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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)
Formerly the Leasehold Valuation Tribunal

Case Reference	:	**LON/00AZ/LVL/2014/0010**
Property	:	**24 Grover Court, Loampit Hill, London SE13 7ST**
Applicant	:	**Mr S. M. Watson (landlord)**
Representative	:	**In person**
Respondent	:	**Mr V. G. Hill (tenant)**
Representative	:	**Mr Martin Strutt of Counsel (1st Day) In person (2nd Day)**
Type of Application	:	**Section 35 Landlord & Tenant Act 1987 – Variation of Lease**
Tribunal Members	:	**Judge Lancelot Robson** **Mrs H. C. Bowers BSc(Econ) MSc MRICS**
Dates of Hearing	:	**25th February and 3rd June 2015**
Decision Date		**15th June 2015**

DECISION

Decision Summary

(1) The Application to vary the terms of the Lease is refused.

BACKGROUND

1. The Applicant seeks an order under Section 35 of the LANDLORD AND TENANT ACT 1987 (as amended) ("the 1987 Act") to vary the terms of a lease dated 25th January 1957 ("the Lease").

2. At the hearing on 25th February 2015 it became clear that there had been insufficient discovery of documents, and also that the Tribunal hearing the case had not seen important parts of the Respondent's case. The Tribunal also noted from the pleadings that the case revealed a very complex factual situation, and several legal points on which there was little case law. The Tribunal, with the agreement of the parties, decided to treat the initial hearing as a case management conference, and gave further detailed Directions in consultation with the parties for the hearing on 3rd June 2015.

3. The factual background was set out by Mr Strutt in his skeleton argument prepared for the hearing on 25th February 2015. This was discussed and agreed at the hearing on 3rd June 2015. This chronology is set out below.

4.

25.1.57	Grant of a 99 year lease from 31st December 1956 of 24 Grover Court (the Lease)
25.2.86	Grant of a 99 year superior lease of 24 Grover Court from 25th December 1983 (the Intermediate Lease)
18.3.87	Respondent purchased the Lease.
12.4.90	Holder of Intermediate Lease (Proudland Ltd) applied to County Court to vary the Lease under Section 35 so as to impose a service charge obligation on lessee (i.e. the Respondent)
14.6.90	Respondent served Answer on Proudland Ltd
21.6.90	Proudland Ltd served Notice of Discontinuance.
10.9.93	Proudland's agent informed prospective purchaser of the Lease that it would apply to vary the Lease if he purchased. Purchaser withdrew.
31.5.94	Proudland transferred Intermediate Lease to to Boxvine Ltd, A director of Proudland, Mr John Sims, was also a director of Boxvine. Mr Sims apparently controlled both companies.

5.12.97	Boxvine makes another Section 35 Application in the County Court to impose a service charge provision on lessee.
5.2.98	Respondent serves Answer.
11.4.03	Final Directions order for parties to produce experts' reports and fixing trial for 6.8.03 (altered to 15.12.03)
28.8.03	Notice of Discontinuance served after letter Boxvine's showing its intention to resurrect application against Respondent's successors in title.
4.11.03	Respondent applied to set aside Notice of Discontinuance.
30.4.04	District Judge set aside Notice of Discontinuance
24.2.05	HH Judge Hamilton refuses Boxvine's appeal against setting aside of Notice of Discontinuance and dismisses Section 35 Application.

5. The chronology continues with facts drawn from the Applicant's statements;

14.2.14	The Applicant bought the property at Auction from Boxvine with completion on 13.3. 14.

6. The Tribunal notes that it gave further Directions for this hearing on the issues of the landlord's right to have the Lease varied, and if so, whether compensation would be payable under Section 38(10) of the Act. The Tribunal had directed that a separate hearing be held to decide on the amount of compensation, if necessary, in order to save unnecessary initial expense to the parties.

Hearing

Applicant's case

7. The Applicant's case can be summarised as follows; in contemplation of purchasing the subject property by auction, he had received the sale pack from the auctioneers. A copy of the Lease was in the pack together with the Enquiries before Contract document. However he had wrongly assumed that he could discharge his service charge liability under the Intermediate Lease by collecting the service charge under clause 2(2) of the Lease. No disclosure of the previous proceedings in the Replies to Enquiries or the Respondent's letter of 20th January 2014 to the seller's solicitors was made by the Auctioneers. He purchased the property at auction on 14th February 2014. After some prior contact, he received a letter from the Respondent on 14th May 2014 making it clear that he considered he had no obligation to pay service charges. The Applicant was then advised by his solicitor on the terms of Section 35 of the Act,

who then drew up a draft deed of variation. The Respondent sent a copy of the Court order relating to the previous proceedings (but no other documents) to him in a letter dated 9th June 2014. On 25th September 2014, he wrote to the Respondent asking him to sign the deed. He also asked for further details of the proceedings in that letter and subsequently, (which were not produced until the hearing on 25th February 2015). On 29th October 2014, he wrote again, with copies of the deed of variation, a service charge demand and budget, and also gave notice of his intention to apply to the Tribunal, which he did on 26th November 2014. The Respondent had not paid the ground rent. There had also been a dispute between the parties relating to the completeness of documents supplied to him on 25th February 2015 during the first hearing.

8. The Applicant submitted that Section 35(2)(e) allowed him to apply in a situation where expenditure incurred by one party to a lease for the benefit of another is recoverable from the party benefitting. The Intermediate Lease required him to pay the service charges demanded by the Freeholder for upkeep of the building and other services. The Lease did not provide for the recovery of those costs. Nevertheless, the Respondent took an active part in the affairs of the freeholder, Grover Court Flat Owners Limited and had paid for a share in the company. He attended meetings as a resident. The Applicant described the situation as an anomaly in the Lease. It was just and equitable that the Respondent should pay for the services, and inequitable that the Applicant should have to bear the costs as he got no benefit from the services provided. He also considered that the historical change of short lettings in the building to the current arrangement whereby long leases were granted on the flats was a material change of circumstances which should trigger a Lease variation.

9. On the question of compensation, he submitted that if the Respondent applied for a new lease under the Leasehold Reform, Housing and Urban Development Act 1993, the terms of that lease would impose the service charge obligations upon him. The Applicant sought to illustrate the difference between a capitalised revenue loss, and a capital loss which would be compensatable under Section 38(10) of the 1987 Act. He did not accept that the lack of an obligation to pay service charge had any value, although he accepted that the Respondent had paid a premium in 1987 which might have included that issue. *(the Tribunal notes that he contradicted himself on this point, at one point accepting that only looking at the service charge obligations, a purchaser would pay more for a long lease without service charges, than one with those charges. He then changed his position).* He suggested that the Respondent should have been made aware of the terms of the proposed 1987 Act (relating to variation of leases) when he purchased. In his view, any rational buyer would value the flat on the basis that the lease would need to be extended to make it saleable. The terms of Section 57 of the 1993 Act would require him to accept a service charge obligation. Thus he considered that no compensation should be paid, indeed it could be argued that the variation would be to the Respondent's benefit. Further,

he considered that the Freeholder could suffer a loss as a result of the deed of variation, and which might need compensation. However the Applicant made it clear at the hearing on 3rd June 2015 that if the Tribunal decided that any compensation should be awarded, he would not proceed further with the application.

10. The Applicant produced copies of the land Registry titles to the leases in question and referred to the following cases in support of his application;

Brickfield Properties Ltd v Paul Botten – 17-64 Carlton Mansions N16 [2013] UKUT 0133 (LC); also LRX/133/2011

Universities Superannuation Scheme Ltd v Marks & Spencer plc [1999] L.&T.R. Part 2 237 (CA)

Keeney Construction Limited - Re Classic Mansions E9; LON/00AM/LVT/2008/0006 (decision 30th May 2014)

Respondent's case

11. The Respondent freely admitted that he was a lay person who did not understand the legal issues. However after discussion on 3rd June, he was prepared to adopt the submissions made by Mr Strutt on his behalf in his skeleton argument for the previous hearing.

12. His evidence and submissions can be summarised as follows; that three leases, including the Lease, had been granted in 1956/7 by the then landlord in return for the cost of repair work to the building. At the time, the building had largely been occupied by tenants on short leases. He had become the tenant of the original lessee, Mr Rose in 1980. In 1986 Mr Rose died and the Lease was offered to the then landlord, Mr Sims (who bought the freehold through Proudland). Mr Sims refused to pay the price the family asked. The Lease was then offered and sold to the Respondent in 1987. Since then the other two leases created in 1957 (nos. 25 and 27) had been surrendered to the freeholder. The lessees of one property, Mr & Mrs Hughes, had told him that they had been pressurised with threats of the expense of court action into the surrender. The other lessee had exchanged her property with Lewisham Council for a council flat. Mr Sims had started a similar action to the one he had taken against the Respondent against the Council. Again the case had dragged on, and the Council eventually sold the Lease at auction for a very small sum. Mr Sims had been selling off long leases of the property since about 1983, - (*and apparently all had been sold by 2003*).

13. The Respondent had participated in the purchase of the Freehold by Grover Court Flat Owners Limited in 2002, and had paid £500 for his share in the company. There had been some difficulty over the issue of his share. The Freehold Company had agreed verbally after a meeting on a price to buy his Lease, but this had been blocked by the Company Secretary on two occasions. It appeared that Mr Sims had intervened to buy the Respondent's share in dubious circumstances. This resulted in a police investigation, which had been terminated by a senior officer

known to Mr Sims. A complaint against the police had later been upheld by the IPCC. Mr Sims then died, and the Intermediate Lease had been sold at the auction. The Respondent disputed that the Applicant was his landlord. He considered himself to be the landlord.

14. The Respondent disputed that the Applicant was entitled to apply to vary the Lease. He had paid a consideration which reflected the terms of the Lease. Mr Strutt, acting for the Respondent, accepted that the Lease fell within the terms of Section 35(2)(e), but relied upon Section 38(6)(a) and (b) of the 1987 Act. He submitted that there was substantial prejudice caused to him not capable of affording him adequate compensation by a monetary award under Section 38(10), and/or it was not reasonable in the circumstances of this case for a variation to be effected. If the Tribunal decided that the Lease should be varied, a substantial award should be made under Section 38(10). He asked for the largest possible award.

Decision

15. The Tribunal noted that both parties had submitted evidence relating to the amount of a compensatory award, and even without prejudice negotiations. The declared purpose of this hearing was to decide firstly whether the Lease should be varied at all, and if so, secondly if compensation is payable in principle. The Tribunal would expect an up to date valuation report before making a final decision on the amount of any compensation. The Applicant requested at the hearing for some indication in the decision as to whether compensation was payable. If it was, he would not continue further with the Application.

16. The Tribunal considered the evidence and submissions. For ease of reference it has set out extracts from relevant legislation in Appendix 1 below.

17. The Tribunal notes that the circumstances of this case are very unusual, probably unique, and also that there is very little definitive case law relating to the application of Section 35, and compensation payable under Section 38. The *Universities Superannuation Scheme* case noted above seemed of little assistance, as it dealt with general principles relating to the effect of miscalculation of final service charge certificates. *Botten* (supra) dealt with Section 35 and 38 of the 1987 act, but related to the validity of backdating orders, which has not been discussed in this case. *Keeney* (supra) may have some relevance in the context of calculating compensation.

18. Dealing with the application of Section 35(2)(e) the Tribunal noted that Mr Strutt for the Respondent accepted that Section 35(2)(e) was the correct provision to apply to the application, but doubted the circumstances of this case were appropriate for it to be successful. The Tribunal also considered Cleary & Ors v Lakeside Developments Ltd [2011] UKUT 264 (LC) which was also a case dealing with the effect of Section 35(2)(e) where the President, George Bartlett QC, allowed an appeal against an order of the LVT to vary leases which made no

provision for lessees to pay the costs of employing a manager. The President stated at para 27;

"There is in my judgement, nothing arguably "unsatisfactory" in the fact that two lessees pay a contribution to the lessor's costs of management and four do not. It simply reflects different contractual provisions that do not appear to cause any difficulty in interpretation or application."

He went on to state in paragraph 29 to state;

"...there is not in the leases that are the subject of the present application anything to suggest that the management costs to which the proposed variation relates are intended to fall on the tenants, and there is no reason why they should do so".

19. It might be argued that each case turns upon its own facts. In the subject application the relevant facts are that in 1956/7, parties at arm's length negotiated a 99 year lease without a service charge, apparently in return for services rendered by the lessee. The Respondent bought that lease in 1987, paying a premium for it. In 2014 the Applicant purchased the immediate reversionary interest (i.e. the Intermediate Lease). He now seeks to vary the Lease, which makes no provision whatsoever for payment of a service charge. The Tribunal found no strength in the submissions that the change from short lettings to long leases was a material change of circumstance, that the proposed terms of the 1987 Act should have been known to the Respondent, or that it was inequitable for the head lessee to pay the service charge without reimbursement from the lessee. The fact that the Applicant was mistaken as to the terms of the Lease when he bid for it might have had more strength, but in this case it seemed to be an illustration of the "Buyer Beware" principle, rather than an error providing good reason to vary the terms of the Lease. The Tribunal decided that the factual nexus in this application was more akin to that in *Cleary* (supra).

20. It might be that an Upper Tribunal decision in 2011 does not bind this Tribunal, but the Tribunal has no hesitation in considering that decision to be correctly decided. The Applicant in *Cleary* had negotiated a surrender and re-grant of the leases only two years prior to the application. In this case, the original parties entered the transaction with eyes wide open, and the Applicant voluntarily bought himself into the position of the head lessee very recently. The Tribunal decided that the intention of the 1987 Act was not to assist parties who had made a bad bargain, but to deal with prejudicial supervening events and circumstances which had not been foreseen.

21. Thus the Tribunal decided that the Applicant had not satisfactorily established under Section 35(2)(e) that the Lease failed to make satisfactory provision for 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 the other party.

22. The above decision apparently disposes with the application, but if for any reason the Tribunal was wrong in its finding, it went on to consider the terms of Sections 38(6)(a) and (b), and 38(10).

23. The Tribunal decided that the terms of 38(6) (a) (relating to substantial prejudice and that an award of compensation would not afford the Respondent substantial compensation) also applied. The Applicant pleaded at some length the likely financial effects of a statutory renewal of the Lease. However it was not at all clear that the Respondent would wish to do so, or could be obliged to do so. He might well decide to remain where he was, without renewing his Lease, and in any event the landlord could not impose fresh terms in any new lease without his consent. He was a man who declared himself as having modest means. Staying in his home might be more important, but in any event that was ultimately his decision.

24. The Tribunal also decided that the case fell within Section 38(6)(b) for reasons touched upon above. The variation sought was not the result of any material supervening event or circumstances. The unchallenged evidence in the County Court case ultimately decided by HH Judge Hamilton in 2005 was that the Applicant's predecessor in title had manoeuvred court proceedings in order to continue to exert pressure on the Respondent to agree to the variation, resulting in the Respondent's main asset and home being under threat for nearly 25 years. While there was no suggestion that the Applicant was cut from the same cloth, it would be inequitable to allow him to succeed where his predecessor had failed.

25. If the Tribunal was wrong in its decision relating to Section 38(6), then it decided that if it was asked to rule on Section 38(10), substantial compensation was likely to be ordered. The bundle contained a joint surveyors' report prepared for the 2004 proceedings. While the Applicant's surveyor was reported to have contended for a "nil" value for compensation, the Respondent's surveyor reportedly contended for a figure of £70,000. The Tribunal noted that in *Keeney* the Tribunal had decided that no compensation should be paid to lessees whose service charge percentages had been increased by the Tribunal. However that particular decision appeared to be due to the fact that a subsequent change in the rating system had led to a windfall for the lessees concerned. This application is not dealing with a "windfall" situation.

26. The Tribunal considered the Applicant's submissions for a "nil" or negative value for compensation. He submitted in his final submissions that awarding compensation would lead to an absurdity in that the Tribunal would have to capitalise the annual service charges to be paid for Applicant, only for the Respondent to pay this back over time. He submitted that this was not what the Act intended.

27. The Tribunal decided that the Applicant had not fully thought through his argument. He was in fact suggesting that because the calculation to

be made by the Tribunal would be based on service charges not otherwise payable, the Respondent should be given nothing by way of compensation to pay those service charges, as the compensation would effectively have to be paid back to the landlord. The Tribunal found no force in this submission, as it would lead to a most unfair result. While not seeking to anticipate any future submissions made on quantum, the Tribunal considered that it was not unreasonable to capitalise the service charges, as the Applicant had himself suggested.

28. While not part of its decision, the Tribunal wishes to clarify a point made in the Respondent' submissions, and was the subject of discussion at the hearing. The Applicant is the Respondent's landlord under the Lease, and is therefore entitled to payment of the ground rent reserved in the Lease, and performance of the other tenant's covenants. Equally the Applicant has certain liabilities under the Intermediate Lease to the freeholder. The fact that the Respondent is a member of the Freehold company does not alter this liability, nor does it make him the Applicant's landlord. The Freehold company is a separate legal person to all or any of its shareholders.

Name: Lancelot Robson **Date:** 15th June 2015

Appendix 1

Landlord & Tenant Act 1987;

Section 35; 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 te following matters, namely –

(a) – (d) ...

(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 the 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) ...

(3) ...

(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 superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of 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) ...

36 Application by respondent for variation of other leases
(1) – (3) ....

38 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) – (5) ...

(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 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, ...

(8) A tribunal may, instead of making an order varying the 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 a variation of it ot (as the case may be) a reference to any variation effected pursuant to such 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 that the tribunal considers he is likely to suffer as a result of the variation.
