



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

Case Reference : **MAN/00EY/LVL/2019/0001**

Property : **Flat 2, 17 Francis Street, Blackpool, Lancs FY1
1SQ**

Applicant : **Great Places Housing Association**

Representative : **Trowers and Hamlins LLP**

Respondent : **Peter Joseph McKenna**

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

Tribunal Members : **Judge Caroline Hunter
Jenny Jacobs MRICS**

Date of Decision : **31 September, 2019**

DECISION

Summary Decision

1. The Tribunal finds that:
 - a. The current lease of Flat 2, 17 Francis Street, Blackpool fails to make satisfactory provision for a number of matters as set out in the Landlord and Tenant Act 1987, s.35.
 - b. The lease of Flat 2, Francis Street, Blackpool should be varied as sought by the applicant.
 - c. The variation is backdated to the commencement date of the lease - 1 March 2005.

The Application

2. The applicant, Great Places Housing Association (GPHA) is the freehold proprietor of 17 and 19 Francis Street, Blackpool. In 2005 the two houses were converted into 7 flats for sale on shared ownership terms by a predecessor of GPHA.
3. The respondent, Mr McKenna is the leasehold proprietor of Flat 2, 17 Francis Street having purchased the lease in 2012.
4. On 29 April, 2019 GPHA applied to vary Mr McKenna's lease under the Landlord and Tenant 1987, s.35. Directions were issued on 10 May, 2019 and included a direction that the matter would be determined without a hearing unless a party requested one. No request came from either party. Indeed Mr McKenna did not respond to the directions at all other than to write to the Tribunal on 11 June, 2019 to say: "Don't know what this [is] all about can you please write to me and explain." On 20 June 2019, a short letter of explanation was sent to Mr McKenna by the Case Officer at the Tribunal.
5. On 20 September, 2019 the Tribunal members met to decide the case.

The Facts

6. It appears that GPHA's predecessor, or more likely their solicitors, made a mess (to put it bluntly) of the creation of the leases in 2005. Five of the leases correctly used the form of the flat model lease produced by the Homes and Communities Agency at the relevant time. For two of the leases, however, the wrong model lease was used – that for houses. In 2009 the problem was rectified for flat 7 by a deed of variation. The other flat with this 'wrong' lease was Flat 2 – Mr McKenna's.
7. It seems that this only became apparent to GPHA when Mr McKenna fell into arrears with payments of his rent and service charges. We have no information when this was or whether the arrears have or not been cleared.

The Law and its application to this case

8. Section 35 of the Landlord and Tenant 1987 allows a party to a long lease to make an application to the Tribunal to vary the lease when the lease fails to make satisfactory provision for one or more the matters set up in section. The full section is set out in the Appendix to this decision.
9. GPHA in their application at para. 3.2 set out the reasons the lease fails to make satisfactory provision under five of the matters:
 - (i) Section 35(2)(a) - as the Lease fails to provide satisfactory provision for the maintenance of the building within which the flat is situated and in relation to the repair or maintenance of any land or building over which Mr McKenna has rights;
 - (ii) Section 35(2)(c) – as there is no satisfactory provision for the repair or maintenance of any installations in the same building which are necessary for Mr McKenna to enjoy a reasonable standard of accommodation;
 - (iii) Section 35(2)(d) - as there is no satisfactory provision for maintenance of any services which are necessary for McKenna to enjoy a reasonable standard of accommodation;
 - (iv) Section 35(2)(e) - as there is no satisfactory provision for the recovery by GPHA from Mr McKenna of expenditure incurred or likely to be incurred as a result of such services;
 - (v) Section 35(2)(f) - as there is no provision for the computation of a service charge payable under the lease. Because the other 6 shared owners pay a proportion (which to be fair and reasonable should be an equal share as between all the shared owners, i.e one-seventh) then there is a potential shortfall in the sums recoverable for maintenance of the structure and internal common parts.
10. Given the lease, we can only agree. Plainly the current lease fails to make provision for these matters and should be varied accordingly.

Backdating

11. GPHA in their application have requested that the Tribunal backdated to the commencement date of the lease. It is clear from the case of *Brickfield Properties Ltd v. Botten* [2013] UKUT 0133, that we have the power to do so. The question is whether in this case we should.
12. In the *Brickfield* case the freeholder had first sought to agree a variation with the lessees and only sought to use section 35 after consultation. We are slightly surprised that no evidence has been provided to the Tribunal as to whether GPHA has sought to agree a variation with Mr McKenna. Despite this we have decided that the variation should be backdated to the commencement of the lease. As the Upper Tribunal noted in the *Brickfield* case (para.33(1)):

“The lessees had enjoyed the services etc during the relevant period. The lessees would obtain an unintended windfall if the variation was not backdated.”

It would not be fair for Mr McKenna to have such a windfall considering that he has, in fact, had the benefit of the services throughout his lease.

13. Next Steps

14. The parties are ordered forthwith to arrange for the deed of variation included in the application to be executed, then register notice of the variation of the lease including the replacement lease at the Land Registry. The costs are to borne by the Applicant.

RIGHTS OF APPEAL

15. 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.
16. 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.
17. If the person wishing to appeal does not comply with the 28 day time limit, that 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.
18. 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.

Name: Judge Hunter

Date: 30 September, 2019

Appendix – 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 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) 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 and Tribunal Procedure Rules 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.

(9) For the purposes of this section and sections 36 to 39, “appropriate tribunal” means—

(a) if one or more of the long leases concerned relates to property in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) if one or more of the long leases concerned relates to property in Wales, a leasehold valuation tribunal.