10265

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AF/LVT/2014/0004**
Property	:	**Flats A & B, 238 High Street, BR1 1PQ**
Applicants	:	**Barbara Craddock (flat B)** **Debbie Hutchison (flat A)**
Representative	:	**Mr D Wilson BSc FRICS**
Respondent	:	**Dilek Yagmur**
Representatives	:	**BrookStreet des Roches (Solicitors)**
Type of Application	:	**Variation of Lease**
Tribunal	:	**Mr M Martynski (Tribunal Judge)** **Mr S A Manson FRICS**
Date of Decision	:	**25 July 2014**

DECISION

Decision summary

1. The Applicants' application for a variation of their leases is dismissed.

2. No order is made in respect of costs.

Background

3. The building in question is a four-storey property with a restaurant on the ground and first floors with and two residential flats on the second and third floors.

4. The Applicants are the respective long leaseholders of the residential flats. The Respondent is one of the co-owners of the freehold of the building.

5. The Applicants' leases were granted in 2007 and appear to be in identical terms. The relevant clauses of those leases are as follows:-

> The Lessee HEREBY COVENANTS with the Lessor that the Lessee will during the said term hereby granted pay to the Lessor by way of additional rent (25%) twenty five per cent (hereinafter referred to as "its Share") of the expenses and outgoing more particularly set out in the Fifth Schedule hereto reasonably and properly incurred by the Lessor (hereinafter called "the Service Charge") such payments to be calculated and paid in the manner set out (the first payment being a proportionate amount for the period from the date thereof to the thirty first day of December next following)
> [Clause 5]
>
> THE FIFTH SCHEDULE **Costs and Expenses to which the Lessee is to contribute by way of Service Charge**
> All charges assessments impositions rates and other outgoings payable by the Lessor in respect of the whole of the Building
> [Paragraph 3 of the Fifth Schedule]
>
> All reasonable costs incurred in the provision and supply of such services for the benefit of the lessees of the Building as the Lessor shall it its reasonable discretion think fit.....
> [Paragraph 8 of the Fifth Schdule]

The lease defines the Building as 238 High Street, Bromley.

6. On behalf of the Applicants it was claimed that at the time of the grant of the leases to the Applicants, it was agreed with the then freeholder that the electrical supply to the Building would be separated so that each flat had its own supply from its own meter.

7. It appears that from the outset, there has been, and continues to be, no separate meterage of the electricity to the Building.

8. The Respondent acquired the freehold interest in the Building in April 2011.

9. The application was set down on the Paper Track. Neither party requested a hearing and accordingly the application has been decided on the bundles of papers submitted by the Applicants and by the Respondent.

The Application

10. The Applicants' application as set out in their application form was for a variation of their leases pursuant to the Landlord and Tenant Act 1987 ('the Act') by way of an addition to clause 5 in those leases in the following form:-

> Until such time as the landlord, at their cost, shall arrange separation of the shared electricity supply serving flat 238a and flat 238b, the cost to the landlord in respect of the electrical supply will not be considered to part of the additional rent as set out in Schedule 5 and the tenant(s) shall pay only a reasonable proportion of the cost of electricity appropriate to their use

11. The Applicants were ordered by the tribunal during the course of proceedings to clarify their case.

12. The Applicants' case (both in its original form and its amended form) as set out on their behalf by Mr Wilson FRICS is confused and confusing. Essentially, so far as we understand it and so far as is relevant[1], the Statement of Case clarifying the Applicants' case made the following basic points:-
    (a) The proportion of the Building taken up by the Applicants' flats is considerably less than 50%
    (b) The restaurant in the Building is by far the biggest user of electricity in the Building with the result that a combined total contribution of 50% from the residential flats to the costs of electricity far exceeded the actual cost of the electricity used by those flats and effectively subsidised the restaurant's use of electricity
    (c) The electricity supplier was charging for the electricity on a commercial rate with VAT
    (d) The last documented charge (made by the previous freeholder) for electricity back in 2007/08 was £1,383 per tenant for the year
    (e) The current freeholder was making verbal demands for very large sums in respect of the Applicants' liability for electricity costs
    (f) The freeholder had, for a period, turned off the electricity supply to the flats and to the fire alarm systems

13. In the addendum to the Applicant's Statement of Case, it was said that the application for a variation of the leases was made pursuant to Section 35(2)(d) and (3) of the Act.

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[1] The Applicants' Statement of Case as drafted by Mr Wilson made a great many other points – some of those points are not relevant to the decision that we have to make, other points were not relevant to the application at all

The Respondent's response

14. In a concise and well-argued Statement of Case in response, the Respondent's representatives clearly set out the issues so far as the Respondent was concerned and claimed that in the circumstances of this case, the tribunal should not vary the lease and had no jurisdiction to do so.

Decision

15. The relevant parts of section 35 of the Act are set out below.

> **35.— Application by party to lease for variation of lease**
>
> (1) Any party to a long lease of a flat may make an application to the appropriate tribunal 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—
> .....
> (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);
> .....
> (f) the computation of a service charge payable under the lease
>
> (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.
> (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.

16. In our view, the provisions of section 35(2)(d) of the Act do not apply in the circumstances of this case. The leases quite clearly provide for the provision or maintenance of services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation – it is the apportionment of the costs of those services that is the problem.

17. It was said by Mr Wilson in the Applicant's Statement of Case that electricity supplies had been disconnected to the flats on two occasions in the past. There was no direct evidence of this from the Applicants nor any details of when or how this happened. The intentional cutting off of the electricity supply was denied in any event in the Respondent's Statement of Case.

18. Mr Wilson argued that the turning off the electricity supply meant that the safety and security of the flats were compromised.

19. This in our view misses the point. It is not the terms of the lease that may compromise the safety and security of the flats; it is the alleged actions of the freeholders which is the cause of the problem.

20. As to the percentage payable by the Applicants in respect of electricity, the more relevant provision of section 35 would be subsection (2)(f). However the Upper Tribunal has considered this subsection in cases where the contributions to a Service Charge add up to 100% of the costs incurred (as is the case in this Building). The Upper Tribunal's decision was made in the case of *Morgan v Fletcher*[2]. The details of that care are as follows.

21. Six of the eight lessees of residential flats brought an application under section 35 of the Act seeking a variation of the service charge percentages in their leases. They had two concerns:
(a) the total proportion of the service charges payable under the eight leases came to 116 per cent;
(b) the proportions paid by the leaseholders seemed too arbitrary, in that larger flats did not pay a larger service charge.

After the application was issued, the leaseholders of the other two flats (one of whom was also the freeholder) varied their leases so as to reduce their service charges, and therefore reduce the total amount recoverable to 100%.

Those two leaseholders then argued that the application should be dismissed, since the reduction in their service charges meant that the leases now made satisfactory provision for the computation of the service charges *i.e.* they now totaled 100%.

The Leasehold Valuation Tribunal ('LVT' as it was then) rejected this argument, relying on the fact that, notwithstanding that the service charges now totaled 100%, the apportionment was manifestly unfair. One of the two leaseholders held the largest flat but paid a significantly lower service charge than the other leaseholders.

The two leaseholders appealed to the Upper Tribunal. They contended that the only circumstances in which an LVT could vary a lease so as to amend the service charge percentages payable was where the total recovery exceeded 100%.

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[2] [2009] UKUT 186 (LC)

The Upper Tribunal found that section 35(4) had to be read as limiting s.35(2)(f) *i.e.* the only circumstances in which an LVT may vary the service charges payable under a lease are where the recovery exceeds or is less than 100%. If the percentage payable is 100% then the LVT and now this tribunal, is not empowered to vary the lease.

22. In these circumstances therefore section 35(2)(f) does not provide a remedy for the Applicants.

23. There was a suggestion in the Applicants' Statement of Case that electricity was not properly a Service Charge under the terms of the Applicants' leases.

24. In our view this is incorrect. The provisions of the Fifth Schedule to the lease are wide enough to cover electricity charges paid by the landlord. In arguing this point the Applicants overlook the fact that their proposed amendment to their leases relies on an interpretation that the Fifth Schedule of the lease includes electricity charges.

Costs

Wasted costs

25. In his Statement of Case in response, the Respondent sought a costs order against the Applicants on the grounds that their representative Mr Wilson:-
    (a) Failed to comply with directions set by the tribunal on two occasions
    (b) Extended the Statement of Case unreasonably when asked by the tribunal only to confirm the specific grounds under Section 35(2) on which the application is based
    (c) Submitted a Statement of Case containing irrelevant material outside of the tribunal's jurisdiction
    (d) Failed to properly particularise the claim
    (e) Referred to matters in the proceedings that were the subject of litigation privilege
    (f) Made allegations against the Respondent that were false and without supporting evidence

26. The Respondent's representatives wrote to Mr Wilson by letter dated 16 May 2014 inviting him to withdraw the application on the grounds that the application raised matters outside of the tribunal's jurisdiction and warned that if he proceeded with the application, they would seek costs.

27. If the Applicants' basic argument is correct, that being that they are effectively subsidising the electricity bill for the Respondent, then they may well have good cause to be aggrieved. There was no specific answer to this issue from the Respondent in his Statement of Case.

28. The Application was poorly and ineptly presented throughout, even the bundles for the final consideration submitted by Mr Wilson were not prepared properly with pages missing. The Application was however arguable. The Upper Tribunal decision on the question of the Service Charge percentage to which we have referred above is not binding on us. It is

perfectly open to a party to proceed with an application arguing that the Upper Tribunal's decision in that case was wrong (as has indeed been argued by some commentators). Whilst were not convinced by anything in the Applicant's case to persuade us to disagree with the Upper Tribunal, that does not mean that we would not have been able to consider an argument of that kind.

29. The same can be said of the Applicants arguments that section 35(2)(d) applied or that electricity charges were not a head of Service Charge – both were arguable.

30. We do not consider therefore that the application was obviously not within our jurisdiction, we quite clearly had jurisdiction to consider the arguments put to us. We have decided that in this case, the circumstances and arguments as put to us do not allow us to go on to make an order varying the leases.

31. This tribunal is, for the most part, a no-costs tribunal where parties are encouraged to bring their disputes to be resolved in an informal and cost effective manner as may be possible in the circumstances of each case.

32. It follows that awards of costs should be made sparingly. The Respondent has been inevitably put to cost in answering this application which has failed. But that is not enough to justify us making an award of costs. The application was poorly argued and presented. That again is not sufficient in our view for wasted costs.

33. There was no suggestion, and it does not seem to us that the application was presented as so to deliberately increase costs. The application and the Statement of Case contained much irrelevant material; this was down to poor presentation rather than malice or unreasonable behaviour.

34. We should mention separately Mr Wilson's failure to properly set out the grounds of the application in the first place and the two breaches of the tribunal's directions, all of which caused the Respondent to incur additional costs by way of making complaint to the tribunal to seek a clarification of the application and compliance with directions.

35. It seems to us that if a party to an application were entitled to costs on a reatively simple failure to state a case fully or on a *relatively* minor breach of directions, that would turn this tribunal too quickly into a 'costs' rather than a 'no-costs' tribunal.

36. In order for a costs order to be made, the unreasonable behaviour referred to in Rule 13[3] must therefore be behaviour that is beyond an ineptly presented case and beyond a simple failure to comply with directions.

37. Accordingly we are not willing to make any order in respect of wasted costs.

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[3] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Section 20C

38. In the application form submitted by the Applicants, it was stated that the Applicants did not want to make an application pursuant to Section 20C of the Landlord and Tenant Act 1985 which would prevent the Respondent from adding his costs of these proceedings on to a Service Charge payable by the Applicants. We are not aware of the Applicants having changed their position on Section 20C prior to our consideration of the application.

39. In any event, given the decision that we have made, it would not be right in the circumstances to make any order pursuant to Section 20C which would deprive the Respondent the ability to claim his costs of these proceedings via the Service Charge (if the terms of the Applicant's leases allow such a charge).

Mark Martynski, Tribunal Judge
25 July 2014