



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

Case Reference : **MAN/OOEJ/LVT/2013/0005**

Properties : **Flats 1; 6; 8; 9; 11; and 15 Stanhope Castle,
Stanhope, County Durham**

Applicant : **Arrandene Ltd.**

Representative : **John Lawson**

Respondents : (1) **Steven Southern**
(2) **Christine Anne Burnside**
(3) **Amanda Taylor**
(4) **Peter Taylor**
(5) **Charles Scott**
(6) **Joy Ferguson**
(7) **Keith Ferguson**
(8) **Jeffrey Fearon**
(9) **Graham Padden**
(10) **Lesley Padden**

Representative : **Michael James (on behalf of Charles Scott)**

Type of Application : **Landlord and Tenant Act 1987 – Section 35**

Tribunal Members : **Judge P Forster**
I R Harris BSc FRICS

Date of Decision : **20 June 2015**

DECISION

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Decision

1. The application is not allowed.

Background

2. This is an application under Section 35 of the Landlord and Tenant Act 1987 ("the Act") for orders varying the leases of a number of flats in Stanhope Castle, Stanhope, County Durham. The application was received by the Tribunal on 6 September 2013.
3. The Applicant is Arrandene Ltd. who is the landlord under all of the relevant leases. The Respondents are the tenants under those leases.
4. Stanhope Castle is a Grade II listed building, built about 1800. It was originally a single dwelling. In the 1980's it was acquired by builders and developers, Bennison and Ellis who converted parts of Stanhope Castle into self-contained flats. Leases of the flats were created but they were not in a standard form.
5. In 1986, the freehold of Stanhope Castle was acquired by a Mr Luvaglio subject to the leases which had already been granted. He continued the programme of converting the building into flats and creating more leases. In 1991, Mr Luvaglio transferred most of his interest in Stanhope Castle to Rowhill Builders Ltd. who created more flats and more leases. In 1996, the property was transferred to Northern Mark Ltd. and then again in the same year to Inspectpoint Ltd.
6. The ownership of the freehold interest became uncertain. The freeholder took no involvement in the building; the fabric fell into disrepair and it was not insured.
7. Mr Luvaglio was a director of Rowhill Builders Ltd. and it is believed that he exercised control over both Northern Mark Ltd. and Inspectpoint Ltd. In May 1992 Mr Luvaglio was made bankrupt. In 2004 Inspectpoint Ltd. went into receivership.
8. In 2008, Ferndene Developments Ltd. purchased from the Official Receiver, Northern Mark Ltd.'s interests in Stanhope Castle. With the exception of Flats 4 and 5, that gave it freehold title to most of Stanhope Castle. It also acquired the freehold of flats 6 and 12. Ferndene Developments Ltd. later transferred its interests to the Applicant.
9. In 2008, the Applicant applied to HM Land Registry to register its freehold title. There were no deeds after the transfer to Rowhill Builders Ltd. in 1991 and before the transfer from the Official Receiver in 2008. The application for the freehold title was opposed by Charles Scott who then owned the leaseholds of Flats 8; 9 and 11, and by Denis Scott who resided in Flat 5. Denis Scott subsequently withdrew his objection. The application was determined by the Land Registry Adjudicator in September 2011. The Applicant was awarded possessory rather than absolute freehold title because of the gap in the title between 1991 and 2008.
10. The Applicant owns the possessory freehold title to flats 1; 6; 8; 9; 11; 15 and 18.

11. The freehold of Flat 7 is owned by Claire Nichol and Paul Nichol QC and the freehold of Flat 12 is held by Craig Heyes and Victoria Heyes.
12. The ownership of Flats 4 and 5 was the subject of litigation between Dennis Scott and Mrs Luvaglio. Mr Scott was unable to establish possessory title of the freehold and Mrs Luvaglio could not show ownership of the leases which vested in her trustee in bankruptcy. Apparently, Mr Scott lets Flat 4 to a tenant and he occupies Flat 5 himself.
13. The Applicant does not have an interest in Flats 4; 5; 7 and 12.
14. The Applicant is owned and controlled by Andrew Scott Robson and he is the leasehold owner of a number of the flats. Since the application was made some of the flats have changed ownership. The current position is:

Flat 1 – is owned by Steven Southern and Christine Anne Burnside who are both Respondents.

Flat 2 - is owned by Andrew Scott Robson.

Flat 3 – is unoccupied.

Flat 4 – ownership is uncertain but the Applicant has no interest.

Flat 5 – ownership is uncertain but the Applicant has no interest.

Flat 6 – is owned by Amanda Taylor and Peter Taylor who are both Respondents.

Flat 7 – the freehold is owned by Claire Nichol and Paul Nichol QC.

Flat 8 – is owned by Charles Scott who is a Respondent.

Flat 9 – is owned by Graham Padden and Lesley Padden. They acquired the flat in December 2014 from Charles Scott. They were not Respondents to the application.

Flat 10 – is owned by Andrew Scott Robson

Flat 11 – is owned by Joy Ferguson and Keith Ferguson. Only Mrs Ferguson was named as a Respondent.

Flat 12 – the freehold is owned by Craig Heyes and Victoria Heyes

Flat 14 – is owned by Andrew Scott Robson who took an assignment of the lease from Carol Oxford who is named as a Respondent.

Flat 15 – is owned by Andrew Scott Robson who took an assignment of the lease from Judy Hirst who is named as a Respondent.

Flat 16 – is owned by Jeffery Fearon who is a Respondent.

Flat 17 – is owned by Andrew Scott Robson

Flat 18 – is owned by Andrew Scott Robson who created Flat 18 from part of Flat 15.

15. It has been necessary to set out all this detail to demonstrate the complexities that beset Stanhope Castle and to put the application in its proper context. It is also necessary in order to identify the specific leases to which the application applies and to identify the Respondents to the proceedings.
16. Mr Robson, in his own capacity, has agreed to the variation of the leases which he holds and he is not a party to these proceedings.
17. The application is to vary the leases of Flats 1; 6; 8; 9; 11 and 15. The correct respondents are Steven Southern; Christine Anne Burnside; Amanda Taylor; Peter Taylor; Charles Scott; Graham Padden; Lesley Padden; Joy Ferguson; Keith Ferguson and Jeffery Fearon.
18. To adopt Mr Lawson's statement, this is not a typical application to vary leases.
19. On their application, Graham Padden and Lesley Padden are joined as Respondents to the proceedings.
20. With the exception of Flat 11, all the leases are for 999 years with varying start dates and at nominal ground rents. Flat 11 is for an initial term of 125 years at a ground rent of £25.00 per year increasing every 25 years.
21. The hearing took place at Newton Aycliffe Magistrates Court on 9 June 2015. Andrew Scott Robson attended on behalf of the Applicant which was represented by its solicitor, John Lawson. Charles Scott was present and represented by counsel, Michael James. Also present were Mr Southern and Ms Burnside; Mr Fearon and Mr Taylor.

Applicant's Case

22. All the leases with which the Tribunal is concerned are within the scope of Section 35 of the 1987 Act.
23. Insurance – with the exception of Flat 11, the Applicant is required under the terms of the various leases to insure the common parts which as defined include the main structure, the roof and foundations but not the window frames and interiors. The Applicant has been unable to insure the common parts alone and has had to insure the entire building without being able to recover the cost from all the leaseholders.
24. The leaseholders are obliged to pay:

“a proportion of the costs reasonably incurred by the lessors and their successors in title in performing...the stipulations such cost to be shared equally by the owners from time to time of the flats having like rights over common ways”.

25. There is no covenant relating to the payment of a proportionate part of insurance premiums. The proportion payable by each leaseholder is not defined. There is no mechanism to recover monthly payments. There is no provision that covers the consequences of late payments or non-payment of for the payment of interest.
26. Most of the leases require the leaseholder to insure their own flat.
27. The lease of Flat 11 does not impose an obligation on the Applicant to insure but it requires the leaseholder to pay the Applicant one twentieth of the cost of insuring the entire building. There is no obligation on the leaseholder to insure. There is no mechanism for the collection of monies.
28. Maintenance and repair – with the exception of Flat 11, the Applicant is obliged to keep in good and substantial repair the common parts. The lease for Flat 8 adds decorative repair.
29. The lease of Flat 11 imposes a similar repairing obligation but with the leaseholder paying one twentieth of the cost. The basis for that proportion is not known.
30. The other leases do not fix the proportion of the repair costs that are payable by leaseholders nor is there a provision that deals with how the costs are to be collected. There are no provisions in respect of late or non-payment. There is no provision for a sinking fund or instalment payments.
31. The Applicant's solution to the problems posed by the current leases is in simple terms to remove from those leases the Sixth and Seventh Schedules and replace them with the Fifth, Sixth and Seventh Schedules from the draft lease prepared by Sintons on behalf of Mr Scott. The Applicant withdrew the draft lease that was attached to its application and put forward Sintons' lease prepared in the course of negotiations between the parties but not agreed by the parties because of issues with the Respondents about the status of their leasehold titles.

The Respondent's Cases

32. Mr Scott's case – the basic facts, so far as they can be established, are not in dispute. Mr Scott objects to the proposed variation of his lease because it will diminish his title from absolute leasehold title to good leasehold title. It is submitted that any variation of his lease would prejudice Mr Scott and any monetary award would not provide him with adequate compensation.
33. The application is not made with the consent of all the parties. At an earlier stage, Mr Scott did indicate that he was prepared to surrender his lease for a new lease but he withdrew his agreement once he appreciated that would diminish his title.
34. The other Respondents who attended the hearing and some of those who did not attend but made written submissions, also objected to the proposed variation of their leases because it would diminish their title. The application to vary the lease was not made with their consent.

The Law

35. So far as relevant to the present application, Section 35 of the 1987 Act provides for an application to be made by a party to a lease for that lease to be varied.

- (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);
 - (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;
- (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.

36. So far as is relevant, Section 39 of the 1987 Act provides for the orders that the Tribunal may make to vary leases

- (1) If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the court, the court 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 court thinks fit.
- (6) The court shall not make an order under this section effecting any variation of a lease if it appears to the court—
 - (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.
- (8) The court may, instead of making an order varying a lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified; and accordingly any reference in this Part (however expressed) to an order which effects any variation of a lease or to any variation effected by an order shall include a reference to an order which directs the parties to a lease to effect a variation of it or (as the case may be) a reference to any variation effected in pursuance of such an order.
- (9) The court may by order direct that a memorandum of any variation of a lease effected by an order under this section shall be endorsed on such documents as are specified in the order.

- (10) Where the court makes an order under this section varying a lease the court 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 court considers he is likely to suffer as a result of the variation.

Decision

37. The recent history of Stanhope Castle is unhappy and litigious. There have been several previous cases before different courts and tribunals. The present application has continued the ongoing dispute between the Applicant and the leaseholders who own flats in the Castle. Uncertainty about the ownership of the freehold title and unsatisfactory leases and a lack of trust between the parties is the cause of the current situation.
38. The purpose of Section 35 is to enable a party to apply to the Tribunal for a variation of the lease in circumstances where the lease fails to make satisfactory provision with respect to certain matters. The purpose is to cure a defect in the lease. In the present case the Tribunal is asked to vary six leases which to complicate matters are in different forms and which would require in effect six different orders.
39. To some extent the parties had been able to settle their differences. They all accepted the unsatisfactory state of affairs and all shared the desire to bring certainty to matters. Negotiations produced a draft lease, prepared by Mr Scott's solicitors, Sintons. To a great extent the terms of the Sinton's lease were acceptable to the parties. It was proposed that the Respondents would surrender their current leases and that new leases would be granted to them. However, problems became apparent when enquiries were made of HM Land Registry.
40. The six leases that are the subject of this application are registered at HM Land Registry with absolute leasehold title. However, the Applicant holds possessory and not absolute freehold title. This situation arose because the leasehold titles were registered before the freehold title. The position is that where an existing lease is surrendered and a new one is granted there will be two separate registered leasehold estates. The original leasehold title is closed and a new one created relating to the lease. Where the freehold title is possessory that will be reflected in the leasehold title and only good leasehold title will be granted. The leasehold title cannot be better than the freehold title.
41. The Applicant informed the Tribunal that a recent application had been made to HM Land Registry to upgrade its freehold title. That was something that the Respondents were not aware of. That did not cure the impasse with the Respondents.

42. The Respondents were not prepared to accept a diminution in title and so an agreed resolution was not possible. An alternative course of action would have been for the parties to try to agree a deed of variation but that had not been proposed or considered. That left the Applicant to pursue its application under s.35 of the Act in the face of opposition from the Respondents.
43. The Tribunal was not provided with draft amended leases and it was not given a schedule that showed the relevant clauses in the current leases that would have to be omitted or amended to give effect to the proposed variations. The Applicant presented the Tribunal with the Sinton's lease and was invited to substitute three schedules from that lease for two schedules in the current leases.
44. Such a course immediately presents difficulties because the schedules from the Sintons Lease use terms and phrases which are not defined in the leases under review. Putting it simply, there is no consistency between the Sintons Lease and the other leases. The Applicant's representative suggested importing the definition clause from the Sintons Lease or amending the other six leases so that when read with the schedules from the Sintons Lease they made sense. That is not a practicable solution and would create more difficulties than it would cure. The practical solution is to start again from fresh with new leases but that cannot be achieved by a surrender and grant of new leases because of the problems with the registered title.
45. There are further difficulties. It was submitted on behalf of the Applicant that the proportion of the service charge to be paid by each of the leaseholders would be calculated on the size of the respective leasehold properties. The Tribunal was told that was agreed by the leaseholders who accepted the measurements of their respective properties. That was bluntly contradicted when the Tribunal heard evidence from Ms Burnside and Mr Fearon who told the Tribunal that they did not accept the measurements attributed to their properties.
46. The draft lease attached to the application was abandoned by the Applicant who now seeks to amend the six leases under review by cutting out two schedules and pasting in three schedule from the Sintons Lease that was drafted by Mr Scott's solicitors. The Applicant contended that matters were agreed between the parties but for the problem of the status or the registered leasehold titles.
47. Section 39 of the Act provides that on an application under Section 35 the Tribunal may make an order varying a lease if satisfied that the grounds in subsection (2) are established. The Tribunal finds that the current leases fail to make satisfactory provision with respect to the insurance of the building and the recovery of expenditure incurred by the landlord for the benefit of the leaseholders. All the parties agree on that point.
48. Section 39 (6) provides that a Tribunal may not make an order effecting any variation of a lease if it appears to the Tribunal that (a) the variation would be likely to substantially prejudice any respondent to the application or any person who is not a party and that an award under subsection (10) would not afford adequate compensation or that for any other reason it would not be reasonable in the circumstances for the variation to be effected.

49. Scott Robson owns 6 of the flats and controls the Applicant Company. 4 of the flats are outside the Applicant's ownership and 1 flat is unlet. The remaining 6 flats are subject to this application. The Tribunal must have regard to the interests of the Respondents who own those 6 properties.
50. The application in its present form is simply not workable and has not been thought through. The Applicant has failed to set out with any precision in respect of each of the six leases under review the parts to be amended. The removal of two schedules and their replacement with three schedule from the Sinton's lease cannot be achieved without amendments to other parts of each of the leases and those amendments have not been considered by the Applicant.
51. An order in the terms requested by the Applicant would substantially prejudice the Respondents and create uncertainty and confusion and encourage further disputes between the parties. It would make an unsatisfactory situation worse. For those reasons, under Section 39 (6) the Tribunal refuses the application.
52. The Tribunal was not addressed on the question of compensation under Section 39(10). This is not a situation where compensation would be an appropriate remedy.