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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**: CHI/00ML/LVT/2014/0014**
Property	**: Brittany Court, 176 New Church Road, Hove, East Sussex BN3 4JT**
Applicant	**: Old Estates Limited**
Representative	**: Gregsons, solicitors**
Respondents	**: The lessees of flats 3,4,6,7,8,9,11,14,15,16,23**
Representative	**: In person save for the lessee of Flat 23 represented by Green Wright Chalton Ennis, solicitors**
Type of Application	**: Variation of leases**
Tribunal Members	**: Judge D Agnew Mr D. Banfield FRICS**
Date and venue of Determination	**: By paper determination on 27th January 2015**
Date of Decision	**: 10th February 2015**

DETERMINATION

Background

1. On 30th September 2014 the Applicant who is the landlord of Brittany Court, 176 New Church Road, Hove, East Sussex BN3 4JT ("the Premises") applied to the Tribunal for an order that certain of the leases of flats at the Premises be varied. The flats concerned are numbered 3,4,6,7,8,9,11,14,15,16 and 23. The variation sought was to increase the tenants' contribution towards the cost of repairing and maintaining the two lifts at the Premises for all but Flat 9 and to remove the requirement of Flat 9 to make any contribution towards the said lift repairs and maintenance.

2. Directions were issued on 28th October 2014 providing for the matter to be determined by the Tribunal on the basis of written representations without an oral hearing unless any party objected within 28 days. No party did object.

3. The directions required any party who did not consent to serve upon the Applicant a statement of case and any claim for compensation. The lessee of Flat 23, Mr Denzil Dolan did serve through his solicitors an objection to the variations sought together with a report from Stephen Lester Atkins MRICS commenting on the scale of the variation sought as far as Flat 23 was concerned and giving an opinion as to compensation if the variation sought was approved by the Tribunal.

4. The lessee of Flat 3, Mr G D Nekoei also objected by letter of 29th November 2014 to any change to his lease but he gave no reasons for his objection.

5. The lessee of Flats 9 and 11, Eden Consultants Limited, wrote to the Tribunal on 11th January 2015 stating that in order to minimise costs it was taking a neutral stance as to whether or not the leases should be varied as sought but that if they were varied it wished the Tribunal to consider ordering compensation for the increased amounts for which it would be liable. No calculations were included.

6. The case came before the Tribunal for determination on 27th January 2015.

The Applicant's case

7. The Applicant stated that it had recently come to its attention that there were two lessees who were contributing towards the cost of lft repairs and maintenance but whose leases did not require them to do so. This led to a review of all the leases and it was discovered that the total contribution towards lift works under the leases amounted to only 84.5 per cent of the expenditure. It was also discovered that the lease of one ground floor flat which did not enjoy lift service did include a requirement for the lessee to contribute to lift works whereas three other ground floor flats with no lift service had no such liability. The lease in point (Flat 9) had been extended at the same time as a lease of another flat at the Premises to the

same lessee. This other flat did enjoy lift service. The inference was that the requirement to contribute towards the lift works in the new lease of Flat 9 had been included in error.

8. It had become necessary to incur expensive repair works to the two lifts at the Premises and so the Applicant landlord was seeking a variation of the leases of the 15 flats which have lift service so that they are all required to contribute an equal one-fifteenth (6.6 per cent) of the cost. In the case of Flat 9, the application was to remove the requirement in the lease to contribute anything at all towards lift repairs and maintenance. The application was made under section 35(1) of the Landlord and Tenant Act 1987 on the ground set out in section 35(2)(f) of that Act.

The Respondent's case

9. Mr Dolan, the lessee of Flat 23, was the only Respondent who had provided a substantive objection to the proposed variation. In his case, the percentage contribution towards lift works in his lease is stated to be 2 per cent instead of 5.5 per cent in the case of all the other leases of flats with lift service. That would mean a much higher increase (from 2 per cent to 6.6 per cent) in his case compared with the other leases where the increase would be from 5.5 per cent to 6.6 per cent.He did not object to the leases being varied in order to achieve a 100 per cent recovery of the costs of lift repairs and maintenance but he suggested that a fair way of doing so would be for the increase in contributions to be proportionate to the contributions as originally provided for in the various leases. He pointed out that the 2 per cent contribution in his case was evidently considered to be equitable when the leases were drawn up. His flat is much smaller than the other flats at the Premises. He relied on the report of Mr Atkins who said that if a proportionate increase were to be ordered then compensation would not be appropriate but if the variation was ordered as asked, he believed compensation should be payable to Mr Dornan. He calculated that there would be an immediate diminution in value of the flat in the sum of £10,446.01 representing the increased contribution required for the imminent cost of works to the lifts and a further £2,020.05 being the estimated capitalised costs of maintenance over the unexpired lease term.

The Leases

10. With regard to the lease of Flat 23 clause 3(13) thereof requires the lessee

"……to pay by way of further and additional rent to the landlord or its agents a sum (hereinafter called "the Tenant's Maintenance Contribution") equal to ONE PER CENTUM (1%)" of all expenditure incurred by the landlord under its covenants under the lease other than that contained in paragraph 15 of the Third Schedule. That paragraph requires the landlord:

"to repair maintain renew light and keep adequately serviced the lift and lifts from time to time serving the building together with all apparatus with regard thereto and the lift shaft and shafts".
Clause 3(15) of Flat 23's lease provides that the lessee shall pay "by way of further and additional rent to the landlord or its agents a sum (hereinafter called the Tenant's Lift Fund Contribution") equal to TWO PER CENTUM (2%)..... of all expenditure..... incurred by the landlord.....under the covenants on its part contained in the fifteenth paragraph of the Third schedule" (see above).

11. With regard to the leases of Flats 3,4,6,7,8,9,11,14,,15 and 16, the Tenant's Maintenance Contribution is stated to be 4.5 per cent and the Tenant's Lift Fund Contribution is stated to be 5.5 per cent. However, Flat 9 does not have the benefit of lift service; hence the application to delete Clauses 3(15) and 3(16) which relate thereto from its lease.

The relevant legislative provisions

12. Section 35 of the Act provides that:-

(1)"Any party to a long lease of a flat may make an application to [a First-tier Tribunal (Property Chamber) (Residential Property)] 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 -

(a)to (e) (not relevant)
(f) the computation of service charge payable under the lease"

13. Sub-section (4) of section 35 states that:-

"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....; 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 proportion referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure."

14. By section 38(4) of the Act "The variation specified in an order.....may be either the variation specified in the relevant application .... or such other variation as the tribunal thinks fit."

15. Section 38(10) of the Act states that "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 or disadvantage that the tribunal considers he is likely to suffer as a result of the variation."

The Tribunal's decision

16. The Tribunal's decision is that the leases of all the flats at the Property which are the subject of this application shall be varied so that the contribution towards service charge expenditure from the lessees with regard to lift repair and maintenance (the "Tenants' Lift Fund Contribution") shall be varied from 5.5 per cent of expenditure for Flats 3,4.6.7,8,11,14,15, and 16 to 6.962 per cent. In the case of Flat 23 the "Tenants Lift Fund Contribution in Clause 3(15) shall be varied from 2 per cent to 2.532 per cent (a proportionate increase). In the case of Flat 9 Clauses 3(15) and Clause 3(16) shall be deleted. No compensation shall be payable in any case. The reasons for the Tribunal's decision are set out below.

17. The reason why the Tribunal has ordered a variation at all is because the total percentage contribution as provided for under the leases is less than 100 per cent. This is precisely the scenario provided for in section 35(2)(f) as amplified in section 35(4) of the Act as set out above. That latter sub-section makes clear that the ground set out in section 35(2)(f) is satisfied if the contributions do not add up to 100 per cent.

18. Having been satisfied that the Applicants have made out their ground for applying for a variation, the next question for the Tribunal to consider is whether the variation should substitute percentage contributions based on an equal contribution towards lift repair and maintenance from all lessees who have the benefit of a lift , as sought in the application, or whether there should be a proportionate increase as contended for by Mr Dolan. (There is a third possibility, namely an equal contribution between all lessees of the Premises whether or not they directly benefit from a lift service. This would be perhaps the more modern way of dealing with repairs to such items as lifts where, arguably, the lessees of the ground floor do not generally have any need to use the lift, but it was not contended for by any party and three of the lessees concerned were not parties to the application anyway. Consequently, the Tribunal has not proceeded to consider a variation on this basis).

19. The Tribunal preferred Mr Dolan's approach. When the leases were drawn up it was evidently deliberately considered that Flat 23's contribution to the lift repair and maintenance should be less than that of the other flats which are served by a lift. It may well be that this was because Flat 23 is considerably smaller than the other flats. Certainly, the contribution towards general service charges for Flat 23 at 1 per cent rather than 4.5 per cent for the other flats would be explained by the fact that Flat 23 is much smaller than the other flats. As the Applicant's solicitors commented on Mr Dolan's submissions, however, Flat 23 does

have an equal if not a greater benefit from the service of a lift than the other flats because it is situated on the fourth floor. It could be that the sort of liability that a one per cent general service charge contribution and a 2 per cent lift maintenance contribution was thought to be as much as a very small studio flat such as Flat 23 could bear. This is pure speculation. The fact of the matter is that the leases were drawn up in that way deliberately at the commencement of the term and it must be supposed that this was for good reason. It is, in any event, the basis upon which those lessees who have bought Flat 23 purchased their property. The increase from 2 per cent to 6.6 per cent, which is what it would be if the Tribunal acceded to the application, is, in the Tribunal's view, too steep an increase. That increase should be proportionate to the proportions in the existing leases and the Tribunal so orders.

20. Having made the determination it has, the Tribunal has considered whether any compensation should be ordered as a result of the variations. It has decided that no compensation shall be payable. Mr Dolan does not pursue compensation if a proportionate increase in his contribution is ordered, and that is what has happened. Eden Consultants Limited, the lessee of Flats 9 and 11 ask for compensation but have produced no evidence as to what the compensation should be nor have they produced any calculations. The Tribunal notes that Flat 9 is to benefit from the variation by having the provision requiring contribution towards the lift repair and maintenance deleted from that lease. All the leases are likely to benefit from there being a proper basis for recovery of 100 per cent of the expenditure on lift repair and maintenance. In all the circumstances the Tribunal declines to make an order for compensation.

Dated the 10th February 2015
Judge D. Agnew (Chairman)

Appeals

1. A person seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal.
2. An application must be in writing and must be sent or delivered to the Tribunal so that it is received within 28 days of the date that the Tribunal sends these reasons for the decision to the person seeking permission to appeal.
3. The application must –
   (a) identify the decision of the Tribunal to which it relates
   (b) state the grounds of appeal; and
   (c) state the result the party making the application is seeking.

4. If the person seeking permission to appeal sends or delivers the application to the Tribunal later than the time required in paragraph 2 above or any extension of time granted by the Tribunal –

   (a) The application must include a request for an extension of time and the reason why the application was not received in time; and
   (b) unless the Tribunal extends time for the application the Tribunal must not admit the application.