



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

Case Reference : CHI/00HP/LVL/2013/0008

Property : Flats 1, 5-12, 12A, 15 & 16 Golden Gates, Ferry Way,
Sandbanks, Poole, Dorset BH13 7QN

Applicant : Golden Gates (Sandbanks) Limited

Representative : Coles Miller, Solicitors

Respondents : Mrs J Hodgson & others, the respective lessees of the
abovementioned 12 Flats

Representatives : -

Type of Application : Variation of Leases -
Section 35 Landlord and Tenant Act 1987

Tribunal Members : Judge MJ Greenleaves

**Date and venue of
Hearing** : None

Date of Decision : 3 February 2014

DECISION

Decision

Variation

1. By virtue of the power conferred by Section 38(8) of the Landlord and Tenant Act 1987 (the Act) the Tribunal directs the parties to this application do vary the leases of the relevant flats so that with effect from the date on which the immediate reversionary interest in Flats 17 and 18 Golden Gates, Ferry Way, Sandbanks, Poole, Dorset is no longer vested in Golden Gates (Sandbanks) Limited:
 - a. The definition of "final service charge" in paragraph 1 of the Third Schedule of the leases set out in the First Schedule hereto be varied so that "final service charge" means one-sixteenth of the service costs
 - b. The maintenance contribution and additional maintenance contribution of one eighteenth in clause 3 of the leases set out in the Second Schedule hereto be varied to one sixteenth
2. The Tribunal directs under Section 38((9) of the Act that a memorandum of variation of the original lease or the new lease, as the case may be, shall be endorsed on that document or recorded at HM Land Registry against the relevant Title.

Compensation.

3. The Tribunal orders under section 38(10) of the Act that upon completion of the above variation in respect of each flat, the Applicant shall pay to the lessee of each flat the subject of this application the sum of £282 per flat.

Reasons

Introduction

4. This is an application by the Applicant for variation of 12 leases in a block of 16 flats consequent upon the leaseholders of 2 other flats enfranchising the building containing those flats and acquiring their head lease from the Applicant.
5. Directions were made on 13 September 2013. Those directions contained notice under rule 31 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 that the Tribunal intended to deal with the application on the basis of written representations and without a hearing. No objection having been received from any party to that course, all parties are taken to have consented to it under rule 31 (2) and (3) and this case was determined on the basis of written representations only.
6. The application was made on 29 August 2013 accompanied by a draft order.
7. Pursuant to the directions a detailed statement of case dated 16 October 2013 was filed by the Applicant. Further, following a direction of the Tribunal dated 2 December 2013 inviting further representations regarding any compensation payable under section 38 (10) of the Landlord and Tenant Act 1987, and the period for compliance with that direction having been extended to 31 January 2014, further written representations were received from the Applicant dated 30 January 2014.

8. None of the Respondents made representations at any stage, either pursuant to the original directions or in respect of the direction dated 2 December 2013. Furthermore, consent to the application was given in writing by the lessees of flats 1, 6, 7, 8, 11, 12, 12A and 15.

Applicant's case

9. The Applicant is the freeholder of flats 1 to 16 Golden Gates "the 16 flats", Ferry Way, Sandbanks, Poole and is also the owner of the head leasehold interest in flats 17 and 18 Golden Gates. Flats 1 to 16 are situated in the main building, while flats 17 and 18 are situated above commercial premises in an adjoining building in respect of which the lessees of flat 17 and 18 have applied to enfranchise that building and to acquire the head lease from the Applicant.
10. The result of that enfranchisement will be that the lessees of flats 17 and 18 will no longer be liable to contribute to the service charges incurred by the Applicant in respect of its remaining property. The consequence is that:
 - a. under each of the leases of flats 1, 6-12, 12A, 15 and 16 ("the subject flats") the Applicant will only be able to recover one-eighteenth of its service charge costs;
 - b. under the leasehold flat 9 the service charge costs in relation to maintaining, improving and repairing the access road and car parking area is limited to one-eighteenth
 - c. so that there will be a shortfall in those respects as to the service charge costs incurred as against the service charges recoverable by the Applicant from the 16 flats.
 - d. that shortfall might be the subject of compensation in the collective enfranchisement proceedings, but the Applicant applies to the Tribunal for a variation of the leases of the subject flats on the terms of the above order, on the basis, under section 35 of the Act, that the leases fail to make satisfactory provision with respect to the computation of a service charge payable under the lease.

Consideration as to variation.

11. Section 35 of the Act is normally applied to the terms of the lease as originally entered into where those terms, as drawn, do not make satisfactory provision. The facts of the present case are different inasmuch as the leases as drawn originally made satisfactory provision for the circumstances on their grant, but consequent upon two lessees exercising rights of enfranchisement the terms of the leases will no longer make satisfactory provision. The Tribunal is satisfied that, subject as below, it has power to make the variations the subject of the application.
12. In considering whether to make an order under section 38 of the Act, the Tribunal is required to consider whether any such variation will be likely to cause prejudice for which compensation would not be adequate or that it would not be reasonable. Section 38 (6) is in the following terms:

"A Tribunal shall not make an order under this section effecting any variation of the lease 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 who is 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. “

13. The Tribunal was satisfied

- a. that the only persons who would be prejudiced by the grant of the application are the lessees of the subject flats; and
- b. that any such prejudice can be compensated under subsection (10) if the Tribunal made a decision so to do under that subsection; and
- c. there was no reason why it would not be reasonable for the variation to be made.

Consideration of compensation under Section 35(10)

14. Section 38 (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 he is likely to suffer as a result of the variation."

15. On 2 December 2013 the Tribunal wrote to all parties in the following terms:

“This application arises as a result of a collective enfranchisement of a building including 2 of the flats which results in the remaining 16 flats not being required under existing lease terms to pay a total of 100% of service charges. The Applicant says that in respect of the collective enfranchisement, the shortfall is a head of loss for which the Applicant could seek compensation in those proceedings. The Applicant prefers to apply to the Tribunal for variation of the leases under the 1987 Act.

By section 38 (6) the Tribunal shall not make an order effecting a variation if the variation would be likely substantially to prejudice any Respondent if an award under subsection (10) would not afford him adequate compensation.

In the same way as the Applicant considers that compensation could be applied for in the enfranchisement, the Tribunal's present view is that because a variation order would result in lessees paying increased service charges, a compensation order must be considered. That is so, even though the majority of lessees affected by the application have consented to it without making a specific application for compensation.

The Tribunal notes that the Applicant says that the lessees will not suffer substantial prejudice by the variations sought because they will not be contributing towards maintenance repair and insurance of flats 17 and 18. That may be so, but the Tribunal needs evidence on which to make its determination.

All parties are invited to make representations to the Tribunal by 31 December on whether this application, if granted, causes prejudice, the extent of that prejudice

based on the last 3 years service charges and any foreseeable additional charges and therefore the extent of the anticipated loss to each lessee. If it is considered that compensation is not payable to any party, that party and the Applicant should provide their full reasons.”

16. The Tribunal has considered the representations received which are from the Applicant only and dated 30 January 2014. As to prejudice, they may be summarised:
 - a. While the Respondents are liable under their leases to pay 1/18 contribution towards service charges, that related not only to the building containing the 16 flats but also to the building containing flats 17 and 18; the result of the proposed variation would mean that they will pay a greater proportion towards service charges for a smaller property;
 - b. the Applicant, with accountants and managing agents have analysed the last 3 years service charge accounts as between the 16 flats and flats 17 and 18. The detailed analysis accompanying the representations appears to the Tribunal to have been reasonably prepared and in relation to each of the 3 accounting years up to and including the year ended 31 March 2013, shows how heads of charge and costs for each head might have been apportioned between the 16 flats on the one hand and flats 17 and 18 on the other.
 - c. For each of those 3 years, in chronological order, had the 16 flats been paying only charges relating to their own building and grounds, each of the 16 flats would have been paying an additional 2.71%, 4.2% and 4.2% more than they actually did by way of their 1/18 shares;
 - d. that those historic differences reflect future differences which each of the 16 lessees will pay if the variation is granted;
 - e. as a result the increase in charges for the future is de minimis and less than a 5% difference and thus not likely to cause substantial prejudice.
17. In coming to its conclusion, the Tribunal takes into account the above evidence; that there are no representations or submissions to the contrary by any of the Respondents and that 8 Respondents have consented to the application as made i.e. without proposals as to compensation.
18. In terms, section 38 of the Act provides that an order shall not be made if the variation would be likely to substantially prejudice a party which could not be adequately compensated under subsection (10) or there is any other reason why it would not be reasonable for the variation to be effected.
19. The Tribunal is satisfied that there is no other reason why variation would not be reasonable.
20. The way in which the Applicant puts its case is that, on the evidence, the variation would not cause substantial prejudice and therefore a compensation order should not be made. In the Tribunal's view, that is not the correct approach to section 38. Subsection (6) so far as material to this case, places a bar on an order being made if there is likely to be substantial prejudice which could not be adequately compensated. Subsection (10) gives the Tribunal power to award compensation "if it thinks fit... in respect of any loss or disadvantage that the Tribunal considers he is likely to suffer as

a result of the variation". The Tribunal is satisfied that "substantial prejudice" is not to be implied in subsection (10) and the terms of subsection (10) are not fettered by the terms of subsection (6).

21. Accordingly, the Tribunal finds that it should consider what if any amount of compensation should be paid to each of the Respondents by the Applicant.
22. It is clear on the Applicant's representations, as above, that the result of variation in the terms sought would be to increase the amount of service charges that the Respondents will pay as against the pre-variation position. The Tribunal found that compensation should therefore be paid compensation equivalent to the increase over a period of 3 years from variation on the basis of the Applicant's expenditure analysis.
23. The analysis includes one year in which major works were carried out. The Tribunal, from its own knowledge and experience, found that, in its exposed position, the block containing the 16 flats would require external redecoration works at least every 3 years consistent with the landlord's covenant to that effect in the flat leases. The Tribunal also considered that the other major works items i.e. car park drainage channels, gate control system, parapet wall/coping repairs, landing window and rendering/pointing were unlikely to recur for the 3 years following variation so that they should be taken out of the compensation calculation. Conversely it might be considered that other major items could arise in the ensuing 3 years, but the Tribunal was unable to speculate and took no account of that possibility.
24. On the above basis, the Tribunal made calculations suggesting that reasonable compensation would be £282 per flat as shown in the Appendix to these reasons and made its Order accordingly.

Appeals

25. 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.
26. 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.
27. 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.
28. 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.

MJ Greenleaves
(Judge)

FIRST SCHEDULE

Flat	Lease	Title No.
1	Lease dated 7 th February 2001 made between Golden Gates (Sandbanks) Limited (1) Bernard James Hodgson (2)	DT283814
5	Lease dated 20 th December 1999 made between Golden Gates (Sandbanks) Limited (1) Abbotswood Investments Limited (2)	DT272542
7	Lease dated 25 th May 2000 and made between Golden Gates (Sandbanks) Limited (1) Jasper Quintus Hollom, Patricia Elizabeth Mary Hollom and Christopher Gilbert Summers (2)	DT276747
8	Lease dated 23 rd December 1999 and made between Golden Gates (Sandbanks) Limited (1) Abbotswood Investments Limited (2)	DT273626
9	Lease dated 9 th January 2003 and made between Golden Gates (Sandbanks) Limited (1) Iain Cameron Robertson and Lorna Robertson (2)	DT365775
10	Lease dated 7 th June 2000 and made between Golden Gates (Sandbanks) Limited (1) Rodney James Osway Evans and Marnie Evans (2)	DT284824
12	Lease dated 1 st December 1999 and made between Golden Gates (Sandbanks) Limited (1) Arthur John Bailey and Elizabeth Anne Bailey (2)	DT273541
12A	Lease dated 7 th June 2000 and made between Golden Gates (Sandbanks) Limited (1) Jean Hazel Tweedie-Smith (2)	DT276891
16	Lease dated 3 rd March 2000 and made between Golden Gates (Sandbanks) Limited (1) Judith Monckton (2)	DT276241

SECOND SCHEDULE

Flat	Lease	Title No.
6	Lease dated 20 th September 1963 made between H	Unregistered

	Dare & Son Limited (1) Dares Investments Limited (2)	
11	Lease dated 20 th September 1963 and made between H Dare & Son Limited (1) Dares Investments Limited (2)	DT41385
15	Lease dated 20 th September 1963 and made between H Dare & Son Limited (1) Dares Investments Limited (2)	Unregistered

Flat No.	Term of years	Service Charge Contribution
Flat 1	999 years from 1 st December 1999	1/18 th service charge payment
Flat 2	999 years from 1 st December 1999	1/18 th service charge payment increasing to a 1/16 th share if the reversionary interest of Flats 17 and 18 become vested in a different person.
Flat 3	999 years from 1 st December 1999	1/18 th service charge payment increasing to a 1/16 th share if the reversionary interest of Flats 17 and 18 become vested in a different person.
Flat 4	999 years from 1 st December 1999	1/18 th service charge payment increasing to a 1/16 th share if the reversionary interest of Flats 17 and 18 become vested in a different person.
Flat 5	999 years from 1 st December 1999	1/18 th service charge payment
Flat 6	99 years from 25 th December 1962	1/18 th service charge payment
Flat 7	999 years from 1 st December 1999	1/18 th service charge payment
Flat 8	999 years from 1 st December 1999	1/18 th service charge payment
Flat 9	999 years from 1 st December 1999	1/16 th service charge payment in relation to all service charge expenditure other than maintaining, improving and repairing the access road and car parking area in respect of which the contribution is 1/18 th .
Flat 10	999 years from 1 st December 1999	1/18 th service charge payment
Flat 11	99 years from 25 th December 1962	1/18 th service charge payment

Flat 12	999 years from 1 st December 1999	1/18 th service charge payment
Flat 12A	999 years from 1 st December 1999	1/18 th service charge payment
Flat 14	999 years from 1 st December 1999	1/18 th service charge payment increasing to a 1/16 th share if the reversionary interest of Flats 17 and 18 become vested in a different person.
Flat 15	99 years from 25 th December 1962	1/18 th service charge payment
Flat 16	999 years from 1 st December 1999	1/18 th service charge payment

APPENDIX

	2012/13		2011/12		2010/11	
	a/cs	1-16	a/cs	1-16	a/cs	1-16
total	103,792	96,122	66,477	61,572	52,491	47,917
<u>less major works:</u>						
drainage	3,421	3,041				
gate control	9,110	8,098				
parapet wall	1,170	1,170	4,999	4,999		
landing window	1,896	1,896				
repointing	10,761	10,761	8,953	8,953		
total deducted	26,358	24,966	13,952	13,952		
balance	77,434	71,156	52,525	47,620	52,491	47,917
1/18th	4,302		2,918		2,916	
1/16th		4,447		2,976		2,995
Increase		145		58		79