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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**: CHI/19UH/LVL/2013/0007**
Property	**: Barton Lodge, 17 The Folly, Cerne Abbas, Dorset DT2 7JY**
Applicant	**: David Peter Darby and Verity Margaret Darby (1)** **Barton Lodge (Cerne Abbas) Management Limited (2)**
Representative	**:**
Respondent	**: Mr and Mrs G Coward (1) Mr Malone (2)**
Representative	**:**
Type of Application	**:Variation of leases: Landlord and Tenant Act 1987**
Tribunal Members	**: Judge D. Agnew**
Date and venue of Hearing	**:**
Date of Decision	**: 6th November 2013**

DECISION

DECISION AND REASONS

Decision

1. The Tribunal orders that the leases of all the 10 apartments situate at and known as Barton Lodge, 17 The Folly, Cerne Abbas, Dorset DT2 7JY ("the Property) shall be and are hereby varied in accordance with the document headed Variations to the Leases appended hereto.

2. A memorandum of the variations shall be endorsed on the leases.

3. The Tribunal makes no order for compensation.

4. The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 that the costs of the proceedings may not be added to any future service charges.

Background.

5. On1st August 2013, the Applicants applied to the Tribunal to vary their lease of 2 Barton Lodge under section 35 of the Landlord and Tenant Act 1987 ("the Act"). The Applicant Mr Darby is also a Director of Barton Lodge (Cerne Abbas) Limited which owns the freehold of the Property and his application incorporated an application on behalf of the landlord for the variation sought to apply to the leases of all the other apartments at the Property under section 36 of the Act. The Applicants asserted that 8 out of 10 lessees agreed with the variations sought.

6. The Respondents to the Application are Mr and Mrs Coward of Apartment 5 and Mr Malone of Apartment 8. Mr Malone has played no part in these proceedings. Mr and Mrs Coward, on the other hand, object to the variations sought, although they recognise the lease as drawn is defective. They disagree with the way the Applicant seeks to rectify the deficiency in the lease.

7. The deficiency in the lease was recognised by the Tribunal as part of its determination in previous proceedings of an application by Mr and Mrs Coward under section 27A of the Landlord and Tenant Act 1985 as to their liability for certain service charges that had been levied against them. The Tribunal agreed with Mr and Mrs Coward that on a true construction of the lease certain charges had been apportioned to them wrongly. Furthermore the Tribunal found that on a true construction of the lease although all the lessees of the 10 apartments were liable to pay 1/19th of certain costs of maintaining and repairing halls, lifts, reception areas and entrances in the Estate, the owners of the nine freehold houses on the Estate were not liable to contribute towards these costs. The result was that the freeholder was only able to collect 9/19ths of the expenditure on these items.

8. This has prompted the application to vary the lease as the freehold company (which is a tenant owned management company) is unable to continue to accept a situation whereby it cannot collect 100per cent of its expenditure.

9. Mr and Mrs Coward accept that the lease is unsatisfactory in this regard but disagree with the way in which the Applicant seeks to vary their lease. The Applicants want to arrive at a situation whereby the lessees of the main building containing six apartments are responsible for all the repair and maintenance costs applicable to their building (save for cost of internal works to the various apartments) and the lessees of what has been referred to as the "new build" apartments (of which there are 4) are responsible equally to bear the cost of repair and maintenance of their building (again, save for the cost of internal work to the apartments).

10. Mr and Mrs Coward, on the other hand, maintain that all 10 apartments should bear the costs associated with the repair, maintenance and decoration of the halls, lifts, reception areas, porches, entrances, stairways, landings and passages equally, which they would have done had the freehold houses also contributed equally to these costs.

The law.

11. Section 35 of the Act provides that:-
(1) Any party to a long lease of a flat may make an application to a leasehold valuation tribunal (now the First-tier Tribunal (Property Chamber)) for an order varying the lease in such manner as is specified in the application.

12. The grounds upon which such an application may be made are that the lease fails to make satisfactory provision with respect to one or more of a list of matters, one of which is that the computation of a service charge payable under the lease. (section 35(2)(f).

13. By section 35(4) of the Act, a lease fails to make satisfactory provision with respect to the computation of a service charge if the aggregate of the proportions of service charge would either exceed or be less than the whole of the expenditure.

14. By section 36 of the Act, it is provided that where an application is made under section 35, any other party to the lease may make an application to the [Tribunal] asking it to make an order effecting a corresponding variation of each of such one or other leases specified in the application where it is in the interests of the Applicant or other persons who are parties to the leases specified for the leases to be varied to the same effect.

Discussion

15. Both the Applicants' and the Cowards' stances have merit. If the Cowards' view were to prevail this would involve a more minor departure from the existing leases. Furthermore, the lessees of the new build apartments do have some use of the entrance way to the main building as that is where their post boxes are situated. However, their use of this area to collect mail is very limited and the wear and tear on the building from such use would be minimal. On the other hand, if the Applicants' suggested variation is approved this brings the repair and maintenance of the halls, passageways etc of each individual block into line with the repairing and maintenance obligation of the exterior and main structure of the main building and new build section: that is that each separate building bears its own costs. Furthermore, it would seem that this was the intention of the developers who were responsible for having the leases drawn up as it would seem that they set up their accounts in this way.

16. The Tribunal perceives that the Cowards are probably mainly concerned about the costs of maintenance of the lift. The main building has a lift whereas the new build apartments do not. The lessees of the latter have no cause to use the lift. This is not necessarily a conclusive argument that they should not therefore contribute towards its upkeep as very often lessees of ground floor flats, for example, are required by their leases to contribute towards the costs of maintaining a lift which they never use. In this case, however, the lift is in a separate building from that containing the new build apartments.

The Determination

17. The Tribunal finds that the computation of the service charge contribution in the existing leases fails to make satisfactory provision as the contributions towards the maintenance and repair of the halls, passageways, lifts etc do not amount to 100% of the expenditure. This is accepted by the Cowards and is uncontroversial. The leases should therefore be varied, but the question is in what way?

18. On balance, the Tribunal favours the variations sought by the Applicants. Reading the lease as a whole, and particularly bearing in mind that the repair and maintenance obligations with regard to the exterior and structure of the main building and new build apartments are borne by the lessees of the buildings separately it is logical that the liabilities with regard to the " halls, lifts, reception areas, porches, entrances, stairways, landings and passages in or exclusively serving the Building of which the apartment comprised in the Property forms part" should be the same. This is effected by the variations sought.

19. Mr and Mrs Coward have submitted a claim for compensation based on the difference in estimated expenditure over the course of the lease between the expenses for repair and maintenance of the halls, passageways etc being divided by 6 as opposed to 19 or 10. The Tribunal is not convinced that this is the correct way of assessing compensation in a case such as this. The estimates are speculative and it would be wrong for

compensation to be paid to a lessee now for losses well into the future when they may only continue to own their apartment for a short period of time. A more appropriate basis for compensation would probably be based on the difference in value of an apartment with the repair and maintenance obligations as originally contained in the lease compared with those in the lease as varied. Evidence on that basis was not presented and therefore no finding can be made and the Tribunal therefore makes no order for compensation.

20. The Applicants Mr and Mrs Darby make an application under section 20C of the Landlord and Tenant Act 1985 that the costs of these proceedings should not be added to any future service charge account for payment by the lessees. As the application was not brought about by any act or omission of a lessee but was the result of unfortunate drafting of the original lease, the Tribunal does make an order under section 20C. It is just and convenient to make such an order as it would be unreasonable for costs of rectification of a defect in the lease, which is the landlord's document, to be placed at the door of lessees as lessees. In any event, the Tribunal had evidence before it that the costs of rectification would be borne by the landlord's solicitors who drew up the original lease.

21. The Tribunal therefore makes the orders set out under the heading "Decision" above.

D. Agnew (Judge)

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.