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

Case Reference : **LON/00AW/LVL/2013/0015**

Property : **69a Lexham Gardens London W8
6JH**

Applicant : **Christopher Howarth**

Representative : **None**

Respondent : **(1) Sixty Nine Lexham Gardens
Limited
(2) Mr L Garigue – director
(3) Mr Watts - director
(4) Mr F Fong – director
(5) Mr T Crowch – director**

Representative : **None**

Type of Application : **Variation of a lease by a party to a
lease**

Tribunal Members : **Judge O’Sullivan
Mr L. Jarero BSc FRICS**

**Date and venue of
Hearing** : **10 Alfred Place, London WC1E 7LR**

Date of Decision : **6 January 2014**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that the application to vary the lease shall be refused.
- (2) The tribunal makes no order under section 20C.

The application

1. The Applicant seeks to vary the lease dated 7 October 1981 and made between 69 Lexham Gardens Limited and Taduesz Heinrich Gebert and Fari Gebert of Flat A (the "Lease") under section 35 of the Landlord and Tenant Act 1987.
2. Directions were made in this matter dated 20 August 2013 further to which both parties lodged statements of case and a hearing took place on 20 September 2013. At the hearing the Applicant appeared in person and Sixty nine Lexham Gardens Limited was represented by Mr Garigue and Mr Fong, both directors with Mr Watts, also a director attending.

The variation sought

3. 69a Lexham Gardens is a lower ground floor flat contained within a period house which has been converted into seven flats over six floors.
4. The variation sought is described in the application as a defect in the drafting of the Applicant's lease. The staircase which is said to be within the Applicant's exclusive use, control and access is said to be missing from the illustrative plan attached to the Lease. The variations sought are twofold. First a paragraph is sought to be added to the Third Schedule of the Lease which defines the demise as follows; "*and the area on the ground floor level and the stairs therefrom [shown edged Green on the attached plan]*". Secondly the Applicant asks for a variation to the illustrative plan to include the staircase.

The Applicant's case

5. The tribunal heard that it is common ground that the staircase is within the Applicant's flat, the front door to his flat, being located on the ground floor. It is also agreed that it has been within the physical confines of the flat since the conversion in or around 1981.
6. The Applicant says that the staircase is not within the definition of the reserved parts or of any other lease of part of the building. No other leaseholder has access to the staircase as it is behind the front door to

the flat and no access to it is necessary as there are no other flats accessed by this staircase.

7. The Applicant relied on the definition of reserved property in the Second Schedule of the Lease as including "*the halls staircases landings and other parts of the buildings forming part of the Estate which are used in Common by the Owners or occupiers of any two or more of the Flats.*" As the staircase was within the physical confines of his flat it could not, he said, be part of the reserved property as it could not be said either to be used in common by the owners or occupiers of any two or more of the flats.
8. The Applicant therefore submits that this is simply a drafting error and asks the tribunal to correct it under section 35. When asked he confirmed that this was not an issue that had arisen when he bought the flat but had been raised by a prospective purchaser when he recently attempted to sell.
9. In response to a question from the tribunal as to whether this fell within the provisions of section 35 the Applicant submitted that it did so as were the staircase part of the communal area there would be questions of repair, insurance access and liability. He confirmed that at present he paid for any repair and maintenance necessary and in fact no issues had arisen in this regard during his period of ownership.

The Respondents' case

10. The Respondents firstly state that the correct party to the proceedings is 69 Lexham Gardens Limited and the tribunal agreed that there was no necessity for individual directors of the landlord company to be named as Respondents.
11. The Respondents queried whether the application fell within the provisions of section 35 but did not elaborate on the grounds. The tribunal heard that the Lease had been in place since 1981 and there had been no problems previously. It was questioned whether a variation was really necessary.
12. The tribunal heard that there has been some background issues between the parties. A dispute has arisen in relation to a water cable and electricity cable which were running across the garden of Flat B and these have been disconnected by the Applicant. Negotiations were taking place which involved a variation of the description of the demise of flat A in the Lease being agreed in return for a licence to allow the cables to run across the garden. Unfortunately these have broken down.

The tribunal's decision

13. The tribunal did not consider it appropriate to grant the variations sought and declined to do so.

Reasons for the tribunal's decision

14. The tribunal agreed that on construction of the Lease the staircase in its view did not form part of the reserved property and it was likely that the intention of the parties to the Lease was that it should form part of the demise of the flat.
15. However the application did not appear to the tribunal to fall within the provisions of section 35. The grounds upon which such an application can be made are that the lease fails to make satisfactory provision in relation to one or more of the following matters and goes on to outline certain categories. The Applicant particularly relied on the provision relating to the repair and maintenance of the flat or the building. However in the tribunal's view the position in relation to the repair is quite clear. The landlord retains responsibility for the reserved property and as the staircase is not reserved it falls to the responsibility of the Applicant. In any event the Applicant accepts responsibility for the staircase and confirms that he carries out any necessary repair and maintenance.
16. The tribunal was not provided with any instance by which the Lease fails to make satisfactory provision in relation to the staircase.
17. The tribunal does appreciate that the Applicant may wish his Lease to reflect his demise more clearly. However in our view this would be matter for an application for rectification rather than variation.
18. Alternatively given the parties have negotiated albeit unsuccessfully in the past they may wish to continue discussions to see if agreement can be reached to the benefit of all. This would be likely to be the most cost effective manner of concluding the disputes between the parties.

Application under s.20C and refund of fees

19. In the application form the Applicant applied for an order under section 20C of the 1985 Act. Taking into account the determinations above, the tribunal determines that no order should be made under section 20C.

Name: S O'Sullivan

Date: 6 January 2014

Appendix of relevant legislation

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.

Landlord and Tenant Act 1985 (as amended)

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

- (2) The application shall be made—
 - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
 - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.