

LONDON RENT ASSESSMENT PANEL

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION
UNDER SECTION 35 OF THE LANDLORD AND TENANT ACT 1987**

Case Reference: **LON/00AT/LVL/2012/0018**

Premises: **Parkfield, Osterley Road, TW7 4PF**

Applicant: **Parkfield (Osterley) Management Co. Ltd.**

Respondent: **The ten long leaseholders of Parkfield**

Representatives and
others present at the
hearing: **Ms Bowmaker (Counsel for the Applicant)
Mr Fitt (Counsel for the Respondent)
Mr Khan (leaseholder of Flat 2)**

Date of hearing: **19 March 2013**

Leasehold Valuation
Tribunal: **Mr M Martynski (Solicitor)
Mr L Jarero BSc FRICS
Mr J Francis QPM**

Date of decision: **27 March 2013**

Decision summary

1. The Applicant's application for a variation of the Respondents' leases is, in its current form, refused.
2. An order is made pursuant to Section 20C Landlord and Tenant Act 1985.
3. No other order is made as to costs.

Background

4. The building in question in this application was probably built in or about 1959. It is a low rise, brick built, two-storey building containing ten flats. Two of those flats, described as maisonettes, have their own front doors. These flats are flat

1 and flat 2 (the lease of which is owned by Mr Khan). Flat 1 is a ground floor flat, flat 2 is a first floor flat with its own door at ground floor level. The other flats in the building are accessed by shared communal entrances and corridors.

5. The freehold of the building is owned by the Applicant Company. All the flats in the building are let on long leases and each leaseholder is entitled to be a member of the Applicant Company. All the leases in the building are in the same form save for some very minor differences in the leases for the 'maisonettes' (flats 1 and 2).
6. All the leaseholders in the building in question are Respondents to the application.
7. The Applicant's application, made pursuant to section 35 of the Landlord and Tenant Act 1987 ('the Act'), is for a variation of all the leases of the flats on the grounds that those leases do not make satisfactory provision for the Service Charge, the services to be provided by the lessor and the provision of a reserve fund.
8. It is important to note that the Applicant's case is predicated on the assumption that the leases in the building are defective. The Applicant was encouraged in that view by a decision of a Leasehold Valuation Tribunal dated 21 May 2011¹. That decision dealt with disputed Service Charges between the Applicant in this case and Mr Khan of Flat 2. In that decision the tribunal, in commenting upon Mr Khan's lease, stated in its decision; "*The Tribunal considered that the Lease was badly drafted and defective*".

The procedural history

9. The Applicant's application is dated 21 August 2012. Directions were given on 21 November 2012. Those directions included a direction for the Applicant to send a Statement of Case to the Respondents by 10 December 2012 and for the Respondents to send in a reply form by 24 December 2012 and to file a Statement of Case by 21 January 2013.
10. Two leaseholders sent in reply forms positively supporting the application. No leaseholder sent in a Statement of Case and no leaseholder gave any notice that they opposed the application.
11. The Applicant's solicitors said that they had sent a Statement of Case to Mr Khan (and all the other Respondents) on 21 November 2012 and had sent him the bundle of documents for the final hearing on 8 March 2013.
12. Mr Khan was the only Respondent to attend the hearing. Mr Khan did not send in any reply form in accordance with the directions nor did he file any statement of case. It was Mr Khan's case that he had not received the

¹Reference number: LON/00AT/LSC/2010/0210

Applicant's Statement of Case and that he had only received the hearing bundle of documents on the Friday prior to the final hearing.

13. Mr Khan attended the hearing, represented by Counsel and with a witness statement and skeleton argument neither of which he had sent to the Claimant beforehand. Mr Khan opposed any form of variation.
14. Counsel for the Applicant asked that either; (a) the Tribunal refuse to consider Mr Khan's witness statement, or that; (b) the hearing be adjourned for her to consider the material now relied upon by Mr Khan and to take full instructions on that material.
15. The Tribunal decided that in the interests of costs (both the costs to the parties and the public expense) it would proceed with the hearing and noted that the Applicant would (and should) have been ready in any event to present argument on all the variations to the leases proposed by it whether or not those variations were opposed.

The leases

16. The leases are all for 999 years from 24 June 1959. A summary of the relevant clauses of the Respondents' leases is as follows:-

The demised premises

In the First Schedule the demised premises are defined as the suite of rooms forming the actual flat in question and "*including the means of access thereto and all foundations and elevations thereof*"

The Service Charge

The leases make provision for the payment of ground rent on the 25 March and 29 September and then make provision for the payment of a "Service Charge" (for the year in which the same is paid) payable on the same days as the ground rent (clause 1)

Decoration, maintenance and insurance

There are covenants on the part of the leaseholder to:-

- paint all outside wood and ironwork of the demised premises [clause 2(iv)]
- repair and maintain "*the demises premises including the structure of the building so far as co-extensive with the Flat and the staircases and landing appurtenant thereto and the windows thereof.....*"[clause 2(vi)]
- "*pay and contribute a rateable or due proportion of the expenses (except where covered by the Service Charge hereinafter defined) of making repairing maintaining painting supporting and cleansing all roofs wires passageways staircases landings pathways sewers drainpipes watercourses water pipes cisterns gutters party walls party structures and gates fences and hedges (if any) easements and appurtenances belonging to or used or capable of being used by the Lessee in common with the*

owners and tenants or occupiers of the remainder of the Registered Lands..... and to keep the Lessor indemnified from and against all costs and expenses or liability relating thereto” [clause 2 (viii)]

- Insure and keep insured the demised premises [clause 2 (xvi)]

Landlord's obligations

At clause 3 (ii) the Lessor covenants to keep the entrance lobbies and staircases in clean and good condition and to keep neat and tidy and in good heart and condition the common garden, grounds, verges and pathways this clause goes on to provide; *“and the Service Charge hereinbefore mentioned shall be one hundred and five per centum of one-tenth of the aggregate of the sums actually expended in any one year by the Lessor in connection with the performance of this covenant”.*

Enforcement of obligations

If there is a dispute between leaseholders, clause 4(i) of the lease provides; *“In case at any time during this demise any dispute shall arise between the Lessee and the lessees of the remainder of the buildings upon the Registered Lands relating to the premises to them respectively demised or the party or other walls structures roofs fences ways passageways pathways sewers drains pipes conduits and other easements rights and appurtenances whatsoever relating or appertaining thereto or any repairs thereto or the contributions in respect of the expenses of such repairs as hereinbefore provided or any nuisance or annoyance arising therefrom then and in every such case such dispute shall be referred to the determination and award of the Surveyor for the time being of the Lessor which determination and award shall be final and binding on the Lessees and such other person in the dispute”.*

The way in which the leases work

17. Considered as a whole, it is clear that the leases are not defective. They may be unfamiliar compared with modern leases and it is very arguable that there would be considerable benefit in changing the leases to a more modern scheme, but the leases do work.
18. The basis of the leases is that:-
 - (a) they split up the building in its entirety amongst the leaseholders. So, each leaseholder owns not only the interior of their flat, they own that part of the structure of the flat that relates to and serves the flat.
 - (b) they make each leaseholder responsible for the insurance and upkeep of their demise
 - (c) they make each leaseholder responsible to contribute to the upkeep of, what would normally be defined as, common parts
 - (d) there is no obligation on the freeholder to maintain the structure and exterior
 - (e) the freeholder's only obligation is to clean and keep in good condition the main entrance, lobbies and staircases and to maintain the garden for which there is a service charge and on which the freeholder makes a profit of five per cent of the total expenditure

- (f) any dispute between leaseholders (including disputes as to payment for works which are the leaseholders' responsibility) is to be resolved by the freeholder's surveyor.
19. The overall scheme of the lease therefore as devised by the draughtsman is that the building and its structure is to be left to the tenants. The only parts of the building for which the freeholder takes any responsibility is the main communal door and those stairs and landings which are not directly appurtenant to any flat. One can see the logic in this as there may be parts of the stairs which are between flats and of course the main door is of equal use to all eight flats that rely upon it. The leaseholders are thus left to themselves to maintain the majority of the building and any dispute between them must be referred to the freeholder's surveyor whose decision is binding.
20. The lease creates a Service Charge only for those functions to be carried out by the freeholder, that is the maintenance of the front entrance door, the stair and the garden. It is clear from the terms of the lease that the reason for the Service Charge contributions adding up to more than 100% is that the extra 5% over and above the 100% is the freeholder's fee for such service, not a basic error of maths made by the draughtsman as argued by the Applicant. Given the scheme of the lease, no Service Charge is necessary for the leaseholders' expenditure.

The proposed amendments

21. The Applicant proposed to vary the leases so as to redefine the demise to individual leaseholders so that those demises only included the interior of the flats. The external parts of those flats and the structure (and foundation) of the building would become common parts. There would then be a Service Charge payable by all leaseholders which would cover the maintenance of the newly defined common parts and the garden. That Service Charge would cover the employment of managing agents and the setting up of a reserve fund.

The Tribunal's decision

22. As set out above, the premise upon which the Applicant's application is made is incorrect. The application was made on the ground that the leases are defective, they are not. Given that the leases are not defective, they should only be varied where really necessary.
23. The Applicant proposed to vary each leaseholder's demise. The Tribunal is not sure whether such a variation is possible under the Act and does not make, at this point, a final decision on the question.
24. Although the leases work, they do not work in the way that modern leases work and there may be very good arguments to support a variation of the leases. The problem for the Tribunal on this application was that there was no evidence or detailed argument as to exactly what problems the leases in their current form do or may pose and what variation may be necessary or

desirable to deal with those specific issues. For example, it may be that the leases, in their current form, create the following problems;

- insurance difficulties if more than one leaseholder is insuring the building as a whole or just part of a building
- difficulties in organising major works if there is a dispute between leaseholders

25. Accordingly, whilst the Tribunal is not prepared to vary the leases as currently proposed on the grounds that the leases are defective, the Tribunal would be prepared to consider alternative proposals for a variation on the grounds that the leases do not make satisfactory provision for the maintenance, management and insurance of the building.

Further discussions between the parties

26. There is clearly a history of dispute between the parties and there is no doubt that Mr Khan feels very aggrieved at the way he considers that he has been treated in the past. However, the leases may well benefit from being varied and it is better that if this is going to happen, that it is done by consent. The Tribunal operates a free mediation service which the parties are encouraged to use if they want to take this matter further.

Costs

27. Mr Khan asked the Tribunal to make an order pursuant to section 20C Landlord and Tenant Act 1985. Given that the application, in its current form, has failed, it would be right in the circumstances to make such an order. Accordingly, it is ordered that none of the costs incurred by the Applicant in connection with this application to date are to be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by Mr Khan.

28. Mr Khan asked the Tribunal to order that the Applicant pay his costs on the ground that the Applicant had behaved unreasonably in the proceedings. No evidence of such behaviour was put forward and none is apparent to the Tribunal. No order is made as to the payment of Mr Khan's costs.



.....
Mark Martynski, Tribunal Chairman

27 March 2013