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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	CHI/ 21UG/LVT/2018/0006
Property	:	54 Flats at Ewell Court, Epsom Court & Merton Court, Sutton Place, Bexhill-on-Sea TN40 1PA
Applicant	:	SPRC Limited 45 leaseholders
Representative	:	Gaby Hardwicke Solicitors
Respondent	:	Mrs Julie Rodaway, Mr Edward Taylor, Mr and Mrs Hill, Mrs Karen Burke, Mrs Lillian Clarke, Mr & Mrs Johnson, Mr & Mrs Lacovara, Mrs Sheila Osborne and Mr Phyall & Ms Carey
Representative	:	
Type of Application	:	Variation of a Lease by a Majority (section 37 of the Landlord and Tenant Act 1987
Tribunal Members	:	Judge Tildesley OBE
Date and venue of Hearing	:	Determination on the Papers
Date of Decision	:	20 February 2019

DECISION

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provision for the recovery of advance service charges. At the moment the relevant clause in the leases only allows a maximum of £45 per annum to be recovered on account. Under the terms of the leases the Applicant is restricted to recovering the vast majority of its expenditure on repairs after they have been incurred and paid. This arrangement presents a barrier to the Applicant's plans to repair the buildings to an acceptable standard. The Applicant is not a commercial landlord but a resident owned management company and does not have the funds to carry out the necessary works unless contributions are made in advance by the leaseholders.

6. This problem about funding has been recognised for some time, and a convention was adopted between the Applicant and the leaseholders to pay the service charge in advance by two instalments even though it did not have the authority of the lease. The convention was effective in respect of service charges which covered the usual items of expenditure. The climate, however, has now changed and the Applicant is wishing to put the arrangements on a formal footing to guarantee that it would have the necessary funds to carry out the major works.

7. In July 2018 the Applicant instructed Gaby Hardwicke Solicitors to write to all leaseholders advising them of its intention to vary the terms of the leases to enable it to collect anticipated service charges in advance and to enable a sinking fund to be built up. The letter enclosed a copy of the suggested amendments, which was the same for all Flats in the three blocks.

8. The solicitors advised that they would be applying to the Tribunal for approval or otherwise of the changes. The solicitors invited the leaseholders to give their consent and or make observations on the proposed amendments.

9. The Applicant has had a response from 50 of the 54 leaseholders. Of which 45 leaseholders had agreed to the amendments with four leaseholders objecting at the time an application was made to the Tribunal to vary the leases which was on 24 October 2018. Since the Application was made it would appear that two more leaseholders have agreed to the variation which leaves three leaseholders who have not responded. The original 45 leaseholders have joined as Applicants to the Application.

10. Under the Landlord and Tenant Act 1987 the Tribunal has powers to vary long leases of flats essentially in two sets of circumstances. The first is under section 35 of the 1987 Act where the lease fails to make satisfactory provision with respect to one or more specific grounds which includes service charges. The second is under section 37 of the 1987 Act which is brought by a majority of the parties concerned for a variation to two or more long leases of flats on the grounds that the object to be achieved by the variation cannot be satisfactorily met unless all the leases are varied to the same effect.

11. The Applicant applied under section 37 of the 1987 Act and in the alternative under section 35 (2)(e).

12. In order for the Tribunal to entertain an application under section 37 of the 1987 the Applicant must satisfy the Tribunal that at the time it made the Application the criteria of the "relevant majority" was met.

13. Under section 37(5)(b) of the 1987 Act the relevant majority for applications involving eight or more leases is that the application is not opposed for any reason by more than 10 per cent of the total number of parties concerned and at least 75 per cent of that number consent to it. Each tenant constitutes one of the parties concerned as well as the landlord. Further a person deemed to be opposed is to be determined objectively.

14. The Applicant stated that at the time of the Application there were 45 leaseholders who consented to the proposed variation which together with the landlord amounted to 83.6 per cent of the parties concerned giving consent. The Applicant said there were four leaseholders who objected which was supported by the documents included in the hearing bundle. The Tribunal does not consider leaseholders who failed to respond to the solicitors' letter as objectors. The four objectors constituted 7.27 per cent of the total number of persons concerned.

15. The Tribunal is satisfied that when it received the Application the Applicant had met the requirements for a "relevant majority".

16. On 19 December 2019 the Tribunal issued directions to progress the Application. The Tribunal directed that the Application would be determined on the papers unless a party requested an oral hearing. The Tribunal received no objection to a determination on the papers. The Application was served on the nine leaseholders who were named as Respondents and had either objected to the proposed amendment or had not responded to the solicitor's letter.

17. The Tribunal received written representations from four Respondents objecting to the Application, Mr Taylor, Mr and Mrs Hill, Mrs Clarke and Mr and Mrs Johnson. Two Respondents consented to the Application. Three Respondents did not reply. The Applicant supplied a hearing bundle consisting of five volumes. The Applicant relied on the witness statements of Mr Jeremy Laws, a solicitor and partner of Gaby Hardwicke Solicitors, dated 22 October 2018 and 23 January 2019. The Applicant also produced a statement of Barbara Anne Dunn, The Committee Chair for the Applicant, dated 21 January 2019 as an exhibit to Mr Laws' second witness statement.

18. In order for its Application to succeed the Applicant has to satisfy the Tribunal of the Object for the proposed variations, how the proposed variations achieve the Object, and do all the leases need to be varied to meet the Object.

19. The Tribunal has already referred to the Applicant's evidence in this case. The Tribunal finds that the Object of the proposed variation is to put the Applicant in funds to carry out major works to the property. The Tribunal is satisfied that the current leases are deficient in that they do not permit the Applicant to collect service charges on account except for a minimal amount or set up a reserve fund. The Tribunal finds that the proposed changes to the lease meet the Object identified by the Applicant. The Tribunal notes that the suggested amendments put conditions on the allocation to reserves.

20. The Tribunals holds that the supplemental amendments in relation to accounts and the ability for the Applicant to charge interest on amounts not paid within one calendar month of the due date are necessary adjuncts to support the Object of putting the Applicant in funds to carry out major works. Finally the Tribunal decides that the Object would not be met unless all the leases are varied to the same effect.

21. Mr Taylor and Mr and Mrs Johnson objected to the changes because they believed that it gave the Applicant unfettered discretion to raise funds. Mr Taylor suggested additional wording to the new Clause 4(2) to ensure that the Applicant acted reasonably when exercising its discretion to raise funds.

22. Mr Laws in his second statement highlighted the safeguards available to leaseholders to prevent the Applicant from imposing charges that do not meet the statutory requirement of reasonableness and those which are not authorised by the terms of the lease. Mr Laws also referred to the additional safeguards that the leaseholders have by virtue of being members of the management company, in particular their ability to remove the directors if they are dissatisfied with the way in which it is managed. The Tribunal has already alluded to the fact that the amended clause imposes criteria for the allocation to reserves, namely, expenditure likely to arise at intervals of more than one year or unforeseen or unusually high expenditure or necessary in the best interests of estate management.

23. The Tribunal is satisfied that the proposed Clause 4(2) places conditions on the allocation to reserves. The Applicant would have to justify its decision in accordance with the criteria in the leases. The Tribunal observes that the changes to the leases do not compromise the protections given to residential leaseholders against the imposition of unreasonable and unjustified service charges.

24. Mr and Mrs Johnson oppose the wording of Clause 4(5)(b) which gives the Applicant an entitlement to allocate overpayments of service charge to the sinking fund on trust for lessees. Mr and Mrs Johnson point out that it is normal under leases for any overpayment to be credited against the specific leaseholder's service charge for the coming year which is a reflection of the common law position that overpayments should be returned to the leaseholders in the absence of specific wording in the lease to the contrary.

25. The Tribunal finds that the purpose of Clause 4(5)(b) is in line with the Object for the proposed variation to put the Applicant in funds to carry out the major works. Also the Tribunal observes that although Clause 4(5)(b) gives the Applicant an entitlement to allocate overpayments to reserves, the Applicant's allocation is still subject to the conditions imposed on such allocations in Clause 4(2) and subject to the requirement that any such allocation must be reasonable as defined by section 19 of the Landlord and Tenant Act 1985.

26. Mr and Mrs Johnson's next point is that there should be a clause stating that the monies held on trust by the Applicant should be returned to the leaseholders on sale of their property. Mr Laws comments that Mr and Mrs Johnson's point appears to be against the operation of the housing market and conveyancing practice. Mr Laws suggests that this is a matter of agreement as between seller and buyer as to the price paid for the property being sold and how the surplus is treated in the conveyancing transaction. The Tribunal observes that it is unlikely that monies held in reserves would be treated as a surplus in the conveyancing transaction. The Tribunal, however, agrees with Mr Laws comment about the price paid. In the Tribunal's view, a leasehold property situated on an estate which is well managed by the Landlord holding reserves on trust to meet future major expenditure is likely to attract a higher price than a Flat where there is no effective management by the Landlord.

27. Mr and Mrs Johnson's final point is that the Applicant should provide each leaseholder with a statement of the monies held on trust by them at the end of each business year. The Tribunal considers that this is covered under the new clause 4(4) which requires the Managing Agent or in default the Lessor to send each leaseholder a copy of the certified accounts as soon as reasonably practicable after the end of the service charge year. The Tribunal would expect the accounts to comply with the RICS Service Charge Residential Management Code which require accounts to be prepared in accordance with ICAEW Technical Release 03/11.

28. The Tribunal is satisfied for the reasons given that the objections of Mr Taylor and Mr and Mrs Johnson do not justify a change in the proposed amendments.

29. Mr and Mrs Hill have supplied two letters of objection. The first one detailed their concerns about the creation of a sinking fund which the Tribunal believes it has dealt with in the preceding paragraphs.

30. In their second letter Mr and Mrs Hill hold serious worries about the sensitivities of the Applicant's Management Committee in considering the difficulties of older members who appear to have serious financial problems in meeting unexpected demands likely to be brought about by the creation of sinking funds. Mr and Mrs Hill add that for the past 45 years the management Committee has always been guided by budget constrained collection of maintenance funds sensitive to savings of members, particularly the older ones. Mr and Mrs Hill fear that sinking funds would upset the equilibrium of the community at Ewell Court.

31. Mr Laws in response points out that the tenants are required to pay what is needed to ensure that the landlord can comply with its repair obligations in the lease, and that leaseholders have the statutory protections afforded by the 1985 Act. Mr Laws asserts that as far as equilibrium is concerned the point cuts both ways. According to Mr Laws, there is scope for significantly greater upset to the equilibrium of the community in the event that the Applicant is unable to secure funds and to carry out the necessary repair works.

32. The Tribunal observes that Mr Hill was a former Chair of the Management Committee. In the Tribunal's view, Mr Hill speaks with authority and knowledge of the circumstances pertaining at Sutton Place. His concerns for the older members is reflected in the comments of Mrs Clarke who has lived in Merton Court since 1995 and is 91 years of age. Mrs Clarke thinks that the money the Committee expects the leaseholders to find in 2019 is disagreeable to her peace of mind.

33. Under section 38(6) of the 1985 Act the Tribunal shall not make an order effecting any variation if it appears that the variation would be likely substantially to prejudice a Respondent to the Application and that an award of compensation under section 38(10) would not afford adequate compensation.

34. When considering prejudice the Tribunal must not lose sight of the fact that variations interfere with the contractual bargain which the original parties reached and formed the basis upon which their successors acquired and will continue to acquire their respective interests. Further the Tribunal must examine prejudice from the perspective of how it changes the relationship of the landlord and tenant under the proposed terms of the lease with specific reference to service charges.

35. The Tribunal is satisfied the proposed variations do not change or enlarge the liability of leaseholders for landlords costs in carrying out the covenants under the lease. The variations are not seeking to

introduce extra liabilities for leaseholders but to alter the method of paying their liabilities for service charges. Under the terms of the current lease, leaseholders could potentially be faced with a massive bill for service charges if urgent and necessary repairs are required which is demonstrated by the current demand for repairing the roof. The purposes of introducing the reserve fund and payments in advance are to enable the necessary funds to be accumulated over time and to ensure that funds are in place. Once introduced this should avoid the problem of facing substantial one-off charges for major works and to limit additional costs that may arise from delaying the works because of lack of funds.

36. Given the above circumstances the Tribunal finds that the proposed variations are not likely to substantially prejudice any respondent or any other person because the proposals would assist the effective management of the buildings which should benefit all the leaseholders.

37. The Tribunal, however, hears the concerns of Mr and Mrs Hill, and although they do not undermine the validity of the proposed variations the Tribunal requests that the Management Committee is mindful of the impact of these changes on the older residents with limited means. The Committee may wish to consider adopting a policy for handling requests for time to pay from leaseholders who are experiencing demonstrable exceptional hardship.

38. The Tribunal is satisfied that there are no reasons which make it unreasonable for the variations to be effected.

39. The Tribunal grants the Application to vary the leases in accordance with the suggested amendments which are set out in Appendix One. The Tribunal makes no order for compensation under section 38(10) of the 1987 Act. The Tribunal is satisfied that The Respondents put forward no compelling case of loss or disadvantage as a result of the proposed amendments.

40. The parties are ordered to endorse a memorandum of this variation on the originals and the counterparts and apply to the Land Registry for a record of the variation to be placed in the property registers of the various titles.

APPENDIX ONE: APPROVED AMENDMENTS

1. Clause 4 of the Lease will be amended to read:

   "THE Lessor and the Management Company HEREBY COVENANT with the Lessee that the Management Company and in default the Lessor will, subject to the Lessee paying their share of the costs towards the expenses paid, incurred, or to be paid or to be incurred by the Management Company or the Lessor by virtue of its obligations under this Clause 4, will..."

2. Clause 4(2) of the Lease shall be deleted and replaced with the following:

   "...(2) before the start of each service charge year (running from the 1 January to 31 December in each year) to prepare and send to the Lessee an estimate of costs to be incurred by the Management Company or Lessor by virtue of its obligation under this Clause 4 and an amount or amounts that the Management Company or Lessor in its discretion deems to be appropriate to be paid towards a reserve and/or sinking fund for or towards those of the matters mentioned in Clause 4 as are likely to give rise to expenditure after the relevant service charge year being matters which are likely to arise at intervals of more than one year or which are likely to require unforeseen or unusually high expenditure in the performance of the Management Company or Lessor's obligations under this Lease or in relation to which the Management Company or Lessor may see as necessary in the best interests of good estate management for that service charge year and to provide a statement of the estimated service charge payable by the Lessee in relation to the demised premises calculated in accordance with Clause 5(2)(a) for that service charge year."

3. Additional Clauses 4(3), 4(4) and 4(5) will be added to the Lease as follows:

"...(3) maintain and keep accounts, records and receipts relating to the costs incurred by the Management Company or Lessor in complying with its obligations under this Clause 4 and to permit the Lessee, on giving reasonable notice, the ability to inspect such accounts, records and receipts by appointment with the Managing Agents or Lessor or their accountants.

(4) as soon as reasonably practicable after the end of the service charge year, the Managing Agent or in default the Lessor shall prepare and send to the Lessee a copy of the certified accounts showing the final service charge payable for Sutton Place Estate or the building as appropriate and in particular the demised premises for that service charge year.

(5) (a) if the certified accounts show a shortfall in costs collected from the Lessee then the Managing Agent or in default Lessor will be entitled to request payment of the shortfall from the Lessee which, will be payable as if it were rent due and payable within one calendar month of demand (b) if the certified accounts show an overpayment in costs collected from the Lessee then the Managing Agent or Lessor will be entitled to retain the overpayment and hold the same in a sinking fund on trust for the Lessees to use as they see fit at a later date."

4. Clause 5 2(a) and 2(b) of the Lease shall be deleted and replaced with the following:

"5(2)(a) The Lessee will be responsible for a proportion of the cost of the Management Company or Lessor complying with its obligations stated in Clause 4 hereof based on the gross rateable value that the demised premises bears to the total gross value of all the flats and garages which have been built on the Sutton Place Estate and

5(2)(b) on the 1 January and 1 July in each year the Lessee will pay to the Management Company or Lessor, in advance, an amount

equal to half of the sum shown in that year's estimate of costs referred to in Clause 4(2)"

5. Clause 6 of the Lease shall be renamed Clause 6(a) and the following Clause will be inserted as Clause 6(b):

"The Lessee will pay interest to the Lessor or Management Company at the rate of 1.5% per annum above the Bank of England base rate (both before and after any judgment) if and whenever the rent or the Lessees share of the costs towards the expenses which may be incurred by the Management Company by virtue of its obligations under Clause 4 or other payment due under this lease, whether formally demanded or not, are not paid within one calendar month of the date it is due. Such interest shall accrue on a daily basis for the period from the due date to and including the date of payment."

APPENDIX TWO: RELEVANT LEGISLATION

37.— Application by majority of parties for variation of leases.

(1) Subject to the following provisions of this section, an application may be made to [the appropriate tribunal][1] 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

38 Orders varying leases.

38.— Orders [...][1] 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][2] , the [tribunal][2] 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][2] with respect to the leases specified in the application under section 36,

the [tribunal][2] 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][2] with respect to the leases specified in the application, the [tribunal][2] 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][2] 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][2] 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][2] shall not make an order under this section effecting any variation of a lease if it appears to [the tribunal][2] —

(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][2] 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][2] 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][2] 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][2] makes an order under this section varying a lease [the tribunal][2] 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 tribunal][2] considers he is likely to suffer as a result of the variation.

RIGHTS OF APPEAL

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.