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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/21UC/LVL/2013/0009**
Property	:	**Flat 1, Granville Crest, 1 Bolsover Road, Eastbourne, East Sussex BN20 7JF**
Applicants	:	**Granville Crest Management Limited (substituted for Granville Crest RTM Company Limited) and five long leaseholders**
Representative	:	**Miss K Smith (lessee of Flat 4/5)**
Respondents	:	**Kenneth and Sylvia MacKenzie**
Representative	:	**Mr K MacKenzie**
Type of Application	:	**Application for lease variation under section 35 Landlord and Tenant Act 1987 ("the Act")**
Tribunal Members	:	**Judge E Morrison (Chairman)** **Mr N I Robinson FRICS (Surveyor Member)** **Miss J Dalal (Lay Member)**
Date and venue of Hearing	:	**21 January 2014 at Eastbourne Combined Court**
Date of decision	:	**29 January 2014**

DECISION

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The Application

1. On 10 October 2013, Granville Crest RTM Company Limited and the lessees of all flats at Granville Crest save the Respondents applied to the Tribunal under section 35 of the Act for an order varying the Respondents' lease of Flat 1.

Summary of Decision

2. No variation of the Respondents' lease is ordered.

The Leases at Granville Crest and the Proposed Variation

3. A copy of the lease Flat 1 was before the Tribunal. It is dated 24 April 2009, and is for a term of 999 years from 29 September 2006 at a ground rent of £200.00 per annum. It is a tripartite lease between the Landlord (Fivewalk Homes Limited), the Residents Association (Granville Crest Management Limited) and the Tenant (the Respondents). A summary of the provisions relevant to this application is as follows:

   (a) The demise comprises the flat, together with its private garden and driveway (but excluding the boundary walls and fences)

   (b) Clause 1(b) provides for the Tenant to pay "such sum as shall be a fair proportion of the amount which the Landlord and/or the Residents Association may from time to time expend and or as may reasonably be required on account of anticipated expenditure and it is agreed that such fair proportion shall be determined from time to time by the Landlord and that as the Apartment has its own private entrance it is acknowledged by the Landlord and the Residents Association that the Tenant shall not be liable to contribute towards the cost of maintenance or upkeep of the lift; the Roadway; the internal lighting of, decoration and keeping clean and furnished the halls landings and internal staircases of the Building; or keeping the internal common parts of the Building (including the lift but excluding the storage and meter room on the lower ground floor and the entrance lobby) in good order and condition".

   (c) The lease then goes on to describe the type of expenditure to which the Tenant may be required to contribute, which includes the cost of performing the Landlord's and/or Residents Assocation's maintenance obligations with regard to the main structure of the building and the common parts.

4. The Tribunal was also shown the leases for two other flats and was told that these and all the remaining leases were (so far as is relevant) identical to Flat 1's lease save that clause 1 (b) of those leases provided

for the Tenant to pay "such sum as shall be a fair proportion of the amount which the Landlord and/ or the Residents Association may from time to time expend and or as may reasonably be required on account of anticipated expenditure and it is agreed that such fair proportion shall be determined from time to time by the Landlord and that as apartment 1 in the Building has its own private entrance it is acknowledged by the Landlord that the Tenant of it shall not be liable to contribute towards the cost of maintenance or upkeep of the lift or roadway".

5. The Applicants sought to vary clause 1(b) of the Respondents' lease of Flat 1 so that it would be in the same terms as the remaining leases. The effect of this would be that the lessee(s) of Flat 1 would be liable to pay a fair proportion of all service charge expenses save those relating to the lift or roadway.

The Inspection

6. The Tribunal inspected Granville Crest on the morning of the hearing, accompanied by the lessees of Flats 1, 2, 4/5, 6 and 7. The building comprises a large detached mansion house built around 1887 which has subsequently been converted into six self-contained flats, with the potential for seven by subdivision of one unit. From the Tribunal's brief inspection, the property had been converted and modernised relatively recently to a high specification. It is not known whether the building was already as flats prior to the recent modernisation but for the purposes of this description it is being described as if a new conversion.

7. The development occupies a corner site with building elevations facing Bolsover Road to the north east, Buxton Road to the south east and St John's Road to the north west. The main pedestrian and vehicular entrance to the property is from Bolsover Road with a communal "Roadway" within the grounds giving access to the main front entrance to the house as well as the parking spaces and garage for all flats except Flat 1. This front house entrance, which is at right angles to Bolsover Road and effectively facing Buxton Road, provides access to Flats 2 - 6. Flat 2, on the ground floor, also has its own external entrance on the Bolsover Road elevation via a private parking area separated from the communal roadway by gates. The Tribunal was told that that the private parking area, garage and a garden area to the rear of Flat 2 are all part of Flat 2's demise. Flat 1, which comprises almost the whole of the basement of the property, has its own access off St John's Road leading via gates to its demised private parking area, garden and the flat itself.

8. On a day to day basis, the occupiers of Flat 1 have no need to enter the building via the Bolsover Road entrance and indeed cannot access their own flat that way. Similarly, the occupiers of the other flats have no rights of access over Flat 1 and cannot access their flats via the St

John's Road entrance. Flat 1 does need some access to the main entrance however, principally because the communal fire alarm serving the whole property has its main panel in the main entrance lobby and, at the very least, in the event of an alarm sounding may wish check the panel to ascertain which area might have triggered the alarm and what action needs to be taken. It was further noted that there were two cupboards on mezzanine landings within the main building where there was a television signal distribution panel in one and apparently combined electrics for the various burglar alarms installed within the flats in the other.

9. In addition, there is a small basement area accessed from the Bolsover Road entrance, by walking in front of the main flats entrance, around the corner to the south west elevation where the six upper flats have storage areas but more importantly all flats, including Flat 1, have their electricity and gas meters. Additionally, Flat 1 has a sump pump, needed if there is a risk of flooding to that flat, situated within one of the storage areas belonging to another lessee. The electricity meter and consumer unit fuse box serving the communal electricity supplies is also in the same basement area.

10. Externally, there are brick elevations under a plain tiled roof. The roof was surrounded by scaffolding for repair works apparently being undertaken following an NHBC claim. This area was not inspected as it did not form part of the issues to be considered. Maintenance of the exterior of the property does not appear to be under dispute between the parties.

11. One of the areas of concern was the communal electricity. It was noted that both the Bolsover Road and St John's Road vehicle entrances have electric gates. It was understood that the Bolsover Road entrance electricity was from the communal supply and that the lighting in the roadway, together with the three PIR operated lights leading to the basement store and the lighting etc. within the store, is also from this supply. No tests had been undertaken to ascertain where the lighting in the parking area serving Flat 2 was fed from or the lighting and gates serving Flat 1 but the lessees seemed to think that this lighting at least was fed from their flat supplies. Electricity would be used to run the fire alarm system, television signal distribution and the assumption was that this was from the communal supply as would be the whole of the lighting and power for the communal staircase and lift. As originally modernised, it is understood that the communal staircase had some 100 lights although at the time of inspection many were disconnected and not therefore working.

12. Another area of concern was the communal stairway maintenance and decoration. The communal stairway is a substantial area and in keeping with the size and nature of the property. It was decorated to an appropriate standard and it is reasonable to expect that this will continue.

Representation and Evidence at the Hearing

13. The Applicants were represented at the hearing by Miss K Smith, a lessee of Flat 4/5 (by profession a lawyer but appearing before the Tribunal in her personal capacity). The Applicants had jointly prepared a statement of case with supporting documentation, including witness statements of Richard Neal (lessee Flat 7) and Dominic Geer (lessee Flats 4/5 and 6). The individual lessee applicants included all lessees save the Respondents and all save Ms Lazorko (Flat 3) attended the hearing.

14. The Respondents had submitted a brief written response to the application. Mr MacKenzie attended the hearing on behalf of himself and his wife.

The Law and Jurisdiction

15. The relevant provisions of the Act are as follows:

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 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) ...
(b) ...
(c) ...
(d) ...
(e) ...
(f) the computation of a service charge payable under the lease
(g) ...

(3) ...
(3A) ...

(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.

Section 3: 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.
...
(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the tribunal thinks fit.

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

Preliminary Matter

16. At the outset of the hearing, it emerged that Granville Crest RTM Company Limited, the First Applicant, was not a party to the lease, or a successor in title to such a party. It therefore had no standing, under section 35(1) of the Act, to make an application. The freehold title is now held by Granville Crest Management Limited, having been recently transferred by Fivewalk Homes Limited. On being told that the membership of Granville Crest Management Limited and Granville Crest RTM Company Limited is identical, comprising all the lessees and no-one else, and all but one lessee being present and consenting, the Tribunal directed that Granville Crest Management Limited should be substituted as First Applicant in place of Granville Crest RTM Company Limited.

The Applicants' Case

17. The variation was sought solely on the ground set out in Section 35(2)(f) of the Act, namely that Flat 1's lease fails to make satisfactory

provision with respect to computation of a service charge payable under the lease.

18. The Applicants' evidence was that Flats 2 and 4/5 were purchased from Fivewalk prior to the completion of Flat 1's lease. The purchasers of Flats 2 and 4/5 had been informed by Fivewalk's solicitors that the service charges would be borne equally between the 6 flats. When the Respondents then negotiated amendments to the lease of Flat 1 in April 2009, which exempted them from paying anything towards the upkeep of the common hallways and most of the other common parts inside the building, the other lessees were not made aware of this. When Mr Neal purchased Flat 6 in September 2009 he too was unaware that the Flat 1 lease differed from his own, having been informed by the vendors' solicitors that the leases had been prepared on a standard basis and that amendment was not acceptable. It was only in May 2010 that the other lessees discovered that clause 1(b) of Flat 1's lease differed from their own leases. The Respondents had refused to contribute to expenses which their lease did not require them to pay for. There were then lengthy negotiations between some of the lessees and Fivewalk with a view to Fivewalk offering compensation to the Respondents in exchange from bringing their lease into line with the others, but ultimately nothing was agreed as the Respondents did not wish to vary their lease.

19. Ms Smith submitted that the conditions set out in section 35(4) of the Act were fulfilled. Flat 1's lease provided for a "fair proportion" of service charge expenditure to be charged to the lessee, and the other lessees also had to pay a "fair proportion" under their leases, thus satisfying subsections (a) and (b). With regard to subsection (c) Ms Smith said that this was fulfilled because the amounts payable by all lessees in respect of some items of expenditure – namely those from which the Flat 1 lease gave exemption – did not add up to 100%. This result was neither fair nor reasonable.

20. Reliance was also placed on a letter from the managing agents, Pepper Fox dated 13 November 2013, in which it was stated that "We are currently unable to collect 100% of the service charge... because the RTM Co has specified that the charges should be split in accordance with the leases held by Flats 2 to 7, and the lessee of Flat 1 has refused to pay on this basis". It went on to state that the Flat 1 exemptions could not be accurately applied in practice because it was not possible to separate out the cost of the communal electricity to which Flat 1 had to contribute from that to which it did not, as there was only one meter. It was also not straightforward to apportion upkeep costs between the entrance lobby and the internal stairways and landings.

21. It was further argued that the differences in Flat 1's lease would make the other flats difficult to sell. Making the leases the same would avoid uncertainty and constant argument. Bringing Flat 1's lease into line would mean that the Respondents remained exempt from contributing to the upkeep of the lift and the roadway, so that while being the largest

flat, the smallest service charge contribution would still be made. This could not be unfair to Flat 1.

22. The Tribunal was referred to those parts of Mr Geer's and Mr Neal's witness statements that set out their efforts to resolve the situation and the time and effort involved. Mr Neal addressed the Tribunal briefly, wishing to emphasise the stress caused by the situation, and that while he had negotiated other major issues with Fivewalk to the financial benefit of all the lessees, it was frustrating that Mr MacKenzie would not agree to compromise a dispute over modest amounts of money.

23. The parties were referred by the Tribunal to the Upper Tribunal's decision in *Morgan v Fletcher* [2009] UKUT 186 (LC), which held that section 36(4) of the Act must be construed as if the word "if" at the end of the opening phrase reads "only if". Thus section 35(4) can apply only if the aggregate of the service charges payable by all lessees is more or less than 100%. Having been given time to consider this decision, Ms Smith made a further submission. She said that the only sensible way to interpret clause 1(b) in the Applicants' leases was to read in the word "only" after the word "roadway" at the very end of the clause. This meant that, for the other lessees, Flat 1's exemptions could not extend beyond the upkeep of the lift and the roadway, and that their "fair proportion" for the remaining expenses payable under their leases therefore had to be calculated on the basis that Flat 1 was also paying a fair proportion of them. As Flat 1's lease did not require the lessee of that flat to pay a "fair proportion" of certain of the remaining expenses, there was an inconsistency between the two versions of clause 1(b), with the result that the aggregate of the amounts payable under the leases for those certain expenses was less than 100% of the cost. Thus the test in *Morgan v Fletcher* was met.

The Respondents' Case

24. Mr MacKenzie made brief submissions, in addition to relying on his written statement. His case was that he and his wife had negotiated the amendments to clause 1(b) of their lease prior to purchase, and would not have bought the flat otherwise. He felt it was only fair that Flat 1 should not have to contribute to the upkeep of the interior common parts, apart from the entrance lobby or meter room, as Flat 1 did not use or benefit from them. Flat 1 had its own private entrance and street address (9B St John's Road) and post was delivered direct to the flat. He only entered the entrance lobby of the main building if the fire alarm went off, in order to check the situation and deactivate it. He went to the rear meter room about 3 times a year to read his electricity meter. He saw no reason why he should pay for expensive redecoration and carpeting of the common hallway and stairway, and said it would "not be rocket science" to apportion the communal electricity and other communal costs so that he only paid what his lease required him to pay. He and Mrs MacKenzie were retired, living on a pension, and could not afford to pay more. He did not want Flat 1's lease to be varied.

Discussion and Determination

25. The authority of *Morgan v Fletcher* makes it clear that notions of unfairness or disproportionality in the way that service charges are borne are irrelevant to establishing a ground for variation under section 35(2)(f) of the Act. In *Morgan* there were 8 lessees, 6 of whom paid between them 96% of the service charges, with the other 2 lessees together paying 20%, so a total of 116% was payable. An application for variation was made by the 6 lessees under section 35(2)(f). Prior to the hearing the leases of the two lowest contributing flats were varied (by the lessor and lessees of those flats) so they now together paid 4%, meaning that a total of 100% was payable. The Upper Tribunal, having considered the reports and debates preceding the legislation, held that section 35(2)(f) was only intended to apply to situations where the service charges payable aggregated to more or less than 100%. Therefore no variation was ordered.

26. The view that there is nothing inherently "unsatisfactory" about a situation where some lessees pay the full cost of a service which is provided to all lessees was reiterated in *Cleary v Robertson* [2011] UKUT 264 (LC) at [27]. In that case the Upper Tribunal also took the view that section 35(2)(f) was inapplicable because the leases which it was sought to vary did not provide for any of the expenditure in question (managing agents fees) to be recovered as a service charge and therefore the condition in section 35(4)(a) could not be met. If that reasoning is applied in this case, it follows that there can be no variation requiring the lessees of Flat 1 to pay for expenditure to which they are not already required to contribute. However, as the Upper Tribunal's view on this point was not central to its decision, it is arguably not binding on this Tribunal.

27. If it is accepted that the conditions in section 35(4)(a) and (b) are met, the critical issue is whether subsection (c) is also met. The arguments in favour of variation based on practical issues such as alleged difficulties in apportioning costs or in selling the flats clearly have no relevance to this and do not need to be considered. Similarly the state of knowledge of the other lessees as to the wording of clause 1(b) in the Respondents' lease has no bearing on the matter (although it may be added that the Respondents were under no duty of disclosure in any event, and whether the other lessees have a remedy against their vendor, Fivewalk, is not for this Tribunal to consider).

28. Ms Smith's case on behalf of the Applicants therefore comes down to whether the amounts payable for the relevant services (the upkeep of the hallways landings and internal staircases of the Building, and the other internal common parts save for the storage and meter room on the lower ground floor and the entrance lobby) add up to 100% of those costs. She says they do not because, under their leases, the other lessees can only be required to pay a fair proportion of those costs, and the

Respondents must also pay a fair proportion. In other words, the proportions of these costs paid by the other lessees must be calculated on the assumption that the Respondents will also pay a fair proportion of them. Ms Smith argues that the restriction on the other lessees' contribution is mandated by reading in the word "only" at the end of clause 1(b) of their leases, with the result that Flat 1 may not have any exemption from contribution save in respect of the lift and roadway. If Flat 1 pays nothing, the result will be that less than 100% is paid.

29. The Tribunal does not accept this reasoning or outcome. Firstly, the word "only" does not appear in the leases and there is no reason why the leases should be read as if it were there. Secondly, even if the leases should be read in that way, those leases are not binding on the Respondents and cannot alter what Flat 1's lease says. Thirdly, even if the leases should be read in that way, it does not follow that less than 100% of the costs are payable.

30. The entire argument put forward by the Applicants rests on the premise that costs should be shared equally between the 6 lessees, save for the lift and roadway. However, none of the leases refer to an equal share or indeed quantify the share to be paid in any way. The phrase used in all the leases is "fair proportion". There is no reason why the fair proportions payable by the other lessees in respect of the relevant services should not be calculated so as to add up to 100% of the cost. Nor is there any reason why, looked at from the point of view of the other leases, Flat 1's fair proportion may not be Nil. Under Flat 1's own lease, there is no contribution to be made. It comes to the same thing. There is no inherent inconsistency or inability to recover 100% of the service charges. Accordingly the application for variation is refused.

32. Although, as explained above, general notions of fairness are irrelevant, it should be noted that the Respondents remain liable to contribute to all costs other than those services specifically exempted by their lease (and from which they derive no direct benefit). The Applicants made the point that the Respondents, while having the largest flat, would be contributing the least. That assumes again, and wrongly, that contributions to all the other costs must be borne equally between the lessees. There are various methods of calculating a "fair proportion", only one of which is equality. The managing agents should be able to advise.

33. It may also be observed that an accurate apportionment of the communal electricity charges may be achieved either by the installation of a sub-meter or by the use of wattage calculations.

Dated: 29 January 2014

Judge E Morrison (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.