligations to maintain the building on the individual Lessees as to those parts specifically demised to them.
3. The Lessee said that the terms of the lease undermined the proper functioning of the leasehold scheme within the building, was prejudicial to the interests of the Building and its occupants, gave rise to health and safety issues, and renders the lease unsaleable.
4. The Lessee said that the statutory grounds set out in section 35(2)(a) of the 1987 for making a variation of the lease were established, because the lease "failed to make satisfactory provision with respect to one or more of the following matters:
 - (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 ...".
5. The Lessee proposed varying the lease by adding clauses 4(4), and 4(5), to impose a positive obligation on the Lessor to maintain, repair, and renew the parts of the flat block - as are not included in the demise of any flat – and garage block, including roofs, foundations, entrance etc. Further, to clean, light entrances, passage stairways etc which form part of the common parts used by occupiers and Lessors.
6. On 18th January 2010 Solicitors acting for the Lessee notified the other Lessees in the block of the pending application, and the proposed new

terms as a result of which Mr. and Mrs. Marino Lessee of flat 4, Mr J. Sandhu Lessee of flat 11, and Mr. E. Humphrey Lessee of flat 5 all notified the Tribunal that they wished to be joined as Applicants. On 26th January 2010 Directions were made in preparation for the hearing.

7. On 17th February 2010 the Lessor filed a reply objecting to the proposed variation. The following points were made:

- the existing covenants in the lease imply that repairs will be carried out
- there is adequate legislation in place to protect the Lessee as they can collectively apply to take over the maintenance of the Block, and then procedures are in place to protect the Lessees prior to work being carried out
- clause 4(3) of the Lease already protects the interests of Mortgage lenders by the provision which requires the Lessor to enforce covenants for the benefit of all
- the Lessor has an obligation to light the hallways, and so the proposed variation is otiose
- the Lessor covenanted to grant leases on like terms and a variation would make the Lessor's position untenable
- the Lessees have in the past said on many occasions that they would not consent to a variation
- it is disputed that the flats cannot be sold as the most recent sale was flat 11 in May 2009
- the reason why the flats may not sell is the length of the lease which is 60 years
- the Lessor sought costs of £1000 plus vat incurred in seeking advice.

8. On 4th March 2010 the Applicants responded as follows:

- the lease imposed no positive obligation on the Lessor, and so in this respect the lease was defective
- the fact that the Lessees could apply to manage the building is irrelevant, and was permitted only in limited circumstances
- the Council of Mortgage Lenders criteria is not always relevant, noting that the most recent sale of flat 11 was at auction and did not involve financing by way of mortgage
- the lease does not adequately deal with lighting of the hallways etc
- the Lessor is mistaken in his assertions as to the fellow Lessees, 3 others have joined the application
- the Applicants dispute the claim for costs, and assert that the Tribunal's jurisdiction is limited
- the Applicant invited the Respondent to deal with the variation by consent, which invitation was not acknowledged, and so a cross application for costs was made on behalf of the Applicant.

9. Solicitors instructed by Mr. Humphrey, the Lessee of flat 5, indicated his support for the application by way of letter dated 9th March 2010 and adopted the points made, but said that he could not afford to be represented at the forthcoming hearing.
10. A letter addressed to the Lessees of flat 5 by the Lessor dated 29th July 2009 asserted various breaches of the Lease, indicating that they were adopting a tougher approach because the Lessee of one flat had been refused a mortgage and another cannot get insurance cover "all due to the fact of a lack of maintenance".
11. The Application was listed for hearing on 5th May 2010.

Inspection

12. Prior to the hearing the Tribunal inspected the estate, and the common parts of the Block, in the presence of the Applicant Lessee, several other Lessees and Mr. Winters on behalf of the freeholder.
13. The Estate consists of several blocks of flats all built at approximately the same time as the subject block, in 1970's. The subject block consists of 12 flats on three levels accessed by two stairways, with gardens to the front and back and garages to the rear. Each flat has a garage demised under the lease.
14. From our inspection it is clear that the common parts of the building are in reasonable condition generally, although some maintenance and cleaning is needed. We particularly noted the condition of the windows on the stairways: the woodwork of the sash windows had rotted, and on at least one window the glass of the window was unsupported on one of the 4 sides.

Hearing

15. Immediately after the inspection we convened a hearing. The following people attended: Mr. and Mrs. Marino (flat 4), Mr. Gilson (flat 7) and Mr. Duckworth of Counsel, Mr. and Ms. Sandhu (flat 11), Mr. Winters on behalf of the Lessor.
16. We heard submissions from both Mr. Duckworth and Mr. Winters on the application for variation, as then drafted, in accordance with the written submissions set out above, but no evidence was called by either party.
17. During the course of the hearing, the Tribunal indicated that the Applicant may wish to consider re-wording the terms of the variation sought. Although it was said that the terms of the obligation to repair and maintain mirrored the existing power in the leases to recover monies expended in doing so, the inclusion of the words "all those parts of the flat block as are not included in the demise" (a) did not

mirror the service charge provision (b) excluded from the repairing/maintaining obligation large parts of the building which would usually be included (i.e. hallways and staircase) because they had been specifically demised to individual flats.

18. Further, on behalf of the Respondent, Mr. Winters indicated that he may wish to make a cross-application for variation of the lease. It also became apparent from examination of the lease at the hearing that the lease was badly drafted in some respects, and that a wholesale revision made may be beneficial, pursuant to section 37 of the Act, or as agreed with all parties. As the freeholder also held the lease of 4 flats, and as it may have been possible to achieve a sufficient majority/lack of opposition to such a revision we adjourned the application, with directions.
20. Subsequent to the hearing on 5th May (a) all Lessees (except the freeholder in his capacity as Lessee of 4 flats) sought to be made parties to the proceedings, and joined Mr Gilson as Applicants (b) the Applicants proposed a slightly amended form of wording to the maintenance/repair obligation (c) the Respondent made a cross-application for a variation of all 12 leases (c) no application was made pursuant to s.37.
21. On 11th June 2010 further directions were made for the filing of evidence, and for the hearing of the application on the papers. In due course the Applicants filed a response to the Respondent's cross-application, and provided extensive submissions on why their first proposed variation was appropriate. Mr and Mrs. Sandhu filed their own short submissions on the Respondent's proposed variation.

Jurisdiction

22. The Tribunal has power pursuant to section 35 of the 1987 Act to vary the terms of the lease on the grounds that the "lease fails to make satisfactory provision with respect to one or more matters, namely –
 - (a) the repair or maintenance of –
 - (i) the flat in question, or
 - (ii) the building containing the flat..."
23. The Applicant reminds us that the Tribunal's powers extend to vary the terms of the lease as specified in the application or such other variation as the Tribunal thinks fit, pursuant to section 38(4).

Findings of Fact

24. On 26th July 2010 the Tribunal convened to consider the cross-applications, the submissions, and the documents, as well as copies of all 12 leases (with their coloured plans).

The Original Variation sought by the Applicant

25. Firstly, we considered the Applicant's application as originally drafted.
26. We make a finding that whilst the leases make provision for the Lessor to demand service charges if and when works of repair/maintenance/renewal are done, there is no positive obligation on him to do such works. It is trite to suggest that we can imply such a term into the lease, and we reject the Respondent's submissions in this regard.
27. The terms of the lease compound the problem because of the way in which the block is demised: the roof is demised in sections to the Lessees of the top flats; the land on which the building is built is demised in sections to the Lessees of the ground floor flat; those parts of the hallways/stairways are demised to the Lessee most proximate to it; the paths/gardens/drying areas are demised to individual Lessees but with communal rights of access across them (except in respect of the gardens at the front). In short this makes individual Lessees responsible for maintaining the structural parts of the building which fall within their demise. The unsatisfactory result of such provision is manifested in the poor and potentially hazardous condition of the windows in the stairways which were observed on our inspection.
28. Whilst the Applicants have sought in their submissions dated 13th July 2010 to argue that this cannot have been what the parties intended and that the lease should not - for business efficacy reasons - be read in this way, the terms of it are quite plain.
29. In short, whilst the lease (clause 3(G)) provides that the Lessor could recover his expenses of maintaining the building and grounds, there is no positive obligation to do so.
30. We are satisfied that the lease fails to make satisfactory provision and so in principle agree that it should be varied.
31. We have carefully considered the original draft, over which we raised concerns at set out at paragraph 17 above. Those concerns remain. The short point is that the effect of the inclusion of the words "all those parts of flat block *as are not included in the demise of any flat...*" will exclude the roof, the passages, the staircases, the entrances, halls, from the Lessors obligations, which are materially the reasons for varying the lease. The amendment would then go in clause 4(4)(A) to outline/describe areas which are then excluded by an earlier clause.
32. For these reasons we reject the terms of variation as originally sought.

The amended variation sought by the Applicant

33. We then considered the alternative draft which was submitted by the Applicants under cover of letter dated 11th June 2010. These omit the offending words as referred to in paragraphs 17 and 31 above. However, what they do not do is to mirror exactly the Lessor's entitlement to collect service charges. It seems to us that the aim must be to provide a clear obligation - so to eliminate the risk of future disputes - and the most satisfactory way of doing so is to provide a repairing obligation which mirrors the right to demand service charges in respect of it.
34. We therefore approve a variation of terms of the lease in respect of flats 1-12, but only in the following form:

Add:

"4(4) At all times during the said term to maintain repair and renew the roof and foundations and renew cleanse and light (where necessary) all entrances passages staircases halls sewers drains pipes tanks gutters cables party walls party structures chimney stacks and fences and appurtenances intended for the use or accommodation of both the Lessee and the Lessors and/or the Lessees or occupiers of other parts of the Flat Block and/or the Garage Block

4(5) At all times during the said term to repair and maintain (a) the garage drives and forecourts shown coloured yellow on the plan annexed hereto and (b) the communal drying area of the Flat Block and the footpaths coloured grey on the said plan over which rights of way are demised to the Lessee by this lease".

The Respondent's Cross-application

35. By application made on 7th June 2010 the Respondent sought a lease variation under Section 35 in respect of all 12 lease, and the grounds for doing so were to "modernise all the leases in the block so as to provide for Landlord to insure and maintain structure with service charge contribution from each tenant".
36. The Applicant objects on the basis that the Respondent has not identified which of the statutory grounds apply and so not established that the Tribunal have jurisdiction to do so.
37. The first point to make is that the Tribunal does not have a general power to modernise leases, and only a power to do so where there is no satisfactory provision in the lease. We consider that there is considerable force in the Applicant's submissions that the changes sought by the Respondent are extensive and unjustified. The

Respondent has not made detailed submissions to persuade the Tribunal that changes are needed. The Tribunal has considered the proposed lease variations and provides the following examples which lead to their (largely) refusing the proposals:

- in respect of insurance, there is an existing provision which the Lessor can enforce. It is not unworkable and not unsatisfactory. The Respondent proposes a set of terms as to mutual enforcement of covenants – yet there is an existing term (clause 4(3)) which cannot be described as unsatisfactory
- the Respondent seeks to introduce a provision (5(d)) which enables the Respondent to introduce regulations for the management of the building and may be altered by him as and when he thinks fit – yet we would need considerable persuasion that this did not breach the Unfair Contracts and Terms Act 1977.

38. In short, without evidence or arguments that the statutory provisions are engaged we are not satisfied that the attempted modernisation of the lease falls within our jurisdiction.
39. Having adjourned the application once for the Respondent to make this application, and in light of the scrutiny given at the last hearing the Respondent cannot have been under any illusion as to the matters which the Tribunal would wish to see. Accordingly, we do not consider that it is in the interests of justice to adjourn the application again. We therefore dismiss the Respondent's cross-application, save in one respect.
40. The only aspect of the cross-application which we grant is to vary the 4 leases of the flats owned by the Respondent, so that they contain the amendment referred to in paragraph 34 above. We do so pursuant to sections 35 and 38(4) of the Act, and the effect of this is that all 12 leases contain identical repairing and service charge provisions.

Mr. and Mrs. Sandhu's Correspondence

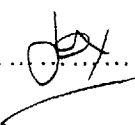
41. On 12th July Mr and Mrs. Sandhu (Lessees of flat 11) asked the Tribunal to consider 4 specific points which they wished to make in response to the Respondent's application. In light of the dismissal of the cross-application we do not consider it necessary to address the points made, save in respect of the point made at paragraph 3: the leases provide that the front gardens are specifically demised to the ground floor flats; the rear gardens are also specifically demised to certain flats – but all lessees have a right to use them under the Schedule to the leases because they constitute the "communal lawn and drying area". So the rear gardens are part of the land referred to in the lease variation at 4(5).

Costs

42. In response to the application the Respondent said that costs had been incurred in taking advice. At the hearing we raised the limited jurisdiction of the Tribunal to make costs orders. Neither party has since that time referred to costs.
43. So that the matter is clear we consider that costs incurred and fees incurred should remain with the party who incurred them, indeed we observe that there is no provision in the lease which entitles the Respondent to recover them.

Summary Decision

44. For the reasons given above the Tribunal makes an order for variation of the leases in respect of flats 1-12 Bishops Walk, Aylesbury, as provided in paragraph 34 above.
45. Further, we direct that the Applicants do notify the Land Registry, in order to annex the decision to the freehold and leasehold titles.

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Joanne Oxlade

Chairman

26th July 2010