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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/23UB/LVT/2013/0009**
Property	:	**110 Evesham Road, Cheltenham, Gloucestershire, GL52 2AN**
Applicant	:	**J Swanborough (Flat 1), V Collins (Flat 2), A Burgess (Flat 3), C Barrow (Flat 4)**
Respondent Road	:	**J Thacker & M England (Flat 5) & Evesham Management Company Limited (Freeholder)**
Type of Application	:	**Lease Variation under section 37 of the Landlord and Tenant Act 1987**
Tribunal Members	:	**Judge Paul Letman**
Date and venue of Hearing	:	**On Paper**
Date of Decision	:	**08 November 2013**

DECISION

Decision

1. The present application under section 37 of the 1987 Act is refused. The tribunal's reasons are set out below. No application is made under section 20C of the 1985 Act and accordingly no order is made in that regard.

Application

2. By application (in form Leasehold 4 Application for variation of a lease or leases (07.13)) dated 25 July 2013 and signed by Mr Alan Burgess, the Applicants John Swanborough, Veronica Collins, Mr Burgess and Carl Barrow, respectively the lessees of Flats 1, 2, 3 and 4, 110 Evesham Road, Cheltenham, Gloucestershire, GL52 2AN applied to vary their leases and that of Flat 5, 110 Evesham Road pursuant to section 37 of the Landlord and Tenant Act 1987 so as to increase the proportion of the service charge payable by Flat 5 from 1/6th to 2/7^{ths}.

3. The Respondents to the application are John Henry Thacker and Mary Catherine England the current lessees of Flat 5 who oppose the variation proposed by the Applicants, and Evesham Road Management Company Limited, the landlord and lessees' management company, the current directors of which are Mr Burgess and Ms Collins (her home address is given as the postal address for the company).

Directions

4. On 31 July 2013 directions were for the conduct of the application. Those directions gave notice under Rule 31 of the new Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 that the tribunal proposed to determine the application on paper, including provision that the parties could object. Both parties have subsequently confirmed their consent to a paper determination.

5. The said directions also provided, amongst other things, for the service of statements of case with supporting documents, at (6) that if the Respondents consented to the application they should write to the tribunal within 21 days (of the date of the directions order) confirming consent, and at (7) an invitation to the Respondents to the effect that if they wished to make a claim for compensation under section 38(10) of the 1987 Act they should send a full statement setting out the amount claimed and the reasons in support of such a claim.

6. Pursuant to the said directions under cover letter dated 20 August 2013 the Applicants provided a statement of case with copy documents in support, under

cover letter dated 05 September 2013 John Thacker sent a statement of case also appending relevant documents, and subsequently by letter dated 20 September 2013 the Applicants provided a brief response to Mr Thacker's objection.

7. Unsurprisingly, no letter was received from the lessees of Flat 5 consenting to the application, but it is also the case that nothing in writing has been received by the tribunal from the freeholder management company. Notably, also Mr Thacker has not made any claim for compensation pursuant to direction (7) (above).

The Property

8. The Property is one half of an elegant early Victorian villa, built I am told about 1840, comprising white painted semi-detached premises numbered 108 and 110, each with its own portico entrance, and situated on a large plot with gravelled carriage driveway (the use of which is now apparently separated between 108 and 110).

9. The original semi-detached premises numbered 110 were apparently divided at some stage into 3 flats. Then in about 1983 the premises were acquired by the Clark family and converted into 5 flats. Thus the lower ground floor was split to form flats 1 and 2, and the first floor was split to form flats 4 and flat 5, leaving flat 3 as most of the ground floor together with a room on the lower ground floor and the stairway leading to it and the land and gardens, presumably, to the rear of the building.

The Leases

10. All of the flats leases grant terms of 999 from 24 June 1987 subject to the covenants therein. The leases were granted as follows:
    (1) The lease of flat 1 was made on 28 June 1991 between Mr Stephen John Clark as lessor and Mrs C M Clark as tenant in consideration of a premium of £35,000.
    (2) The lease of flat 2 was made on 07 December 1990 between Mr S J Clark as lessor and one R W Gillen as tenant in consideration of a premium of £40,000.
    (3) The lease of flat 3 was made on 11 November 1987 between Evelyn Jeane Clark and S J Clark as lessor and S J Clark alone as the tenant in consideration of a premium of £60,000.
    (4) The lease of flat 4 was made on 04 June 1993 between S J Clark as lessor and Christopher Ronald Tarren as tenant in consideration of a premium of £37,500.
    (5) The lease of flat 5 was also made on 04 June 1993 between S J Clark as lessor and himself and Cynthia Margaret Clark Christopher Ronald Tarren as tenant in consideration of a premium of £37,500.

The interests under the said leases are now vested as referred to above (at paragraphs 2 and 3).

11. The leases are in common form with all the lessees covenanting to pay an initial yearly rent of £25. The leases also impose like repairing and service charge obligations upon the lessor and under the Third Schedule the lessor's expenses and outgoings and other heads of expenditure in respect of which the tenant is to pay a part by way of service charge are the same. The Third Schedule covers the costs of maintaining and repairing the structure of the Building including roofs and foundations external and internal walls, sewers and drains, boundary walls and fences, driveways paths and any other part of the property used in common with other occupiers of the Building.

12. However, where the leases differ is that the lessees of flats 1, 2, 4 and 5 covenant under clause 3 of their leases, to pay 'one equal sixth part of the expense and outgoings properly incurred by the lessor in the repair maintenance renewal and insurance of the Building and the provision of services therein and the other heads of expenditure as the same are set out in the Third Schedule..', whilst the lessee of flat 3 covenants in similar terms to pay one third of all such expenses and outgoings. It is these proportions that are the subject of the present application.

Jurisdiction

13. The present application is made under section 37 of the Landlord and Tenant Act 1987 ('the 1987 Act'), this provides as follows:

(1) Subject to the following provisions of this section, an application may be made to [the first tier tribunal (property chamber)] 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 the 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;...

(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...

(b) the landlord shall also constitute one of the parties concerned.

14. In so far as is presently material section 38 'Orders..varying leases' of the 1987 Act provides under sub-sections (1) and (2) for variation applications under sections 35 and 36, and then in relation to section 37 as follows:

(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 section 36 or such other variation as the tribunal thinks fit.
(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.
(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, 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.

15. In summary, therefore, the tribunal must be satisfied that the threshold conditions under section 37(3) are met, that if any respondent is likely to be substantially prejudiced he can be adequately compensated by an award under 38(10) and that it would not be unreasonable in the circumstances for the variation sought by the application to be effected.

16. Notably, it is clear from section 38(4), that the tribunal's powers under section 37 are limited to ordering the variation sought by the application. Although the terms of subsection (3), that the variation is to be as specified in the order of the

tribunal, may afford the tribunal a residual power to make minor changes to the order applied for.

17. Further, under section 38(10), given the power to order a party to any varied lease to pay compensation to any other person, in my view it is open to the tribunal to order, if appropriate, that the Applicants pay compensation to the Respondents.

The Parties' Submissions

18. The Applicants seek to vary their own leases and the lease of flat 5 with the object of achieving what they submit to be a more equitable apportionment of the service charge costs amongst all the lessees, by varying the current proportions (detailed at paragraph 12 above), so that flats 1, 2 and 4 will pay 1/7th of the costs and flats 3 and 5 will pay 2/7ths of the costs. The Applicants' essential argument for such an alteration is that they allege flats 3 and 5 are considerably larger than flats 1, 2 and 4 and that it would be normal to apportion the service charge based on flat floor areas.

19. In support of varying the service charge proportions the Applicants suggest that the 1/6th proportion payable under the lease of flat 5 was a concession to the Clark family arising out of their original ownership, that this concession was withdrawn in 2003 when it is alleged flat 5 was increased in size by the incorporation of the loft space and that thereafter up until flat 5 was sold to the current owners the lessees paid their service charges on the basis of a 2/6ths proportion, with all other lessees paying the proportion defined in their respective leases.

20. In this regard the Applicants refer to and rely upon the minutes of a management committee meeting dated 20 May 2003, where it is recorded that 'the special concessions made to Mrs Clark, Flat 5, were revoked and the full amount of maintenance reinstated together with the 20% increase making flat 5 to pay £60.00 per month as from 1st July.' The increased contribution of £60pcm in 2003 for flat 5 is indeed substantiated by a receipt dated 11 November 2003 to the then lessee, a Mr Bell.

21. In addition the Applicants produce copy bank statements for the management company current account dating back to March 2004, which (as annotated) show the tenants of flats 3 and 5 paying £60pcm whilst the lessees of flats 1, 2 and 4 were paying £30pcm, and then from May 2006 contributions of £120 and £60 respectively, apparently following a management committee decision at that time to increase the charges.

22. From October 2008 until the present, however, the current owners have insisted on paying only the £60pcm, in accordance with the 1/6th proportion provided under the terms of their lease. The management company has written off the so-called shortfall of £1620; albeit the collection of this additional 1/6th would seemingly have resulted in the collection of more than 100% of the service charge costs.

23. The Applicants assert that the payment of only 1/6th for flat 5 is unfair because of the increased size of flat 5. Further, that payment of an increased proportion in relation to flat 5 was plainly intended by the parties when the loft space was incorporated in 2003, as demonstrated by the payment history.

24. Taking into account the added floor area of the loft, which they estimate to be 30 square metres, the Applicants say that the approximate floor area of each flat is as follows:

Flat 1	-	55 square metres
Flat 2	-	63 square metres
Flat 3	-	99 square metres
Flat 4	-	57 square metres
Flat 5	-	93 square metres

Based on these figures the Applicants now require that the leases of all the flats be varied as referred to above.

25. The respondent owners of flat 5 oppose the variation proposed in principle, or alternatively, if any change were to be made, assert that the service charge contribution of flat 5 should be increased by one third, producing proportions of 3/19ths for flats 1, 2 and 4, 6/19ths for flat 3, and 4/19ths for flat 5.

26. Thus Mr Thacker argues that it would be wrong in principle to alter his lease because he purchased the same in good faith on the basis of the express terms set out therein, which provide for payment of 1/6th of the service charge expenses and outgoings. He contends that certainty is the 'bed-rock of Landlord and Tenant relationships' and that this would be undermined if leases could be varied at will, absent the existence of some special reason for the change.

27. In this case he maintains that there is no such special reason, and the Applicants are mistaken in relying upon an alleged increase in the floor area of flat 5 after the date of grant of the lease. In this regard Mr Thacker refers to clause 1 of his lease where in a manuscript amendment flat 5 is described as 'on the first and second floors' and to the plan attached to the lease that appears (although the plan is not coloured) to show both the first floor and loft space as part and parcel of the demise. Mr Thacker also produces an official copy entry as at 26 November 2008 for flat 5, with registered title number GR170841, where against the

property register dated 27 February 1995 it is noted that the flat comprises premises on both the first and second floors, indicating the loft space was already incorporated.

28. Further, to prove that the manuscript amendments and plan were not made subsequent to the grant, Mr Thacker produces copy the original lease duly stamped in 1995 and filed for the purposes of registration, in which clause 1 is already annotated and initialled, and the plan showing both the first and loft floors is included and countersigned by Mr Clark. Finally, at exhibit 3 of his statement of case, Mr Thacker produces copy pages 1 and 2 of the original counterpart lease, again stamped in 1995, with the like manuscript amendment to clause 1 describing the flat as on the first and second floors.

29. As to the payment of £120pcm by his predecessor in title, Mr Thacker comments that the bank statements do not show why he was paying this sum. Moreover, that whatever the nature of the arrangement, it was personal and not binding on him as successor in title.

30. Subject to these points, Mr Thacker objects to the level of payment requested by the Applicants. He points out that the eaves of the roof and the stair well up into the loft area reduces the useable floor area to approximately 20 square metres. It is said that Mr Burgess, one the Applicants, has accepted as much in email correspondence (though this is not produced). On this basis Mr Thacker states that, if the leases are to be varied, the service charge contribution of flat 5 should be increased by one third, so that the proportions would become 3/19^{ths} for flats 1, 2 and 4, 6/19^{ths} for flat 3 and 4/19^{ths} for flat 5.

Consent

31. As referred to above an application under section 37 of the 1987 Act where there are as here less than 9 flats, must have the consent of all, or all bar one, of the relevant parties, which includes the lessees and the landlord. The consent of the lessees of all flats save flat 5 is well documented before the tribunal (each tenant has signed a separate email confirming their consent). No written consent has been provided from Evesham Road Management Company Limited, pursuant to the directions made or at all.

32. Given, however, that the directors of the management company Mr Burgess and Ms Collins are also lessees and Applicants, it seems reasonable to infer their consent to the application both in their capacities as flat owners and as directors of the respondent company. Indeed on the basis of that inference the tribunal is duly satisfied that the management company does consent to the application, and that accordingly the necessary majority exists in support.

Determination

33. As to the variation applied for, the reliance placed by the Applicants on the incorporation of the loft space in 2003 does not appear to be correct. The documentation produced by Mr Thacker establishes clearly it seems to me that the second floor loft space was part of the demise of flat 5 in 1995 when the leasehold title was registered and in all likelihood, therefore, in 1993 at the date of grant of the lease, and in so far as necessary I so find.

34. The reference to the concession granted to the last owner from the Clark family and increase in service charge contribution in 2003, in my view, also does not assist the Applicants. It is by no means clear what concession is being referred to, or indeed from what and on what basis the service charge contribution for flat 5 was increased to £60pcm. Moreover, absent any formal variation (as now sought), in my view Mr Thacker is correct as a matter of law to say that if the sums paid thereafter did reflect an increased contribution agreed with his predecessors in title, that was no more than a personal arrangement which is not binding upon him as successor in title.

35. However, rejecting these arguments is not the end of the matter. An application under section 37 for a given variation is based on the consent of what might be described as the overwhelming majority, and the statute effectively contemplates that it will be granted unless (as referred to above) there is substantial prejudice to a respondent that cannot be compensated by a suitable payment (per section 38(6)(a)), or there is some other reason why the proposed variation is unreasonable (section 38(6)(b) refers). Certainty may be a guiding principle of contract law, but as regards long residential leases they are subject to this and other statutory intervention. It is necessary, therefore, for the tribunal to consider these matters, to determine whether the proposed variation should be ordered or refused.

36. As regards prejudice, the question is whether the proposed increase in the service charge proportion payable is likely substantially to prejudice the lessee of flat 5. In terms of level of contribution the proposed increase is from 17% to 28% of the relevant expense and outgoings. In monetary terms at current service charge levels this would amount to an additional payment of £240 per annum. Whilst by no means insignificant, such an increase does not I think constitute prejudice of sufficient magnitude to be treated as substantial. In capital terms also it seems unlikely such an increase would be material, and I note indeed there is no allegation in the statements of case that such an increase would have any material effect on the market value of the lease of flat 5.

37. Further, in this regard I note that the owners of flat 5 do not assert that they are likely to be substantially prejudiced, as one would have expected had that been the case. Indeed neither have they made any application for compensation under

section 38(10), as invited under direction (7). Although, Mr Thacker's primary case might be expected to be that any such award would not be adequate compensation, nonetheless, if any quantifiable prejudice had been suffered it would be surprising for no alternative compensation claim to be made. In the circumstances I conclude that the proposed variation is not such as is likely substantially to prejudice the lessees of flat 5.

38. Turning to section 38(6)(b), the question to be answered is whether or not there is any other reason why it would not be reasonable in the circumstances for the proposed variation to be ordered. In this regard it seems to me that it is necessary to consider whether the apportionment advocated by the Applicants is itself fair and achieves the stated object of a more equitable apportionment of the service charge. Mr Thacker maintains that it would not be, because the habitable space afforded by the loft space is not 30 square metres but a substantially smaller 20 square metres.

39. In the absence of an agreed survey of the sizes of the flats and in particular flat 5, it seems to me that Mr Thacker is more likely to be correct. His evidence of the area takes into account the physical layout of the loft area as shown by the lease plan, whereas it is not apparent that this has been factored into the Applicants' estimate of area. As an owner of flat 5 Mr Thacker is also it seems to me better placed to provide such information. Further, if the Applicants had any better information as to the loft area or disagreed with the assertion that Mr Burgess had accepted the lower figure, they would no doubt have produced the contrary evidence when replying on 20 September 2013. In the circumstances, I accept Mr Thacker's evidence that the useful area is only 20 square metres.

40. The consequence of the above finding in my view is that the variation proposed by the Applicants is neither correct nor fair. Assuming for present purposes that a variation based on floor areas is the appropriate measure, it seems to me that it should fairly be based at least approximately on useful habitable area. Thus as Mr Thacker has calculated the appropriate proportions would I think be in 19^{ths} as referred to above (according to the ratio 60:60:120:60:80 for flats 1 to 5 respectively). The proposed variation would not, therefore, in my view achieve even its own object of equitably apportioning the service charge on the basis of flat floor areas. For these reasons, I do not think it would be reasonable in the circumstances for the proposed variation to be effected.

41. The obvious question that then arises is whether the tribunal should make an order adopting Mr Thacker's proportions, but as a preliminary to that whether I actually have jurisdiction and the power to make such an order. Given the limitation on the tribunal's powers under section 38 (referred to at paragraph 16 above) it seems clear that I do not have the necessary power. Mr Thacker's alternative proposals are not a minor departure from the variation sought by the application, but a wholly different apportionment based upon different

measurements. I have no jurisdiction, therefore, to order such an alternative variation, either pursuant to any residual power or otherwise.

42. Unless, therefore, the proportions proposed by Mr Thacker can be implemented by agreement between the parties, a further application would need to be made for a variation in such terms. I say no more though about the merits of such an application, given that it would very likely be heard before a differently constituted tribunal, with different evidence and submissions.

Conclusions

43. For the reasons set out above the present application to vary is refused. In summary, whilst it does not appear to me that the owners of flat 5 would be substantially prejudiced by the proposed variation, on the basis of the evidence before me I find that the Applicants' proportions are inappropriate and would not achieve the stated object of an equitable apportionment of the service charge expenses and outgoings.

44. Further, given the tribunal's limited statutory powers on an application to vary under section 37, the tribunal does not have jurisdiction to order the alternative proportions proposed by the respondent owners of flat 5. In the absence of agreement between the parties to implement those proportions, therefore, it would be necessary for a further application to be made to vary the leases in those terms.

45. The tribunal decides accordingly.

Appeal

46. Pursuant to rule 36(2)(c) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169) ('the Rules') the parties are duly notified that they have a right of appeal against the decision herein. That right of appeal may be exercised by first making a written application to this tribunal for permission to appeal under rule 52 of the Rules. An application for permission to appeal must be sent or delivered to the tribunal so that it is received **within 28 days** of the latest of the dates that the tribunal sends to the person making the application (a) written reasons for the decision or (b) notification of amended reasons for, correction of, the decision following a review (under rule 55) or (c) notification that an application for the decision to be set aside (under rule 51) has been unsuccessful.

Dated 08 November 2013 Judge Paul Letman