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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : LON/00AW/LVL/2018/0003

Property : Flat 2, 55 Cadogan Gardens London SW3
2 TH

Applicants : Edith Muscatt (1) and Sawley Properties
Ltd (2)

Representative : Stephen Muscatt

Respondent : Gary Hershaw

Representative : Freeman Box Solicitors

Type of application : Variation of a lease by a party to the lease

Tribunal members : Judge Carr
Ms Alison Flynn MA MRICS

Date and venue of hearing : 29th May 2018
10 Alfred Place, London WC1E 7LR

Date of decision : 29th May 2018

DECISION

Decisions of the tribunal

- (1) The Tribunal determines that the Application has succeeded and that the proportions of contributions to the service charge in the lease of the property shall be varied as set out as proposed in Schedule A to this decision.
- (2) The Tribunal determines that the variation shall be backdated to 1st April 2014.
- (3) The Tribunal determines that no compensation is payable to any party pursuant to Section 38(10) of the Landlord & Tenant Act 1987 in respect of the variations determined above.
- (4) The Tribunal makes the determinations as set out under the various headings in this Decision

The application

1. The Applicant seeks a determination pursuant to Section 35 of the Landlord and Tenant Act 1987 (the Act) to vary the lease of the property on terms set out in Schedule A attached to this decision.
2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. At the directions hearing on 22nd March 2018 the tribunal directed that the matter be determined on the basis of written representations unless any party requested a hearing. No such request having been made the matter is determined on the basis of the documentation and written representations provided by the parties.

The background

4. The First Applicant is the landlord and the Second Applicant is the Management Company named in the lease.
5. The property is a flat within a building comprising two adjoining 4 floor terraced houses that were converted into flats during the 1970s. The particular flat which is the subject of this application, Flat 2, was created in 1987 by joining two flats together.

6. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

The issues

7. The tribunal determined that the issues between the parties are as follows:
 - (i) Do the proposed variations fall within the grounds set out in section 35(2) of the Act, that is to say does the lease fail to make satisfactory provision for one of the matters set out in that section?
 - (ii) Should the tribunal order the proposed variations to be made to the leases?
 - (iii) Should the variation be backdated, and if so, to what date?
 - (iv) If it does make an order varying the leases, should the tribunal order any person to pay compensation to any other person?
8. Having read the evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows:

The argument of the Applicant

9. The application is made pursuant to section 35 of the 1987 Act.
10. The Applicants seek an order varying the terms of the underlease of the property so that the Second Applicant is able to recover 100% of the sums incurred in providing services to the Building.
11. The Applicant states that the problem arose following the First Applicant and her husband combining flat 3 of 53 Cadogan Gardens and Flat 2, 55 Cadogan Gardens to create one, larger flat, now known as 2/55 Cadogan gardens. The original eleven flats in the Building were thereby reduced to ten.
12. Prior to the combining of the two flats, the Applicants state that,, as they understand it, the terms of each of the then 11 underleases required that each lessee contributed 9.5% towards the relevant service charge costs with the result that the contributions exceeded 100%.

13. At the time of the combination of the flats, and by an underlease dated 16th August 1987, the First Applicant granted an underlease of 2/55 Cadogan Gardens to herself and her husband jointly for a term of seventy and three quarters years less three days from 24 June 1979. The underlease comprised two documents, the original and the counterpart.
14. By clause 4(19) (B) of the original underlease, the lessee covenants 'to pay to the Company and as a separate covenant by the Lessee with the Company 9.5 percentage part of' the costs listed in the subsequent paragraphs.
15. By clause 4(19)(b) of the counterpart underlease, the lessee covenants 'to pay to the Company and as a separate covenant by the Lessee with the ~Company 20 percentage part of ' the costs listed in the subsequent paragraphs.
16. In or around 2000 the Second Applicant came under new management, whereupon it was noted that, because nine flats contributed 9.5% each according to their underlease, and Flat 2/55 contributed 20%, the service charge contributions totalled 105.5%. The Second Applicant therefore varied the percentages contribution. Using the original number of flats as the denominator and the quantity of those flats owned by each lessee as the numerator, the contributions were adjusted so that the relevant contribution for each of the original flats was 9.1%. The lessees of 2/55 Cadogan Gardens who effectively occupied two of the original flats therefore contributed 18.2% towards the relevant costs.
17. Following this, and on 29th March 2004, 2/55 Cadogan Garens was assigned to a Mr Brennerman who paid 18.2% of the relevant costs throughout his tenure as lessee.
18. The Respondent has been the long leasehold owner of 2/55 Cadogan Gardens since 5th March 2013. During the course of pre-purchase enquires which the Second Applicant believes to have been made by the Respondent or his conveyancers, the Second Applicant informed Pinsent Mason LLP, solicitors retained by Mr Brennerman's receivers, of the following
 - (i) That the service charges for the 12.-13 year were estimated to be between £3- 5000 per flat. As F2 55 comprises 2 flats the service charge will be doubled and be between £6 and £10,000, and
 - (ii) That it is important the buyer relies on inspection and survey of the building to ascertain the works (and therefore the level of service charges for which flat 2-55 contributes 2/11)..

19. By a letter dated 19th March 2013, solicitors for the Respondent asked the Second Applicant to explain how it had calculated the amount sought from the Respondents in service charge demand dated 17th March 2013. The Second Applicant set out its calculation in a letter dated 9th June 2013. The Respondent's solicitors asserted, by letter dated 11 June 2013 that the Respondent was liable to contribute only 9.5% of the relevant costs. In response, by a letter dated 13th June 2013, the Second Applicant explained that the counterpart underlease provided that the flat 2/55 was liable to contribute 20% towards the relevant costs.
20. The Respondents solicitors replied on 18th June 2013 that the official copy of the lease provided by HM Land Registry showed that the Respondent was liable for 9.5% of the relevant costs by way of service charge and that the Applicant was only entitled to charge what the lease allows, which is 9.5%.and no more.
21. Since that date the Respondent has refused to contribute more than 9.5% towards the Second Applicant's relevant costs. This means that the Second Applicant has been able to recover only 95% of the relevant costs.
22. On at least two occasions the Second Applicant has invited the Respondent to agree to vary to 14.5% the percentage of his service charge contribution so that the percentage service charge contributions by all lessees in the Building total 100%
23. The Applicants therefore seek variation of the lease so that the lease provides that the Respondent contributes 14.5% towards the relevant costs from 24th June 2012. The variation sought is set out in Schedule A.
24. The Applicant also asks that the variation be backdated in accordance with the decision of the Upper Tribunal in *Brickfield Properties Ltd v Botten* [2012] UKUT 0133. The Applicant has requested that the variation is backdated to 24th June 2012. The Applicants have provided no explanation for this date.

The Respondent's arguments

25. The Respondent argues that the Tribunal should not order the proposed variation to be made to the lease and that the proposed variation does not fall within the grounds as set out in Section 35(2) of the Act. The Respondent also argues that if the Tribunal does make an order varying the lease, then it should order the Applicants to pay compensation to the Respondent.

26. The Respondent in his statement raises a number of questions about the Applicant's statement, including for instance querying the date of the Underlease, the registration of the Underlease, the typeface of the counterpart of the Underlease, These questions and queries are responded to by the Applicants in their additional statement dated 27th April 2018. The tribunal considers that the responses are adequate.
27. The Respondent argues that the only correct service charge percentage currently payable pursuant to the Underlease is the 9.5% figure, which is that contained in the original Underlease itself.
28. The Respondent also argues that if the service charge percentages are going to be increased, the increase should not be borne solely by the Respondent but also by the lessees of the other flats including the lessees of Flats 4, 5 and 6..
29. The Respondent has also noted that the Applicants have provided no reasons why the variation should be backdated.
30. The Respondent also asks that the Tribunal should order the Applicants to pay compensation to the Respondent in respect of the loss and disadvantage that the Respondent is likely to suffer as a result of the variation. The Respondent has provided no details of his compensation claim.

The Tribunal's decision

31. The Tribunal determines the issues before it as follows:
 - (i) The Application has succeeded and that the proportions of contributions to the service charge in the lease of the property shall be varied as proposed in Schedule A to this decision.
 - (ii) The variation is backdated to the first date when the Applicant proposed to the Respondent that the percentage of his service charge contribution be varied to 14.5% which appears from the documents to be 1st April 2014.
 - (iii) No compensation is payable.

Reasons for the Tribunal's decision

32. The Tribunal notes that the Respondent asserts that there are no grounds for the variation, that there should be no back-dating and that if a variation is made there should be compensation paid, but also notes

that the Respondent has failed to provide argument in support of those assertions.

33. The Tribunal considers that section 35(2) of the Act has been satisfied in that the lease of the property fails to make satisfactory provision for the computation of service charges for the property. This results from the reduction of flats from eleven to ten, by the combining of two flats and a variety of mistakes made in the resulting documentation.
34. There has been no change to the physical layout of the other flats in the building and therefore it is not appropriate to vary the leases of the other flats.
35. The Tribunal accepts the arguments of the Applicants in connection that the variation should be backdated. It does not accept the suggested date, but instead chooses the date when the Applicant appears to have first proposed the variation.
36. The Tribunal finds no reasons for ordering compensation and therefore determines that no compensation should be payable.

Next steps

37. The parties are ordered to arrange for endorsements to be executed and attached to the lease, then register notice of the variations of the lease at the Land Registry. In such cases the costs are normally borne by the Applicant.

Chairman: Judge Carr

29th May 2018

Appendix of relevant legislation

VARIATION OF LEASES

Applications relating to flats

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] [FN1] 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] [FN2] 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.[...]

S36 Application by respondent for variation of other leases.

- (1) Where an application ("the original application") is made under section 35 by any party to a lease, any other party to the lease may make an application to the [tribunal] [FN1] asking it, in the event of its deciding to make an order effecting any variation of the lease in pursuance of the original application, to make an order which effects a corresponding variation of each of such one or more other leases as are specified in the application.
- (2) Any lease so specified—
- (a) must be a long lease of a flat under which the landlord is the same person as the landlord under the lease specified in the original application; but
 - (b) need not be a lease of a flat which is in the same building as the flat let under that lease, nor a lease drafted in terms identical to those of that lease.
- (3) The grounds on which an application may be made under this section are—

- (a) that each of the leases specified in the application fails to make satisfactory provision with respect to the matter or matters specified in the original application; and
- (b) that, if any variation is effected in pursuance of the original application, it would be in the interests of the person making the application under this section, or in the interests of the other persons who are parties to the leases specified in that application, to have all of the leases in question (that is to say, the ones specified in that application together with the one specified in the original application) varied to the same effect. [...] [FN2]

[FN1] word substituted by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (3)

[FN2] word substituted by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (3)

S37 Application by majority of parties for variation of leases.

- (1) Subject to the following provisions of this section, an application may be made to [a leasehold valuation tribunal] [FN1] in respect of two or more leases for an order varying each of those leases in such manner as is specified in the application.
- (2) Those leases must be long leases of flats under which the landlord is the same person, but they need not be leases of flats which are in the same building, nor leases which are drafted in identical terms.
- (3) The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.
- (4) An application under this section in respect of any leases may be made by the landlord or any of the tenants under the leases.
- (5) Any such application shall only be made if—
 - (a) in a case where the application is in respect of less than nine leases, all, or all but one, of the parties concerned consent to it; or
 - (b) in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10 per cent. of the total number of the parties concerned and at least 75 per cent. of that number consent to it.
- (6) For the purposes of subsection (5)—
 - (a) in the case of each lease in respect of which the application is made, the tenant under the lease shall constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such leases shall be regarded as constituting a corresponding number of the parties concerned); and
 - (b) the landlord shall also constitute one of the parties concerned.

[...] [FN2]

[FN1] words substituted by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (4)

[FN2] words substituted by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (4)

Orders varying leases

S38 Orders varying leases.

- (1) If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the tribunal, the tribunal may (subject to subsections (6) and (7)) make an order varying the lease specified in the application in such manner as is specified in the order.
- (2) If—
 - (a) an application under section 36 was made in connection with that application, and
 - (b) the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application under section 36,the tribunal may (subject to subsections (6) and (7)) also make an order varying each of those leases in such manner as is specified in the order.
- (3) If, on an application under section 37, the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application, the tribunal may (subject to subsections (6) and (7)) make an order varying each of those leases in such manner as is specified in the order.
- (4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the tribunal thinks fit.
- (5) If the grounds referred to in subsection (2) or (3) (as the case may be) are established to the satisfaction of the tribunal with respect to some but not all of the leases specified in the application, the power to make an order under that subsection shall extend to those leases only.
- (6) 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) any person who is not a party to the application,and that an award under subsection (10) 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.
- (7) A tribunal shall not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under this section effecting any variation of the lease—
 - (a) which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes; or
 - (b) which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes; or
 - (c) which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer.
- (8) A tribunal may, instead of making an order varying a lease in such manner as is specified in the order, make an order directing the

parties to the lease to vary it in such manner as is so specified; and accordingly any reference in this Part (however expressed) to an order which effects any variation of a lease or to any variation effected by an order shall include a reference to an order which directs the parties to a lease to effect a variation of it or (as the case may be) a reference to any variation effected in pursuance of such an order.

(9) A tribunal may by order direct that a memorandum of any variation of a lease effected by an order under this section shall be endorsed on such documents as are specified in the order.

(10) Where a tribunal makes an order under this section varying a lease the tribunal may, if it thinks fit, make an order providing for any party to the lease to pay, to any other party to the lease or to any other person, compensation in respect of any loss or disadvantage that the court considers he is likely to suffer as a result of the variation.[...] [FN2]

[FN1] words repealed subject to savings specified in SI 2004/669 Sch.2 para.12 by Commonhold and Leasehold Reform Act (2002 c.15), Sch 14 Para 1

[FN2] words repealed subject to savings specified in SI 2004/669 Sch.2 para.12 by Commonhold and Leasehold Reform Act (2002 c.15), Sch 14 Para 1

S39 Effect of orders varying leases: applications by third parties.

(1) Any variation effected by an order under section 38 shall be binding not only on the parties to the lease for the time being but also on other persons (including any predecessors in title of those parties), whether or not they were parties to the proceedings in which the order was made or were served with a notice by virtue of section 35(5).

(2) Without prejudice to the generality of subsection (1), any variation effected by any such order shall be binding on any surety who has guaranteed the performance of any obligation varied by the order; and the surety shall accordingly be taken to have guaranteed the performance of that obligation as so varied.

(3) Where any such order has been made and a person was, by virtue of section 35(5), required to be served with a notice relating to the proceedings in which it was made, but he was not so served, he may—

(a) bring an action for damages for breach of statutory duty against the person by whom any such notice was so required to be served in respect of that person's failure to serve it;

(b) apply to [a leasehold valuation tribunal] [FN1] for the cancellation or modification of the variation in question.

(4) [A tribunal] [FN2] may, on an application under subsection (3)(b) with respect to any variation of a lease—

(a) by order cancel that variation or modify it in such manner as is specified in the order, or

(b) make such an order as is mentioned in section 38(10) in favour of the person making the application, as it thinks fit.

- (5) Where a variation is cancelled or modified under paragraph (a) of subsection (4)
- (a) the cancellation or modification shall take effect as from the date of the making of the order under that paragraph or as from such later date as may be specified in the order, and
- (b) the [tribunal] [FN3] may by order direct that a memorandum of the cancellation or modification shall be endorsed on such documents as are specified in the order;
- and, in a case where a variation is so modified, subsections (1) and (2) above shall, as from the date when the modification takes effect, apply to the variation as modified.[...] [FN4]

[FN1] modified by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (6)

[FN2] modified by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (6)

[FN3] modified by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (6)

[FN4] modified by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (6)

Applications relating to dwellings other than flats

S40 Application for variation of insurance provisions of lease of dwelling other than a flat.

- (1) Any party to a long lease of a dwelling may make an application to [a leasehold valuation tribunal] [FN1] for an order varying the lease, in such manner as is specified in the application, on the grounds that the lease fails to make satisfactory provision with respect to any matter relating to the insurance of the dwelling, including the recovery of the costs of such insurance.
- (2) Sections 36 and 38 shall apply to an application under subsection (1) subject to the modifications specified in subsection (3).
- (3) Those modifications are as follows—
- (a) in section 36—
- (i) in subsection (1), the reference to section 35 shall be read as a reference to subsection (1) above, and
- (ii) in subsection (2), any reference to a flat shall be read as a reference to a dwelling; and
- (b) in section 38—
- (i) any reference to an application under section 35 shall be read as a reference to an application under subsection (1) above, and
- (ii) any reference to an application under section 36 shall be read as a reference to an application under section 36 as applied by subsection (2) above.
- (4) For the purpose of this section, a long lease shall not be regarded as a long lease of a dwelling if—
- (a) the demised premises consist of three or more dwellings; or
- (b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.
- (4A) Without prejudice to subsection (4), an application under subsection (1) may not be made by a person who is a tenant under a long lease of a dwelling if, by virtue of that lease and one or more

other long leases of dwellings, he is also a tenant from the same landlord of at least two other dwellings.

(4B) For the purposes of subsection (4A), any tenant of a dwelling who is a body corporate shall be treated as a tenant of any other dwelling held from the same landlord which is let under a long lease to an associated company, as defined in section 20(1).

(5) In this section "dwelling" means a dwelling other than a flat. [...]

[FN2]

[FN1] words substituted by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (7)

[FN2] words substituted by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 163 (7)