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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/45UG/LIS/2014/0007** **CHI/45UG/LVT/2014/0004**
Property	:	**Harlands House, Harlands Road, Haywards Heath, West Sussex RH16 1LG**
Applicant	:	**Hyde Housing Association Limited**
Representative	:	**Felicity Thomas of Counsel** **Katerina Birkeland, Hyde Housing**
Respondent	:	**OM Property Management Limited**
Representative	:	**Ms. J. Lamb** **Mr. S. Doherty both of Peverel Property Management**
Type of Application	:	**Section 27A of the Landlord and Tenant Act 1987** **& Landlord and Tenant Act – lease variation**
Tribunal Members	:	**Judge D. R. Whitney** **Mr. B. H. Simms FRICS** **Mrs. J. E. Herrington**
Date and venue of Hearing	:	**2ND July 2014 at Horsham Magistrates Court**
Date of Decision	:	**21st July 2014**

DECISION

DECISION

1. The tribunal determines the issues as follows:

- The Applicants application to adjourn the hearing of both applications was refused;
- The tribunal does not have jurisdiction to determine the sums as included in the Application dated 13th January 2014;
- The tribunal refuses to make an Order varying the leases held by the Applicant at Harlands House, Harlands Road, Haywards Heath, West Sussex RH16 1LG.
- The Respondent must within 14 days of the date of the hearing write to all Leaseholders against whom they had indicated they were no longer proceeding.

BACKGROUND

2. This matter concerns two separate applications regarding Harlands House, Harlands road, Haywards Heath, West Sussex ("the Property"). The freeholder is Proxima GR Properties Limited. The manager (under the various leases for the Property) is now OM Property Management Limited who employ Peverel Property Management to manage the Property on a day to day basis. The freeholder and manager are referred to collectively as the Respondents throughout this decision.

3. Hyde Housing Association Limited are the long residential leaseholders of various flats at the Property. They are referred to as the Applicant throughout this decision.

4. The Applicant originally made application dated 13th January 2014 in respect of Flat 57 at the Property under section 27A of the Landlord and Tenant Act 1985 for a determination of liability to pay and reasonableness of service charges. Directions were issued on 31st January 2014 which highlighted at paragraph 3 that there may be an issue as to the tribunal's jurisdiction to determine this matter.

5. OM Property Management Limited made an application to vary the Leases of flats 44-64 inclusive at the Property pursuant to Section 35 of the Landlord and Tenant Act 1987 dated 28th March 2014. Directions were issued on 11th April 2014.

6. It was directed that both applications would be considered together.

THE LAW

7. The relevant sections for the service charge application are sections 18, 19 and 27A of the Landlord and Tenant Act 1985. The Tribunal had

regard to these sections and section 18 is set out in full in the Annex to this decision.

8. In respect of the application to vary the leases the relevant section is section 35 of the Landlord and Tenant Act 1987 which is also set out in full in the Annex to this decision.

LEASE TERMS

9. In respect of the application to vary the leases all of the leases of the flats in question contain a similar clause which imposes a cap on the amount of the service charge recoverable. Paragraph 6.3 of Schedule 7 states:

"Provided Always that the sums payable by the Lessee shall not exceed £10.63 per week for the period of one year from the date hereof and thereafter shall be capped at £10.63 per week and increased in accordance with increases in the retail Price Index in accordance with the Eleventh Schedule."

10. The Respondents sought to have this clause removed from the leases in its entirety.

INSPECTION

11. The tribunal inspected the Property immediately prior to the hearing in the company of the parties representatives as set out on the cover sheet save that Mr Doherty was not present. Also in attendance was Mr C. Openshaw who had made a statement in support of the Applicants case.

12. The Property consists of two modern blocks of flats. Each was four storeys high and were believed to have been built in about 2002. One block consists of long residential leaseholders and the second block is affordable housing. All of the flats connected with the two applications before the tribunal were within the second block of affordable housing.

13. To the rear of the two blocks was allocated parking believed to be one space per flat with no visitors parking. The communal external areas were all well maintained.

14. The tribunal inspected internally including Flat 57. The internal communal areas again appeared to be well maintained. Flat 57 was a spacious two bedroom flat. The tribunal was advised that the configuration of the flats varies.

HEARING

Application for Adjournment

15. The start of the hearing was delayed at the request of the parties.

16. Ms Thomas, counsel for the Applicant, had helpfully prepared a skeleton argument and a bundle of authorities. At the start of the hearing she made an application to adjourn both applications.

17. This was on the basis that in her submission further evidence was required as to the reason why the clause existed in the lease which the Respondents, by their application, now wished to have removed. In her submission this evidence was critical.

18. Further Ms Thomas stated that prior to the application to vary there had been no pre-action discussions and the Applicant had not consulted with it's Underlessees. In her submission a short adjournment to allow the parties to hold discussions and for consultation particularly over any compensation which may be required if the lease was to be varied would be desirable including giving consideration as to whether any form of alternative dispute resolution could be considered. Ms Thomas reminded the tribunal that the Property was currently an "integrated" community of both traditional long leaseholders and those occupying affordable accommodation under various arrangements. The Applicant was keen to ensure that there was no divergence between the affordable housing and the more traditional long residential leasehold owners.

19. Ms Thomas highlighted to the tribunal that the Respondents application did not have attached to it various documents to which it referred in the application form and these should be provided.

20. Ms Thomas confirmed that whilst in her skeleton argument she conceded that the tribunal did not have jurisdiction to determine the sums payable by the Applicant she was not withdrawing the same. It was in her submission for the tribunal to determine this point.

21. Ms Lamb for the Respondents objected to the request for an adjournment.

22. She was satisfied that the tribunal had everything it required to make the determination she sought. In her view the section 106 agreement was not necessary for the tribunal to determine the matter and the tribunal had the information it required.

23. Ms Lamb confirmed she had copies of the documents that had not been provided with the application. She further confirmed she did not have a copy of the Section 106 agreement mentioned in representations made to the tribunal within the bundles provided.

24. The Respondents were satisfied that but for the cap within the lease 100% of the service charges were recoverable from the leaseholders as a whole.

25. The tribunal questioned as to which leases the Respondents were seeking to vary. After the adjournment for the tribunal to consider the adjournment Ms Lamb confirmed she was proceeding in respect of the variation of the leases for the flats included in the schedule at page 105 of her bundle which belonged to the Applicant being 43-46 inclusive, 48,49, 52-57 inclusive and 62-64 inclusive.

Tribunals determination of application to adjourn

26. The tribunal considered carefully the application to adjourn. The tribunal was mindful of the overriding objective within the tribunal rules. All the parties affected were present and represented at the hearing. This was confirmed by the Respondents when they confirmed they were only proceeding in respect of the flats registered to the Applicants.

27. It was unclear why no prior consultation had been undertaken by the Applicant with its underlessees.

28. The tribunal was satisfied given the time available to it on the day of the hearing it would be possible to hear the substantive application by the Respondents to vary the lease. The tribunal indicated it would determine this and then if appropriate would issue further directions as to consultation with underlessees and to receive any submissions as to whether it was appropriate for any compensation to be made or other conditions to be attached to the making of any Order to vary the various leases.

29. The tribunal also ordered that the Respondent must within 14 days of the date of the hearing write to all Leaseholders against whom they had indicated they were no longer proceeding.

Substantive Applications

30. During the hearing an issue arose as to whether the freeholder was aware of the application and the hearing. Ms Lamb for the Respondents arranged for an email to be sent to the tribunal from Estates & Management Limited, the agent for Proxima GR Properties Limited, confirming that they supported the application for variation of the leases. The tribunal proceeded on this basis.

31. Also during the course of the hearing a copy of the Unilateral Undertaking agreement dated 14th May 2001 relating to the Property was discovered and copies provided to all parties and the tribunal. It is referred to as the Section 106 agreement.

32. Ms Lamb for the Respondents submitted that if the cap applied it was not possible to manage the block effectively as sufficient monies could not be collected to pay for repairs and maintenance. She confirmed

that all of the Applicants leases provided that the service charge was capped at an initial figure of £10.63 per week rising by RPI.

33. Ms Lamb relied upon sections 35(2)(d) & (f) of the Landlord and Tenant Act 1987 in support of her application.

34. She submitted that (d) applies in this refers to provisions for maintenance services and (f) applied in that it related to computation of the service charge amounts.

35. With regards to (f) Ms Lamb submitted that whilst each lease allowed the totality of the service charge to be calculated the imposition of the cap meant that 100% of the costs was not recoverable.

36. It was explained that the cap had never been applied. The Respondents had always sought to recover 100% of the service charge and the Applicants had always paid the amounts demanded without the cap having been applied to these demands. Ms Lamb said she did not know why the cap was applied and had been unable to locate any documents relating to back when the leasehold structure was first set up. As to the proportions payable under each lease she submitted that these were calculated on a square footage basis but there was no specific evidence.

37. If the cap is applied the lease does not provide a satisfactory regime for recovery of service charges as 100% of the costs cannot be recovered. If the clause relating to the cap is removed then 100% of the costs is recoverable and there is a proper and workable service charge mechanism within the lease which allows recovery on a fair and reasonable basis.

38. When questioned by the panel as to what would happen if the cap was in place Ms Lamb said works could not be undertaken if costs were not recovered. She did not believe that the Applicants (collectively or individually) would fund this shortfall despite their covenants under the lease to repair and maintain the Property.

39. Ms Thomas for the Applicants had filed with the tribunal a skeleton argument dealing with both applications and a bundle of various authorities upon which she sought to rely. The tribunal confirmed they had received and read the skeleton argument and a copy of the skeleton argument and bundle had been provide to Ms Lamb.

40. Ms Thomas submitted that the Applicant was an original party to the lease as was the manager. In her submission the Respondents were now seeking to rewrite what they now saw as a bad bargain. In her submission the cap was a free standing contractual obligation which had been entered into by all parties and should not be varied. What is in any other leases is irrelevant. Ms Thomas relied on various documents at page 139-144 of the bundle prepared by the Applicants which set out part of the history of the negotiations relating to these lease. These documents included a memorandum produced by Mid

Sussex District Council relating to negotiations as to conditions imposed on the developer relating to the provision of affordable housing at the development. It was plain that consideration was being given within these documents as to how the local authority could ensure any affordable accommodation remained affordable in the future.

41. In Ms Thomas' submission paragraph 6.3 of Schedule 7 is the only clause which gives such protection.

42. When questioned by the tribunal Ms Thomas did not believe Section 35(2)(e) applied and she did not seek to rely upon the same.

43. Ms Thomas relied upon Gianfrancesco v. Haughton LRX/10/2007 (Lands Tribunal) and particularly paragraph 21 of that judgement. She relied upon the fact that the tribunal in that decision said we should consider all the circumstances.

44. Ms Thomas referred the tribunal to the Upper Tribunal (Lands Chamber) decision in Cleary & others v. Lakeside Developments Limited [2011] UKUT 264(LC). In her submission this was a lease involving commercial parties who all entered into the transaction with their eyes wide open.

45. The tribunal was directed to Brickfield Properties Limited v. Botten [2013] UKUT 0133 (LC). In Ms Thomas' submission this case could be distinguished. Further it was a matter of evidence. In this case the service charge regime allowed 100% of the service charge to be calculated but then separately imposed a cap. The reasoning for the variation granted in Brickfield was due to a fundamental change in the relationships due to the enfranchisement of a block within the development as a whole.

46. The tribunal was also referred to Campbell v. Daejan Properties Limited [2012] EWCA Civ 1503 and paragraphs 37 and 47 of that judgement. In Ms Thomas' submission the language is clear and nothing was wrong with the clause and anyone reading it would have recognised what was meant and intended.

47. Ms Thomas further submitted that if the tribunal was minded to vary the leases this should not be retrospective. It was the Respondent's error in not applying the cap or applying sooner for a variation. The Underlessees were not aware but when they became aware it was drawn to the Applicants notice and the application under S27A was made promptly.

48. Ms Thomas referred the tribunal to Section 38(6) of the Landlord and tenant Act 1987. This provides that the tribunal shall not make an order to vary the lease when a respondent to the application (in this case the Applicant) or any person who is not a party to the application (the Underlessees of the Applicant in this case) will suffer serious prejudice.

In the Applicants submission serious prejudice would be caused to the Applicant and the Underlessees. The tribunal was referred to the witness statement of Mr Openshaw found at page 145 of the Applicants bundle in support of this.

49. Paragraph 4 of the section 106 agreement refers to "Affordable Housing". Paragraph 4.2 refers to "Subsidised Housing and Low Cost Housing ... to be maintained in perpetuity". Ms Thomas says varying the lease to remove the cap would undermine the purpose of this agreement and is not remediable by compensation.

50. Simply because the Respondents now say this is a bad bargain it is not appropriate for this tribunal to vary the terms.

51. In respect of the service charge application Ms Thomas submitted that the charges complained of do not fall within the definition of a service charge. She relied upon Coventry v. Cole [1994] 1 WLR 398 and submits the tribunal did not have jurisdiction to deal with the same.

52. In reply Ms Lamb contends that there is a two fold test. Firstly objectively taking account of the statutory provisions at Section 35(2)(d) & (f) and the fact that the total amount recoverable is not 100% of the costs. Secondly, subjectively, taking account of all the circumstances.

53. In her submission the cap is grossly unfair if applied. The Respondents have now no records as to why the cap was included but in her submission it contradicts the percentages contained within the leases. Ms Lamb sought to rely upon the decision in Brickfield and that the tribunal should follow that decision and grant a variation retrospectively.

54. In her submission the fact that the Applicants and their Underlessees have to pay service charges in full if the cap is removed does not prejudice them as they benefit from the services. The services have been provided from the outset and within the current regime there is no provision for recovery of any shortfall. If the cap is applied the Applicant will receive a windfall.

55. Ms Lamb submitted the cap is not a fixed charge as it could fluctuate.

DETERMINATION

56. The tribunal considered all the documents before it. These included a bundle from both the Applicant and the Respondent together with a skeleton argument and bundle of authorities on the part of the Applicant. Further during the course of the hearing a copy of the section 106 agreement was provided to all parties and the tribunal.

57. The case was not an easy matter to determine. There was limited evidence as to why the cap was included in the original leases. The

67. The tribunal determines that it is not satisfied that the leases, the subject to this application, should be varied as sought by the Respondent under Section 35 of the Landlord and Tenant Act 1987.

68. As to the application under section 27A in respect of service charges the tribunal accepts the Applicants submission that it does not have jurisdiction to determine the same. If the tribunal is wrong on this matter it would have determined that the service charges for each of the years in dispute should have been limited in accordance with paragraph 6.3 of Schedule 7 of the lease and would have invited the parties to agree the figures as there was a modest amount of disagreement as to the respective figures but both parties indicated that they would be able to agree these.

69. A letter was received from the Respondents dated 14 July 2014 setting out the leases against whom they were seeking a variation. This differed from those agreed at the hearing as set out in paragraph 25 above. The tribunal has made its determination on the basis of the matters before it at the hearing and recorded in this decision.

Judge D. R. Whitney

Appeals

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 the First-tier Tribunal at the Regional office which has been dealing with the case.

2. 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.

3. 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.

4. 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 application is seeking.

ANNEX

Section 18 of the Landlord and Tenant Act 1985

Section 18 Meaning of "service charge" and "relevant costs".
(1)In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—

(a)which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b)the whole or part of which varies or may vary according to the relevant costs.

(2)The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3)For this purpose—

(a)"costs" includes overheads, and

(b)costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period

Section 35 of the Landlord and Tenant Act 1987
35 Application by party to lease for variation of lease.
(1)Any party to a long lease of a flat may make an application to the court 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, or

(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)the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);

(c)the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;

(d)the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);

(e)the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;

(f)the computation of a service charge payable under the lease.

(g)such other matters as may be prescribed by regulations made by the Secretary of State.

(3)For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include—

(a)factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and

(b)other factors relating to the condition of any such common parts.

(3A)For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.

(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 expenditure incurred, or to be incurred, by or on behalf of the 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 any 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)Rules of court 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 persons served with any such notice to be joined as parties to the proceedings.

(6)For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—

(a)the demised premises consist of or include three or more flats contained in the same building; or

(b)the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

(8)In this section "service charge" has the meaning given by section 18(1) of the 1985 Act.