12048

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AZ/LSC/2016/0370**
Property	:	**19 Boddington House, Kender Estate, New Cross, London SE14 5BX**
Applicant	:	**Mr Alfred Aisedionlen**
Respondent	:	**London Borough of Lewisham**
Type of application	:	**Service charge and/or lease variation**
Tribunal member	:	**Judge P Korn**
Date of decision	:	**12th December 2016**

DECISION ON A PRELIMINARY ISSUE

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Decisions of the tribunal

(1) The Tribunal does not have jurisdiction in relation to these proceedings and therefore the whole of the case is struck out pursuant to paragraph 9(2)(a) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

(2) The Tribunal declines to grant a section 20C cost order. No other cost applications have been made.

The application

1. The Applicant seeks (i) a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as to the payability of certain service charges for the years 2002/03 to 2015/16 inclusive and/or (ii) a variation of the lease of the Property.

2. The lease ("**the Lease**") is dated 23rd July 2001 and was originally made between the Respondent (1) the Applicant (2). The Applicant sold the Lease on 21st August 2015 and is therefore not the current leaseholder.

3. The Applicant submits that the wording and/or the application of the service charge contribution formula in the Lease is unfair and has resulted in his having paid a higher service charge than is equitable during the service charge years referred to above.

4. On 3rd November 2016 the Tribunal issued directions following a case management conference. The Procedural Judge expressed concern that the Tribunal might not have jurisdiction in this case and therefore set the case down for a decision on the preliminary issue of whether the Tribunal has jurisdiction. The Procedural Judge decided that the preliminary issue could be determined on the papers alone unless either party requested an oral hearing. Neither party has requested an oral hearing, and consequently this preliminary issue is being determined on the papers alone.

The background

5. The Property comprises a one bedroom flat in a block of 20 flats.

6. In his application the Applicant describes the question that he wishes the Tribunal to decide. He states that the amount of service charge payable is at issue due to the way the service charge has been calculated. He then goes on to summarise the formula used by the Respondent and submits that the formula overcharges smaller flats and undercharges bigger flats. He therefore asks that the current formula be varied to take into account the size of each flat and to charge each

flat "in accordance to size based on unit value". The Applicant goes on to propose an alternative formula which he submits would be fairer.

Applicant's submissions on preliminary issue

7. The Applicant notes that he is not the current leaseholder of the Property but submits that nevertheless he has every right to bring an application under section 27A of the 1985 Act, and he relies on the case of *Re Sarum Properties Limited Application (1999) 2 EGLR 131* as authority for this proposition. He also states that a single leaseholder (or former leaseholder) can make a section 27A application.

8. The Applicant characterises his application as an equitable claim for a specified sum and states that therefore there is no period of limitation and the doctrine of 'laches' does not apply. He adds that details of the issue only came to his notice following receipt of the estimate letter of 8th October 2014 in respect of new major works.

9. As to whether the application is an application for determination of the payability of service charge or whether it is an application for the variation of the Lease, the Applicant states that "the issue of lease variation which may be the case ... is only incidental to the case. It is a subordinating issue ...". He adds that although the application was not made under section 35 of the Landlord and Tenant Act 1987 ("**the 1987 Act**") the Applicant "has the right to make the application if variation of the lease was the main issue and even necessary". He considers that the case of *Morgan v Fletcher (2009) UKUT 186* does not apply.

10. As regards whether the Applicant can be said effectively to have agreed the service charges by virtue of the passage of time he submits that the decisions in *Shersby v Greenhurst Park Management Ltd (2009) UKUT 0241* and *Cain v London Borough of Islington (2015) UKUT 542* can be distinguished as irrelevant to this case.

11. As regards the contribution formula itself, the Applicant states that the formula in its present form "is not really an issue", although he goes on to state that the Respondent ought to recognise "that there is some block of flats with flats of different sizes". He then goes on to state how the Respondent could apply the formula, for example stating that "in some block of flats, all the flats may be of different sizes. Here B in the formula, which is the divisor, would still be B and substitute for the total number of flats but in total units of their sizes in weighted average method. As B is here used in units in a weighted average method, it would ideally produce equitable results to all the flats. B in the formula will still be B but in a weighted average method."

12. The Applicant also expresses the view that "to do what is equitable here does not cost money. It is only a matter of will to do what is right and equitable."

Respondent's submissions on preliminary issue

13. The Respondent notes the Applicant's description of the question that he wants the Tribunal to determine. The Respondent also states that the Applicant attended the case management conference and confirmed that he objects to the contribution formula itself. Furthermore, his barrister wrote to the Tribunal on 21st October 2016 indicating that the Applicant was seeking a variation of the Lease and a determination as to whether the formula stated in the Lease is the correct formula.

14. As regards the ability to apply for a lease variation under section 35 of the 1987 Act, the Respondent refers to *Morgan v Fletcher* as authority for the proposition that an application to vary the apportionment method could only be made under section 35 where the aggregate amount payable by leaseholders adds up to more or less than 100%.

15. Regarding the decision in *Shersby*, the Respondent submits that this shows that payment followed by a long interval can amount to an admission. As for the decision in *Cain*, this shows that agreeing to pay a sum as settlement can constitute an admission. In the present case the Applicant has paid all charges since 2002.

16. In any event, the Respondent submits that what the Applicant is really seeking is a lease variation. In the Respondent's submission, the Applicant cannot apply to vary the Lease under section 35 as he is not a party to the Lease.

Tribunal's analysis

17. Having considered the parties' respective written submissions, I am of the view that what the Applicant is seeking is a variation of the Lease so as to change the contribution formula. Both the application form and his barrister's letter of 21st October 2016 refer to the fact that the Applicant is seeking a variation of the Lease, and in my view this is also the only reasonable way to interpret the Applicant's written submissions.

18. The Applicant refers several times in his written submissions to the 'equitable' nature of his claim. However, his perception as to what is equitable or fair is not by itself sufficient to give this Tribunal jurisdiction. The Tribunal's jurisdiction derives from statute, and therefore it first has to be established which statute (if any) gives the Tribunal authority to make a determination in a particular case and (if so) on what basis.

19. The Applicant in his written submissions seeks to present his application as not being about varying the contribution formula. In the alternative, the variation of the formula is presented as merely a subsidiary matter. In this latter regard, he uses the words "incidental" and "subordinating". However, it seems clear that a variation of the formula is exactly what he is seeking, and that the variation sought is only incidental in the sense that the Applicant wishes to argue that the main issue is the question of what is equitable.

20. The Applicant describes in his written submissions, by way of example, what he is seeking to achieve. In a passage from his submissions quoted above he refers to the formula being applied in such a way that "B" is weighted according to size of flat. Having considered the formula itself it seems to me that this method of applying the formula would constitute a variation of the formula itself. "B" is stated in the relevant clause to be the number of Flats/Maisonettes and other dwellings receiving the benefit of the expenditure, and although the formula goes on to state that "B" may vary according to the element of expenditure involved, the purpose of this wording in my view is clearly to reflect a scenario in which not all flats benefit from a particular service. Its purpose is not to allow the Respondent to charge different percentages to different sizes of flat, and this could only be achieved by an actual variation of the Lease.

21. Therefore this application can only be construed as an application for the variation of the Lease, and it can only be an application under section 35 of the 1987 Act as the application is just in respect of one lease. Section 35(1) states that "any party to a long lease of a flat may make an application" for an order varying the lease, but the Applicant is no longer a party to the Lease having sold his interest well before making the application. It follows that the Applicant cannot make an application under section 35 of the 1987 Act. As the application, for the reasons given above, does not constitute an application under section 27A of the 1985 Act this Tribunal does not have jurisdiction to hear the case.

22. In any event, I agree with the Respondent that the application as pleaded would seem to fall foul of the decision in *Morgan v Fletcher*. There is no evidence before me that the leaseholders of the various units between them pay anything other than 100% of the service charge and it would therefore seem – on the basis of the information available to me – that the Tribunal would not have had any grounds under section 35 to grant the variation apparently sought.

23. In relation to the points arising out of the *Shersby* and *Cain* cases, whilst in the light of the above findings and determination these points do not need to be formally decided, I would just comment that I am not persuaded on the information before me that the Applicant would necessarily be unable to pursue his case solely by virtue of the

reasoning in *Shersby* and *Cain*. This is because there may be grounds to argue that these cases can be distinguished on the basis that the Applicant (according to his own submissions) was unaware of the issue until recently.

24. In conclusion, this Tribunal does not have jurisdiction to hear the Applicant's substantive case in this matter. The whole case is therefore struck out pursuant to paragraph 9(2)(a) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Cost applications

25. The Applicant has made an application for a cost order under section 20C of the 1985 Act. As the Applicant has lost his case on this preliminary issue and there is no issue with regard to the Respondent's conduct in this case (to the extent that it would be relevant) I decline to make a section 20C cost order.

26. There were no other cost applications.

Name: Judge P Korn **Date:** 12th December 2016

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.