11707

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	: CHI/45UD/LVL/2014/0003
Property	: 135, High Street, Selsey, West Sussex PO20 0QB
Applicant	: Ms C Hibbert
Representative	: Mr Kevin Pain, counsel and Anderson Rowntree, solicitors
Respondent	: Mr R Butlin
Representative	:
Type of Application	: Variation of Lease- section 35 Landlord and Tenant Act 1987
Tribunal Members	: Judge D Agnew Judge J. Talbot
Date of Hearing	: 23rd June 2016
Date of decision	: 9th August 2016

DECISION

Background

1. The Applicant is the freehold owner of 133/135 High Street, Selsey, West Sussex PO20 0QB ("the Building"). The building comprises a carpet shop on the ground floor and a residential flat with a roof terrace and patio to the rear on the first floor. The Respondent is the lessee of 135 High Street, which is the first floor flat, roof terrace and patio ("the flat"). The lease is for a term of 99 years from 7th October 1988.

2. By an application dated 22nd August 2014 the Applicant applied to the Tribunal for an order under section 35 of the Landlord and Tenant Act 1987 ("the Act") for the variation of the said lease.

3. The ground for the application is that the lease "fails to make satisfactory provision with respect to:
   (1) the repair or maintenance of the flat or the building containing the flat or 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" as provided for by section 35(2)(a) of the Act: and
   (2) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him for the benefit of that other party, as provided for by section 35(2)(e) of the Act.

4. Directions have been issued by the Tribunal on a number of occasions. These provided for statements of case to be filed and served by each party. This has been done and the matter came before the Tribunal for an oral hearing on 23rd June 2016.

5. At the conclusion of the hearing the Tribunal asked the Applicant's counsel to file and serve a copy of any current lease of the ground floor premises as this had not been referred to in either party's case and had not been included in the hearing bundle. The Tribunal wished to have site of any such lease before making its determination so that it could see what provision for repairing the Building, if any, had been made in that lease/those leases. Further directions also provided for the parties to make representations to the Tribunal in writing as to how, if at all, any lease of the ground floor premises affected the application before the Tribunal.

6. That process was completed on 20th July 2016 and the Tribunal then proceeded to make its determination.

A Summary of the parties' cases

7. The Applicant's counsel, Mr Pain, said that there were three problems with the lease of the flat as drafted. The first was that it did not provide for payments by the lessee in advance of expenditure by the landlord on items of repair and did not provide for a reserve or sinking fund to be established.

8. The second problem concerned a fire escape attached to the side of the Building. This serves the flat and there is an express right of way granted to the lessee of the flat to pass on foot over an area at the side of the Building for the purpose of access to and egress from the fire escape. It was accepted by Mr Pain that this conferred an implied right of way to the lessee of the flat over and along the fire escape itself albeit that this was not expressly stated in the lease. The fire escape is in need of repair and has been declared as being in a dangerous condition by the local authority. The Applicant has therefore boarded up the entrance to the fire escape from the roof terrace/patio of the flat so that it cannot currently be used. There is no express obligation on the part of either landlord or tenant contained within the lease to repair the fire escape. The Application therefore seeks an order from the Tribunal either for the right of way over the fire escape to be removed or, alternatively, the lease varied to provide an obligation on the part of the landlord to repair the fire escape and for the lessee to contribute towards the cost of repair in the same manner as other service charges, that is by contributing one-half of the cost of repair and maintenance.

9. The third problem with the current lease that the Applicant seeks to overcome by a variation concerns the landlord's rights of access to the Respondent's flat in order to be able to effect repairs to the Building which are the landlord's responsibility . Mr Pain submitted that the current lease was unsatisfactory in that regard and he sought to supplement the existing provisions with two new clauses giving rights of access to the landlord and others for certain purposes.

10. The Respondent's position was that the lease as it currently stands is perfectly satisfactory and does not need to be varied. He opposed the application.

The relevant lease provisions

11. Clause 2 of the lease (which should be numbered clause 3) states that:
"The Tenant agrees with the Landlord:
3.3 TO pay the Landlord on demand one-half of the amount spent in carrying out the obligations in this lease to provide services."

12. The services to be provided are set out in the Fifth Schedule. They are:
" 1. Repairing the roof, foundations and common parts of the building
2. Decorating the outside of the building every three years
3. Repairing and maintaining those sewers drains, pipes, wires and cables in the building which serve both the property and other parts of the building".

13. Schedule 3 paragraph 2 of the lease grants:
"A right of way for the Tenant and all persons expressly or impliedly authorised by him over and along the side of the property and

shown coloured green on the plan at all times for the purpose of access to and egress from the fire escape."

14. Clause 3.9 of the lease requires the Tenant "to allow the landlord on giving at least seven days notice to enter the property to inspect the state of it."

15. Clause 3.13 of the lease requires the Tenant "to allow anyone who reasonably needs access in order to inspect repair or clean neighbouring property, or any sewers, drains, pipes, wires or cables serving neighbouring property to enter the property at any reasonable time. The person requiring access must give at least seven days notice and make good any damage to the property promptly"

16. Clause 3.24(e) provides for the Tenant to "allow the Landlord to enter the property to comply with any lawful requirement under the Planning Acts even if that restricts the enjoyment of the property."

17. Although not referred to by either party either in their statements of case or at the hearing paragraph 1(b) of the Fourth Schedule to the lease also states as "Rights to which the property is let subject" (sic) the following:
"So that services may be provided to other parts of the Building
(b) the right of the Landlord to repair and maintain any of those sewers, drains, pipes, wires and cables to enter the property, with workmen and appliances if necessary, to do the work".

18. Clause 1.5 of the lease provides that :
"Authority given to a person to enter the property after giving notice extend (sic) if the circumstances justify it, to entry after giving less notice than specified or without giving any notice."

The relevant law

19. By section 35 (1) of the Act "Any party to a long lease of a flat may make an application to a [First-tier Tribunal (Property Chamber)] for an order varying the lease in such manner as is specified in the application.

20. By section 35(2) of the Act "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
    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
    .....

(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."

21. By section 38(4) of the Act the Tribunal may order the variation sought or such other variation as it thinks fit.

22. By section 38(6) of the Act it is provided that "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)....., and that an award of compensation 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.

The Applicant's case in detail

23. The Applicant's counsel pointed out that the lease as it stands provides no ability for the Landlord to levy service charges in advance of expenditure or to build up a reserve fund for future expenditure, as is common in modern leases. The application seeks to remedy that situation. He cited three authorities in support of his case.

24. The first such authority was the case of *Gianfrancesco v Haughton LRX/10/2007*. This is a Lands Tribunal decision on appeal from a Leasehold Valuation Tribunal ("the LVT"). In that case the LVT varied a lease by (inter alia) adding the words "on demand in advance" to the lessee's covenant to pay service charges thereby changing the liability to pay after expenditure had been incurred to payment in advance of expenditure. The decision was appealed with regard to other variations allowed by the LVT and not this particular variation but the Lands Tribunal President noted at paragraph 23 of his judgment that "the lack of mechanism for collecting the landlord's contribution to roof repairs is accepted to have been cured by the variation made by the LVT to clause 2(3)(b)."

25. The second authority relied on by Mr Pain was the LVT case of *Canons Park Close, Donnefield Avenue, Edgware, Middlesex HA8 6RL* in which an on-account fixed payment of £50 was varied to an obligation to pay one-eighteenth of a reasonable estimated service charge payment in advance.

26. The third authority relied on by Mr Pain was the LVT case of *Southall Court, Lady Margaret Road, Southall UB1 2RG*. In this case there were two types of lease: one where there was no provision for payments on account of service charges and the other where there was such a provision. The LVT ordered a variation of the first type of lease to provide for payments on account and for a sinking fund

saying "These are...defects which must make this particular block almost impossible to manage effectively to the detriment of all leaseholders."

22. Mr Pain contended that the inability to levy service charges in advance of expenditure and being unable to establish a sinking fund "failed to make satisfactory provision" with respect to the matters set out in section 35(a) of the Act because the amendments sought would:-
    a) allow the Tenant to challenge anticipated expenditure before it is incurred
    b) prevent the landlord from being out of pocket and increase the likelihood of recovery
    c) absolve the Landlord from the requirement to borrow money, thereby increasing expenditure further
    d) remove the risk of the Landlord breaching her duties to repair the premises
    e) permit longer-term, more expensive repairs being paid for in more manageable instalments

    all of which the existing lease terms do not provide.

23. With regard to the fire escape, Mr Pain submitted that the failure expressly to provide an obligation on the part of the Landlord to maintain it or for the Tenant to pay for its maintenance brought the matter within section 35(2)(a)(ii) or (iii) of the Act in that there was a failure to provide for the repair or maintenance of the building containing the flat or, alternatively, "any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him." He cited the LVT case of *Flats 1-8 Baden House, Great Bedford Street, Bath (CHI/00AH/LVT/2006/0005)* as an example of a case where the Tribunal had varied a lease to make provision for costs to be recovered which had not been specified in the original lease.

24. Mr Pain produced two versions of the variation sought. The first involved the removal of the landlord's obligation to provide a fire escape. It is expensive to maintain and is not a requirement of the fire authorities on safety grounds. The removal of the obligation to provide the right of way over the fire escape would cure the problem. The second alternative was a draft clause to expressly provide an obligation on the part of the landlord to maintain and repair it and for the Tenant to pay for one half of the cost thereof as for all other service charge expenditure.

25. Mr Pain considered that currently there is no provision in the lease to enable the Landlord access to the flat should she require it to carry out repairs. He contended that such a provision would benefit both parties. Not having an express provision, and having to rely on implied rights is unsatisfactory. Further, having a specified notice period makes things more certain for the parties and enables the Tenant time to raise further issues or defects and provision can be made for emergency situations where no notice would be required.

The Respondent's detailed response

26. Mr Butlin told the Tribunal that he bought the flat in 2009 after which he carried out a lot of work both inside and out in order to rent it out. Initially repairs such as repointing to the brickwork and repairs to a leaking flat roof were initiated by the lessee of the ground floor shop and Mr Butlin paid 50% of the bill. Subsequently, the landlord took over doing the repairs. Another flat roof repair was required and Mr Butlin paid his 50% within a week. Later, the Landlord wanted to install new soffits and gutters costing about £2,000. He paid his share of that. He considers that the only substantial repair that might now be required is the replacement of the slate roof which is about 100 years old but is not showing signs of needing replacement yet and he has savings to cover any such work. His case is, therefore, that the lease provisions as they currently exist do provide a satisfactory means of dealing with repairs and the recovery of expenditure by the landlord and there is no need to vary the lease at all.

27. With regard to the fire escape, one of the attractions of the property when he acquired the lease was that there was a rear access by means of the fire escape which served just the flat. This enabled rubbish bins for example to be taken to the street this way rather than down the internal staircase to the front door which is situated immediately adjacent to the pavement in High Street, Selsey. The Landlord has, however, boarded this access up and it cannot currently be used. It would be of benefit to him and his tenants if the fire escape were to be repaired. He does not feel that he is obliged to contribute towards the cost of repair as it is outside the demise of the lease. However, he conceded during the hearing that if the Tribunal does vary the lease to make the Landlord obliged to repair it then it would be acceptable to him to have to contribute 50% of the reasonable cost, in the same way as for the other services set out in Schedule 5 to the lease. In his written representations after having had sight of the commercial lease for the premises below the flat, he appears to have resiled from this concession.

28. With regard to the Landlord and others having a right of access to carry out repairs he saw no reason to alter the current lease terms. As the lessees of the ground floor shop are concerned, if they require access they should ask their Landlord (which is also his Landlord) and the Landlord can make the necessary arrangements for access.

The Tribunal's decision

29. The Tribunal does not find that the inability of the Landlord to levy service charges in advance of expenditure or to provide for a reserve or sinking fund of itself constitutes a failure of the lease to make satisfactory provision with respect to the recovery (emphasis added) by

the Landlord of her expenditure on the services set out in Schedule Five to the lease. It may not be ideal from the Landlord's point of view that this is the case and it may not be how most modern leases are drafted. However, as the President of the Lands Tribunal said at paragraph 21 of the *Haughton* case referred to in paragraph above:

"Whether the lease fails to make satisfactory provision is one for the tribunal to judge in all the circumstances of the case. A lease does not fail to make satisfactory provision, in my judgment, simply because it could have been better or more explicitly drafted."

In the case of the Respondent's lease, there is a satisfactory provision for the landlord to be reimbursed 50% of the expenditure she incurs on the services set out in the Fifth Schedule. Thus the lease does not fail to make satisfactory provision for the recovery of the expenditure. It expressly provides for it, albeit not in advance. Indeed, the Landlord can levy a service charge immediately after the expenditure has been made and does not have to wait until the end of the service charge year in which to levy the charge, as in some leases. The evidence is that with the exception of the fire escape, which is a special case where the lease is unsatisfactory for the reasons set out below, the service charge mechanism has worked out satisfactorily to date. There is therefore no necessity to vary the lease.

30. Dealing with the Applicant's list of advantages of a payment in advance referred to in paragraph above the Tribunal responds as follows using the same lettering as in that paragraph:-

(a) the Tenant is given the right by virtue of the provisions contained in section 20 of the Act to be consulted with regard to any anticipated expenditure on items which may cost the Tenant in excess of £250 whether or not a levy in advance of expenditure is required

(b) the Landlord's duty to maintain and repair exists whether or not payment is made in advance

(c) the mere fact that the Landlord may have to borrow money before carrying out the repair does not make the provision unsatisfactory any more than the tenant perhaps having to borrow money to pay for the repair after it is carried out. In any event there was no evidence in this case that the landlord would have to borrow money

(d) as stated above the landlord's duty to repair and maintain is not contingent upon receipt of money from the Tenant

(e) simply because the provision of a reserve fund is beneficial or prudent does not make the absence of such a provision in the service charge mechanism unsatisfactory. The Tribunal's own experience is that there are very many leases where there is no provision for a reserve fund but they operate satisfactorily. Again, the alleged defect in the lease would have to make recovery of the landlord's

expenditure on service charge items unsatisfactory and the Tribunal does not consider that is the case here.

31. With regard to the Applicant's authorities the Tribunal points out, first, that of those relevant to this application they were all first instance decisions with the exception of the *Haughton* case. The first instance decisions are not binding on this Tribunal. They are not on all fours with the instant case and the *Southall Court* case is, in the Tribunal's opinion, fact-specific. As for the *Haughton* case, the LVT's variation to provide for service charges to be levyable in advance was not the subject of the appeal to the Lands Tribunal and it cannot therefore be said that the said variation was approved by the higher tribunal: the matter was simply not before it.

32. For the above reasons the Tribunal finds that section 35 of the Act is not satisfied insofar as the failure of the lease to provide for levying service charges in advance of expenditure or providing for a reserve fund is concerned to enable the Tribunal to vary the lease for that reason .

33. The lease does, however, fail expressly to confer on either the Landlord or Tenant the obligation to repair and maintain the fire escape. It is outside the demise to the Tenant but it serves the Tenant's flat only. There may be an implied obligation on the part of the Landlord to maintain and repair it but, if so, there is no obligation on the part of the Tenant to pay for such works. The case therefore comes within sections 35(2)(a)(ii) and (iii) and 35(2)(e) of the Act. The Tribunal may therefore make an order varying the lease in this respect. The Tribunal is not prepared, however, to adopt the Applicant's first suggested remedy which is the removal of the Landlord's obligation to provide a fire escape entirely. The Tribunal considers that this would be extending its statutory powers under sections 35 and 38 of the Act too far. The Tenant has been granted a right of way over the fire escape (albeit by implication). The Tribunal considers that its powers under the aforesaid sections should only be used as necessary to remedy the defect in the lease and no more. The removal of the right to use the fire escape would be a substantial interference with the Tenant's rights and a derogation from the grant. The Tribunal does, however, approve the Applicant's alternative variation which expressly makes the Landlord responsible for maintaining and repairing the fire escape and provides for the Tenant to contribute to the cost thereof in the same way as for the other services provided by the Landlord (i.e. by contributing one half of the cost). The variation is, therefore, to add a new paragraph to the Fifth Schedule to read as follows:-

"4. Repairing and maintaining the fire escape and keeping the same in good repair and condition"

The Tribunal finds that there is no prejudice within the context of the

Act either to the Respondent or anyone else in the making of this order. If there is it would be capable of being compensated for but there is no application for compensation before the Tribunal and so none is ordered.

34. With regard to the landlord's rights of access, the Tribunal does not find that the lease is deficient. This is because the Tribunal finds that, on a true construction of the lease, sufficient rights of access are already provided. By clause 3.9 of the lease the Landlord is given the right to enter the Tenant's flat on giving at least seven days notice in order to inspect the state of it. Clause 3(13) requires the Tenant to allow "anyone who reasonably needs it access to "inspect, repair or clean neighbouring property or the "sewers, drains, pipes, wires or cables serving neighbouring property. In this case the entry shall be at any reasonable time and seven days notice must be given. Any damage is to be made good. The Tribunal construes "neighbouring property" to include the ground floor shop and any part of the building containing the flat other than the flat itself. Construed in this way the Tribunal considers that there are satisfactory provisions in the lease as currently drafted for the repair or maintenance of the Landlord's property. Clause 1.5 provides for emergencies. Shorter notice than seven days (or even no notice at all) may apply in appropriate circumstances.

35. Although the Tribunal has construed the lease in this way solely by considering this lease alone, nevertheless support for this construction may be gleaned from the lease of the shop below the flat which the Tribunal asked to be submitted. In that lease at clause 1.7 the phrase "neighbouring property" is explained as follows:
"The expression **neighbouring property** does not include the Building." This indicates that the landlord considers that "neighbouring property" is capable of meaning the rest of the Building (other than the demised premises). If the draftsman of the lease of the flat had not intended "neighbouring property" to mean the rest of the Building he could easily have included a similar definition in that lease, Furthermore the absence of such a definition in the lease of the flat is an indication that the same expression has a different meaning in that lease from the meaning in the shop lease.

36. There are additional provisions with regard to landlord's access in the lease as currently worded. In paragraph 1.4 the right given to the Landlord to enter the first floor flat extends to anyone the Landlord authorises to enter and includes the right to bring workmen and appliances onto the property. Finally, in the Fouth Schedule ("Rights to which the property is let subject")(sic) in paragraph 1b there is expressed the right of the Landlord to enter the flat to repair and maintain sewers, drains, pipes etc on giving seven days notice with workmen or appliances if necessary. When all the provisions for access are taken together and when "neighbouring property" is construed as in paragraph 37 above, the Tribunal considers that the lease already makes satisfactory provision for access and therefore refuses the application in that respect.

Summary of decision
The Tribunal orders that the Respondent's lease of 135 High Street, Selsey, West Sussex PO20 0QB shall be varied by adding a new paragraph to Schedule 5 as follows:-
"4. Repairing and maintaining the fire escape and keeping the same in good repair and condition."
There shall be no variation of the lease in any other respect as requested in the application.

Dated the 9th day of August 2016
Judge D. Agnew (Chairman)

)

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.