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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AY/LVL/2018/0008**
Property	:	**Apartments 1-48, Crown Lane Gardens, London SW16 3HZ**
Applicant	:	**Crown Lane (Streatham) Residents Association Limited**
Representative	:	**Mr Jack Dillon of Counsel instructed by Debenham Ottaway Solicitors**
Respondents	:	**The Long Leaseholders of 1-48 Crown Gardens**
Representative	:	**In person**
Type of application	:	**To vary two or more leases by a majority**
Tribunal members	:	**Judge N Hawkes** **Mr M Mathews FRICS** **Mr O N Miller BSc**
Dates and venue	:	**16 November 2018**
Date of decision	:	**5 December 2018**

DECISION

Decision of the Tribunal

For the reasons given below, the Tribunal dismisses the applicant's application.

The application

1. This is the hearing of an application dated 21 August 2018 made by the applicant in relation to Flats 1-48, Crown Lane Gardens, London SW16 3HZ ("Crown Lane Gardens").

2. The applicant is the registered freehold proprietor of Crown Lane Gardens and the respondents are the lessees of Flats 1-48 Crown Lane Gardens.

3. This is an application made by the applicant to vary the respondents' leases ("the Leases") pursuant to section 37 of the Landlord and Tenant Act 1987 ("the 1987 Act").

4. The Tribunal has been informed that Crown Lane Gardens is a private residential square surrounded by four blocks of purpose built, ground and first floor flats, with garages to the rear.

5. The Tribunal has also been informed that, over time, the condition of Crown Lane Gardens has deteriorated; for example, the roof is not watertight, and that the applicant does not have the funds to remedy the present problems.

6. The application is made in order to enable the applicant to collect service charges in advance of expenditure and to enable the applicant to establish a reserve fund. The only active opposition to the application has been from Dr Burns, the lessee of Flat 7 Crown Lane Gardens.

The hearing

7. The applicant was represented by Mr Jack Dillon of Counsel, instructed by Debenhams Ottaway Solicitors, at the hearing. The Tribunal is grateful to Mr Dillon for his assistance. None of the respondents attended the hearing.

8. Dr Burns wrote to the Tribunal concerning the hearing by letter dated 16 November 2018 which was received prior to the commencement of the hearing. It is apparent from his letter that Dr Burns continues to oppose the applicant's application. The letter included a statement from Dr Burns that:

"...my presence would be taken as bestowing a credibility on the meeting which I should not wish it to"

9. The Tribunal was satisfied that Dr Burns was aware that the hearing was due to take place on 16 November 2018 and that he had made a conscious decision not to attend, notwithstanding his continuing opposition to the application.

10. In all the circumstances, the Tribunal considered that it was in the interests of justice to proceed with the hearing in Dr Burns' absence.

The relief sought

11. The applicant seeks to amend its application so as to provide as follows.

(1) In respect of Flats 1-24, 26-28, 30-33 and 35-48, the applicant applies for the First-tier Tribunal to make an order in the following terms:

The leases of Flats 1-24, 26-28, 30-33 and 35-48 are hereby each varied with effect from 1 April 2019 as follows:

i. Clause 2(14) is deleted; and

ii. The following wording is substituted:

(14) (i)In this sub clause the following definitions apply:

a. Service Charge Year: is the annual accounting period relating to the Service Costs beginning on 1 April in 2019 and each subsequent year during the Term provided that the Landlord may from time to time (but not more than once in any calendar year) change the date on which the annual accounting period starts and shall give written notice of that change to the Tenant as soon as reasonably practicable.

b. Service Charge: is one forty-eighth part of the Service Costs.

c. Service Costs: all monies expended or to be expended by the Landlord in complying with the covenants on the part of the Landlord contained in Clause 3(i)-(ii) of the Lease

d. Reserve Fund Contribution: one forty-eighth part of the reasonable cost to the Landlord of setting up and maintaining, in accordance with the principles of good estate management, a reserve/sinking fund for the provision of anticipated future expenditure in complying with the covenants aforesaid.

(ii) To pay to the Landlord the estimated Service Charge for each Service Charge Year (to be estimated by the Landlord by the preparation and service of a budget and demand for payment at least 28 days prior to the start of the Service Charge Year) and the Reserve Fund Contribution by two equal instalments in advance on the first day of the Service Charge Year and the day six months thereafter.

(iii) To pay the difference within 28 days of any demand if in any Service Charge Year the estimated Service Charge is less than the Service Charge actually expended. If the estimated Service Charge is more than the actual Service Charge in any Service Charge Year the Landlord shall return the difference to the Tenant on request or otherwise shall credit the difference towards the following instalment due from the Tenant in respect of the estimated Service Charge Year.

(iv) Save as expressly modified by this variation the terms of the Lease shall continue with the same effect as prior to this variation."

(2) In respect of the leases of Flats 25, 29 and 34 (copies of the relevant leases not currently being available) the parties to the said leases are directed to vary those leases so as to include the service charge provisions set out above by 31 January 2019.

The Tribunal's determination

12. Section 37 of the 1987 Act provides that:

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

13. By a letter dated 11 July 2018 to the respondents, the applicant explained its reasons for making this application (emphasis added):

"Shortly after HML took over the management of Crown Lane Gardens earlier this year, it was discovered that although the service charges have been billed in advance since the formation of the company in 1966, this was in fact not in accordance with the lease which stipulates that funds can only be collected once "expended" which make it an arrears lease. This applies to both the service charge costs and the insurance costs. There is also no provision under the terms of the lease for a reserve fund.

...

HML have only raised charges based on actual expenditure from the beginning of the financial year to date. You will no doubt notice that the amount which we have requested is only a fraction of the cost of running the development in the past which is because we are already

experiencing cash flow issues and can only attend to the very urgent items such as staff salaries and emergency works.

The current situation is untenable as the property has fallen into a substantial state of disrepair with the following areas requiring urgent attention.

1. The roof which is currently not watertight

2. The common parts electrics

3. Fire and health and safety compliance in the common areas

4. The paintwork both internally and externally with the externals being particularly bad

The state of disrepair is in breach of the lease obligations of the Management Company, of which all leaseholders are shareholders. That said, with no commercial landlord to forward fund works pending reimbursement by leaseholders, and no mechanism within the lease to fund the works, there is no way to raise the funds needed to undertake these works

...

We believe that the only way forward would be to make an application to the First Tier Tribunal to have the lease varied so that both service charges and insurance costs can be demanded in advance, based on a budget (once the accounts are prepared, adjustments can be made to bring charges in line with actual costs) and the second item would be for a provision to be made for a reserve fund so that we can collect funds towards major works which will need to be carried out.

We had hoped to get 100% agreement from all 48 shareholders at the EGM however, due to objection in advance to the meeting, no vote could be taken. Instead, we need 75% of leaseholders to support a lease variation. The current proposal, which the directors are in agreement with, as were those present at the meeting, is that a written vote is taken and will be sent to the First Tier Tribunal (FTT) as part of the application – I will also include a copy of this letter, along with other supporting information, including pictures of the development, etc. ..."

14. The Tribunal was taken through evidence relied upon by the applicant demonstrating that:

(i) a "written vote" was taken as stated in the letter of 11 July 2018;

(ii) the voting slip states "To apply to First Tier Tribunal for a lease variation";

(iii) four voters voted no;

(iv) thirty-nine voters (that is over 80%) voted yes.

15. The applicant states that the voting slips should be read together with its letter dated 11 July 2018. Accordingly, in consenting to the application to the Tribunal, the lessees were consenting to what is set out in the letter of 11 July 2018. The applicant places particular reliance upon the passage which has been highlighted in bold above and submits that the lease variations sought at the hearing fall within the consent that was given by the requisite majority prior to the issue of proceedings.

16. The Tribunal questioned why the respondents had not been provided with the wording of the proposed lease variations prior to voting. The applicant accepted that this would have been desirable but submitted that that there is no statutory requirement for the exact wording to be provided; no lessee had asked for further information before completing the voting slip; and that the amendment now sought at the hearing falls within the scope of the consent which was given.

17. The applicant seeks permission to amend its application so as to provide that it seeks a variation in the terms set out above. The draft variation set out at page 7 of the application dated 21 August 2018 is incomplete.

18. As he was bound to do, Mr Dillon referred the Tribunal to *Simon v St Mildreds Court Residents Association Limited [2015] UKUT 0508 (LC),* an authority which is binding on this Tribunal. Mr Dillon sought to distinguish *Simon v St Mildreds Court Residents Association* on the grounds that the facts of that case were different and, in particular, the timing of the consent was in issue.

19. However, at paragraph 31, HHJ Gerald gave the following general guidance:

"further, even in apparently straightforward cases (not that variations to leases are ever straightforward – vice *the first application), lessees should be given an opportunity of considering and if so consenting to the proposed wording."*

20. The Tribunal has some sympathy for the position of the applicant which was clearly and persuasively described by Mr Dillon. However, the wording of the letter of 11 July 2018 is in broad terms and the Tribunal is mindful of the guidance given by the Upper Tribunal in *Simon v St Mildred Court Residents Association Limited*, of the importance of the wording in a lease, and of the fact that none of the respondents have had sight of the wording which is currently proposed.

21. In all the circumstances and, in particular, having regard to the broad terms of the letter of 11 July 2018, the Tribunal is not satisfied that on the evidence that the respondents who completed voting slips following receipt of the letter dated 11 July 2018 have consented to the lease variations which are now sought.

22. Accordingly, the Tribunal dismisses the applicant's application.

Name: Judge Hawkes **Date:** 5 December 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).