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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/OOMD/LVL/2015/0001**
Property	**:**	**44 – 47, 110 – 129, & 143 – 162 Windmill Road, Slough, Berkshire SL1 3SX, 3SN & 3SW**
Applicants	**:**	**Mr Michael Earlington and the lessees of 61 other flats listed on the schedule attached to the application**
Representative	**:**	**Miss Read, Counsel for all Applicants** **Mrs Toor from Barratt and Thomson, Solicitors**
Respondent	**:**	**Parkwood Investments Limited**
Representative	**:**	**Mr C George accompanied by Mrs R George**
Type of Application	**:**	**An application to vary leases (part iv Landlord and Tenant Act 1987 as amended)**
Tribunal Members	**:**	**Tribunal Judge Dutton** **Mrs J Oxlade (Tribunal Judge)** **Mr D Barnden MRICS**
Date and venue of Hearing	**:**	**Slough County Court, Slough SL1 2HE on 22nd June 2015**
Date of Decision	**:**	**7th July 2015**

DECISION

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DECISION

The Tribunal dismisses the application to vary the leases for the reasons set out below.

The Tribunal declines to make an order under Section 20C of the Landlord and Tenant Act 1985 (the 1985 Act) for the reasons set out below.

BACKGROUND

1. This application, dated 19th February 2015 was made by a number of leaseholders living in flats in Windmill Road, Slough the details of which appear on the front page of this decision. The tenants were represented by two firms of solicitors, Messrs Barratt and Thomson and Singh Karran & Co. The Respondent, Parkwood Investments Limited, was represented by solicitors until just before the Hearing when Mr George, a director of the Respondent Company, took over the representation.

2. It is worth briefly setting out the history of the property and the reason why this matter came before us on 22nd June 2015. The development comprises some 71 flats situated in Windmill Road in Slough. The title to the property has caused some confusion but it seems clear that George Wimpey West London Limited, the original developers, granted leases to the various leaseholders in or around December 2003 with a commencement date on 1st January 2003 for a term of 150 years. Subsequent to the grant of the last of the flat leases on 19th December 2005, a lease for a similar term was granted to Metro (Slough) Management Company Limited (the management company) which in effect leased the reserved properties to the management company and created obligations and rights on and for the management company to undertake maintenance and other matters at the development. In the individual flat leases there is a covenant by each leaseholder to become a member of the management company and to ensure that on devolvement of title any successor also becomes a member of the management company. In the flat lease reference is also made to the lease to be granted to the management company, which is referred to as a head lease, which has caused confusion until now. It is quite clear, however, that this lease was to be granted following the grant of leases of all the flats and accordingly it is something of a misnomer. It was described at the Hearing to us as a "mezzanine lease."

3. In any event, through failings on the part of the management company, the ground rent was not paid nor indeed was insurance and as a result of proceedings commenced in the Slough County Court the management company was eventually wound up and the lease under which it held the reserve parts (the mezzanine lease)was forfeited. This had obvious implications for the lessees and the management of the development. However, the problems with the management of the development had been in existence for some time and at the Hearing we were told that the property was in a state of neglect, that there had been no hot water to certain parts and indeed that at the time of the Hearing it was not insured.

4. Prior to the Hearing we were provided with a bundle of documents, which included the application, the directions issued by the Tribunal and the Respondent's statements of case. In addition, we had a copy of a sample lease of a

Windmill Road flat, a copy of the head lease, registers of title and some details relating to the possession action taken in the County Court by the Respondent against the management company. This included witness statements of Mr George and a skeleton argument from Mark Warwick QC acting for the Respondents at the Hearing. This hearing was due to take place in March of 2014. We also had copies of the management company's memorandum and articles of association and other associated documents, as well as copies of correspondence as well as the proposed deed of variation put forward by the Respondent Company together Mr George's final witness statement made in April 2015.

5. The application to the Tribunal set out the proposed wording put forward by the Applicants. This did not seek an extensive variation of the existing lease but an amendment to the fourth schedule as follows:

3(c) that if at any time the management company shall:
(i) default in the performance or observance of any of the covenants or obligations imposed upon it and specified in clause 5 or in the fifth and sixth schedule hereto; or
(ii) enter into liquidation (save for the purposes of restructuring or amalgamation)
the company will subject to the payment by the buyer to the company of all sums falling due from the buyer from the date of service of the notice set out in paragraph 3(d) below, which would otherwise be payable to the management company) undertake the performance of all or any of the said covenants or obligations imposed upon the management company by this lease or the head lease and the company shall be able to enforce any of the covenants and obligations of the buyer pursuant to this lease.
(d) Where the company is obliged pursuant to 3(c) above to undertake all or any of the said covenants and obligations imposed upon the management company by this lease of the head lease, the company shall serve written notice on the buyer stating that it intends to carry out the said obligations of the management company.
In the statement which accompanied the application the terms of the proposed variation are slightly different in that there is no 3(d) and reference is made to payment to the landlord. We do not propose to make any further comment on that for the moment.

6. Also in the bundle was a proposed deed of variation put forward by Parkwood Investments Limited which required in effect a surrender of the existing lease and a re-grant on terms contained therein.

HEARING

7. At the Hearing all Applicants were represented by Miss Read of Counsel and Mr George represented Parkwood Investments Limited, his company.

8. Miss Read gave us a brief resume of the history and confirmed that a draft consent Court order sent to the Tribunal members in the week before the Hearing had not in fact been entered into. It appears that not all lenders were in agreement with the proposed draft, for reasons we do not need to go into, and that accordingly that had not been proceeded with. We were told that the County Court proceedings

have been stayed until December of 2015 when, if there is no movement, we understand they will be struck out. Part of the difficulties in respect of the County Court proceedings was a suggestion that the Respondents (the Applicants in the County Court action) wished to split losses, it is said that the company had suffered as a result of the non-performance by the management company, equally between all lessees. It was alleged that some lessees had in fact paid their dues but others had not.

9. At this point we put to Miss Read that in fact the lease did not need varying. Our reason for so saying was in our view to be found at paragraph 3 of the fourth schedule under covenants by the company which reads under the heading Maintenance as follows: *(a) Until such time as it grants the head lease to procure that the management company shall observe and perform the obligations of the management company contained in the fifth and sixth schedules, and itself to carry out such obligations in the event of the management company failing to do so.* The view that we expressed to both parties was that the wording "*and itself to carry out such obligations in the event of the management company failing to do so*" foreshadowed the exact position in which the parties now find themselves. That is to say that although a lease, referred to as a "head lease", had been issued to the management company, the management company had failed to perform under the terms of same, the lease had now been forfeited and the management company was failing to carry out its obligations under the terms of the flat leases.

10. We gave the parties some time to consider whether our initial views were ones that were supported. Miss Read indicated that if that was to be our finding, then she would be content that the application be dismissed as there was sufficient protection for the lessees under the existing flat lease. During the adjournment Mr George managed to obtain some legal advice and he told us that, as a result of same, his view was that the clause we have referred to above was not designed to enable the company, that is to say the Respondent, to step into the shoes of the management company in these circumstances. It was only intended to enable the company to deal with the management until the head lease had been granted. He accepted that if that were the case, if the management company were in default after the head lease had been granted, there was no management provision.

11. The application had been brought by the leaseholders because there was a reluctance on the part of the Respondent company to take on the management responsibilities without first receiving financial compensation from the leaseholders as a result of the management company's failings and a wish to create a new lease with wider terms. Attempts to persuade the Respondent company that they were obliged to take on the management had failed and it was thought by the Applicants that the way forward was too make the application in the form before us. Miss Read, however, confirmed that she thought our interpretation of the relevant clause did cover the situation.

THE LAW

12. The law applicable to this application is set out in the attached appendix.

FINDINGS

13. In reaching our conclusion that this application should be dismissed, we have borne in mind the provisions of section 35 of the Landlord and Tenant Act 1987 (the Act). In Mr George's witness statement prepared in April of this year, he indicated that an application would be made under section 36 of the Act so that if we were minded to make a variation, he would seek a variation of those leases which were not held by the Applicants. No application to that effect had been made to the Tribunal at the time of the Hearing. Our decision, therefore, does have the benefit of removing the need for a further application to be made under the Act.

14. Our reason for concluding that the application should be dismissed is that our interpretation of paragraph 3(a) in the fourth schedule of the flat lease is that if the management company, for whatever reason, fails in its obligations to carry out the covenants under the terms of the flat lease, then the company, that is to say the Respondent in this application, covenants to take on those obligations. We do not read the wording in paragraph 3(a) to mean that these obligations are only taken on until such time as the head lease has been granted. We find support in that proposition by reference to paragraph 2 of the sixth schedule part I under the heading Payment which says as follows: *the buyer shall within 14 days of receipt of demand therefore, pay the maintenance charge to the management company (or to the company if the company is carrying out the obligations of the management company under the provisions of paragraph 3(a) of the fourth schedule.* This relates to the payment of the maintenance charge which is defined at the beginning of the lease as follows:
(a) in relation to the buildings and the common parts the proportion applicable to the property (specified in part (iii) of the sixth schedule) of the sum spent or to be spent by the management company on the matter specified in part I of the fifth schedule and so far as the same relate the matter specified in part II of the sixth schedule as estimated or adjusted in accordance with part I of the sixth schedule, (b) in relation to the immediate areas, a sum equal to the total amount spent or to be spent by the management company on the matter specified in part II of the fifth schedule and so far as the same relate the matter specified in part II of the sixth schedule estimated or adjusted in accordance with part I of the sixth schedule divided by the number of flats or other dwellings within the development.
This definition seems to us clearly to cover the possibility that the obligation on the company to carry on with the maintenance is beyond the date upon which the head lease might be granted and is intended, as is often the case, to ensure that the company takes over the obligations of the management company if the management company fails so to do. In those circumstances, therefore, we find that the company is obliged under the provisions of paragraph 3(a) of the fourth schedule to now take on the obligations of the management company following that company's failings.

15. We are also satisfied that the company can undertake this role without undue difficulty in that, as we have indicated above, the maintenance charge is clearly one that can be recovered by the company. Under the heading Sundry Fees in part II of the sixth schedule, this includes *"all fees charges expenses salaries wages and commission paid to any Auditor Accountant, Surveyor Valuer Architect Solicitor*

or any other agent, contractor or employee whom the management company may employ in connection with the carrying out of obligations under this Lease and the Leases including the costs of an incidental to the preparation of the estimates, notices and accounts referred to in Part I of the schedule and also by reference to clause six of the same part which states as follows: *"all sums paid by the management company for the repair and maintenance, decoration, cleaning, lighting and managing of the development whether or not the management company was liable to incur the same under the covenants hereto."* These clauses in our finding clearly envisage that the management company could and the company now can instruct a managing agent to deal with the development. The company is bound by, but has the benefit of, the buyer's covenants set out in the third schedule to the lease and the obligations set out in parts I and II of the fifth and sixth schedule.

16. This is a role that the Respondent company needs to take up as quickly as possible. The employment of an experienced managing agent, will we suspect, be of great help and will enable them to put together the relevant budget to obtain estimates and to seek money on account. In addition also, the lease provides for a reserve fund to be set up, which is a step that they should also take.

17. Much of this has been brought upon the lessees by their failure to run the management company properly and they can have little complaint if the company now steps into the management company's shoes and runs the development appropriately. One matter that will need to be dealt with as a matter of urgency is the payment of the insurance premium and the company may wish to issue an immediate estimated demand in respect thereof so that funds can be recovered.

18. On the question of the application under s20C, which was not pursued at the hearing, we find that no such order should be made. The application has been dismissed. The problems stem from the collective apathy of the leaseholders and it would be wrong in our finding to make an order that the provisions of s20C should apply in this case.

Judge:

A A Dutton

Date: 7th July 2015

Relevant Law

S35 Application by party to lease for variation of lease.

(1) Any party to a long lease of a flat may make an application to a leasehold valuation 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—
(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;
(b) the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);
(c) the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;
(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);
(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;
(f) the computation of a service charge payable under the lease;
(g) such other matters as may be prescribed by regulations made by the Secretary of State.
(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.
(3A) For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.
(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.
(5) Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002 shall make provision—
(a) for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and
(b) for enabling persons served with any such notice to be joined as parties to the proceedings.
(6) For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—
(a) the demised premises consist of or include three or more flats contained in the same building; or
(b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.
(8) In this section "service charge" has the meaning given by section 18(1) of the 1985 Act