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Residential Property
TRIBUNAL SERVICE

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

PART IV LANDLORD AND TENANT ACT 1987

REF: LON/00BE/LVL/2010/0013

PROPERTY: FLATS 70, 112 and 114 SEDGMOOR PLACE,
LONDON SE5 7SE

Applicant LONDON BOROUGH OF SOUTHWARK

Respondent
(1) MS EMMA AKYEABEA OWUSU (Flat 70)
(2) MR MARTIN DEREK EDWARD BAYNTUN (Flat 112)
(3) MR MOHAMMED FAZLUL KARIM
and REBA KARIM (Flat 114)

Date of receipt of Application: 27 June 2010

Date of Directions: 6 July 2010

Date of Hearing: 13 September 2010

Date of Decision: 11 November 2010

Members of Tribunal: Mr S Shaw LLB (Hons) MCI Arb
Mr K M Cartwright JP FRICS
Mr L G Packer

DECISION

Introduction

1. This case involves an application by the London Borough of Southwark ("the Applicant") in respect of Flats 70, 112 and 114 Sedgmoor Place, London SE5 7SE ("the Property"). The application is made against Ms Emma Akyeabea Owusu (Flat 20 Sedgmoor Place), Mr Martin Derek Edward Bayntun (Flat 112) and Mr Mohammed Fazlul Karim and Reba Karim (Flat 114) – who collectively will be referred to as "the Respondents". The Applicant makes this application for a variation of the Respondents' leases to their respective properties, pursuant to the provisions of Part IV of the Landlord and Tenant Act 1987.

The Applicant's Case

2. The hearing of this matter took place before the Tribunal on 13 September 2010. The Applicant was represented by Ms Ezani Bennett and Mr Orland Strauss, both of whom are litigation officers with the Applicant Local Authority. One of the housing estates within the Applicant's portfolio is called Havil Street Estate. On the Applicant's case, within the physical parameters of that estate is a building comprising four flats, that is to say Flat 70, Flat 68, Flat 112 and 114. As will be noted, three of these flats are owned on long leases by the Respondents to this application. The fourth flat, number 68, is owned by the Applicant itself and occupied by one of its tenants. It is not directly relevant for

present purposes. The Applicant seeks three variations of the Respondents' leases.

(i) The first variation is to change the definition of "the building" on page 1 of the lease from "68 to 114 Sedgmoor Place" to "68-70 and 112-114 Sedgmoor Place [shown edged and coloured blue on the plan attached hereto]".

(ii) Insert on page 1 of the lease the words: " "The estate" means the estate known as Havil Street Estate [edged bold black and coloured red on the plan attached hereto] including all roads, paths, gardens and other property forming part thereof".

(iii) Reinstate on page 2 of the lease under the definition of "the services" the words: "maintenance of gardens or landscaped areas".

3. The first of these variations applies to each of the leases and is not opposed by any of the Respondents. The second and third of the variations applies to Flat 114 only, that owned and occupied by Mr and Mrs Karim, and is opposed by them.

4. Mr and Mrs Karim's lease is dated 10 May 1993 and is for a term of 125 years from that date. The lease appears at page 30 in the hearing bundle. It has the appearance of a pro-forma document and there is a definition of "property" at the top of the lease of "freehold land known as the Havil Street Estate, Camberwell." There is thus an initial reference to the estate within the body of the lease. However, thereafter, in the recitals, "the building" is defined as "the building known as 68-114 Sedgmoor Place including any grounds, outbuildings,

gardens, yards or other property appertaining exclusively thereto" and then the words "the estate" means "the estate known as ... including all roads, paths, gardens and other property forming part thereof" are deleted and the lease continues "but should the flat not form part of a Council estate this clause and any subsequent reference in this lease to the "estate" shall have no force or effect."

5. On the following page there is a definition of the expression "the services" as meaning "the services provided by the Council to or in respect of the flat and other flats and premises in the building and on the estate and more particularly set out hereunder:-."

6. Thereafter a number of different items of service are provided for, some of which have been expressly deleted but others have specifically not been deleted and one of those items is "maintenance of estate roads and paths" (which remain un-deleted). Another item, that is to say "maintenance of gardens or landscaped areas" has been deleted. The Applicant's case is effectively that the words which should have defined the estate were wrongly deleted and there is an inconsistency in the lease generally in that it does make reference at some parts as mentioned above to "the estate" but then provides that if the flat does not form part of a Council estate the references to the estate should be ignored. Yet further, some items of service which do in fact benefit the flat, have been deleted in the list of items for which a service charge should be payable, and others because they contain a reference to "the estate" cannot presently be recovered because of the words left in the lease and requiring the reference to

estate to be of no effect. The Applicant contends that as a matter of physical fact, the flat plainly is part of the estate, it does get the benefit of the maintenance of estates, roads and paths and of the gardens and landscaped areas within the estate, and that it is anomalous for the owner of Flat 114 not to be paying the appropriate contribution to these services. The Applicant points out that the error was apparently picked up in respect of the two latter proposed variations in the leases entered into in respect of Flats 70 and 112 and the position there was correctly stated, so that these leaseholders do indeed make the appropriate contributions. It is to be noted that neither of these leaseholders opposes the application for variation.

7. The Applicant called evidence from Mr Gulam Dudhia at the hearing who is an accountant employed within the Applicant's Home Ownership Unit. He told the Tribunal that at present the lease does not allow the Applicant to recharge to the Respondent owner of 114 Sedgmoor Place the maintenance of gardens and landscaped areas. The result of this has been a loss to the Applicant of, on average, about £55 per year since 2006/07.

The Respondents' Case

8. As indicated, the leaseholders of Flats 112 and 70 did not dispute or challenge this application, nor did they or any representatives appear before the Tribunal. Mr Karim however did appear before the Tribunal and was represented by Miss Layiwola, a solicitor of Anthony Ogunfeiboa & Co. Miss Layiwola argued that there should be no variation to allow for recovery of estate service charges because, as a matter of fact, Mr Karim's flat was not really part of the

estate at all. She argued, by reference to the plans and photographs, that the building in which it was situate was really separate and self-contained and that therefore the deletions in the lease had been deliberate. Alternatively, as understood by the Tribunal, she contended that if there had been a mistake in the way these deletions had been carried out (which was really the way the Applicant was putting the matter) then she argued that the application was misconceived and that the Applicant ought to be applying to the County Court for rectification of the lease in order to cure the alleged mistake. In particular she pointed out that rectification would go back to the date of the deed and that the Applicant would have to persuade the Court that this was a proper case for rectification.

9. In a written Statement of Case presented on behalf of Mr Karim by his solicitors and in a statement dated 7 September 2010 signed by him, it was advanced that there was no need to vary the lease because for the period of thirteen years from the date of the lease until he took his Assignment in 2006 nobody had ever raised any suggestion of an error or omission in the lease that it had apparently run smoothly. He also argues in his statement that the specific exclusions from certain service charges were a factor in him paying more for his flat than other flats on the estate. No detail is given of this assertion nor any documentary evidence.

The Law

10. When asked which provision of the Act was relied upon, the Applicant told the Tribunal that it was relying upon Sections 35(1) and (2)(f) and Section 35(4). These provisions provide:

(i) 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.

(ii) The grounds on which any such application may be made of the lease fails to make satisfactory provision with respect to one or more of the following matters, namely - ... (f) the computation of a service charge payable under the lease.

(iii) For the purposes of subsection (2)(f) the lease fails to make satisfactory provision with respect to the computation of the service charge payable under it if:-

(a) it provides for any such charge to be a proportion of expenditure 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.

The Tribunal's Decision

11. From the plan of Havil Street Estate presented to the Tribunal, it seems clear to the Tribunal that the building in which Flat 114 is situate, is indeed clearly part of the estate, and at page 64 in the bundle is a plan supporting the application, from which it is apparent that in order to exclude this building of four flats from the estate, it would be necessary artificially to abut into the area of the estate expressly to effect that exclusion. It may well be that the building has the use of some private gardens, but in the view of the Tribunal that of itself does not preclude the leaseholders of Flats 70, 112 and 114 from using the estate gardens and thereby logically carrying some liability for their maintenance. As a matter of common sense, and by reference to the plan and photographs shown to the Tribunal, it seems plain to the Tribunal that, as indicated, the building in which the flat is situate is indeed part of the estate.

12. The lease itself has been infelicitously completed. There are contradictions on the face of the lease as already referred to earlier in this Decision and inconsistencies arising from the fact that the property is described as in effect being part of the Havil Street Estate, but then being followed by an apparent deliberate inclusion of liability for a service relating to the maintenance of estate roads and paths (which then has to be ignored because of an earlier reference) and yet exclusion of maintenance of gardens or landscaped areas. It is fair to say that it is possible to operate this lease notwithstanding these apparent aberrations in the drafting but, the question the Tribunal asks itself, within the provisions of the Act set out above, is whether or not the lease presently stands

makes "satisfactory provision" ... for the "computation of a service charge payable under the lease." Specifically, if the leaseholder of Flat 114 is released from the obligation to make a contribution to the upkeep of the gardens and landscaped areas, would that result in a recovery of "less than the whole of any such expenditure"? The sums involved here are not presently figures which are especially substantial, but it seems to the Tribunal there would be an under-recovery by the Applicant and that satisfactory provision is not presently made in the lease as it stands. It is wholly out of sync with the other two long leases, which have been granted in respect of flats within this particular building. It may or may not be that a claim for rectification is also possible in the context of this factual scenario. The Applicant however made it plain that it was not seeking to have retrospective effect applied to this variation, and that it would apply for the future only. In any event, the Tribunal is satisfied that this is an appropriate case in which to grant the variations requested, within the provisions of the Act.

Conclusion

13. For the reasons indicated above, the Tribunal is satisfied that this is an appropriate case for the variation of the leases in question and that that variation should be in the form of the Deed of Variation attached to the application and which deed will be supplemental to the original lease in each case.

14. No application was made for costs by the Applicant but, for the avoidance of doubt, the Tribunal considers that the Respondents were justified in having this matter fully aired before the Tribunal and the Applicant in the circumstances

may wish to take that fact into account before seeking to apply any additional costs arising out of this application to any subsequent service charge account.

Dated: 11 November 2010

Legal Chairman: S Shaw