



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

Case Reference : CHI/29UN/LVT/2023/0002

Property : Paragon Court, Fort Paragon, Margate,
Kent, CT9 1 JB

Applicant : Ms Prudence Beecroft

Representative : Karslakes Solicitors

Respondents :
1) The Leaseholders
2) PCMC Limited (the freeholder)
3) Paragon Court RTM Company
Limited

Representative :

Type of Application : Variation of a lease pursuant to section 37
of the Landlord and Tenant Act 1987

Tribunal Member(s) : Tribunal Judge Lal

Date of Decision : 24 May 2023

DECISION

Background

1. The Applicant seeks to vary the lease of 7 Paragon Court, of which she is the lessee pursuant to section 37 of the Landlord and Tenant Act 1987. It is said that there are 24 flats in the Property, that there is one block containing all of those flats and the Property additionally includes a courtyard area.
2. On 23 February 2023 the Tribunal directed that the application be dealt with on the papers. The parties did not request an oral hearing. The applicant has submitted the hearing bundle which consists of 85 pages.
3. On 27 April 2023, the Tribunal reviewed the hearing bundle and decided that the application remained suitable to be dealt with on the papers given the parties' respective positions were clear from the papers submitted.

The Application

4. In summary, the Applicant is the leaseholder of 7 Paragon Court, Fort Paragon, Margate, CT9 1JB and also a director and shareholder of Paragon Court (Margate) RTM Company ("the RTM Company"). Flat 7 is one of the flats contained at Paragon Court ("the Property") which is owned by PCMC Limited.
5. The Tribunal is informed that the Property consists of 24 leasehold flats let on similar terms for a term of 125 years. The leases provide for the leaseholders to pay a fixed interim service charge each year. However, the service charge proportions are not uniform and do not add up to 100%.
6. The RTM Company now seek to ensure that it can collect 100% of the service charge. It is stated that the proportions currently add up to 93.8%. There is an additional property known as the Courtyard with 23 Paragon Court which is registered with a separate title and that lease specifies a percentage of 5.4% and it is the Applicant's view that stays as it is.
7. The variations that are sought are that each lessee's proportions be increased pro rata so that the service charge proportions add up to 100% and a further variation is sought that flexible interim service charges may be demanded in advance.
8. The Applicant has enclosed in the Bundle the current proportion and the revised percentage increase. There are also returned consent forms individual leaseholders representing 20 of the flats at the Property. The application also asks that the variations sought be retrospective from the year 2000 although the consent forms do not specifically deal with the issue of retrospectivity.

The Objection

9. There is one objection to the application and that is from Mr Jonathan Myers, Flat 8, by way of an email sent on 2 March 2023 in which he states that “ I was given an assurance by Wade at Bamptons that the only variation will be to bring the percentage up to 100% and that nothing else will be in the application,” He then refers to Section 11 of the Application (the interim service charges element) as not being agreed and that it should be removed.

The Reply to the Objection

10. By way of a Supplement Statement of Case in reply to the objection, the Applicant states that Mr Myers never consented to the application and that the 75% of the leaseholder’s consent.

The Tribunal’s Decision

11. The Tribunal had regard to the provisions of Section 37 of the Landlord and Tenants Act 1987 (‘the Act’), which provides:

Section 37 Application by majority of parties for variation of lease

- (1) Subject to the following provisions of this section, an application may be made to the court 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.

12. The Tribunal noted the factors that it must consider in the exercise of its discretion and these are set out in Section 38.

Section 38(6) provides that a Tribunal shall not make an order 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.

13. Having considered the application, the Tribunal is satisfied that the current situation does not allow for service charges percentages to add up to 100%. There will always be a shortfall. The Tribunal assesses this to be an anomaly that needs correction. It recognises how such an anomaly may have occurred, namely historic service charge percentages which were all marginally different in each individual lease for each of the Flats at the Property but when assessed as a whole never quite managed to reach 100%.

14. In respect of the second variation sought, the Tribunal notes the request for flexible interim service charges. The Tribunal is satisfied that the current lease arrangements do not provide for this and that such a variation would allow for the effective management of the Premises.

15. Finally, there is a request that any variation be retrospective from the year 2000 on the basis that the monies have been demanded into and withdrawn from the reserve fund and the deficit has been recorded as a debt due to the leaseholders from the RTM Company. The case of *Brickfield Properties Ltd v Botten* [2013] UKUT 0133 is cited.

16. The Tribunal noted that it was accepted in *Brickfield* that the purpose of any variation was to cure a defect and there was no reason why the parties should have to suffer a defect pending an application. Further, the parties were free to agree to a retrospective variation and there was no reason to interpret a statutory power any less generously.

Finally, the statutory wording suggested that there was no such restriction.

17. The Tribunal notes it was identified at Directions stage on 23 February 2023 that it may not be apparent that the consents specifically address the issue of retrospectivity, although it was also accepted that they consent to the application of which the retrospective element forms part.
18. The Tribunal is satisfied that in the particular circumstances of this application it can draw a reasonable evidential inference that the consenting lessees are aware and consent to the retrospectivity element of the application as each consent specifically records the draft application has been provided. Again, the practical effect of the Tribunal's decision is that it seeks to resolve the debt due anomaly.
19. The Tribunal has weighed this against the general legal presumption against retrospectivity but like all presumptions it can be rebutted and in accordance with the Brickfield decision and in order to cure the particular mischief in this case, the Tribunal accedes to the variations and that such be retrospective.
20. The Tribunal notes the objection which seems only to be in respect of the flexible interim service charges element of the Application but it is satisfied that well over 75% of the lessees agree. The Tribunal is satisfied that the objection cannot succeed as there was no evidence of substantial prejudice or any other reason why it would not be reasonable. In fact, the evidence suggested that the variations sought would ensure effective management of the Property and would seek to resolve the anomalies identified.
21. The Tribunal therefore approves the variation so that each lessee's proportion is increased pro rata so that the service charge proportions add up to 100%. The adjusted proportions are as set out in Tab C of the Application.
22. Furthermore, the Tribunal approves the use of the wording of the variation proposed by the Applicant and orders that Clause 4(1) of each lease be varied in the following terms:

“The Lessee shall pay such proportion of the costs expenses outgoings and matters referred to in sub-clause (v) as is referred to in sub clause (iv) below. The Lessee shall on the days hereinbefore appointed for the payment of rent in every year throughout the term hereby granted pay on account in advance to the Lessors half of the estimated amount of his proportion to the said costs expenses outgoings and matters as aforesaid, Provided that the first payment shall be a proportionate part of such sum calculated from the date hereof up to the next such day.”
23. The Tribunal orders that the variations specified above to take effect as from 1 January 2000.

24. Further, the Tribunal orders that the Applicant shall ensure that this order is registered at HM Land Registry in respect of each of the Respondent's leasehold titles.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk 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.