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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/00MG/LVL/2015/0004**
Property	:	Block 5, 62–90 (even numbers) Albion Place, Campbell Park, Milton Keynes MK9 4AB
Applicants	1	Midland Heart Limited [freeholder]
	2	Second Campbell Park Property Management Company Limited [management company]
Representative	:	Shakespeare Martineau LLP
Respondents	:	Betty Louise O'Toole and others, as listed in Annex 1 to the application, being lessees of all 15 of the flats concerned
Type of Application	1	For variation of the terms of each of the 15 leases as explained in the 4 page Grounds of Application and Annex 3 [LTA 1987, s.35]
	2	For an order that all or any of the costs incurred by the landlord in connection with these proceedings before the tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant [LTA 1985, s.20C]
Tribunal Members	:	G K Sinclair & D S Brown FRICS
Date of Decision	:	23rd March 2016

DECISION FOLLOWING A PAPER DETERMINATION

Summary

1. Block 5, Albion Place in the Campbell Park area of Milton Keynes comprises 15 flats initially let on shared ownership leases for a term of 99 years commencing on and from 29th September 1996. Of the 15 flats 8 are now purchased outright by their lessees and 7 remain with the equity shared 50:50.

2. The applicant housing association considers that aspects of the common form lease are defective, namely:
   a. That the provision in paragraph 22.1 of the Sixth Schedule for building up a reserve fund over a period of no more than 3 years is too restrictive because that allows insufficient time to accumulate enough money to pay for major works, and
   b. That the lease fails to provide for the costs of managing and collecting the additional rent for those flats remaining in shared ownership ("a rent management fee")

   and it invites the tribunal to vary the leases accordingly pursuant to section 35 of the Landlord and Tenant Act 1987.

3. For the reasons set out below, and after due consideration of the documents and written submissions received, the tribunal determines that :
   a. Paragraph 22.1 in the Sixth Schedule fails to make satisfactory provision for accumulating a reserve fund for the repair and maintenance of the building containing the flats [s.35(2)(a)(ii)] and the variation is granted as sought
   b. The applicant has not demonstrated how a "rent management fee" falls within either of grounds (d) or (e) of s.35(2) and therefore the tribunal lacks jurisdiction to make the variations sought, viz proposed clause 1.24, the proposed amendment to paragraph 1 of the Eighth Schedule, and the proposed new Twelfth Schedule
   c. An order be made under section 20C of the Landlord and Tenant Act 1985, as requested.

4. The tribunal also notes that, although they do not feature in the application or the applicant's submissions, the lease marked up with proposed amendments includes new clauses 1.1 (account year) and 1.2 (authorised person). As these have neither been explained nor justified they are also disallowed.

Relevant statutory provisions

5. As set out in detail in the applicant's written submissions, the tribunal derives its jurisdiction to vary residential long leases as sought here from section 35, in Part IV of the Landlord and Tenant Act 1987. The section provides as follows :

> 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 the appropriate 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 the following matters, namely –
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> (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 and Tribunal Procedure Rules 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.

(9) For the purposes of this section and sections 36 to 39, "appropriate tribunal" means –

(a) if one or more of the long leases concerned relates to property in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) if one or more of the long leases concerned relates to property in Wales, a leasehold valuation tribunal.

Material before the tribunal

6. As had been directed, the applicant prepared and filed application bundles with the tribunal, none of the parties having sought an oral hearing and a written reply being produced jointly by only Nicholas Catlin (no.90), Ms Betty O'Toole (no.62) and two lessees of flats in block 6. They did not really wish to oppose what the applicant was seeking but felt that a global approach should be adopted for all the blocks owned by the applicant, and they considered that the proposal concerning the rent management fee was not as they recalled had been discussed between the parties previously.

7. Despite the tribunal issuing clear directions, however, the bundle did not include a copy of the application with the grounds for the amendments sought, or the lessees' submissions (although the lessor's response to these was provided), or the directions. The tribunal had to request copies so that it could understand what the applicant was actually seeking.

8. A single copy of the generic lease was requested, marked up with the proposed amendments. Copies of every single lease were not required, nor copies of every freehold and leasehold title, but they needlessly filled more than one and a half lever arch files. A slim bundle complying with the directions would have sufficed.

The reserve fund

9. The Sixth Schedule to the generic shared ownership lease sets out those items to be covered by the "maintenance expenses", which form the basis for the service charge apportioned between lessees that is dealt with in the Seventh Schedule. Paragraph 22.1 states as follows :

> Such sum (to be fixed annually) as shall be estimated by the Management

Company (whose decision shall be final) to provide a reserve fund for sums of expenditure referred to in this Schedule to be or expected to be incurred **at any time during the period of three years** commencing with the date upon which the estimate is made. *[emphasis added]*

10. The applicant argues that this limitation to costs that might be expected to be incurred within three years prevents a true reserve fund being built up, as some of the works required of it (such as repairs to the roof) could prove to be very expensive, and the obligation in paragraph 2 of the Sixth Schedule to paint the exterior at least once every four years does not sit easily with a three-year reserve fund. The applicant argues that "the present wording potentially gives rise to a situation where a major project could result in a large bill for leaseholders and a relatively little time to find the funds." This, it says, is unsatisfactory within the meaning of section 35(2)(a), (b) and (d).

11. The tribunal has considerable experience of reserve funds, and of the cost of work to high buildings which requires expensive scaffolding. The purpose of a reserve or sinking fund is to apply what in the endowment assurance business is called "smoothing" – designed to soften the shock of occasional financial blows. In the case of shared ownership leases, where qualification is often based on a capped annual income, the need to smooth annual expenditure is even more important. Many landlords have an external maintenance schedule in excess of every three years – more likely every five or six – and roof or lift repairs are almost certainly more infrequent.

12. The tribunal determines that the present wording of the lease is unsatisfactory within the meaning of section 35(2)(a). Sub-section (b) deals with annual insurance and (d) to "services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation", so the applicant's reference to these provisions is puzzling. The purpose of the reserve fund is to meet costs likely to be incurred on a periodic but not annual basis.

13. The proposed amendment, which the tribunal recognises as similar to provisions in use in other shared ownership schemes, is therefore approved as drafted (save for a missing word "in" at the end of the first line). The Sixth Schedule, as varied, will now have new paragraphs 22.1 and 22.2, with the existing 22.2 being renumbered as 22.3. The new paragraphs will read :

The Block Maintenance Expenses shall also consist of :

22.1 an appropriate amount as a reserve for or towards the matters specified in this Schedule as are likely to give rise to expenditure after such Account Year being matters which are likely to arise either only once during the then unexpired term of this Lease or at intervals of more than one year including (without limitation) such matters as the decoration of the exterior of the building (the said amount to be calculated in a manner which will ensure as far as is reasonably possible that the Block Maintenance Expenses shall not fluctuate unduly from year to year) but

22.2 reduced by any unexpended reserve already made pursuant to paragraph 22.1 of this Schedule.

The "rent management fee"

14. The applicant argues that the cost of billing shared ownership leases by preparing rent demands, etc is something that cannot be covered by such rent, on the ground that the rental income must be applied to providing new housing. This has not been explained any further. A landlord's costs of administration would normally be paid from the rental income, and most of the list of management tasks covered are those which, even in leasehold properties, would be covered by the regular management fee.

15. Further, no explanation has been provided for the claimed annual fee of £180, to be paid in addition to the management company's regular management fee, nor the proposed annual uplift of such fee by reference to the RPI (even though the RPI is no longer recognised as an official ONS statistic). In recent years many have had to get used to the idea of no annual increase in income – and in some cases there have been actual reductions in professional fees.

16. More fundamental, however, is the question how the proposed variation of the lease to include such a fee can be described, under section 35(2)(d), as "the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation" or, under (e), as "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". As guidance to the interpretation of section 35(2)(d) please see sub-section (3).

17. In the tribunal's determination such a case is simply not made out. The proposed fee is designed to benefit the lessor, not any of the lessees. The tribunal therefore lacks the jurisdiction to make such a variation – regardless of whether or not the lessees oppose the lessor's proposal (which in the case of block 5 affects only 7 of the 15 lessees). In the circumstances it need not embark on a consideration of the reasonableness or otherwise of the suggested compensation for existing lessees by payment of a sum of £500 and a freeze on increases in the rent management fee for 2 years.

Other matters

18. Although not mentioned in the application the marked up lease includes, as new clauses 1.1 and 1.2, definitions for the "account year" and for an "authorised person". The tribunal recognises these as part of a template shared ownership lease used elsewhere, but it cannot understand why the applicant would wish or need to import them. In particular, there is no need for an "authorised person" because this is a tripartite lease, with obligations for providing services, carrying out repairs, etc. and making service charge demands being delegated to the management company. For the avoidance of doubt, the introduction of these new clauses in the marked up copy are also rejected, for the reasons set out in paragraphs 16 and 17 above.

19. In paragraph 18 of its Grounds of Application the applicant states that it had told the lessees that it will be "meeting the costs of this application in full and will not be recharging these to the leaseholders". Accordingly it invites the tribunal to make an order under section 20C of the Landlord and Tenant Act 1985 to give effect to that promise. As the applicant has been only partially successful in its

application the tribunal gladly accedes to that request.

Dated 23rd March 2016

Graham Sinclair

Graham Sinclair
Tribunal Judge