FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HP/LVT/2020/0002
Property	:	Kenilworth Court, 3 Western Road, Poole, Dorset BH13 7BB
Applicant	:	Kenilworth Freehold Limited & 10 additional Applicants
Representative	:	Mr Rose
Respondent	:	Mehson Property Company Limited & 4 additional Respondents
Representative	:	Mr Mehson
Type of Application	:	Landlord & Tenant Act 1987 (Section 35- Variation of a lease by a party to the lease)
Tribunal Member(s)	:	Judge Paul Letman Mr William H Gater FRICS MCIArb
Date of Hearing	:	15 October 2020
Date of Decision	:	8 December 2020

DECISION

The tribunal determines that the leases of flats 1 to 12 should be varied by the addition at the end of existing clause 8(1) of the following words:

'save and except that the expression 'rateable proportion' shall in relation to the 12 garages belonging to Flats 1 to 12 inclusive of Kenilworth Court mean such proportion as the rateable value of the demised premises bears to the total of the rateable values of Flats 1 to 12 inclusive.'

(References to bundle documents are shown as [number])

The Application

1. This is an application dated (date) to vary the leases at Kenilworth Court, 3 Western Road, Canford Cliffs, Poole, Dorset BH13 7BB (Kenilworth Court). The application is brought by Kenilworth Freehold Limited ('KFL') and the lessees of flats 4, 5, 6, 9, 11, 12, 13, 14, 15 and 16. At the hearing KFL was represented by Mr Richard Rose, one of its directors and one of the joint owners of flat 12. In attendance also were Vanda Skoniezcna (flat 4) and Mr John Hudson (presently of flats 8 and 13).

2. The application names Mehson Property Company Limited ('Mehson') as the Respondent as well as 4 others, being the lessees of flats 1, 2, 7 and 10. At the time of the application Mehson owned flats 3 and 8, but it has since sold flat 8 to Mr Hudson the owner of flat 13 and one of the applicants. Only Mehson has actively resisted the application. It has been represented throughout and was at the hearing by Mr Mehson.

3. It should be recorded that the hearing took place remotely because of the current pandemic. Mr Rose attended by video on the HCTS system. Mr Mehson who is elderly was able to attend by telephone. Given that prior to the hearing it was suggested to the tribunal that Mr Mehson may have some difficulty following proceedings, great care was duly taken to ensure that this did not arise and there was no indication whatsoever at the hearing of any such problems.

4. On the contrary, Mr Mehson in fact proved himself to be a remarkably astute interlocutor and adept advocate throughout the course of the hearing. As indeed it must be said did Mr Rose who addressed us skilfully too on behalf of the Applicant. Certainly, in the result the tribunal was entirely satisfied that it was able to hear and follow the full extent of the submissions that each side desired to put before us.

Background

5. Kenilworth Court is a purpose-built block of flats dating back to the late 1950's. It originally comprised 12 flats over 3 floors with a separate block of 12 garages and surrounding areas. In or about 2010/2011 4 new flats (numbers

13 to 16) were developed by the addition of a further storey to the building. Following completion of these 4 new flats each was sold off on a long lease. In December 2013 KFL, which is owned by 12 of the 16 long leaseholders, acquired the freehold of Kenilworth Court from the developer of the new flats [302].

6. Under the original 12 leases each lessee was to contribute a rateable proportion of the service charge (see clause 1(c)(ii) [21]) as specified in each lease; although in practice it appears to have been the case that each paid 1/12th instead. The service charge under the original leases comprising the expenditure incurred by the lessor incidental to the performance of its covenants under clause 6. By that clause [25] the lessor covenants, amongst other things, to 'maintain, repair, redecorate and renew … the main structure and in particular the roofs chimneys .. etc.' of Kenilworth Court.

7. Under each of the 4 new leases as originally entered (rather than using rateable values) it was provided that each lessee would pay 1/16th of the annual service charge expenditure incurred in the performance of clause 6 except in relation to the costs (incurred under clause 6(4) of each lease [194]) of maintaining the lifts, in respect of which the lessees each specifically covenanted to pay an equal share divided by the number of flats entitled to use the lifts (see clause 1(c) of these new leases [189]).

8. In addition, by deeds of variation made in early 2013 [252 et seq] between the then freeholder and each of the lessees of flats 13 to 16, their leases were varied to provide, amongst other things, that for the avoidance of doubt the lessee should not be required to contribute towards the maintenance and repair of the 12 garages already constructed at Kenilworth Court. This was done by (clause 1.3 of the deeds of variation [254]) inserting into clause 1(c) of each of the new leases the words 'other than the main structure the roofs the chimney stacks gutters and rainwater pipes of the 12 existing garages constructed prior to the date hereof.'

The Previous FtT Decision

9. On 29 September 2019 the Applicant herein made a previous application to the tribunal, opposed by the same Respondent (albeit then owner of flats 3, 8 and 10) to vary the leases of the 16 flats pursuant to section 35 of the Landlord and Tenant Act 1987. The Applicant proposed, amongst other changes (none of which are material to the present application), that all the leases be varied to require all of the flats to pay 1/16th toward the service charges save in respect of the garages to which the 12 original flats would contribute equally (i.e. 1/12th).

10. The proposal also recognized that the costs of the provision of the lift would still be borne only by those who had access to and use of the same, that group comprising the 4 new flats and others who entered deeds varying their leases to allow them to use the lifts subject to payment of a dedicated lift service charge to meet the landlord's costs of maintenance and repair of the lift (see paragraph 22 of the decision [406]).

11. In relation to the then existing regime, it is noted that on questioning from the tribunal (see paragraphs 40 and 41 of the previous decision) Mr Rose confirmed that he was not aware why the top floor flats had been varied so they did not have to contribute towards the costs of the garage block save that at some point works would be required. Further, that on questioning as to why when the new flats were built the whole service charge structure had not be changed so that everyone paid 1/16th to everything including the garages 'he candidly stated he had not considered this.'

12. The Respondent contended that though 'the leases were a bit of a mess' the leases were not defective and the letting scheme worked satisfactorily. Alternatively, if the tribunal accepted that the leases were defective, it should apply rateable values as the basis of apportionment. To this end, extensive expert evidence was also received by the tribunal and argument heard for the purposes of determining notional rateable values for the 4 new flats (where none had previously existed).

13. In the event the LVT decision on the requested variation to the service charge provisions was as follows:

> '71. Turning now to the requested variation to the service charge provisions we are satisfied that the provisions for the recovery of the service charge as they exist currently are defective. Currently the old leases are required to pay a proportionate amount(s) calculated by reference to each flats rateable value as a proportion of the total of the rateable values for the 12 flats. The four new flats pay a fixed contribution of 1/16th for the building. The costs of the garages are only recoverable from the original 12 flats and the costs of the lift only by those having access to the same. Clearly these arrangements are defective. This tribunal is satisfied that Section 35(4) is engaged.
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> 72. The Applicants contend that each flat should pay 1/16th of the costs of the Property excluding costs relating to the garages and the lifts. Mr Rose contends this gives equality. The Respondents suggest that there is no defect and Rateable Values should be adopted.
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> 73. The tribunal considered carefully the evidence we heard. We were not persuaded that a change to 1/16th created equality. Plainly there are different amounts and no doubt different schedules for different aspects of the service charge. This seems to be because of the various variations relating to the garages and also due to the somewhat strange nature of the lifts and their use.
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> 74. On balance we prefer the suggestion that the leases of the top floor flats should be varied. The original twelve already have a mechanism providing that each should pay according to its rateable value. We do not intend to interfere with that and so the original 12 flats should have their proportion calculated in accordance with the rateable values set out at A18 of the bundle. We highlight that these flats do not all have the same proportions but the service charges should be calculated by reference to these amounts.' The tribunal then proceeded to determine

new rateable values for the new flats, based upon the hypothetical rental values in 1973. Lastly, the tribunal considered and dismissed any claim for compensation, essentially because of a lack of evidence of loss.

14. Ultimately (at paragraph 84), in so far as material the tribunal ordered that the new leases of flats 13-16 be varied so that the words of clause 1(b) (insurance) and clause 1(c) (annual service charge) [189] were altered from 'one sixteenth' to 'a rateable proportion being such proportion as the rateable value of the demised premises bears to the rateable value of the whole of Kenilworth Court…'. The tribunal left untouched in these leases the exclusion of the garages and 'equal share divided' provision in relation those legally entitled to use the lift. For completeness the tribunal annexed to its decision a schedule headed 'Impact FTT Decision' which shows the rateable value of each of the 16 flats and its consequent proportion (as a percentage and totalling to 100%).

The Law

15. The present application was made under Part IV of the Landlord and Tenant Act 1987 ('the 1987 Act') and specifically Section 35 thereof which is annexed to this decision at Annex A.

The Parties' Submissions

16. Before this tribunal the Applicants accepted that 'Kenilworth Court' as defined under the leases of all flats (1 through 16) should properly be treated as including the present building comprising 16 rather than the 12 flats and the 12 original garages together presumably with the lift now forming a part of it. Further, that this is the case was also positively asserted by the Respondent and is accordingly common ground between the parties.

17. On this basis the Applicant's case is that the leases are defective (as altered by the previous tribunal) because there is inevitably a shortfall in recovery of any maintenance or repair costs of the existing garages; the introduction of rateable values for flats 13-16 coupled with the continuing exclusion of any contribution to such costs by those flats, results in the recovery of only 76.52% of garage repair costs. Mr Rose submits that this was never appreciated by the parties or the previous tribunal, but is an unintended consequence of that decision.

18. The issue, however, has only arisen now because KFL is proposing to rebuild the garages at a cost of some £240,000 and is concerned at the prospect of being unable to recover the full cost of theses works. KFL therefore request the tribunal to vary the original 12 leases by adding the following paragraph in place of clause 8(i):

[new clause 8(i)(a)]
'The expression 'rateable proportion' shall in relation to the 12 garages belonging to Flats 1 to 12 inclusive of Kenilworth Court mean the proportion

as the rateable value of the demised premises hears to the whole of the rateable values of Flats 1 to 12 inclusive.'

19. Secondly, the applicants seek to add effectively new clause 8(i)(b), as follows:

'The expression 'rateable proportion' shall in relation to the remainder of Kenilworth Court (excepting any liability to contribute to the repair and maintenance of the lifts in Kenilworth Court under the leases of Flats 13, 14, 15 and 16 or under separate Deeds of Variation entered into by any lessee in relation to the lifts) mean such proportion as the rateable value of the demised premises hears to the whole of Kenilworth Court.'

20. The Respondent objects to the proposed variation to the original 12 leases. Firstly, the Respondent contends that the previous tribunal has refused the variation already so that the matter is res judicata and the Applicant estopped thereby from pursuing this application. Had it wanted to achieve the present change it is argued that it should have appealed the earlier decision.

21. Indeed, the Respondent contends that the estoppel goes further, in that County Court proceedings for the recovery of service charges were outstanding at the time of the previous application and adjourned pending its determination. Following the decision of the previous tribunal those proceedings were then settled on the basis of the new rateable values.

22. Further, the Respondent maintains that the shortfall of which the Applicant complains is a function of the deeds of variation entered between the former freeholder and each of the lessees of the top floor flats and the introduction of the provision that they were not to contribute to the costs of the existing garages. In so far as this arrangement results in under recovery, this was a shortfall for which it is said the freeholder accepted liability and which should not now be visited upon the owners of flats 1 to 12.

23. Turning to compensation, Mr Mehson acknowledged that as he was no longer the owner of flat 8, he could not pursue the loss claimed in the Respondent's case in the sum o £4,613.34 based upon the difference between what it would have paid towards the projected garage rebuilding costs based on the percentages fixed by the previous tribunal and the cost if shared between just flats 1 to 12 calculated in accordance with the proposed variation. Further, Mr Mehson admitted that in so far as he could recall the present dispute and this outstanding application had not made any difference to the sale price that he had agreed.

24. Nonetheless, he did pursue an equivalent claim in respect of Flat 3, based upon the £240,000 (albeit this figure is disputed in other proceedings between KFL and Mr Mehson under section 27A of the 1985 Act) and calculated as follows:

Flat 3
Rateable value £302

12 Flats contributing:
302/3502 x £240,000 = cost payable £20,696.74

16 Flats contributing:
302/4580 x £240,000 = cost payable £15,825.32

Difference = £4,871.42

25.Suffice to say the Applicant disputed the claim for compensation, relying in particular upon the absence of any evidence of loss on the sale of flat 8.

Discussion

26. There was no dispute before the tribunal as to the principles applicable in relation to res judicata or issue estoppel, as set out in the current (4th Edition) of Spencer Bower and Handley, Res Judicata (see in particular paragraph 8.23 therein). In essence, before the result of earlier proceedings before a judicial tribunal can give rise to an issue estoppel, there obviously must be "a decision" on the point that is later in issue. Further, the matter which was decided on the earlier occasion must be the identical issue to that which is involved in the subsequent litigation.

27. Yet further, the decision on a point in the earlier proceedings must have been necessary to the result of the first proceedings before it will give rise to an issue estoppel. Not every finding made in the earlier proceedings will create such an estoppel (see the paradigm statement of principle by Diplock LJ in *Thoday v Thoday* [1964] P 181 at 198).

28. An examination of the decision of the previous tribunal does not so it appears to this tribunal show that the variation presently sought or any issues arising therefrom were considered let alone decided by the previous tribunal. Whilst paragraph 71 of the decision refers to the fact the garage costs are recoverable from only the original 12 and the lift costs from those who enjoyed their use, it is plain that it was no part of either sides argument that any change should be made to those exclusions.

29. Moreover, it is absolutely clear from paragraphs 73 and 74 and the order made that the only change the tribunal made was to alter the 1/16ths to rateable values to combine with those for the original flats to ensure 100% recovery. The tribunal was not asked to and certainly did not decide to change the exclusions in relation to the garage or in relation to the lifts. Indeed, in their discussion on compensation, they specifically refer to the fact the exclusion of the lift costs will continue.

30. In our judgement, therefore, it is clear that the issue we are being asked to consider, far from being something that the previous tribunal was asked to or which it did decide is something they absolutely did not decide. Rather the effect of the exclusions where the proportionate contributions were being rebased by the decision the FtT did take, was plainly not recognized by any

party or the tribunal at the time but appears instead simply to be a wholly unintended consequence of the decision that was taken.

31. For these reasons we do not accept that any res judicata or other species of estoppel arises in respect of the current application. Further, we do not accept the argument that the exclusion of liability for the lifts was some side agreement under which the freeholder was accepting a liability for a shortfall. At the time the variations were agreed, there was no shortfall before or after. The original 12 flats would have defrayed the entire costs of maintenance and repair of the garages under their leases. As stated above, the shortfall only arose as a collateral and unintended consequence of recalibrating the rateable values.

32. Looking therefore at the current provisions of the leases, untrammelled as it were by the previous decision, we have no doubt that they are defective in that in the case of garage expenditure there is inevitably under recovery, only 12/16 rateable value proportions being recovered. In our view therefore it is right that the variation proposed in terms of the new sub-paragraph 8(i)(a) should be made.

33. As regards the second allied variation, the corollary of the introduction of sub-paragraph 8(i)(a) above is that all other service charge costs should remain as they are under the current leases so as to be shared according rateable values and the percentages fixed by the previous tribunal, subject always to the existing terms in respect of the garages and lifts. Nothing more is required to fix as it were the defect, in terms of a shortfall, which is the basis of the present application.

34. Notably, however, the words in parenthesis in the proposed sub-clause 8(i)(b) go beyond this requirement. They are patently included 'for the avoidance of doubt', to ensure that the original 12 lessees who have not entered deeds of variation regarding the lift (as entered by flats 4, 5, 6 and 12) should not be required to contribute to those costs. There appears though to be no issue or dispute that on a proper interpretation of the leases as they are that there is no such liability. The very existence of the deeds of variation confirms that to be the accepted position.

35. In these circumstances the tribunal do not consider there is any defect, jurisdiction or warrant for the inclusion of these words and it is only the exception under 8(i)(a) for which provision needs to be made.

Compensation

36. Again, there was no dispute before the tribunal as to the principles applicable in this regard either. Reference was made to *Cleary v Lakeside* [2015] UKUT 607 (LC) and the three-stage process promulgated in *Keeney Construction v Brooke* (unreported), requiring the tribunal firstly to identify if there is any loss, to decide whether in the exercise of its discretion to make any award and if so to quantify the loss. Further, it was common ground and is accepted by this tribunal that a loss or disadvantage may not only be measured in terms of the diminution in value of a party's interest in their

property but simply in terms of loss of the benefit of their bargain and an increase in service charge following a variation.

37. In this case there is no evidence before the tribunal of any capital loss, but Mr Mehson instead relies on the loss of an advantageous apportionment of service charge. Plainly, at the present time it can be seen that the proposed variation will increase the contribution he would have to make to maintenance and repair of the existing garages. An obvious difficulty though in accepting Mr Mehson's figures is that in other proceedings under section 27A (current in this tribunal) he is contesting the proposal to rebuild the garages at £240,000 or anything approaching that cost.

38. Further, from a valuation perspective it is in our view artificial to focus on the fact that these costs are proposed now, with in all likelihood no similar costs arising for decades to come. In these circumstances the proposed cost and consequent increase in service charge produced by the variation even if correct should it seems to this tribunal be amortised over the useful life of the works. Some account also should in our view be taken of the wider benefit accruing from the fact of the variation and its effect in establishing a workable regime for the repair of the garages.

39. Moreover, the claim for compensation can in our view be seen as wholly opportunistic, when it is recognised that at the time Mehson purchased (in or about March 2016) it would have been liable for its rateable proportion of the full costs of maintenance and repair works to the garages and the current application seeks only to restore that position, inadvertently removed. In the circumstances, even if a loss could be identified and we are not satisfied that it can, the tribunal does not consider it appropriate in any event to make an award of compensation and as a matter of discretion declines to do so.

Decision

40. For the reasons stated above the tribunal determines that the leases of flats 1 to 12 should be varied by the addition of the following words clause 8(1) by the following:

'save and except that the expression 'rateable proportion' shall in relation to the 12 garages belonging to Flats 1 to 12 inclusive of Kenilworth Court mean such proportion as the rateable value of the demised premises bears to the total of the rateable values of Flats 1 to 12 inclusive.'

8 December 2020

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 RPSouthern@justice.gov.uk. 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.

2. 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.

3. 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 appeal is seeking.