



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

**Case reference** : **LON/00AK/LVL/2018/0002**

**Property** : **Flat 44 Geary Court 24 The  
Concourse Edmonton Green  
London N9 0TQ**

**Applicant** : **London & Quadrant Housing Trust**

**Representative** : **Devonshires Solicitors**

**Respondents** : **Paraskevi-Maria Petrou and  
Antonios Mikelis**

**Representative** : **N/A**

**Type of application** : **Variation of a lease by a party to the  
lease**

**Tribunal members** : **Judge Carr  
Mr Barlow FRICS**

**Venue** : **10 Alfred Place, London WC1E 7LR**

**Date of hearing** : **10<sup>th</sup> May 2018**

**Date of decision** : **24<sup>th</sup> May 2018**

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**DECISION**

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### **Decisions of the tribunal**

- (1) The tribunal determines to vary the lease as specified in Appendix 2 to this decision.
- (2) The tribunal makes the determinations as set out under the various headings in this Decision.
- (3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

### **The application**

1. The Applicant seeks a determination pursuant to s.35 of the Landlord and Tenant Act 1987 in connection with a proposed variation of a lease.
2. The relevant legal provisions are set out in Appendix 1 to this decision.

### **The hearing**

3. The Applicant was represented by Mr Wayne Beglan of Counsel at the hearing and the Respondents appeared in person, Mr Mark Foxcroft Solicitor and Mr Adam Clarke Property Manager with the Applicant also attended and gave evidence on behalf of the Applicant.

### **The background**

4. The property which is the subject of this application is a flat which is one of a block of 51 self contained flats known as Geary Court.
5. The Respondents hold a shared ownership lease of the property. There are a further 46 flats which are held on shared ownership long leases. The remaining 4 flats have been let out on intermediate rent assured tenancies. The specific provisions of the lease and will be referred to below, where appropriate.
6. The problem which led to the application is set out in full in the application. In essence it is made because the Respondents' lease is defective because (a) there is no express obligation as between the Applicant and the Respondent whereby the Applicant is required to repair etc and (b) there is no express obligation permitting the Applicant to recover any such costs of repair etc, providing services to and maintaining Geary Court from the Respondents, or indeed any of the leaseholders in Geary Court.

7. Mr Adam Clarke, the property manager responsible for the block gave very useful background evidence to the tribunal.

### **The issues**

8. In the directions the tribunal identified the relevant issues for determination as follows:
  - (i) Do the proposed variations fall within the grounds set out in section 35(2) of the Landlord and Tenant Act 1987 (the Act)?
  - (ii) Should the tribunal order the proposed variations to be made to the lease?
  - (iii) If it does make an order varying the leases, should the tribunal order any person to pay compensation to any other person under s.38(10) of the Act?
9. There was some discussion about whether all the shared owners/lessees had been given notice of the application. The Respondents were concerned that the Applicant's records of addresses were not up-to-date. It appeared from the discussion that not all shared owners had been notified. However the tribunal is confident that the further steps which will need to be taken following this determination will require the Applicant to contact all the shared owners so that the Respondents should rest assured that everyone will be aware of the defects in their leases and the proposed variations.
10. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

### **Do the proposed variations fall within the grounds set out in s.35(2) of the Act?**

11. Counsel for the Applicant argued that the power conferred by s.35 of the Act is a wide power which is designed to correct defects in leases. His argument was that the position in this case was analogous to *Sinclair Garden Investments v Fernie* where there was no obligation on the part of the tenants to reimburse the landlord for the costs of repairs and maintenance. The leases in this case were varied to introduce standard service charge provisions. Indeed, Counsel argued that the

case for variation may be stronger in the instant case than in Fernie in that there is no direct express obligation on the applicant to repair. Counsel argued that it is clear that s.35 covers this situation and that the tribunal ought to exercise its powers to vary the Lease so as to remove the defect.

12. Whilst the Respondents made several observations about the Application, they did not argue that the proposed variation did not fall within the grounds set out in s.35(2) of the Act.

### **The tribunal's decision**

13. The tribunal determines that the proposed variation falls within the scope of the statutory power to vary.

### **Reasons for the tribunal's decision**

14. The Tribunal accepts the argument of the Applicant's Counsel, and notes that no argument to the contrary was made.

### **Should the tribunal order the proposed variations to be made to the lease?**

15. There are two aspects to this issue. First should the variations be made in the terms proposed? Second should the variations be made retrospectively?
16. Counsel for the Applicant produced the proposed variations. The Respondents had some concerns about the proposed variations in that they were not clear that they imposed an obligation upon the Applicant to provide for and maintain security apparatus, including CCTV in connection with the block of flats.
17. There was some discussion between the tribunal and the parties as to whether the proposed variations covered security. The Applicants agreed to amend the proposed variations to specifically include the requirement to provide for and maintain security apparatus. The Respondents had some remaining concerns that current practices of monitoring intruders and anti-social behaviour would continue. The tribunal expressed the opinion that such a level of detail was not appropriate for the terms of the lease but could be made clear in meetings of lessees and in letters explaining the variation. The Respondents were content with this.
18. Counsel for the Applicant argued that the variations needed to take effect retrospectively. He referred to an Upper Tribunal decision, *Brickfield Properties Ltd v Botten* [2013] UKUT 0133 which makes it

clear that s.35 may be used to effect retrospective variations. He pointed out that no lessee of the block has, for the relevant period doubted the obligation to pay service charges. Whilst there have been disputes about the amount these relate to reasonableness and not payability under the lease. In essence services were provided by the Applicant and by and large lessees paid for those services and therefore it would be inappropriate not to make the variation retrospective.

19. The Respondents had concerns about retrospectivity. They disagreed with the Applicant that corrective action was taken as soon as the Applicant had become aware of the defects. They considered that the Applicant waited until the Respondents made a further s.27A application in connection with the reasonableness of service charges and used this as an opportunity to correct the defect.
20. The Applicant's evidence was a little confused here; it appears that the Applicant became aware of the defect in the context of proceedings in relation to service charge arrears against the Respondent in 2016, at a time when the tribunal proceedings were part heard. That claim was then settled and whilst further action was considered it was not actually taken until the 2017 s.27A application was made.
21. The Respondents were concerned that this meant that they were being used as the test case for the lease variation. They would have wanted the Applicant to take proceedings against all of the shared owners simultaneously as this would have created a pool of Respondents who could have shared legal costs. As it transpired they have been left on their own to seek and fund legal advice in connection with the application.
22. Counsel for the Applicant argued that the reason for making only one application under s.35 was to reduce application fees and this strategy was appropriate and proportionate particularly for a social housing provider.

### **The tribunal's decision**

23. The tribunal determines to order the proposed variations as amended to include specific reference to security, in the terms set out in the Appendix to this decision. It also determines to make the variation retrospective.

### **Reasons for the tribunal's decision**

24. The tribunal accepts the arguments of the Applicant in connection with retrospectivity and the proposed variations as amended to address the Respondents' concerns about the Applicant having clear obligations in connection with security.

### **Is compensation payable?**

25. Counsel for the Applicant argued that compensation is not payable to the Respondents as they have not suffered loss as a result of the proposed variations.
26. The Respondents argue that they have had to incur £1000 of legal fees for advice in connection with the proposed variations, and have had to take time off work in order to properly prepare their case.

### **The decision of the tribunal**

27. The tribunal determines that no compensation is payable.

### **Reasons for the tribunal's decision**

28. The tribunal considers that there is no power in the Act for it to order compensation to cover legal costs and costs incurred for preparing and attending the hearing.
29. It is sympathetic to the situation that the Respondents have found themselves in, and would urge the Applicant to consider an ex-gratia payment of say £1500 to cover the Respondents' costs in connection with the application. It was right and proper that they sought legal advice in connection with the application.
30. The tribunal also notes that the Respondents have acquitted themselves very well at this hearing, presenting thoughtful and cogent arguments in connection with a very technical property law matter.

### **Application under s.20C and refund of fees**

31. At the hearing, the Respondents applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties the tribunal determines to make the order. Although the application has been successful, the mistake was a mistake of the Applicant and the tribunal considers that it is inappropriate that the Respondents and the other lessees bear the costs of the defect being rectified. The tribunal also notes that whilst Counsel argued that the hearing could have been avoided if the Respondents had agreed the proposed variations, correspondence between the parties in connection with this does not seem to have pursued by the Applicant.

**Name:** Judge Carr

**Date:** May 24<sup>th</sup> 2018

## **Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

## Appendix 1

### Relevant legislation

#### Landlord and Tenant Act 1987

##### **PART IV VARIATION OF LEASES**

###### *Applications relating to flats*

###### **S35 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] [FN1] 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) [Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002] 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.[...]

**S36 Application by respondent for variation of other leases.**

- (1) Where an application ("the original application") is made under section 35 by any party to a lease, any other party to the lease may make an application to the [tribunal] [FN1] asking it, in the event of its deciding to make an order effecting any variation of the lease in pursuance of the original application, to make an order which effects a corresponding variation of each of such one or more other leases as are specified in the application.
- (2) Any lease so specified—
  - (a) must be a long lease of a flat under which the landlord is the same person as the landlord under the lease specified in the original application; but
  - (b) need not be a lease of a flat which is in the same building as the flat let under that lease, nor a lease drafted in terms identical to those of that lease.
- (3) The grounds on which an application may be made under this section are—
  - (a) that each of the leases specified in the application fails to make satisfactory provision with respect to the matter or matters specified in the original application; and
  - (b) that, if any variation is effected in pursuance of the original application, it would be in the interests of the person making the application under this section, or in the interests of the other persons who are parties to the leases specified in that application, to have all of the leases in question (that is to say, the ones specified in that application together with the one specified in the original application) varied to the same effect. [...] [

**S37 Application by majority of parties for variation of leases.**

- (1) Subject to the following provisions of this section, an application may be made to [a leasehold valuation tribunal] [FN1] in respect of two or more leases for an order varying each of those leases in such manner as is specified in the application.
- (2) Those leases must be long leases of flats under which the landlord is the same person, but they need not be leases of flats which are in the same building, nor leases which are drafted in identical terms.
- (3) The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.
- (4) An application under this section in respect of any leases may be made by the landlord or any of the tenants under the leases.
- (5) Any such application shall only be made if—
  - (a) in a case where the application is in respect of less than nine leases, all, or all but one, of the parties concerned consent to it; or
  - (b) in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10 per cent. of the total

number of the parties concerned and at least 75 per cent. of that number consent to it.

- (6) For the purposes of subsection (5)—
- (a) in the case of each lease in respect of which the application is made, the tenant under the lease shall constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such leases shall be regarded as constituting a corresponding number of the parties concerned); and
  - (b) the landlord shall also constitute one of the parties concerned. [...]

*Orders varying leases*

**S38 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.
- (2) If—
  - (a) an application under section 36 was made in connection with that application, and
  - (b) the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application under section 36,the tribunal may (subject to subsections (6) and (7)) also make an order varying each of those leases in such manner as is specified in the order.
- (3) If, on an application under section 37, the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application, the tribunal may (subject to subsections (6) and (7)) make an order varying each of those leases 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.
- (5) If the grounds referred to in subsection (2) or (3) (as the case may be) are established to the satisfaction of the tribunal with respect to some but not all of the leases specified in the application, the power to make an order under that subsection shall extend to those leases only.
- (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.
- (7) A tribunal shall not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under this section effecting any variation of the lease—
  - (a) which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes; or
  - (b) which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes; or
  - (c) which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer.
- (8) A tribunal 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) A tribunal 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 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 court considers he is likely to suffer as a result of the variation.[...]

## Appendix 2 - The Variation

### Add new clauses 3(2)(d)

"3(2)(d) To pay a sum or sums of money equal to 1/51<sup>st</sup> of the amount which the Landlord may expend in fulfilling its obligations under the Headlease and to do so in accordance with the machinery contained in Schedule 4A."

3(2)(e) To pay a sum or sums of money equal to 1/51<sup>st</sup> of the amount which the Landlord may expend in fulfilling the obligations under Schedule 4A of this Lease, and to do so in accordance with the machinery contained in Schedule 4A.

### Add new clauses 5(5), 5(6), 5(7) and 5(8)

"5(5) For the purpose of clauses 5(6) and 5(7) the Premises shall mean the premises as defined in the Headlease, save this demise.

5(6) Throughout the term to keep the Premises in good and substantial repair and condition and in addition where necessary to carry out all works of rebuilding, reinstatement and renewal of the Premises

5(7) To decorate and clean all parts of the Premises (as are not comprised in any unit of accommodation) as are usually or ought to be decorated or kept clean and keep them decorated and clean to a standard reasonable and appropriate to the use of the Premises

5(8) To provide and maintain such security installations and measures as the Landlord considers appropriate

5(9) To set aside (which setting aside shall be for the purposes of Schedule 4A hereto be deemed to be an item of expenditure incurred by the Landlord) such sums of money as the Landlord shall reasonably consider necessary to meet future costs to be incurred by the Landlord in carrying out works pursuant to clauses 5(6), 5(7) and and 5(8) above.

Add a new Schedule 4A

**Schedule 4A above referred**

1. The aggregate expenditure incurred by the Landlord in carrying out its obligations under Clauses 5(5), 5(6), 5(7) and 5(8) hereof ("the Total Repairs Expenditure").

2. The Service Charge means 1/51<sup>st</sup> of the Total Repairs Expenditure

3. The Tenant will pay the Service Charge in the following manner:

(a) The Landlord will issue an estimated Service Charge statement before 1 April in each year relating to the accounting period for the following year running from 1 April to 31 March. The estimate shall be the Landlord's reasonable estimate of the Service Charge likely to be incurred in the relevant accounting period in relation to the obligations set out in paragraph 1 above, together with an appropriate amount in reserve in accordance with clause 5(9) hereof but taking into account any unexpended reserve already made

(b) The Tenant will pay 1/51<sup>st</sup> of the estimated Service Charge ("the Interim Charge") by equal monthly direct debit payments payable on the first of each month.

(c) The Landlord will by 31 October in each year issue a statement setting out the level of service charge actually incurred. If the costs charges and expenses in respect of any accounting period exceed the Interim Charge for that period then the surplus shall be carried forward by the Landlord and credited to the account of the Tenant in computing the level of charge in the next succeeding accounting period.

(d) If the Service Charge in respect of any accounting period exceeds the Interim Charge paid by the Tenant in respect of that period together with any surplus from previous years carried forward as aforesaid then the Tenant shall pay the excess to the Landlord within 14 days of service upon the Tenant of the certificate referred to in the sub-paragraph next following.

(e) As soon as practicable after the expiration of the accounting period the Landlord's accountant shall draw up and submit to the Tenant accounts setting out details of the Service Charge in respect of that period and shall certify the amount (if any) due from the Tenant on account of the Service Charge.

(f) The said certificate shall be conclusive and binding on the parties hereto except in the case of manifest error.

4. The parties hereto acknowledge that the object of the Service Charge provisions is to enable the Landlord to recover all the monies the Landlord may be liable to incur in respect of outgoings of the block so that there shall be no residual liability upon the Landlord for any such matters.

