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**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **BIR/00CN/LVL/2013/0002**

Property : **Flat 21 Wickets Tower, 2 Wyatt
Close, Edgbaston, Birmingham B5 7TJ**

Original Applicant : **Mrs Wafia Hussain**

Joined Applicants : **Mr and Mrs Oedra
Mrs M Whittier**

Respondent : **Birmingham City Council**

Representation : **Mrs H Kiteley, Solicitor**

Type of Application : **Under Section 35 of the Landlord and
Tenant Act 1987 ('the Act')**

Date of Application : **9th September 2013**

Tribunal : **Judge W J Martin
Mr N R Thompson F R I C S**

Date : **11th February 2014**

DECISION

Preliminary

1 On 9th September 2013 Mrs Wafia Hussain (the 'Original Applicant') made the following Applications in respect of Flat 21 Wickets Tower, Wyatt Close, Birmingham B5 7TJ ('the Original Applicant's Flat') to the First-tier Tribunal (Property Chamber):

(a) an Application under section 27A of the Landlord and Tenant Act 1985 ('the section 27A Application') as to the payability and reasonableness of service charges, and

(b) an Application under section 35 of the Landlord and Tenant Act 1987 ('the section 35 Application') for an order varying the terms of a lease.

The section 27A Application includes an Application under section 20C of the 1985 Act. Following written requests, the Joined Applicants were joined into both sets of proceedings as applicants. The Original Applicant and the Joined Applicants are together referred to as 'the Applicants'.

2 Birmingham City Council ('the Respondent') is named as the Respondent in both Applications.

3 The Lease under which the Original Applicant holds her Flat ('the Lease') is dated 7th November 1988 and is made between the Respondent (1) and Hadi Hassan Khalil Al-Ayfari and the Original Applicant (2). The term is for 101 years (less 3 days) from 25th March 1961. The freehold is vested in the Trustees of the Calthorpe Estate, who granted a headlease ('the Headlease') to the Respondent.

4 Following a Case Management Conference, the Tribunal issued Directions Order No 1 (the 'Directions'). The Directions provided that the section 27A Application would be determined following an oral hearing. However, in respect of the section 35 Application, the Directions ordered that the parties provided written submissions on the basis that the section 35 Application would be determined without the need for an oral hearing, and provided a timetable for the provision of the written submissions.

The relevant provisions of the Lease

5 The Demised Premises are described in the Second Schedule as:

'ALL THAT Flat Number 21 on the third floor of the Building the site of which premises is edged red on the plan annexed hereto TOGETHER ALSO with:-

(A) All landlords fixtures and fittings now or from time to time during the term hereby granted thereon or therein

(B) The floors ceilings walls doors and windows thereof so far as not hereinafter excepted Provided that... [as to boundaries]

(C) All cisterns tanks drains pipes wires ducts and conduits used solely for the purposes of the Demised Premises whether or not within the boundaries of the Demised Premises.'

6 The Demise in Clause 2 reserves the ground rent, the insurance premiums, and by sub-clause (C), the service charge, as rent. Sub-clause (C) reads as follows:

'(C) Further or additional rent by way of service charge of an amount calculated in accordance with and paid at the times and in the manner provided by the Fifth Schedule hereto'

- 7 The Fourth Schedule contains the exceptions and reservations from the Demise. Paragraph (A) provides:

'(A) The main structure of the Building including the roof and foundations lifts shafts machinery and floors (except wooden floors) and all external walls (but not glass in windows non-structural walls within the Demised Premises nor the interior joinery plasterwork tiling and other surface of walls floors and ceilings nor the cisterns tanks drains wires pipes ducts and conduits used solely for the purposes of the Demised Premises).'

- 8 Clause 3 of the Lease contains the Lessee's covenants. Sub-clause (4) (A) provides as follows:

'(4) (A) To repair and keep the Demised Premises and all landlord's fixtures and fittings therein and all additions thereto in good and substantial repair order and condition at all times during the said term including the renewal and replacement forthwith of all worn and damaged parts.'

- 9 Clause 5 (b) of the Lease contains the Respondent's covenants for the repair of the building:

'(b) The Council shall:

(i) repair rebuilt (sic) or repoint or otherwise treat as necessary and keep the excepted part thereof in good substantial repair order and condition and renewing and replacing all worn or damaged parts thereof painting with two coats at least of good quality paint and in a proper and workmanlike manner the external surfaces of the excepted premises and also the halls staircases and landings once in every six years during the term

(ii) caretake the Building and generally maintain the excepted premises

(iii) clean and maintain the staircase windows of the Building and the staircase lighting therein

(iv) keep any lawns and ornamental or open areas adjacent to the Building mown cultivated or otherwise in a clean and tidy condition

(v) keep all roads drives walks and footways and paths serving the Building in good repair and clean and tidy'

- 10 The Fifth Schedule contains the Service Charge mechanism. It is not necessary to set this out in detail here, except to mention that the service charge proportion is left blank in paragraph 1 of the Schedule. This is referred to in the Respondent's submissions below. The Schedule provides for the recovery of the Respondent's expenses of complying with its covenant to repair in Clause 5 (b) (and the cost of compliance with the Headlease), provides for the establishment of a reserve fund and allows for a

10% management charge. There are also provisions for the certification of the amount of the service charge by the City Housing Officer, and for the payment of estimated amounts on account of the service charge half yearly in advance, and for a balancing at the end of each service charge year.

The relevant legal provisions

11 THE LANDLORD AND TENANT ACT 1987

35 Application by a party to a lease for variation of lease

- (1) *Any party to a long lease of a flat may make an application to the appropriate tribunal for an order varying the lease in such manner as is specified in the Application*
- (2) *The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely-*
 - (a) *the repair or maintenance of -*
 - (i) *the flat in question*
 - (ii) *the building containing the flat, or*
 - (iii) *any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it;*
 - (b) to (d) [- not relevant to the section 35 Application]
 - (e) *the recovery by one party to the lease from another party to it of expenditure incurred by him, or on his behalf, for the benefit of that other party or of a number of other persons who include that other party*
 - (f) *the computation of the service charge payable under the lease*
 - (g) [- not relevant to the section 35 Application]
- (4) *For the purposes of subsection (2) (f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if -*
 - (a) *it provides for any such charge to be a proportion of the expenditure incurred, or to be incurred, by or on behalf of a landlord or a superior landlord; and*
 - (b) *other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and*
 - (c) *the aggregate of the amounts that would, in a particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure*
- (5) *Procedure regulations under Schedule 12 to the Commonhold and Leasehold Procedure Act 2012 and Tribunal Procedure Rules shall make provision -*
 - (a) *for requiring notice of any application under this Part to be served by the person making the application, and by any respondent*

to the application, on any person who the applicant or, (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and
(b) for enabling any persons served with any such notice to be joined as parties to the proceedings.

38 Orders...varying leases

(1) If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the tribunal, the tribunal may (subject to subsections (6) and (7) make an order varying the lease specified in the application in such manner as is specified in the order

(6) A tribunal shall not make an order under this section effecting a variation 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 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.

(7) [relating to insurance]

(10) Where a tribunal makes an order under this section varying a lease the tribunal may, if it thinks fit, 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 that he is likely to suffer as a result of the variation.

The submissions of the Parties

12 In the Application, the Original Applicant stated that the grounds upon which she sought a variation of the Lease were that the costs the Respondent sought to recover from her for the repairing of her windows were excessive. She desired that the terms of the Lease are varied so that, instead of the Respondent having the responsibility to carry out the works, the Original Applicant should have the right to carry them out at her own expense. The Original Applicant says that this means that the Lease does not make satisfactory provision for the repair of the building in which the Original Applicant's Flat is situated.

13 The particular clauses and schedules of the Lease requiring variation were stated to be Clause 2(c), 3(4) 5 (b)(i)-(iii) and the relevant related paragraphs of the First, Second, Fourth and Fifth Schedules.

14 The draft variation sought is:

'1. Unless the lessee otherwise agrees to undertake or undertakes at her own expense the landlord shall maintain the windows and undertake external refurbishment. Any proposed works or expense incurred in relation to the works must be agreed between the lessee and landlord prior to the work being carried out.

2. *If the lessee intends to undertake external refurbishment of the premises then she must obtain the written consent of the landlord which should not be unreasonably withheld.*

3. *The landlord must obtain the prior written consent of the lessee in respect of any estimated expense which the landlord incurs in carrying out the external refurbishment of the premises which he expects the lessee to contribute to; if the lessee objects to the proposed expense the lessee should be invited to undertake the relevant work at her own expense in conformity with the specifications agreed between them.*

4. *The lessee should be permitted to carry out the relevant works, at her own expense, which are identified as necessary by the landlord.'*

15 The Original Applicant did make further submissions, which are summarised below:

01. The basic submission is that the obligation is the Original Applicant's to change the windows, not the Respondent.
02. Clause 2 (4) contains the obligation upon her to be responsible for the windows.
03. Clause 5 (b) (iii) does not give the Council the right to change the windows.
04. The term 'external walls' in the Fourth Schedule does not include the windows.
05. The right to install scaffolding does not extend to changing the windows.
06. The service charge provisions in the Fifth Schedule do not permit the changing of the windows.
07. The Original Applicant is not responsible to pay for the estimated or incurred costs as claimed.

16 The Respondent also made written submissions, which are summarised below:

01. The Respondent holds the land upon which Wickets Tower is built by virtue of a head-lease granted by the Calthorpe Estate for a term of 101 years from 25th March 1961.
02. The Respondent objects to the proposed variation because the Act only permits a variation under section 35 in very limited circumstances. Section 35 (2) of the Act is paraphrased in outline in the submission.
03. Section 35 (2) of the Act only permits a variation where the lease 'fails to make satisfactory provision' for one of the listed circumstances, in the present case the repair of the Building. The Applicant executed the Lease under professional advice and cannot now apply for a variation because she now dislikes the terms of the Lease.
04. The format of the Lease is essentially the same throughout 2,700 of the Respondent's 'Right to Buy' leases. A more modern form is in use in the remaining 1,800 of the Respondent's stock, but the provisions relating to repair are very similar in these more modern leases.
05. There is no justifiable reason to vary the Lease as the repair and service charge provisions are fully workable. The Council is

- responsible for carrying out the repairs, and the Applicant must pay the service charge. In any case the particular variation requested would negate proper and sensible management of the Building.
06. The Landlord and Tenant Act 1985 provides a statutory regime of protection for leaseholders, and the Applicant has made a challenge as to the reasonableness of the service charge. That is a quite separate matter to the variation under section 35 of the Act.
07. The headlease contains a covenant by the Respondent with the freeholder to include in all underleases a covenant by the underlessee to pay to the Respondent the maintenance costs for the Building. More importantly the headlease also contains a covenant (Clause 3 (24)) "*not to allow the tenant of any flat or maisonette to deal with work of any kind to the exterior of the buildings on his block it being the intention that the [Respondent] shall themselves comply with the covenants for such work*". It is submitted that the variation proposed by the Application would place the Respondent in breach of these covenants.
08. The Applicants have failed to satisfy the requirements of section 35 (2) and the Application should be refused.
17. However, the Respondent's submissions also include a 'cross-application' to vary the Lease, on the basis that the omission of the percentage in the Fifth Schedule is an error, and that if it is interpreted so that the Original Applicant's share is zero percent, the Lease becomes defective for the purposes of section 35 (2) (e) of the Act, in that it fails to make adequate provision for the recovery by the Respondent of expenditure incurred by the Respondent for the benefit of the Original Applicant or for the benefit of a number of other persons who include the Original Applicant. Similarly the Lease would also be defective for the purposes of section 35 (2) (f) of the Act in that it fails to make satisfactory provision with respect to the computation of the a service charge payable under the Lease.
18. The vast majority of the Respondent's Right to Buy leases do not contain a fixed percentage, but specify that the lessee should pay a 'reasonable proportion' of the expenses. It is submitted that the reason for the slight difference at Wickets Tower is that the underleases were intended to mirror the provisions of the headlease. In practise, when ascertaining a 'reasonable proportion' the policy of the Respondent is to simply divide on an equal basis the total cost by the number of residential units contained in a block. Most of these are calculated on a block by block basis, but some services are charged to individual blocks, having been incurred on a city wide basis. However, the net effect is that each leaseholder ends up paying an equal proportion based upon the number of units.
19. At Wickets Tower there are 116 flat units in the block. The charges at Wickets Tower have in practise been collected on the basis of 1/116 (or 0.86206%) of the annual costs, and this has not been challenged by the leaseholders. The Respondent therefore requests that the Tribunal orders a variation of the Lease so that paragraph 1 of the Fifth Schedule will read as follows:

"THE FIFTH SCHEDULE

1. *The Service Charge shall be 0.86206% (being the fraction 1/116) of the Aggregate of..."*

- 20 The Original Applicant's submissions with regard to the Respondent's 'cross-application' are that it should be refused. However, she did not wish to make any specific challenge and would leave the matter to the discretion of the Tribunal.

The Tribunal's Determination

21 The Applicants' Application

The Tribunal agrees with the Respondent that the Application to vary the terms of the repairing provisions of the Lease as requested in the Application are outside of the Tribunal's powers conferred upon it by section 35 of the Act. The expression 'fails to make satisfactory provision' means that the Lease does not provide adequate covenants by one party or the other for the upkeep and repair of the fabric of the flat or the Building containing the flat. Where such covenants exist, so that there is a workable mechanism that ensures that the fabric of the Building is satisfactorily repaired and maintained, the Tribunal has no power to interfere with the contractual arrangements the parties made when they entered into the lease in question, even if the provisions as to repair (or one of the other matters referred to in section 35 (2) of the Act), are demonstrably unfair to one of the parties.

- 22 In the present case much of the Original Applicant's submissions relate to the interpretation of the repairing provisions of the Lease, with particular reference to the powers of the Respondent to renew or replace the windows. This is a matter of the interpretation of the Lease which is within the Tribunal's jurisdiction under the section 27A Application. The Applicants' submissions on this will be considered as part of the disposal of the section 27A Application. However, the submission that, in any case, the provisions of the Lease are varied so that in respect of all repairs the lessee shall have the right to carry out the repairs if he or she so chooses, is outside of the limited jurisdiction conferred upon the Tribunal by section 35 of the Act and must therefore be rejected.

- 23 For the above reasons the Tribunal's determination is that it will not grant the variation order requested by the Applicants.

24 The Respondent's 'cross-application'.

Whilst it would appear, on the face of it, that the omission of the percentage or fraction from paragraph 1 of the Fifth Schedule to the Lease is a matter in respect of which the Tribunal has the power to make a variation order under section 35 2 (e) and/or section 35 2 (f) of the Act, the Tribunal does not consider that such an application is properly made as a 'cross-application'.

- 25 The Respondent does not indicate how many other leases have been granted at Wickets Tower, or whether any of the other leases contain similar omissions, or if not, exactly what is inserted into paragraph 1 of the Fifth Schedules to the remaining leases.

- 26 The correct procedure for the Respondent to adopt with regard to the proposed variation of the Lease is for a separate application to be made in respect of which all of the leaseholders at Wickets Tower are named as respondents. The Tribunal will not wish to vary one lease unless it is satisfied that all of the leases are in a similar form, and that, for the

purposes of section 35 (2) (f) and section 35 (4) the contributions of the leaseholders do not exceed or are less than the total expenditure. The Tribunal will also need to be satisfied as to the matters referred to in section 38 (6) of the Act.

- 27 For the above reasons the Respondent's 'cross-application' is refused by the Tribunal.
- 28 If either party is dissatisfied with this decision they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made within 28 days of this decision (Rule 52 (2)) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Judge W. J. Martin