FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CHI/40UB/LVL/2020/0003**
HMCTS code	**:**	**P: PAPERREMOTE**
Property	**:**	**FFF, 88 Tor View Avenue, Glastonbury, Somerset, BA6 6AG**
Applicant	**:**	**Aster Communities**
Representative	**:**	**Capsticks LLP, Solicitors**
Respondent	**:**	**Emma Stoodley**
Representative	**:**	**Gould & Swayne, Solicitors**
Type of application	**:**	**Part IV of the Landlord & Tenant Act 1987 – lease variation**
Tribunal members	**:**	**Tribunal Judge I Mohabir** **Mr K Ridgeway MRICS**
Date of decision	**:**	**2 October 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers, which has been not objected to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing on the papers. The documents that we were referred to are in a bundle of 199 pages, the contents of which we have noted. The order made is described at the end of these reasons.

Background

1. This is an application made by the Applicant under section 37 of the Landlord and Tenant Act 1985 (as amended) ("the Act") to vary the terms of the residential lease granted in respect of First Floor Flat, 88 Tor View Avenue, Glastonbury, Somerset, BA6 6AG ("the property").

2. On 15 December 1986, Mendip District Council granted a lease of the property to a Lilian May White for a term of 125 years from that date ("the lease"). Subsequently, the Applicant acquired the freehold interest by means of a Large Scale Voluntary Transfer from the Council of its housing stock. The Applicant is, therefore, the lessor under the lease. The Respondent is the present lessee having taken an assignment of the lease on 16 November 2015.

3. The property is described as being part of a semi-detached block comprised of 2 flats. The property is on the first floor. The other ground floor flat (Number 88) is occupied by a general needs tenant and is not required to pay any service charge contribution for the upkeep of the building.

4. Clause 7 of the lease obliges the Applicant to repair and maintain the exterior of the property and the building. However, under clause 6(m), the lessee's covenant is only to pay a fair share of the cost of keeping the internal common parts of the building in a clean and tidy condition. In other words, the lease as presently drafted does not allow the Applicant

to recover the costs it incurs pursuant to clause 7 as service charge expenditure from the lessee.

5. By an application dated 19 May 2020, the Applicant is seeking to vary clause 6(m) of the lease to permit the Applicant to "recover the Council's costs of complying with its obligations under clause 7".

6. It is the Applicant's case that the defect in the lease that does not allow it to recover the costs of repair and maintenance was an omission at the time it was granted and it was always intended by the parties to do so. In support of this, the Applicant refers to other leases granted by the Council, which contain a covenant on the part of the lessee to pay a service charge contribution. The Tribunal was provided with leases granted in respect of 34 and 94 Tor View Avenue. In her statement of case the Respondent contends otherwise. For reasons that will become apparent, it is not necessary to set out in any details the Respondent's arguments.

The Law

7. Section 35(4) of the Act provides:

"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 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 the 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.

Section 37 of the Act provides:

"(1) Subject to the following provisions of this section, an application may be made to a leasehold valuation tribunal 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 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 of 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)…

(6)…"

Decision

8. The Tribunal's determination took place on 2 October 2020 and was based solely on the statement of case and documentary evidence filed by the parties.

9. In the Tribunal's judgement, both limbs under sections 35(4)(a) and (b) of the Act have to be satisfied before this application can succeed. Section 35(4)(c) does not apply. These are considered in turn below.

Did the Parties Intend for the External Repair & Maintenance Costs to be Recovered as Service Charge Expenditure?

10. To answer this question, it is necessary to attempt to construe what the intention of the parties' was at the time the lease was granted based on the available evidence.

11. As a matter of general principle, it is now well established that, its clear terms are not to be manipulated in order to turn a bad bargain into a good one: see ***Arnold v Britton*** [2015] UKSC 36. The authorities relied on by the Respondent do no more than restate this principle. The authorities relied on by the Applicant were of no assistance because

in those cases it was beyond doubt that the parties to the leases did intend for the landlord's repair and maintenance costs to be recoverable as service charge expenditure and the leases expressly provided for this. Those cases decided a different issue, namely, the extent of such recovery. The present case can be distinguished because the lease contains no express provision for the recovery of the Applicant's external repairing and maintaining costs.

12. It is common ground that the landlord and tenant have acted in accordance with the express terms of the lease in repair and maintenance of the building since the lease was granted some 34 years ago. Indeed, external decorations were carried out by the Applicant in 2014/15 but leaseholders whose property number was higher than 52 Tor View Avenue were not charged for the cost of the works. The reason given for this is "administrative error". It seems that the reason why the Applicant is seeking to vary the lease it to allow recovery, in part, the cost of proposed major works to the building as service charge expenditure.

13. Two points arise from this. Firstly, it can be construed that the Applicant or its predecessor in title never intended to recover the cost of externally repairing and maintaining the building and have acted accordingly. Secondly, as was submitted by the Respondent, an estoppel by convention may have arisen whereby the Applicant is arguably now prevented from seeking to vary the lease. It was not necessary for the Tribunal to decide the latter point because it does not have jurisdiction to do so.

14. As to the intention of the parties, the only substantive evidence relied on by the Applicant is the terms on which the leases of Flats 34 and 94 Tor View Gardens were granted. The leases of both properties contain the same repairing obligation on the landlord as the lease here. Those leases do contain an express service charge covenant in clause 6(b) on the part of the lessee to pay a service charge contribution. However,

those leases can be considered to be defective because they do not expressly state anywhere what the service charge contribution is payable for including any costs incurred by the landlord for repairing and maintaining the external parts of those properties.

15. Therefore, the Tribunal could not safely conclude on the facts of this case that, at the time the lease was granted, the contracting parties intended that the cost incurred by the landlord for repairing and maintaining the external parts of the building should be recoverable as service charge expenditure under clause 6(m) and the requirement in section 35(4)(a) of the Act has not been satisfied.

Other Tenants Liable to Pay Such Expenditure?

16. For the reasons set out in paragraph 14 above, the answer to this question must be no. The Tribunal could not safely conclude or infer what the service charge contribution was payable for in relation to the leases granted for Flats 34 and 94 Tor View Gardens or whether it included the cost of external repair and maintenance of those properties. Therefore, the Tribunal was satisfied that the requirement in section 35(4)(b) had not been met also.

17. Based on the evidence, the only conclusion that the Tribunal could properly reach is that the Applicant is bound by the express terms of clause 6(m) in the lease and the any cost incurred in repairing and maintaining the external of the building is not recoverable as service charge expenditure. Accordingly, the application is dismissed.

Name: Tribunal Judge I Mohabir **Date:** 2 October 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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.

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

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).