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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AU/LVT/2018/0004**
Property	:	**90 Banner Street, London, EC1V 8JU**
Applicant	:	**90 Banner Street RTM Company Ltd**
Representative	:	**Mr Charles Sinclair (Counsel)**
Respondents	:	**Mr Michael Lord (Flat 1)** **Ms Emma Poultney (Flat 2)** **Ms Valerie Dodds and** **Mr Alexander Dodds (Flat (3)** **Mr James Butters (Flat 4)** **Mr Raoul Ries (Flat 5)** **Mr Stephen Fairburn (Flat 6)** **Mr Riku Mattila (Flat 7)** **Mr David Sclater (Flat 8)** **Fairhold Holdings (2006) Appts Ltd**
Representatives	:	**Mr Stephen Fairburn appeared in person.** **Mr John Dodds appeared for the other lessees**
Type of application	:	**Variation of a lease by a party to the lease**
Tribunal members	:	**Judge Robert Latham** **Mr Luis Jarero BSc FRICS**
Date and venue of hearing	:	**21 March 2018 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**11 April 2018**

DECISION

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(i) The Tribunal makes an Order pursuant to section 35 of the Landlord and Tenant Act 1987 to vary the lease for Flat 6, 90 Banner Street, Islington, London EC1Y 5JU, to substitute "12.09%" for "9.68%" in Paragraph 1 of the Sixth Schedule of the lease, as the proportion of the service charge payable by the lessee.

(ii) On the assurance given by the Applicant that it not seek to reopen the service charges payable between 1 January 2014 and 31 December 2015 which have been determined in LON/00AU/LSC/2016/0413, the Tribunal orders that the variation be backdated to 25 October 2005.

(iii) The Tribunal makes no order for the refund of tribunal fees or under section 20C of the Landlord and Tenant Act 1985.

Introduction

1. On 19 January 2018, 90 Banner Street RTM Company Limited ("the RTM Company") issued an application pursuant to Section 35 of the Landlord and Tenant Act 1987 ("the Act") to vary the lease in respect of Flat 6, 90 Banner Street, Islington, London EC1Y 5JU ("Flat 6"). The Applicant contends that there was an error when the lease was executed on 25 October 2005. Paragraph 1 of the Sixth Schedule of the lease wrongly specified "9.68%" as the proportion of the service charge payable by the lessee, whereas it should have been "12.09%". As a consequence, the contributions payable by the eight lessees only totalled 97.59%. Had the error not been made, the totals would have been 100%.

2. The Respondents are the eight lessees and Fairhold Holdings (2006) Appts Ltd, the freeholder.

3. On 29 January 2018, the Tribunal issued Directions. The Tribunal set the matter down for hearing on 21 March. The Applicant was directed to send a copy of the Application Bundle to any tenant who opposed the application by 2 March. On 14 March, the Applicant e-mailed Mr Fairburn (Flat 6) a copy of the Bundle and he received a hard copy next day. Mr Fairburn applied for an adjournment. He contended that the Bundle was incomplete and that he needed more time to prepare his case. On 16 March, the Tribunal refused this application, but permitted him to renew it at the hearing.

4. The relevant legal provisions are set out in the Appendix to this decision.

The Hearing

5. Mr Charles Sinclair, Counsel, instructed by Brady Solicitors, appeared on behalf of the Applicant, RTM Company. The freeholder, Fairhold Holdings (2006) Appts Ltd has not taken any positive steps in these proceedings.

6. Mr John Dodds appeared on behalf of the following: Mr Michael Lord (Flat 1); Ms Emma Poultney (Flat 2); Ms Valerie Dodds and Mr Alexander Dodds (Flat (3); Mr James Butters (Flat 4); Mr Raoul Ries (Flat 5); Mr

Riku Mattila (Flat 7) and Mr David Sclater (Flat 8). Mr Dodds is a retired Solicitor, but appears in a personal capacity. He is the father of Mr Alexander Dodds. All these tenants support the position adopted by the Applicant. Mr Lord (Flat 1); Ms and Mr Dodds (Flat 3); and Mr Mattila (Flat 7) have filed Statements of Case in support. Ms Poultney (Flat 2); Mr Butters (Flat 4); and Mr Sclater (Flat 8) have written to Tribunal adopting their position. Mr Ries (Flat 5) was present at the hearing and confirmed that he also adopted their case.

7. Mr Stephen Fairburn (Flat 6) is the only tenant who opposes the application. Mr Fairburn is a partner with C J Jones (Solicitors). He appeared in a personal capacity. The Tribunal is mindful of the fact that Mr Fairburn is the only tenant who will have to pay more as a result of this application. All the other parties will benefit as if Mr Fairburn pays more, there will be no shortfall falling on the service charge account or the RTM Company.

8. At the beginning of the hearing, Mr Fairburn renewed his application for an adjournment. He complained not only of the late service of the Bundle, but also that the original application had been flawed in that it had not provided the required particulars in Sections 5 and 8. We were satisfied that Mr Fairburn is now fully aware of the case that he has to answer and has had sufficient opportunity to prepare his case. We therefore refused the application. As the case proceeded, it became clear to us that the issues that we are required to determine are extremely straight forward.

9. There are four issues that we are required to determine:

   (i) Is the applicant estopped from bringing this application as a result of the previous decision of a First-tier Tribunal (FTT) in LON/00AU/LSC/2016/0413. Mr Fairburn relies upon both issue and cause of action estoppel.

   (ii) Should the Tribunal vary the lease for Flat 6 to substitute "12.09%" for "9.68%" in Paragraph 1 of the Sixth Schedule of the lease.

   (iii) If so, should the variation be backdated? The Applicant contends that it should be backdated to 25 October 2005, namely the date of the grant of the lease.

   (iv) If a variation is made, should any order be made providing for any party to pay compensation to Mr Fairburn in respect of any loss or disadvantage that he is likely to suffer as a result of the variation?

10. As the hearing proceeded, it became apparent that Mr Fairburn's main concern was the backdating of any variation. He accepted that if a variation was made for the future, it would not be appropriate to make any award of compensation. However, he insisted that the Tribunal was estopped from making any variation.

11. The parties have provided the Tribunal with two Bundles. References to the Applicant's Bundle will be prefixed by the letter "A___"; reference to Mr Fairburn's Bundle by the letter "R___".

The Background

12. There are eight flats at 90 Banner Street. The leases were granted between 29 April 2005 and 25 October 2005. The original landlord was William Hartley (UK) Limited. On 5 May 2016, Fairhold Holdings (2006) Appts Ltd was registered as acquiring the freehold interest (see A219). In February 2012, the Applicant acquired the Right to Manage the property. The RTM Company is owned equally by the eight lessees.

13. Mr Fairburn occupies Flat 6 pursuant to a lease dated 25 October 2005 (at A125). The original tenants were Mr Fairburn and his son, James. On 8 April 2014, the lease was transferred into Mr Fairburn's sole name.

14. The Applicant has provided the Tribunal with the leases to the eight flats. Mr Dodds has recently discovered amongst his papers the sales particulars dating back to 2005 (at A228-A236). On 28 February 2017, these were sent to Mr Fairburn. The sales particulars specify the square footage of each flat. On the basis of this information, it is apparent that the service charge apportionment was computed on the square footage of each flat and that an obvious drafting error was made in respect of Flat 6. However, that error is only apparent if a party has access to all this relevant information.

Flat	Date of Lease	Size (square footage)	Service Charge based on sf	Service Charge in lease	Proposed Change
Ground Floor					
Flat 1	29.4.2005	419 sq ft	9.28%	9.28%	9.28%
Flat 2	5.5.2005	507	11.23%	11.23%	11.23%
First Floor					
Flat 3	1.6.2005	431	9.54%	9.54%	9.54%
Flat 4	2.5.2005	540	11.96%	11.96%	11.96%
Second Floor					
Flat 5	13.10.2005	437	9.68%	9.68%	9.68%
Flat 6	25.10.2005	546	**12.09%**	**9.68%**	**12.09%**
Penthouse Flats					
Flat 7	10.6.2005	822	18.20%	18.20%	18.20%
Flat 8	14.10.2005	814	18.02%	18.02%	18.02%
	Total:	**4,516 sq ft**	**100%**	**97.59%**	**100%**

15. The Applicant makes the following additional points:

(i) The lease in respect of Flat 6 was the last to be granted. By this stage, the service charge contributions should have totalled 100%. In the event, they totalled 97.59%.

(ii) It is apparent that the error arose because the percentage for Flat 5, was wrongly replicated in the lease for Flat 6. Flat 6 is substantially larger and the lessee would be expected to make a higher contribution.

(iii) Flats 4 and 6 are very similar (but not identical) in their lay out. Flat 6 is marginally larger, but the service charge contribution in the lease is significantly lower.

16. Mr Fairburn was compelled to accept that an error was made in drafting the lease for Flat 6 and that there was no other explanation for the service charge contributions not adding up to 100%. The remarkable fact is that this error has only become apparent many years later. The reason seems to be that neither party had regard to the service charge contribution specified in the lease. The landlord demanded a service charge contribution of 12.09%, rather than 9.68%, and Mr Fairburn (and his son) readily paid the sums demanded.

17. Matters came to a head when the RTM Company assumed responsibility for the management of the property in February 2012. The service charges demanded increased. Mr Fairburn refused to pay these and arrears accrued. He stated that his concern was that the appropriate service charge funds were not transferred to the RTM Company. On 12 December 2015, the RTM Company issued proceedings in the County Court seeking a money judgment in the sum of £5,612.02. Mr Fairburn filed a Defence contending that the service charges were unreasonable. On 1 November 2015, the proceedings were transferred to the FTT.

18. It was only at this stage that Mr Fairburn argued that he was being charged 12.09% whereas the lease specified a contribution of 9.68%. The RTM Company sought to argue that the lease permitted the service charge contribution to be recalculated in the event that there is "an equitable re-planning of the layout of the Development". At some unspecified date before it assumed the management of the property, such an adjustment had been made.

19. On 7 June 2017, the application (LON/00AU/LSC/2016/0413) was heard by Judge Martynski (at R4). Mr Fairburn failed to attend as he had made an error as to the date of the hearing. The FTT rejected the RTM Company's argument that there had been any adjustment as permitted by the lease. There was no evidence that any requisite notice had been given. Even had it been given, the FTT was satisfied that there had been no relevant "equitable re-planning of the layout of the Development". The FTT therefore recomputed the service charges on the basis that the tenant was only obliged to pay 9.68%. This reduced his liability from £7,122.88 to £5,703.00 in respect of the service charges payable between 1 January 2014 and 31 December 2015.

20. On 3 July 2017, the Tribunal referred these proceedings back to the County Court. Mr Fairburn has now filed a Counterclaim. These proceedings have been adjourned pending the outcome of this application.

Our Determination

Issue 1: Is the Applicant estopped from bringing the current application?

21. Mr Fairburn relied on (i) cause of action estoppel and (ii) issue estoppel. He referred us to the decision of HHJ Walden-Smith in the Upper Tribunal ("UT") of *The Moorings (Bournemouth) Limited v McNeill* [2013] UKUT 0243 (LC) which sets out the well know principles of law at [29] – [32]. We are satisfied that his arguments are hopeless:

    (i) Cause of action estoppel arises where the cause of action in the later proceedings is identical to the earlier proceedings. The previous application did not relate to a variation of the lease under Part IV of the 1987 Act. It solely related to the payability and reasonableness of service charges under the Landlord and Tenant Act 1985.

    (ii) Issue estoppel arises where an issue has already been decided by a court of competent jurisdiction or where it should have been raised in the previous proceedings. The previous application was a transfer from the County Court. The Tribunal only had jurisdiction to determine the matters referred to it by the County Court.

22. It would be remarkable, and indeed inequitable, were the Tribunal to be precluded from determining the current application to vary the terms of the lease so that the landlord would be unable to collect 100% of the service charge expenditure. For some ten years, Mr Fairburn had been paying a service charge contribution of 12.09%, despite the express terms of the lease. The need for an application under Part IV of the 1987 Act only became apparent when a Tribunal had determined that the tenant was not contractually obliged to pay this sum.

    Issue 2: Should the Tribunal vary the lease for Flat 6?

23. Section 35(1) of the Act permits any party to a long lease to make an application to the tribunal for an order varying the lease in such manner as is specified in the application. Subsection 2 specifies the grounds on which any such application may be made. Sub-paragraph (f) relates to the computation of a service charge payable under the lease. Subsection (4) provides that a lease fails to make satisfactory provision with respect to the computation of a service charge if the aggregate of the sums payable by lessees would exceed or be less than the service charge expenditure.

24. This is a clear case where the service charge contributions do not amount to 100% of the expenditure. The contributions only total 97.59%. The reason for this shortfall is an obvious error in the drafting of the lease for Flat 6. If this error is corrected, the contributions will total 100%. This is a clear case for a variation.

    Issue 3: Should any variation be backdated and, if so, should any compensation be payable?

25. Section 38(1) of the Act provides that if the Tribunal is satisfied that a relevant ground for variation under section 35 is established, it may make an order varying the lease "in such manner as is specified in the order". Any such variation is subject to sub-sections (6) and (8) which raise the issues of substantial prejudice and the option of compensation in respect of any "loss or disadvantage" likely as a result of the variation.

26. In the UT decision of *Brickfield Properties Limited v Paul Botten* [2013] UKUT 133 (LC), HHJ Huskinson confirmed that a FTT is entitled to backdate any variation. The judge noted that the substantial prejudice contemplated on section 38(6) does not include "the removal of an unintended and undeserved windfall" (at [34]).

27. Mr Fairburn accepted that this was not a case in which compensation was appropriate. He raised a number of arguments. He initially suggested that there was no power to backdate the variation. He argued that the Applicant had not requested that the variation should be backdated in its application. Further, it would be wrong to re-litigate matters which were resolved in LON/00AU/LSC/2016/0413.

28. The Tribunal is satisfied that we have a discretion to backdate the variation. In exercising this discretion, we have regard to the following:

    (i) Between October 2005 and 31 December 2013, the then landlord demanded and the tenant paid service charges assessed on a basis that the tenant was obliged to pay 12.09%. It seems that both parties acted under a mutual misunderstanding of the figure specified in the lease.

    (ii) In LON/00AU/LSC/2016/0413, a FTT determined that the service charges payable between 1 January 2014 and 31 December 2015 should be computed on the basis of a figure of 9.68%. Neither party has sought to appeal that decision. These proceedings are still pending before the County Court.

    (iii) Since 1 January 2016, no service charges have been paid as the parties have awaited the decision of this Tribunal.

29. The Tribunal has been anxious to avoid further litigation between the parties. We therefore canvassed the following scenarios:

    (i) We asked Mr Fairburn whether, if we only backdated the variation to 1 January 2016, he would agree not to reopen the service charges which he had paid between October 2005 and December 2013. He agreed that he would not do so.

    (ii) We asked Mr Sinclair whether, if we backdated the variation to 25 October 2005, the Applicant would agree not to reopen the service charges payable between 1 January 2014 and 31 December 2015 which had been determined in LON/00AU/LSC/2016/0413. He asked for a short adjournment and then confirmed that he was instructed to give this assurance.

30. The parties were thus agreed on the outcome that the Tribunal sought to achieve. The issue is the order that we should make in order to achieve this. On the assurance given by the Applicant that it will not seek to reopen the service charges payable between 1 January 2014 and 31 December 2015 which had been determined in LON/00AU/LSC/2016/0413, we order that the variation be backdated to 25 October 2005. This is the date on which the drafting error was made.

Application under s.20C and refund of fees

31. The Applicant applies for a refund of the tribunal fees that it has paid in respect of the application. On the other hand, Mr Fairburn applies for an order under Section 20C of the Landlord and Tenant 1985 Act so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge. The Tribunal makes no order on either application. The effect of this is that it may be possible for the RTM Company to pass on the cost of these proceedings, including the application fee, through the service charge to be borne by all lessees according to their respective service charge contributions. We note that this is a RTM Company which is owned by the lessees. It has been in the interests of all parties to correct the error that was made in the drafting of the lease for Flat 6. It is a matter of regret that it has taken so long for this error to be corrected.

Judge Robert Latham
11 April 2016

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the

case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix: Sections 35 & 38 of the Landlord and Tenant Act 1987

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—

(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 3 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.

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) 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 with respect to the leases specified in the application under section 36,

the tribunal 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 with respect to the leases specified in the application, the tribunal 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 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 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 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 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 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 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 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 or disadvantage that the tribunal considers he is likely to suffer as a result of the variation.