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

Case Reference : CHI/00HG/LVL/2013/0006

Property : 8a Edgar Terrace Plymouth Devon PL4 7HG

Applicant Representative : Roy Herbert Maggs
: Anthony Dyke Curtis Whiteford Crocker Solicitors

Respondent Representative : Gavin Nicholas Turney
: None

Type of Application : Application for variation of a lease
Section 35 Landlord and Tenant Act 1987 **(the Act)**

Tribunal Members : Judge Cindy A Rai (Chairman)
Michael C Woodrow MRICS Chartered Surveyor

Date and venue of Hearing : 25 September 2013
Plymouth Magistrates Court

Date of Decision : 5 October 2013

DECISION

Decision

1. The Tribunal has no jurisdiction to make an Order varying the Lease (defined below), in the form specified in the Application described in paragraph 3.
2. The reasons for its Decision are set out below.

Background

3. The Applicant made an application dated 10 June 2013 (**the Application**), for an order varying the lease dated 2 July 1986, made between Robert John Bryan and Christine Norah Bryan(1) Sheila Dawn Watts (2) (**the Lease**) of the Property, which is a ground floor flat at 8a Edgar Terrace Plymouth PL4 7HG. The Applicant is the current freeholder of the Property and occupies and also owns the leasehold interest in the first floor flat at 8 Edgar Terrace Plymouth PL4 7HG which is situated within the same building. The Respondent occupies and owns the leasehold interest in the Property and is the current freeholder of the first floor flat.
4. Following receipt of the Application on 5 July 2013 (which had been amended and resubmitted) **Directions** dated 11 July 2013 were issued by the Tribunal which:-
 - a. Required that the Applicant serve a statement of case setting out why he sought a variation of the Lease and under which provision of section 35(2) of the Act the Application was made.
 - b. Required that the Respondent submit a response to the Application and, if he wished to apply for an order under section 38(10) of the Act, submit a written application to the Tribunal.
 - c. Set a target date for a hearing and timescales for the submission of the parties' statements.
5. Subsequently both the Applicant and the Respondent submitted written statements in accordance with the Directions. No further application was made by the Respondent.

Inspection

6. At 10 o'clock on the morning of the 25 September 2013 the Tribunal inspected the front garden of the Property. The Property is a ground floor flat within a two storey mid terraced building fronting Edgar Terrace. The building comprises a ground floor flat and a steeply sloping front garden adjacent to the road and a first floor flat which includes the rear garden. Access to both the Property and the first floor flat is via steps which lead to a pathway across both front doors which are next to each other.
7. The Respondent was present at the inspection. The Applicant was in his flat and leant out of a window to acknowledge the presence of the Tribunal members who advised him who they were and told him that

they were inspecting only the external parts of the front of the building. The Applicant's Representative was not present.

The Hearing

8. Prior to the Tribunal hearing the Applicant's case the Tribunal confirmed which papers it had received and requested that Mr Dyke clarify under which part of section 35(2) of the Act the Application was made. The Chairman advised him that she was unclear as to the Tribunal's jurisdiction to deal with the Application and that in spite of the clear wording of the Directions the Applicant's statement did not state under which provision of section 35(2) of the Act the Application was made.
9. She read section 35(2) of the Act, which is set out below, reminding the Applicant and Mr Dyke that it set out the grounds under which an application could be made, which grounds appeared to her to be dependent upon the relevant lease failing to make satisfactory provision in respect of an identified matter relating to repair and maintenance of the flat, the building containing the flat or land or buildings let to the tenant under the lease in respect of which rights were conferred (on the Applicant) and other matters set out in sub paragraphs (b) to (e) of the subsection.
10. Mr Dyke said the Applicant was relying upon section 35(2) (a)(iii) and that this was implicit in his statement. The path and stairway are land or buildings over which rights are conferred.

11. Section 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 [a leasehold valuation 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, 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].

12. The Applicant's written statement referred to a proposed variation of an existing provision contained in paragraph 2 of Part III of the first schedule to the Lease and requested that this clause be varied to read:-

"the uninterrupted and unobstructed right at any time of the owners and occupiers of the upper flats and or their agents or invitees to pass at all times and for all purposes on foot over the path and steps in the front garden"

13. The existing wording of the clause in the Lease referred to in the preceding paragraph grants:-

"the right of way for the owners and occupiers of the upper flats to pass over the path and steps in the front garden"

The Applicant's case

14. Mr Dyke spoke on behalf of the Applicant. He said that he believed that the Tribunal would be aware that the Application was not the only application made by the Applicant in respect of the Property. He referred the Tribunal to paragraph 26 of a Tribunal Decision dated 14 June 2013, (the **Previous Decision**), being an application by the Applicant for a determination of breach of lease, which stated that:- "The Tribunal was not pointed to a covenant by the Respondent not to prevent free passage by the Applicant to his flat, but accepts that it may be implicit that such a requirement exists for the proper enjoyment by the Applicant of the easement of the right of passage reserved to him by paragraph 2 of Part III of the First Schedule of the Lease"
15. He said that the Application falls within section 35(2)(a)(iii) of the Act as the Applicant's right of access has to be protected. Unless there is clarification the dispute between the parties will continue. It was all documented within the Previous Decision.
16. When Mr Dyke was asked by the Tribunal to comment on paragraph 27 of the Previous Decision, which stated that there was no evidence before that Tribunal that suggested that the respondent in that case, (who is the Respondent in this case), had not consistently provided the Applicant with free passage on foot over the path and steps in the front garden he said that the reason for the Application is to clarify the extent of the Applicant's rights over the steps and access path. He accepted that a variation of the Lease may not resolve the dispute. The nub of his argument is that the current issues have been fuelled by uncertainty within the Lease.

The Respondent's case

17. He said that the variation proposed would prejudice his use and enjoyment of the Property. His statement to the Tribunal set out the issues. The pathway is part of his Property. He occasionally sits on a chair placed on the path to take advantage of the weather. He is entitled to do this and always moves out of the way if the Applicant is using the

path. He does not and has never extinguished the right of way or interfered with the Applicant's use of it.

18. The proposed variation is unnecessary and the wording would potentially interfere with his enjoyment of the Property as he believed it might be interpreted as preventing him from using the pathway to gain access to the Property.

The Law and the reasons for the Decision

19. The jurisdiction of the Tribunal is contained in Section 35 of the Act and was transferred to this Tribunal on 1 July 2013 by the Transfer of Tribunal Functions Order 2013 [SI 1036].
20. An extract from Section 35 is set out in paragraph 11 above and the Directions required that the Applicant state under which provision within that section the Application was made. He omitted to include an explanation in the written statement provided to the Tribunal. Mr Dyke's only explanation at the Hearing was that "it was implicit in the Applicant's statement".
21. In fact the Application form referred to the proposed variation of an different clause in the Lease but Mr Dyke offered no explanation as to why his written statement referred to another.
22. The Tribunal does not agree with the Applicant that there is anything in Section 35 of the Act which would enable the Application to fall within its ambit. Section 35 is intended to enable an applicant to apply for an order to vary a lease which contains inadequate provision for those matters referred to in section 35(2).
23. The provision is intended to address the inadequacy of maintenance provisions. Mr Dyke suggested that maintenance may become an issue but this is difficult to comprehend when the pathway and steps belong to the Respondent and the Applicant has no obligation to contribute towards the costs of their maintenance.
24. The Tribunal determines that the Application is not for a variation which it could make, even if it was minded to do so, under the Act. Therefore it determines that as the Application does not fall within the Act it has no jurisdiction to make the variation proposed.
25. Any application for an order for the variation of one lease in a building containing two flats which share a single access, as in the case of the Property, would normally require that a corresponding variation also be made to the lease of the other flat within the building so that the provisions of both leases were consistent. No indication that the Applicant would agree to this or ensure that this occurred was included within the Applicant's statement.

Judge Cindy A Rai (Chairman)

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.