

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/00HN/LVL/2007/0002

REASONS

Application : Section 35 of the Landlord and Tenant Act 1987 as amended (“the 1987 Act”) and section 20C of the Landlord and Tenant Act 1985 as amended (“the 1985 Act”)

Applicant/Leaseholder : Miss Susan Dack, Flat B3

Respondent/Landlord : Maximillian De Kment

Building : 453 Christchurch Road, Boscombe, Bournemouth, BH1 4AD

Flats : The residential Flats in the Building, including the Premises

Premises : Flat B3

Date of Application : 21 February 2007

Date of First Directions Hearing : 3 April 2007

Date of Second Directions Hearing : 4 July 2007

Date of Third Directions Hearing : 19 December 2007

Date of Fourth Directions Hearing : 4 April 2008

Date of Fifth Directions Hearing : 21 October 2008

Date of Sixth Directions Hearing : 6 February 2009

Date of Seventh Directions Hearing : 15 May 2009

Date of final hearing : 5 June 2009

Venue : Mezzanine Suite, De Vere Royal Bath Hotel, Bath Road, Bournemouth, BH1 2EW

Appearances for Applicant/Leaseholder : Miss Dack

Also in attendance : Miss R Simmonds

Appearances for Respondent/Landlord : Mr De Kment

Members of the Tribunal : Mr P R Boardman JP MA LLB (Chairman), Mr M Ayres FRICS

Date of Tribunal's Reasons : 9 June 2009

Introduction

1. At the hearing on the 6 February 2009, the Tribunal made decisions about preliminary issues, namely :
 - a. the new service charge proportion
 - b. the date from which the variation should take effect
 - c. the fact that the deed of variation should be drawn to provide that as and when any further flats are formed or altered then the service charge should be further adjusted with a suitable dispute resolution provision
 - d. the costs of the Respondent/Landlord

2. According to subsequent correspondence before the Tribunal :
 - a. the Applicant/Leaseholder has instructed LZWlaw ("LZW") to act for her in the conveyancing
 - b. the Respondent/Landlord has instructed PTC ("PTC") to act for him in the conveyancing
 - c. LZW sent PTC a draft deed of variation
 - d. following subsequent letters and telephone calls, PTC indicated that they agreed the terms of the draft deed except the clause dealing with the adjustment of the Applicant/Leaseholder's service charge proportion as and when any further flats were formed or altered
 - e. on the 11 May 2009 PTC sent LZW an e-mail suggested new wording for that clause

3. At the hearing on the 15 May 2009, the Tribunal gave further directions

4. According to subsequent correspondence before the Tribunal :
 - a. on the 1 June 2009 LZW sent PCT a revised draft deed of variation, a copy of which is at Appendix 1 to these reasons
 - b. by letter dated the 3 June 2009 PCT indicated that the Respondent/Landlord :
 - was not willing to agree the proposed "generic" provision in the event of further alteration of the Building
 - was nevertheless willing to agree in principle the proposed specific provision relating to the construction of a new flat to be constructed on the fourth floor and to be known as Flat E1, calculations for which would follow
 - was not intending to seek compensation under section 38(10) of the 1987 Act
 - c. by e-mail dated the 4 June 2009 PCT indicated that, on the basis of the information in the spreadsheet entitled "gross internal floor areas and percentages (as proposed)" at Appendix A of the Tribunal's decision dated the 12 February 2009, the Respondent/Landlord's calculations for the new proposed new service charge percentage in the event of Flat E1 being built were as follows :
 - floor area of Flat B5 [sic] : 73.12 m²
 - total floor area of Building, excluding common areas, but including proposed Flat E1 (74.32 m²) : 1.209.34 m²
 - proportion of 73.12 m² to 1.209.34 m² : 6.05%

The hearing

5. The parties agreed that :
 - a. the floor area of the Applicant/Leaseholder's flat, namely Flat B3, was 73.12 m²
 - b. the total existing floor area of the Building, excluding common areas, was 1,154.08 m², in accordance with the spreadsheet entitled "gross internal floor areas and percentages (as existing)" at Appendix A of the Tribunal's decision dated the 12 February 2009, which was the appropriate spreadsheet for present purposes, rather than the spreadsheet entitled "gross internal floor areas and percentages (as proposed)", for the reasons set out in the Tribunal's decision dated the 12 February 2009
 - c. the floor area of the proposed Flat E1 was 74.32 m²
 - d. the total floor area of Building, excluding common areas, but including proposed Flat E1 (74.32 m²), would therefore be 1,228.40 m² (1,154.08 m² + 74.32 m²)
 - e. the proportion of Flat B3's area to the total floor area of Building, excluding common areas, but including proposed Flat E1, was therefore 5.95% (73.12 m² ÷ 1,228.40 m² x 100)
 - f. the proviso to paragraph 2 of the schedule to the deed of variation should so provide
6. The Tribunal asked Mr De Kment for submissions on the question whether, as proposed by LZW on behalf of the Applicant/Leaseholder, the deed of variation should also provide that as and when any further flats were formed or altered then the service charge should be further adjusted with a suitable dispute resolution provision
7. Mr De Kment said that he :
 - a. had originally proposed, by his solicitors' letter dated the 15 January 2009, that the deed of variation should so provide
 - b. he had then agreed the Applicant/Leaseholder's subsequent suggestion that instead there should be a fixed formula simply dealing with the proposed Flat E1
 - c. he was now prepared to agree to the deed of variation providing for both, but would have preferred the variation to have been limited to Flat E1, because he wished to avoid the expense of future dispute resolution
8. The Tribunal indicated that, subject to contrary submissions, the Tribunal was minded to find that :
 - a. the percentage to be inserted in the proviso to paragraph 2 of the schedule to the deed of variation, dealing with the addition of proposed Flat E1, should be 5.95%, as agreed by the parties at the hearing
 - b. the deed of variation should also provide that as and when any further flats were formed or altered then the service charge should be further adjusted with a suitable dispute resolution provision, because :
 - the basis of the Applicant/Leaseholder's application for variation had included the fact that common parts in the Building had been used in the past to create and alter flats
 - in the event of further flats being created or altered it would be open to the parties to agree a further variation without incurring the cost of dispute resolution
 - the inclusion in the deed of variation of a provision for dispute resolution would not force the parties to incur the expense of dispute resolution, in that the parties would no doubt consider the economics of such expense, compared with the perceived benefit to be gained, before availing themselves of the power given to them in the deed of variation in that respect

- c. for the avoidance of doubt, after the words "PROVIDED THAT" in paragraph 2 of the schedule to the deed of variation, there should accordingly be added the following words :
".....without affecting the generality of the preceding provisions of this paragraph....."
- d. there should be no order for compensation under section 38(10) of the 1987 Act, in the light of the indication by the Respondent/Landlord that he was not seeking an order in that respect

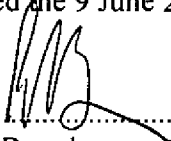
9. Ms Dack made no contrary submissions

10. Mr De Kment said that he was prepared to agree, but, again, that he would have preferred the variation to have been limited to Flat E1

Tribunal's decision

11. The Tribunal finds, for the reasons given at the hearing, that :
 - a. the Applicant/Leaseholder's lease of Flat B3 shall be varied in accordance with the deed of variation copied at Appendix 1 to these reasons, subject to the following additions :
 - after the words "PROVIDED THAT" in paragraph 2 of the schedule to the deed of variation, there shall be added the following words :
".....without affecting the generality of the preceding provisions of this paragraph....."
 - the percentage to be inserted in the proviso to paragraph 2 of the schedule to the deed of variation, dealing with the addition of proposed Flat E1, shall be 5.95%
 - b. the Tribunal makes no order for compensation under section 38(10) of the 1987 Act
12. As mentioned, the Tribunal's decision dated the 12 February 2009 has already dealt with the question of costs

Dated the 9 June 2009



.....
P R Boardman
(Chairman)

A Member of the Tribunal appointed by the Lord Chancellor

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/00HN/LVL/2007/0002

Flat B3, 453 Christchurch Road, Boscombe, Bournemouth, BH1 4AD

Appendix 1

ALAN/DACK DEED OF VARIATION
LEASE 1.6.09

This deed is dated

HM Land Registry

Landlord's title number: DT96042

Administrative area: Bournemouth

Tenant's title number: DT60464

Administrative area: Bournemouth

PARTIES

(1) MAXIMILLIAN DE KMENT of

(Landlord).

(2) SUSAN DACK of Flat B3, 1st Floor, 453 Christchurch Road, Boscombe,
Bournemouth, BH1 4AD (Tenant).

BACKGROUND

- (A) This deed is supplemental and collateral to the Lease.
- (B) The Landlord and the Tenant have agreed to vary the Lease on the terms set out in this deed.
- (C) The Landlord is entitled to the immediate reversion to the Lease.
- (D) The residue of the term granted by the Lease is vested in the Tenant.

AGREED TERMS

1. INTERPRETATION

1.1 The definitions in this clause apply in this deed.

Lease: a lease of the Property dated 12 September 1978 and made between (1) the LANDLORD and (2) the TENANT.

Property: Flat B3, 1st Floor, 453 Christchurch Road, Boscombe, Bournemouth, Dorset BH1 4AD as more particularly described in and demised by the Lease.

Rent Obligations: all obligations in the Lease relating to the yearly rent including, without limitation, the obligation to pay the yearly rent, the provision for re-entry on the non-payment of the yearly rent, the obligation to pay interest on any arrears of the yearly rent and the provisions for the review of the yearly rent.

1.2 References to the **Landlord** include a reference to the person entitled for the time being to the immediate reversion to the Lease. References to the **Tenant** include a reference her successors in title and assigns.

1.3 A reference to the Lease includes any deed, licence, consent, approval or other instrument supplemental to it.

1.4 A reference to laws in general is to all local, national and directly applicable supra-national laws in force for the time being, taking account of any amendment, extension, application or re-enactment and includes any subordinate laws for the time being in force made under them and all orders, notices, codes of practice and guidance made under them.

1.6 A **person** includes a corporate or unincorporated body.

1.7 Each of the expressions **landlord covenant** and **tenant covenant** have the meaning given to them by the Landlord and Tenant (Covenants) Act 1995.

1.8 Unless the context otherwise requires, a reference to the **Property** is to the whole and any part of it.

1.9 Except where a contrary intention appears, a reference to a clause or Schedule, is a reference to a clause of, or Schedule to, this deed and a reference in a Schedule to a paragraph is to a paragraph of that Schedule.

1.10 Clause, Schedule and paragraph headings do not affect the interpretation of this deed.

1.11 Except to the extent that they are inconsistent with the definitions and interpretations in clause 1 of this deed, the definitions and interpretations in clause 1 of the Lease shall apply to this deed.

2. VARIATIONS OF THE LEASE

2.1 Variations made

From and including 21 February 2007, the Lease shall be read and construed as varied by the provisions set out in the Schedule.

2.2 Lease remains in force

The Lease shall remain fully effective as varied by this deed and the terms of the Lease shall have effect as though the provisions contained in this deed had been contained in the Lease with effect from 21 February 2007.

3. LANDLORD AND TENANT'S COVENANTS

The Landlord and the Tenant covenant to observe and perform the respective landlord's and tenant's covenants in the Lease as varied by this deed.

4. REGISTRATION OF THIS DEED

4.1 Application for registration

Promptly following the completion of this deed, the Tenant and the Landlord shall apply to register this deed at HM Land Registry against the Tenant's registered title number DT60464 and the Landlord's registered title number DT96042.

4.2 Requisitions

The Tenant and the Landlord shall ensure that any requisitions raised by HM Land Registry in connection with an application for registration are dealt with promptly and properly.

4.3 Official copies

Within one month after completion of the registration, the Tenant and the Landlord shall send to the other official copies of the respective registered titles.

5. EXECUTION

This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.

6. APPLICABLE LAW

This deed shall be governed by and construed in accordance with the law of England and Wales.

7. CONTRACTUAL RIGHTS OF THIRD PARTIES

No term of this deed shall be enforceable under the Contracts (Rights of Third Parties) Act 1999 by a third party.

THE SCHEDULE

VARIATIONS TO THE LEASE

1. REPLACEMENT OF EXISTING CLAUSES

The Tenant's Share of Expenditure in paragraph 7 of the particulars on the first page of the Lease shall be changed from eleven per cent (11%) to six point thirty four percent (6.34%)"

2. ADDITION OF NEW CLAUSES

The following shall be added to the Lease as new clauses:

"If any further flats are built in the Building or alterations are made to other flats in the Building so that the floor areas of those flats are increased the Tenant's Share of Expenditure shall be changed from eleven per cent (11%) to such percentage as shall

represent a fair percentage of Total Expenditure PROVIDED THAT if the Landlord shall build a new Flat in the existing roof space of the building the gross internal floor area of which shall be 74.32 square metres then the Tenant's Share of Expenditure shall be changed from 11% (eleven percent) to % (percent).

If there is any dispute between the Landlord and the Tenant about the fair percentage of Total Expenditure to be paid by the Tenant it shall be referred by either the Landlord or the Tenant to arbitration by an Independent valuer to be appointed.

The Landlord or the Tenant may apply to the President for the time being of the Royal Institution of Chartered Surveyors or a person acting on his behalf for an independent valuer to be appointed. The independent valuer shall be an associate or fellow of the Royal Institution of Chartered Surveyors. The fees and expenses of the valuer and the cost of the valuer's appointment and any counsel's fees incurred by the valuer shall be payable by the Landlord and the Tenant in the proportions that the valuer directs (or if the valuer makes no direction then equally)*.

Signed as a deed by Maximilian De Kment
 In the presence of:-

Signed as a as a deed by Susan Dack
 In the presence of:-